

HOUSE OF LORDS

SESSION 2001–02

28th REPORT

SELECT COMMITTEE ON
THE EUROPEAN UNION

DEFINING REFUGEE STATUS AND
THOSE IN NEED OF INTERNATIONAL
PROTECTION

WITH EVIDENCE

Ordered to be printed 16 July 2002

PUBLISHED BY AUTHORITY OF THE HOUSE OF LORDS
LONDON – THE STATIONERY OFFICE LIMITED

£14.50

CONTENTS

	<i>Paragraph</i>	<i>Page</i>
PART 1: INTRODUCTION	1	5
A common European asylum system.....	2	5
Earlier Reports.....	4	5
Timetable.....	5	6
Main issues.....	6	6
Our inquiry	10	6
PART 2: BACKGROUND	11	7
The Geneva Convention	11	7
The UNHCR.....	12	7
The Convention and the Treaties.....	15	8
Definition of “refugee”—the 1996 Joint Position	18	8
The Protocol on asylum for nationals of EU Member States	20	9
Temporary protection.....	22	10
PART 3: ISSUES, EVIDENCE AND ANALYSIS	25	11
General reactions.....	25	11
Relationship with international law instruments.....	31	12
Terminology	35	13
Relationship with other EU instruments.....	37	13
Scope	44	15
International protection ‘sur place’.....	59	17
Persecution: the role of non-State actors	65	19
Non-State actors as ‘protective’ agents	72	21
Internal protection.....	81	22
Cessation/withdrawal of refugee status	86	23
Subsidiary protection—general	90	24
Subsidiary protection—serious and unjustified harm.....	96	25
Subsidiary protection—content of the status	101	26
(i) temporary character	103	26
(ii) other differences	107	27
Subsidiary protection—family protection	112	28
PART 4: SUMMARY OF CONCLUSIONS.....	116	29
Recommendation.....	117	30
Appendix 1—Membership of Sub-Committee E		31
Appendix 2—List of witnesses.....		32
ORAL EVIDENCE		
<i>Professor Guy S Goodwin-Gill, University of Oxford</i>		
Written evidence (with Agnès Hurwitz, Refugee Studies Centre, University of Oxford)		1
Oral evidence, 10 April 2002		3
Supplementary written evidence.....		13
<i>United Nations High Commissioner for Refugees (UNHCR)</i>		
Written evidence.....		14
Oral evidence, 24 April 2002		22
<i>Immigration Law Practitioners’ Association, JUSTICE, the Refugee Council, the European Council on Refugees and Exiles, Statewatch</i>		
Written evidence.....		30
Oral evidence, 1 May 2002.....		47
<i>Angela Eagle MP, Parliamentary Under Secretary of State at the Home Office</i>		
Written evidence.....		61
Oral evidence, 15 May 2002.....		64
Supplementary written evidence.....		75

WRITTEN EVIDENCE

Immigration Advisory Service	76
Immigration Appeal Tribunal	78
European Region of the International Lesbian and Gay Association (ILGA-Europe)	80
Refugee Legal Centre	84

NOTE: Pages of the Report and Appendices are numbered in bold type; pages of evidence are numbered in ordinary type. References in the text of the Report are as follows:

(Q) refers to a question in oral evidence

(p) refers to a page of the Report or Appendices, or to a page of written evidence

TWENTY-EIGHTH REPORT

16 JULY 2002

By the Select Committee appointed to consider European Union documents and other matters relating to the European Union.

ORDERED TO REPORT

DEFINING REFUGEE STATUS AND THOSE IN NEED OF INTERNATIONAL PROTECTION

2001/0207 (CNS) 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

PART 1: INTRODUCTION

1. This Report examines the Commission's 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 (the Refugee Qualification Directive). The Directive would lay down rules for a common definition of the concept of "refugee", as contained in the Geneva Convention relating to the Status of Refugees 1951 (the Geneva Convention). It would also provide a common definition of beneficiaries of "subsidiary protection".¹ A minimum standard of subsidiary protection would be available to complement the Geneva Convention in all Member States.

A common European asylum system

2. The Refugee Qualification Directive is the final element in a four part package of measures aimed at establishing a common European asylum system. That system is to be established by a two-stage process. At Tampere (October 1999), Member States agreed on a number of matters establishing minimum standards to be addressed in the short (first) term. In the (second) long term a truly common asylum procedure and a unified status for refugees, valid throughout the Union, is to be established.

3. The first stage requires the adoption of a number of key measures, including:

- a Directive on minimum standards in asylum procedures for granting and withdrawing refugee status (the Procedures Directive)
- a Directive on minimum standards for reception of asylum seekers (the Reception Conditions Directive)
- a Regulation (replacing the Dublin Convention) on criteria and mechanisms for determining the State responsible for examining asylum requests (the Dublin II Regulation)
- a 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 (the Refugee Qualification Directive).

Earlier Reports

4. We have already reported to the House on the first three proposals. The proposal for a Directive on minimum standards in asylum procedures was the subject of the Committee's Report, *Minimum*

¹ Since the 1950s States have realised that the Geneva Convention does not cover every eventuality or provide protection for all those in need. States have found it necessary to introduce some form of complementary protection, taking account of other international obligations.

Standards in Asylum Procedures.² The second was the subject of our Report, *Minimum Standards of Reception Conditions for Asylum Seekers*.³ The Regulation that would replace the Dublin Convention was the subject of our Report, *Asylum Applications—Who Decides?*.⁴

Timetable

5. While it would have been logical to deal with the fundamental question of the definition and content of refugee status first, a combination of political and practical considerations has resulted in the Refugee Qualification Directive being presented last. But, as was predicted at the time of our first Report, *Minimum Standards in Asylum Procedures*, the negotiation of the various measures is overlapping and the final order of adoption seems unlikely to follow the order of their presentation. Indeed the Procedures Directive, the first text to be presented, would appear to have run into trouble and has been sent back to the Commission to be rewritten. The Reception Conditions Directive was a priority of the Spanish Presidency who secured a “general approach” agreement at the Justice and Home Affairs Council in May. Final adoption appears to have been delayed pending clearance of national parliamentary scrutiny procedures. The Dublin II Regulation is under discussion on the Council Working Group and is a priority of the Danish Presidency. Work on the Refugee Qualification Directive has also begun. The recent Seville European Council agreed to speed up all work on immigration and asylum. The European Council has urged the Council to adopt:

- by December 2002, the Dublin II Regulation;
- by June 2003, minimum standards for qualification and status as refugees;
- by the end of 2003, common standards for asylum procedures.⁵

Main issues

6. The Directive deals with two fundamental questions relating to international protection for asylum applicants. Who is a refugee? Who otherwise should be protected? Subsidiary questions relate to the rights to be accorded to successful applicants.

7. Fundamental to any common policy on asylum is the definition of those to whom protection is to be given. All EU Member States are party to the Geneva Convention, which provides a definition of the term “refugee” and requires protection to be afforded to individuals having that status. The Convention, together with the Office of the United Nations High Commissioner for Refugees (UNHCR), has provided the international legal regime and practice for the determination of refugee status. It is therefore not surprising that it forms the basis for EU policy on refugees. It remains a legitimate concern that both the criteria and standards laid down in the Convention and established in the many years’ experience and practice giving effect to it should not be undermined.

8. The Directive looks beyond the Geneva Convention and seeks to provide a common definition of those who would not necessarily qualify for protection under the Geneva Convention but who are nonetheless in need of international protection (“subsidiary protection”). Here there is no international yardstick to adopt and there is much disparity in the approach and practice of EU Member States. Setting minimum standards for qualification for subsidiary protection could have a major impact across the Union.

9. The Directive also stipulates the minimum rights and benefits to be enjoyed by the beneficiaries of refugee and subsidiary protection status. Mostly these rights and benefits are the same. But entitlement to some of them (such as access to work and to integration programmes) is temporarily postponed for beneficiaries of subsidiary protection.

Our inquiry

10. The inquiry was conducted by Sub-Committee E (Law and Institutions) under the chairmanship of Lord Scott of Foscote. The membership of the Sub-Committee is listed in Appendix 1. We would like to thank all those who gave evidence. The witnesses are listed in Appendix 2. The evidence, both written and oral, is printed with the Report.

² 11th Report 2000-01, HL Paper 59.

³ 8th Report 2001-02, HL Paper 49.

⁴ 19th Report 2001-02, HL Paper 100.

⁵ Conclusions, para 37.

PART 2: BACKGROUND

The Geneva Convention

11. The Convention relating to the Status of Refugees 1951 (the Geneva Convention) was adopted in response to the large number of refugees in the aftermath of World War II. The Convention provides a basic definition of refugee and determines the legal status of refugees, setting out Contracting States' obligations. A Protocol was added in 1967 in order to overcome the limitation of the application of the Convention to those who became refugees as a result of events occurring before 1951. It removed geographical and temporal restrictions in the Convention so that it now applies to all persons falling within the definition in Article 1A(2). For the purposes of the Convention "refugee" means any person who:

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of the country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it".⁶

While the Geneva Convention has not been without its critics and in recent years its relevance has been questioned,⁷ it remains the principal universal international instrument setting out basic principles for the international protection of refugees. Some 140 countries, including all Member States of the Union, have ratified the Convention and/or its 1967 Protocol.⁸ The Convention's definition of "refugee" has proved sufficiently flexible to encompass new types of refugees as they have emerged over the years. The Convention also established a framework of basic refugee rights; for example, the right to identity papers and travel documents (Articles 27 and 28), access to courts (Article 16) and education and social security (Articles 22 and 24). A cornerstone of the Convention is the principle of *non-refoulement* set out in Article 33. No refugee should be returned to a country in which "his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

The UNHCR

12. The United Nations High Commissioner for Refugees (UNHCR) was established by the UN General Assembly in 1950.⁹ It is mandated to lead and co-ordinate international action for the worldwide protection of refugees and the resolution of refugee problems. UNHCR seeks to safeguard the rights and well-being of refugees. It provides basic necessities such as shelter, food, water and medicine in emergencies. It also seeks to ensure long term solutions so those in need can exercise the right to seek asylum and find safe refuge in another State and to return home voluntarily.

13. UNHCR is one of the world's principal humanitarian agencies, its staff of more than 5,000 personnel helping an estimated 22 million people in more than 120 countries. During its half century of work, the agency has provided assistance to at least 50 million people.¹⁰

⁶ Article 1A(2) as amended by the 1967 Protocol.

⁷ UNHCR has responded, under the heading of "Global Consultations on International Protection", by conducting talks between UNHCR, governments, non-governmental organisations (NGOs) and experts focusing on how States are interpreting and implementing the 1951 Refugee Convention and examining protection problems not fully covered by the treaty, so as to better protect refugees.

⁸ Three countries (Cape Verde, USA and Venezuela) have only signed the Protocol and four (Madagascar, Monaco, Namibia and Saint Vincent and the Grenadines) only the Convention.

⁹ Its predecessor was the High Commissioner of the League of Nations, established in 1921. At its beginning UNHCR was only given a limited three-year mandate to help resettle 1.2 million European refugees left homeless by the global conflict. But as refugee crises mushroomed around the globe, its mandate was extended every five years.

¹⁰ UNHCR's programmes, its protection and other policy guidelines, are approved by an Executive Committee of 57 Member States which meets annually in Geneva. A second "working group" or Standing Committee meets several times a year. The High Commissioner reports on the results of the agency's work annually to the UN General Assembly through the Economic and Social Council.

Estimated number of persons falling under the mandate of UNHCR

Region	1 January 2001
Asia	8,450,000
Africa	6,072,900
Europe	5,571,700
North America	1,047,100
Latin America and Caribbean	575,600
Oceania	76,000
Total	21,793,300

14. UNHCR has a special status in relation to Article 63 of the EC Treaty. Declaration 17, adopted at the conference leading to the Amsterdam Treaty, provides that on matters relating to asylum policy UNHCR must be consulted.

The Convention and the Treaties

15. Article 63 of the EC Treaty requires the Council to adopt within five years of the entry into force of the Amsterdam Treaty “measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties”.¹¹ Article 63(1)(c) refers specifically to “minimum standards with respect to the qualification of nationals of third countries as refugees”.

16. At the Tampere European Council (October 1999) Member States confirmed that the Union was “fully committed to the obligations of the Geneva Refugee Convention”¹² and agreed to work towards establishing a common European asylum system “based on the full and inclusive application of the Geneva Convention”.¹³ The Council reaffirmed “the importance which the Union and Member States attach to absolute respect of the right to seek asylum”. A common European asylum system would be based on “the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, *ie* maintaining the principle of “*non-refoulement*”. Member States agreed that the system “should include, in the short term, ... the approximation of rules on the recognition and content of refugee status” and that the system should contain “measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection”.¹⁴

17. The Treaty requirement to respect the Geneva Convention is also reflected in Article 18 (Right to Asylum) of the EU Charter of Fundamental Rights, which provides:

“The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.”

Definition of “refugee”—the 1996 Joint Position

18. In 1996 the Council adopted a Joint Position on the harmonised application of the definition of the term “refugee” in Article 1 of the Geneva Convention.¹⁵ The Joint Position, the first such measure to be adopted in the field of justice and home affairs following the coming into force of the Treaty on European Union, sought to establish guidelines for the competent authorities of the Member States for the application of criteria for recognition and admission as a refugee. The instrument is wide ranging and contains provisions on the recognition of refugee status, the principle of individual determination of such status, the evidence for granting refugee status, the concept of persecution and its origins

¹¹ Article 63 is contained in Title IV of the EC Treaty (Visas, asylum, immigration and other policies related to free movement of persons). Title IV is not applicable to the United Kingdom and to Ireland, unless those Member States decide otherwise in accordance with the procedure laid down in the Protocol on the position of the United Kingdom and Ireland. The UK may “opt in” to particular measures and has elected to do so in respect of the Directive. Title IV is not applicable to Denmark, by virtue of the Protocol on the position of Denmark. But, unlike the UK or Ireland, Denmark does not have a right of selective “opt in”.

¹² Presidency Conclusions, point 4.

¹³ *Ibid*, point 13.

¹⁴ Presidency Conclusions, points 13 and 14.

¹⁵ [1996] OJ L63/2.

(persecution by the State—legal, administrative and police measures, and prosecution—and persecution by others), civil war and other general internal conflicts, grounds of persecution (race, religion, nationality, political opinions, social groupings), resettlement within the country of origin, refugees *sur place*, conscientious objectors, absence without leave and desertion, withdrawal of refugee status and clauses excluding persons from protection.

19. The Joint Position was hailed as “an important instrument in the process of establishing an asylum and immigration policy common to all Member States”.¹⁶ However, its preamble stated: “This Joint Position is adopted within the limits of the constitutional powers of the Governments of the Member States; it shall not bind the legislative authorities or affect decisions of the judicial authorities of the Member States”. The substantive statements made in the Joint Position are, in the view of Dr Plender, “both conventional and reminiscent of the UNHCR Handbook”. He has concluded that “The Commission has a long way to go before its Joint Position can mature into a draft Directive”.¹⁷

The Protocol on asylum for nationals of EU Member States

20. The provisions on asylum set out in the EC Treaty do not expressly envisage applications from EU citizens. When reference is made to applicants, in particular in Article 63, it is to nationals of third countries. The general assumption would appear to be that the question of granting asylum to the nationals of another Member State should not arise. However, a separate Protocol (proposed by Spain¹⁸) was agreed at the intergovernmental conference leading to the Amsterdam Treaty 1997 to deal with the circumstances in which the issue could rise. It purports to limit the freedom of one Member State to decide on an asylum application from a national of another Member State.

Protocol on asylum for nationals of Member States of the European Union

SOLE ARTICLE

Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters. Accordingly, any application for asylum made by a national of a Member State may be taken into consideration or declared admissible for processing by another Member State only in the following cases:

- (a) if the Member State of which the applicant is a national proceeds after the entry into force of the Treaty of Amsterdam, availing itself of the provisions of Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms, to take measures derogating in its territory from its obligations under that Convention;
- (b) if the procedure referred to in [Article 7(1)] of the Treaty on European Union has been initiated and until the Council takes a decision in respect thereof;
- (c) if the Council, acting on the basis of [Article 7(1)] of the Treaty on European Union, has determined, in respect of the Member State [of] which the applicant is a national, the existence of a serious and persistent breach by that Member State of principles mentioned in [Article 6(1)];
- (d) if a Member State should so decide unilaterally in respect of the application of a national of another Member State; in that case the Council shall be immediately informed; the application shall be dealt with on the basis of the presumption that it is manifestly unfounded without affecting in any way, whatever the cases may be, the decision-making power of the Member State.

21. The Protocol is controversial. Belgium made a Declaration stating that it intended to process applications from EU nationals according to point (d) (right of Member States to decide individual cases). Other Member States shared Belgium’s concerns but did not join Belgium in making a declaration. There was, however, a further Declaration, made by all the Member States, stating that the Protocol did not prejudice the right of each Member State to take the organisational measures it deems

¹⁶ Doc 11720/95 (Presse 332). Conclusions of the Justice and Home Affairs Council 23 November 1995.

¹⁷ Richard Plender QC. Speech “Immigration, Asylum, Third Country Nationals”, Kings’ College London, 15 February 2002.

¹⁸ The Protocol was a political response by Spain to the protection extended by some countries, notably Belgium and France, to members of the Basque nationalist organisation ETA. Lindgren, *Deflecting international protection by treaty: bilateral and multilateral accords on extradition, readmission and the inadmissibility of asylum requests*, New issues in refugee research Working Paper 10, UNHCR July 1999.

necessary to fulfil its obligations under the Geneva Convention. The Protocol has come under criticism, including from UNHCR.¹⁹

Temporary protection

22. States at times offer “temporary protection” when they face a sudden mass influx of people, for example during the conflict in the former Yugoslavia in the early 1990s. In such circumstances regular immigration/asylum systems may not be able to cope. Under “temporary protection” arrangements people are speedily admitted to safe countries, but without any guarantee of permanent asylum. “Temporary protection” complements, but is not a substitute for, the wider protection available under the Geneva Convention.

23. In 2000 the Commission brought forward a proposal for a Directive on temporary protection of displaced persons. This proposal followed three years of fruitless negotiation to establish an EU temporary protection regime in the event of a “mass influx” of displaced persons and a mechanism for a more equitable sharing of the physical and financial burden between the Member States.²⁰ The proposed Directive superseded two proposed Joint Actions, one on temporary protection and the other on burden sharing (or “solidarity”) brought forward under the pre-Amsterdam Third Pillar, whose negotiation had become deadlocked. Three significant developments intervened. First, with the entry into force of the Amsterdam Treaty in May 1999, responsibility for measures and displaced persons became shared between the Community and Member States. There is a specific legal base, in Title IV of the EC Treaty, for the adoption of minimum standards on temporary protection. Second, Member States’ experience during the humanitarian crisis in Kosovo strengthened their conviction that a comprehensive (EU wide) solution was needed. Third, agreement was reached on a European Refugee Fund,²¹ removing the contentious issue of funding from the negotiation of the proposed Directive.

24. The Directive,²² which was adopted in July 2001, contains definitions of and minimum standards for temporary protection in the event of a mass influx aimed at promoting a balance between the efforts made by the Member States to receive the persons concerned and to bear the consequences. The Directive provides expressly that temporary protection is without prejudice to recognition of refugee status under the Geneva Convention and also makes clear that the Member States may introduce or maintain more favourable conditions for persons enjoying temporary protection (Article 3). Core provisions of the Directive concern the method for activating and terminating temporary protection and fix a maximum length of one year extendable, unless terminated, by six monthly periods for a further one year. The Member States’ first obligation towards beneficiaries of temporary protection is to issue a residence document, valid for the duration of the protection (Article 8). The Directive also imposes obligations regarding housing and accommodation, welfare or subsistence assistance, medical or other assistance, education and training (Articles 12-14). Persons enjoying temporary protection must also be guaranteed access to asylum procedures no later than the end of the temporary protection (Article 17).

¹⁹ Lindgen *op cit*.

²⁰ There existed two earlier measures: a Council Resolution of 25 September 1995 on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis, and a Council Decision of 4 March 1996 on an alert and emergency procedure for burden-sharing with regard to the admission and residence of displaced persons on a temporary basis, based on Article K.3(2)(a). These were adopted in response to the influx of displaced persons from former Yugoslavia in the early 1990s, many of them from Bosnia-Herzegovina. But they were never implemented, not even in the context of the Kosovo crisis in Spring 1999.

²¹ Council decision 2000/596/EC of 28 September 2000. [2000] OJ L 252/12. The aim of the Fund is to “support and encourage the efforts made by Member States in receiving and bearing the consequences of receiving refugees and displaced persons”. Financial support may be given for Member States’ action improving reception conditions, promoting integration and facilitating voluntary repatriation. Further, the Fund may provide emergency measures to support Member States financially in the event of a sudden influx of refugees or displaced persons. This reflects the burden sharing principle (Article 63 (2) (b) TEC) introduced into the Treaties following the experiences of Kosovo.

²² Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. [2001] L 212/12.

PART 3: ISSUES, EVIDENCE AND ANALYSIS

General reactions

25. At paragraph 13 of her Explanatory Memorandum the Minister said: “The Government considers that the proposal adequately sets the minimum standards required to determine who should qualify as a refugee and who should otherwise qualify as a beneficiary of subsidiary protection and what rights and benefits should be attached to their status” (p 62).

26. Witnesses generally welcomed the Commission’s proposal. Mr Kingsley-Nyinah, for UNHCR, said: “The importance of this Directive cannot be overstated. In terms of its subject matter, it goes to the very heart of refugee protection and, given the standing of the European Union on the world stage, this Directive is likely to have great impact not just in Europe but even beyond” (Q 86). In particular, UNHCR (p 14) welcomed the fact that the proposal:

“(1) Reaffirms that the 1951 Convention and its 1967 Protocol are the cornerstone of the international legal regime for the protection of refugees, and emphasises that the subsidiary protection regime that the draft Directive provides for is complementary and additional to the refugee protection regime enshrined in those instruments.²³

(2) Acknowledges that the recognition of refugee status is a declaratory act.²⁴

(3) Recognises that the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status provides valuable guidance for Member States when determining refugee status.²⁵

(4) Recognises that, for a person to qualify as a refugee under the 1951 Convention, it is immaterial whether the persecution feared stems from the State, or from parties or organisations controlling the State, or from non-State actors—provided, in the latter case, that the State is unable or unwilling to offer effective protection.²⁶ This approach is in conformity with the practice of the vast majority of States, and also reflects UNHCR’s long-standing position as set out not least in the Handbook.²⁷

(5) Further recognises that, for a person to qualify as a refugee under the 1951 Convention, 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.²⁸

(6) Recognises that the risk of punishment for draft evasion or desertion may, by itself, provide grounds for a refugee claim if the reason for the evasion or desertion is the person’s unwillingness to participate in military actions incompatible with his or her deeply held moral, religious or political convictions.²⁹

(7) Recognises that cessation of refugee status must be declared on a case-by-case basis and that the burden of proof lies with the Member State which has granted such status.³⁰

(8) Contains special provisions for the protection of unaccompanied minors, and provides that the “best interests of the child” should be a primary consideration of Member States when implementing the Directive.³¹

(9) Recognises that persecution may be gender-related, and that a social group may be defined, *inter alia*, by gender or sexual orientation.³²

(10) Provides that the notion of “members of the family” of the refugee encompasses not only the spouse and minor children, but also other close relatives who lived together as part of the

²³ Preamble, paras 3 and 17.

²⁴ Preamble, para 10.

²⁵ Preamble, para 11.

²⁶ Articles 9 (1) and 11 (2)(a).

²⁷ UNHCR Handbook, para 65.

²⁸ Article 11(2)(b).

²⁹ Article 11(1)(d)(ii).

³⁰ Article 13(2).

³¹ Article 28 and Preamble para 23.

³² Article 12(d) and Preamble para 15.

family unit at the time of leaving the country of origin, and who were wholly or mainly dependent on the applicant at the time.³³

(11) Emphasises that Member States have the power to introduce or maintain more favourable standards of treatment both in respect of the qualifying criteria and of the rights and benefits attached to the possession of the relevant status.³⁴

(12) Generally provides for an adequate level of treatment of refugees and beneficiaries of subsidiary protection, taking into account not only the provisions of the 1951 Convention, but also the development of international human rights law.³⁵

27. JUSTICE welcomed the following in particular: the inclusion of non-State agents of persecution among the sources of persecution in the Directive; the specific reference to gender-specific and child-specific persecution and the wide definition of the reasons for persecution, which includes under the concept of “social group” groups defined by sexual orientation, age or gender, amongst others; and the inclusion of subsidiary protection in the Directive (p 35). For JUSTICE, Mr Nicholas Blake QC said: “one feature which is considered to be highly welcome is that there is encouragement for certain Member States to elevate up, as it were, the criteria and then there can be some degree of harmonisation of the essential concepts or a level playing field of not the lowest common denominator but an appropriate level of protection” (Q 132).

28. The Immigration Law Practitioners’ Association (ILPA) was in no doubt that the Directive was needed: “It is clear that harmonisation of interpretation of international obligations as regards those seeking asylum is necessary given the wide divergence in interpretation across Member States at the present time” (p 30). The Refugee Legal Centre (RLC) thought that the proposal constituted a sound foundation for the adoption of EU minimum standards for the qualification and status of persons as refugees or as persons who otherwise need international protection. Much of the text was in accordance with the dominant trend in the international interpretation of the Refugee Convention (p 83).

29. The Directive is a necessity—no common policy could exist without agreement on core definitions—and is to be welcomed. As the list provided by UNHCR indicates, the Directive is in many respects firmly based on the Geneva Convention and contains a number of helpful and positive measures. The fact that the Directive would, in the Minister’s words, be “quite challenging for some Member States to put into effect” (Q 268) draws attention to the degree of change that would be involved. Most significantly, it potentially offers two main gains: first, a uniform approach on “non-State actors” where none exists today (this is discussed in detail at paras 65-70) and second, a measure of harmonisation of the principles of subsidiary protection (discussed in paras 89-94). We do not doubt that if the Directive were adopted in its present form there would be an improvement on the present position where divergence in interpretation of the Geneva Convention can give rise to practical problems and where the definition and content of subsidiary protection status varies substantially.

30. The Directive provides an opportunity to remove such differences and lay down meaningful common standards and by so doing assist in the reduction of secondary movement of asylum seekers in the Union. But, as we shall explain below, there are a number of places where some amendment is needed. The Minister was cautious in her approach to the negotiations: “What we would not want to do is try to create higher standards at the risk of losing agreement on the minimum standards” (Q 267). The Committee understands the point but there are some matters on which there should be no compromise.

Relationship with international law instruments

31. All Member States are party to a number of international law instruments under which they must afford protection. Witnesses were critical that the Directive was silent on the question of the relationship of the Directive with relevant instruments such as the Geneva Convention, the European Convention on Human Rights and the Convention against Torture. This relationship needed further clarification in the text of the Directive.

32. In the view of Professor Goodwin-Gill, Professor of International Refugee Law, University of Oxford, the draft (in particular the Preamble and Article 2) usefully underlined the international legal basis for protection. The reference to the EU Charter of Fundamental Rights was a new and welcome

³³ Article 2(j).

³⁴ Article 4.

³⁵ Chapter V.

addition. But the Directive could benefit from further clarification. Other human rights instruments, including the ECHR, the Covenant on Civil and Political Rights, and the Convention on the Rights of the Child, should be cited, because they were the acknowledged sources of subsidiary protection (p 1, Q 3). Mr Fortin, for UNHCR, called the Geneva Convention “the constitution”. Implementing legislation might be adopted, either at regional level or at national level, but should always be in conformity with the Convention. Further, any conflict between the Convention and the Directive should be resolved on the basis that the Convention was paramount. The Convention had a mechanism (in Article 38) for resolving differences of interpretation in the International Court of Justice in the Hague. That was authoritative and should take precedence over any interpretation of the provisions of the Convention by the European Court of Justice. Mr Fortin said that UNHCR had assumed that the Directive would not contradict the Convention but the Directive should say that expressly (Q 88). ILPA agreed.

33. As regards the relationship of the Directive with other international instruments the problem was most acute in relation to the Geneva Convention. The Hague Court’s supervisory role was weak compared with the regime under the ECHR and the protection of rights safeguarded by the Strasbourg Court. ILPA believed that there was a risk of lower standards if Member States stuck to the words of the Directive as opposed to the Geneva Convention. The European Court of Justice could be expected to construe the Directive consistently with the Convention and Member States’ obligations thereunder but, Ms Rogers said, it would be “better to simply state that the 1951 Convention has primacy and thereby giving that effect rather than leaving it to hope” (p 30, QQ 137-9).

34. There is a legitimate concern that silence on the question of the relationship of the Directive with relevant international law instruments such as the Geneva Convention, the European Convention on Human Rights and the Convention against Torture could result in the lowering of international standards on refugee protection. We agree that the relationship between that Directive and existing refugee and human rights international instruments needs further clarification in the text. Further, as some witnesses have argued, the Directive should expressly recognise that the Geneva Convention (and judgments of the International Court) should have primacy. We anticipate that it will be argued that it is not necessary to repeat existing international obligations and that the Court of Justice, mindful of the fundamental obligations accepted by these international instruments and Article 6 TEU and of the statements set out in the EU Charter of Fundamental Rights, will ensure that result. But EC legislation does on occasion refer expressly to Member States’ international obligations and there is much value, both in terms of legal certainty and in making the instrument accessible to the individual, to be had from having a fuller statement of the legal position. Clear legislation may avoid unnecessary litigation.

Terminology

35. UNHCR had a number of concerns relating to the terminology employed in the Directive. Terms such as “refugee” and “international protection” were not given the same meaning as in the Geneva Convention (p 15, QQ 128-9). The Refugee Legal Centre was critical of the choice of term “subsidiary protection”. They would prefer “complementary protection”, a term that demonstrated the supporting nature such a status plays to the Geneva Convention and did not suggest that non-Geneva Convention refugees were in any less need of international protection (p 83). ILPA argued similarly (p 31).

36. We see some advantage in the Directive following the language of the Geneva Convention and other established refugee and protection instruments. In principle it would be better to adopt, where relevant, terms which are internationally agreed and understood.

Relationship with other EU instruments

37. From the outset of the Committee’s work on the asylum package we have been aware of criticisms of the order in which the Commission has brought forward texts. It was anticipated that agreement by all Member States on fundamental issues, such as those dealt with in the Refugee Qualification Directive, would be more difficult to obtain than agreement on other elements of the package. The argument was nevertheless raised by witnesses that adoption of the Directive should precede the adoption of the other three key measures in the package.

38. In JUSTICE’s view it was ironic that the Refugee Qualification Directive was chronologically the last draft to be produced by the Commission, as the central issue in the harmonisation process was the reaching of agreement on a harmonised interpretation of the definition of a refugee under the Geneva Convention (p 35). Professor Goodwin-Gill said: “this very important Directive should be leading the pack. It seems to me that the other Directives should be formulated or reformulated in light

of the objectives ... set down in the present directive ... it does actually recognise the reality which many individual States have been reluctant to admit, that their obligations to protect go beyond the 51 Convention” (Q 11). JUSTICE said that a harmonised definition would give applicants the same rights of protection in each EU Member State. Had the Refugee Qualification Directive been drafted and agreed first, it would have been clearer to whom the draft Directives on minimum standards on procedures and on reception conditions had to be applied (p 35).

39. ILPA also argued that discussion of the Directive should be given priority. Ms Nicola Rogers, for ILPA, drew particular attention to the implications for the reform of the Dublin Convention. A better alternative to the Commission’s present proposed reform (the so-called Dublin II Regulation) would be for a person to be able to have his or her claim determined in the country in which asylum was claimed.³⁶ One reason why the Commission had not so far adopted such an approach was because there was not sufficient harmonisation in the systems of the Member States. Ms Rogers believed that it would be better and more logical to try and harmonise the criteria for refugee status first before bringing forward a more workable solution to deal with the problems of the Dublin Convention (p 30, QQ 133-5).

40. Both JUSTICE and the Refugee Council argued that it was not practical or appropriate to set standards in, for example, the Procedures Directive without first agreeing upon a basic definition of those to whom those standards would apply (pp 35, 37). Witnesses also argued that a common understanding of other persons in need of protection was needed urgently. The Refugee Council welcomed the Commission’s initiative in uniting refugees and other persons in need of protection in a single instrument, which the Council said was rightly dubbed “the heart of a common European asylum system” in the Commission’s Explanatory Memorandum (p 37). For JUSTICE, Mr Nicholas Blake QC said: “At least these measures ought to be brought in together at the same time so there is an overall scheme whereby asylum seekers are being dealt with broadly fairly and consistently inside the EU States” (Q 131).

41. The Minister said that when the Vienna Action Plan 1998³⁷ (establishing a calendar of priorities for work under Title IV of the EC Treaty, including measures in the field of asylum) had been drawn up, it was thought that the Refugee Qualification Directive would probably be the most difficult of the four to agree (there was, for example, no uniform pattern of approach to subsidiary protection in Europe) and so it was put in a slower track. But “there have been changes which have meant that Qualification might actually have more of a chance of coming to the fore than was thought of when the Vienna Action Plan was drawn up”. Negotiation of the Procedures Directive had been put back while the document was being redrafted. The Reception Conditions Directive had been the subject of a “general approach” at the April Justice and Home Affairs Council. The Dublin II Regulation was “still enmeshed firmly” in a Council working group, though the Danes were to give it priority in their Presidency. It was, however, unlikely that the inclusion of subsidiary protection in the Refugee Qualification Directive would lead to amendment of the scope of the other instruments in the package: “We naturally welcome the fact that [subsidiary protection] is in the Qualification Directive, as it does recognise that there are non-Geneva Convention reasons why people may need to be protected. The practicalities of trying to establish a common approach to subsidiary protection when there is virtually no pattern across Europe in the way that it is branded at the moment means that it is probably a bit too early” (QQ 204-5).

42. The Directive is important for two main reasons. First, it contains fundamental provisions (such as definitions of refugee and of subsidiary protection) which may determine the scope and affect the interpretation of the other three elements of the Commission’s asylum package. Second, it is a feature of this particular Directive which distinguishes it from the other three instruments in the package that it is the only one that deals with subsidiary protection. The absence of provision for those claiming such protection status has been one of the main objections to the Procedures Directive and to the Reception Conditions Directive. It has been suggested that some Member States would oppose combining the way in which Geneva Convention refugees and those entitled to subsidiary protection are treated under the other instruments, and that if the measures had been presented in what might seem a more logical order, it might have put at jeopardy securing the recognition of subsidiary protection in the Refugee Qualification Directive.

43. However, once the content of the Refugee Qualification Directive has been agreed by all Member States it would seem necessary to revisit the other instruments. Ideally the scope of the

³⁶ Ms Rogers referred to a recommendation of the Select Committee to this effect: *Asylum Applications—Who Decides?* 19th Report 2001-02, at para 110.

³⁷ Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice. [1999] OJ C19/1.

other Directives should be extended to cover all in need of protection. There is a strong argument for saying that as regards allocation of responsibility, and as regards procedures and reception conditions full account should be taken of all bases for international protection and that the Community's package of measures should ensure high standards and consistency in application across the Union. But we recognise that this is not solely a question of logic but is also a question of practical politics. There is likely to be difficulty in getting some Member States to agree to the degree of protection proposed being afforded to those who are not Geneva Convention refugees. We accept that securing agreement on subsidiary protection in the Refugee Qualification Directive would be a significant first step.

Scope

44. The Directive limits eligibility for refugee status or subsidiary protection to "third country nationals or stateless persons" (Article 2(c) and (e)). It is thus not applicable to nationals of EU Member States. Two questions arise: first, whether this limitation is compatible with Member States' obligations under the Geneva Convention; and second what, if any, are the implications of this limitation in the context of EU Enlargement.

45. The terms of the Directive reflect the language of Article 63 TEC as well as the approach of Protocol 29 to the Amsterdam Treaty.³⁸ Applications for asylum from EU nationals (*ie* nationals of Member States) are not envisaged. The Protocol states that "Member States shall be regarded as safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters" and seeks to limit the circumstances in which an application for asylum made by a national of one Member State may be processed in another. Limiting the Directive to third country nationals was seen by a number of witnesses as an attempt to rule out asylum applications from nationals of EU Member States.

46. Professor Goodwin-Gill said that Protocol 29 "effectively amounts to an *ex post facto* reservation to the territorial effect of the 1951 Convention, a qualification, if you like, of the refugee definition in Article 1 which is expressly prohibited by the terms of the Convention". Several Member States had only been able to accept it on the basis that it was non-binding (QQ 5, 8). UNHCR argued similarly: the Geneva Convention (Article 42—limiting the scope of the making of reservations) did not permit any qualification of the Convention definition of refugee. States have an obligation to consider all applications for asylum and recognition of refugee status that may be submitted to them. Mr Fortin (UNHCR) said that "to introduce a geographical limitation would be contrary to the text of the Convention, in effect". He rejected the Commission's argument that all that the Directive was doing was providing rules which applied whenever a third country national applied for asylum and was not saying that others cannot or should not apply. UNHCR argued that the EC Treaty itself recognised the fact that EU citizens could apply for asylum and that Member States would deal with their applications. The problem with the Directive was that, by limiting its scope to third State nationals, it left "in a vacuum" the treatment of EU citizens and their rights as refugees. In UNHCR's view, the Directive should ensure that all persons seeking protection, no matter their country of origin, were entitled to have their claims properly considered (p 17, QQ 89-92).

47. In practice the UK receives very few asylum applications from nationals of other EU States. The Minister said: "The fact that all Members of the European Union sign up to proper protections of rule of law, democracy and freedom of expression, having an independent judiciary, all of the things that enable rights to be protected and minimise to almost minuscule the chances that they will be subject to persecution by their own state and that they will not have any means of pursuing that and getting justice in their own states. So the number of European Union asylum seekers that we have is minuscule". The majority of such applications were false (third country nationals with false identity documents) or vexatious. The Minister described it as "absolutely a technical problem" (QQ 216-18, 228). There were 90 EU nationals recorded as seeking asylum in the UK in 2000 and 2001 (p 75).

48. Several witnesses proposed that the Directive's definition of "refugee" should be aligned with the definition in Article 1 of the Geneva Convention. In ILPA's view the Geneva Convention had to be given primacy: "The definition of a refugee is a person who fulfils the requirements of Article 1(A) of the Refugee Convention without any further qualification". Mr Peers, for Statewatch, spoke of a "contradiction" between the way the Geneva Convention was worded, covering everyone, and the wording of the Directive which was restricted to third country nationals. That distinction could also be seen in the Protocol on Asylum and Article 63(3)(c) TEC. But even if the Directive could not cure the problem of that "contradiction" the position was different for subsidiary protection. Article 63(2)(a)

³⁸ Protocol on Asylum for Nationals of Member States of the European Union. The Protocol is described at paras 20-1 above.

TEC was not so limited. The obligation to act within five years in that sphere applied equally to EU nationals and third country nationals (Q 141).

49. A number of witnesses expressed particular concern at the implications of Enlargement of the Union. Mr Ockelton, Deputy President, Immigration Appeal Tribunal, referred to “a considerable phenomenon of recognition of refugees from Eastern European States”. According to UNHCR figures, 265 nationals of Bulgaria, 131 of the Czech Republic, 80 of Hungary and 53 of Poland had been recognised as refugees in 1999. The figures for 2000 were 181, 88, 339 and 108. Mr Ockelton noted that following Enlargement nationals of some of these countries might not be “third country nationals” for the purposes of this Directive. National and Community law might, he thought, deem nationals of EU countries not to need international protection but such a provision would not meet international obligations under the Geneva Convention (p 77). Mr Peers, for Statewatch, pointed out that some Member States were for some purposes already treating the nationals of some accession States as if they were already EU nationals (Q 142). Mr Blake, for JUSTICE, expressed concern that there should be any attempt to exclude anyone from the Geneva Convention *a priori* and spoke of “a major attempt by politicians to, as it were, magic away protection rights” (Q 143).

50. The Refugee Council considered that no country could be declared safe for all its nationals for all time, let alone a group of fifteen States that was soon to expand. Enlargement raised the question of how groups such as the Roma, who had been fleeing countries such as the Czech Republic and Poland and finding protection within the EU, would fare once those countries had become EU Member States (p 38). Mr Hardwick, for the Refugee Council, said that according to the UNHCR statistics 7,232 Roma asylum seekers from accession States had been granted refugee status in the EU in the period 1990-99. In the UK refugee status had been granted in ten Czech cases and 20 Polish cases in 2000 alone. He accepted that granting refugee status to a national of another EU State would be a rare occurrence. Only in very exceptional circumstances would their case amount to persecution and would they be unable to get protection from their own State. But, Mr Hardwick said, “as the case of the Roma illustrates there are occasions when even if there are supposedly safeguards in place in theory, those safeguards are not being effectively implemented and for the individuals concerned, regardless of membership of the club, they are being persecuted in their country and they are not being protected and that is what the courts here, and indeed the authorities in other countries, have found in over 7,000 cases” (QQ 144-8).

51. The Minister told the Committee that the number of asylum applications from Roma was going down, though figures could not be provided because the Government does not collate information on the ethnicity of asylum seekers. Generally as regards applications from the accession States the Minister said that “before any enlargement States join, they will be expected to adhere to the principles of Article 6 of the Treaty of the European Union which establishes a respect for human rights. They would not be allowed to join if it was not judged in their implementation of the *acquis* that they had not sorted that out, and that implies that if they were allowed to join, then issues about human rights problems and lack of access to a free and independent court system would have been solved ... [We] have to have trust that there will not be a cynical dash to enlarge for the sake of it before the rules and regulations which allow you to join the European Union are actually put into effect and in place adequately in individual countries” (QQ 224-6). Since 1999 the UK has received 17,925 applications from nationals of EU accession countries excluding Malta (p 75).

52. Witnesses raised a further objection. Mr Fortin for UNHCR said “we think that this may be copied in other parts of the world and there may be other regions of the world where human rights do not attract the level of respect that exists in Europe ... For us it is a question of giving the right example to the rest of the world rather than any concern that applies to the situation in Europe today (QQ 89-92). ILPA, the Refugee Council and the Refugee Legal Centre expressed similar concern about the precedent that apparently restricting the scope of the Geneva Convention to nationals of States outside of the EU would set internationally (pp 31, 38, 83). Mr Hardwick, for the Refugee Council spoke of “the overall integrity of the international system”. In his view it was important to preserve that overall integrity “because if other regions start saying “the rules do not apply to us either” that will have consequences for the movement of people that might not be thought to be in the interests of the EU” (Q 150).

53. It is a feature of the Directive that it limits eligibility for refugee or subsidiary protection status to third country nationals or stateless persons (Article 2 (c) and (e)) and it does not therefore, according to its terms, apply to nationals of Member States of the Union. Geneva Convention refugee protection applies, however, to everyone, including nationals of Member States, and it is a fact that some applicants for asylum, albeit few in number, have come from other Member States. A larger number come from countries which are now applicant members of the Union.

54. We believe that the Directive should in principle apply to all persons without distinction as to nationality. This would be consistent with Member States' international obligations under the Geneva Convention. While it may be unlikely that nationals of EU Member States would have any valid claim to asylum, this consideration should not affect the way in which the universal refugee definition of the Geneva Convention is defined in the legal systems of the Community and of its Member States. Further, for a major regional grouping of countries such as the Union to adopt a regime apparently limiting the scope of the Geneva Convention among themselves would set a most undesirable precedent in the wider international/global context.

55. This view is reinforced by practical considerations of the Enlargement process. Already there are signs that Member States may be tempted to treat persons coming from an accession country as if they were coming from another Member State. They would say that such countries are automatically "safe". We have already registered our concern with such an approach, in the context of the Reception Conditions Directive.³⁹ The way the key definitions in Article 2 are currently drawn, those who, when Enlargement occurs, would become EU citizens would not enjoy any protection under the Directive. It would only be given for third country nationals. There is a risk of the political decision to allow Enlargement being taken before current Member States can be sure that Article 6 TEU and all the relevant *acquis* are in place and are actually being applied. There is a danger that if States, on the basis of EU citizenship (*ie* nationality of a Member State), bar from refugee protection such a group as the Roma, who may be persecuted on racial grounds, or other groups, who may be persecuted on religious grounds, this would seriously undermine the effectiveness of Geneva Convention protection within Europe.

56. There is, however, a potential *vires* problem. The term "third country nationals and stateless persons" tracks the language of Article 63(1)(c) of the EC Treaty. That phrase, it is argued, limits the permissible scope of the Directive, at least as regards the definition of "refugee". We express no final view on this. However, even if the scope of the Directive cannot be widened to include nationals of Member States, Member States' responsibilities under the Geneva Convention cannot, as a matter of international law, be thereby limited.

57. Finally, Professor Goodwin-Gill drew attention to the position of the Palestinian refugees. They have a special position under the Geneva Convention.⁴⁰ He suggested that the definition of "refugee" in the Directive should be amended to reflect this (p 13, QQ 80-4). UNHCR agreed. Although in practice assistance was provided to Palestinian refugees by the United Nations Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA),⁴¹ there could be situations where they would *ipso facto* be entitled to the benefits under the terms of the Convention (QQ 93-6). The Government agreed that the issue needed to be explored. The extent of States' obligations under Article 1(D) of the Geneva Convention was currently the subject of litigation in the English courts. The Government was keeping an eye open to the possible implications for the Directive (QQ 221-2).

58. It is, as we have said above, most important that the Directive should be consistent with the Geneva Convention. That may mean that the special position of Palestinian refugees should be reflected in the text of the Directive. The issue is, however, legally controversial and the position of Palestinian refugees under the Convention is currently the subject of litigation in our courts. The Government is alive to the issue and we are pleased to note that they are to re-examine the matter in the light of the outcome of that litigation.

International protection 'sur place'

59. Article 8 provides that a claim for international protection may be based on events which have taken place since the applicant has left his country of origin. Article 8(2) states that a well-founded fear of persecution 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".

³⁹ The issue has arisen in the context of a proposed declaration to be made by Austria. See letter of 13 June 2002 from Lord Brabazon to Lord Filkin. To be published.

⁴⁰ Article 1D of the Convention provides: "This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance. When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention".

⁴¹ UNRWA is responsible for providing basic health, education, and social services to 3.9 million Palestinian refugees in the West Bank and Gaza Strip, Jordan, Syria and Lebanon. Since 1972 the EC and UNRWA, whose ability to provide its services depends on annual voluntary contributions, have signed ten conventions providing funding for UNRWA's operations.

60. Introducing this issue Professor Goodwin-Gill said: “the self-created refugee is someone who always seems to put decision makers’ backs up. Decision makers, whether they be officials or judges or tribunal members, do not like to think they are being taken for a ride or that the country in which they are working is being taken for a ride and therefore tend to view with a measure of scepticism those who appear suddenly to have become politically aware as soon as they arrive in a country or as soon as they were threatened with removal” (Q 17). UNHCR acknowledged that States faced difficulty in assessing the validity of such claims, and agreed that the practice should be discouraged. At the same time, UNHCR insisted that the principle at stake was whether the person would face a risk to his or her life or liberty upon return and not primarily how the risk had come about. Mr Fortin said: “What the Convention requires is that the person has to demonstrate that he or she has a well-founded fear of being persecuted for one of the reasons. No mention is made in the text of the motives or the good faith that the person could hold ... So the objective fact that the individual may face persecution on return for one of the reasons should be sufficient for recognition of his or her status as a refugee. We have insisted that this is the only interpretation that can be given to the text” (p 18, QQ 97-8). Mr Peers, for Statewatch, pointed out that Article 8(2) also applied to subsidiary protection and that the case law on Article 3 ECHR said that the only test was whether there was a real risk of torture or other inhuman or degrading treatment. The question when and why the activity which caused the individual concerned to face that treatment began was irrelevant (Q 154).

61. There was strong opposition to the approach taken by Article 8(2). The Refugee Legal Centre described it as “dangerous, concentrating the enquiry as to the determination of refugee status on the subjective state of mind of the individual, which is notoriously difficult to establish, rather than upon the single factor which the common international interpretation of refugee law recognises as determinative of an entitlement to protection: the objective risk to the individual” (p 83). ILPA was “acutely concerned at this qualification which is contrary to established case law and principle”. There was no good faith requirement in the Geneva Convention. Member States would doubtless closely scrutinise an application based on “self serving” activities but if risk of harm was nonetheless established international protection must be given (p 32, Q 152).

62. In UNHCR's view, a proper analysis of such cases demanded not an assessment of whether the asylum-seeker had acted in “bad faith” but rather, as in every case, whether the requirements of refugee status under the Geneva Convention were in fact fulfilled taking into account all the relevant facts. The objective fact that the individual might face persecution on return for one of the Convention reasons should be sufficient for recognition of his or her status as a refugee (p 18, Q 99). Professor Goodwin-Gill agreed that risk of persecution to the individual was the important objective consideration. The English courts had adopted that approach.⁴² Moreover in practice the cases were few and the fear that there might be great numbers of applications to which Article 8(2) applied was misplaced (QQ 17-9). It was unlikely that Member States would be burdened. Mr Nicholas Blake QC, for JUSTICE, suggested that if the Directive needed to say anything at all Article 8(2) might be amended to enable an inference to be drawn that the applicant would not be persecuted. But the Directive should not, as it were, redefine “persecution” (Q 156).

63. The Minister was uncertain how great a practical problem “self-created” refugees were. Each asylum application had to be considered on its merits. Certain objective facts had to be established, including the nature of the regime from which the applicant was fleeing, the applicant’s particular history and political beliefs and activities. The applicant’s credibility would be examined. Whether an individual indulged in a course of behaviour after he reached safety to bolster up an asylum claim would presumably be part of that test of credibility in an individual case. The Minister doubted that Article 8 needed amendment but was prepared to consider whether the text should be amended to avoid the danger that it might encourage concentration on motivation rather than on what the actual position was (QQ 229-33).

64. We believe that Article 8(2) of the Directive has been rightly criticised for making the assessment of the existence of a well-founded fear of persecution conditional upon the motivation of the applicant. The approach of the Geneva Convention to genuine fear of persecution is not to look at the reasons for the activities that have given rise to the fear but simply to look at the objective risk to the individual or individuals concerned. There is a danger that the present text would encourage the determining authorities to concentrate on motivation rather than on what the actual position is, however caused. The Directive appears to provide less protection for the asylum applicant than the Geneva Convention requires. Article 8(2) should be deleted.

⁴² *Danian v Secretary of State for the Home Department*. Court of Appeal, 28 October 1999. Noted by Professor Goodwin-Gill in *International Journal of Refugee law*, Vol 12 2000 at p 663.

Persecution: the role of non-State actors

65. The Directive recognises that a person may be entitled to protection if the persecution which he or she is escaping emanates not from the State but from some non-State actor within the State. This is already a problem in some parts of the world and is likely to continue so. Article 9(1) extends the concept of persecution to include threats by non-State actors, where the State is unable or unwilling to provide effective protection. There are some Member States which have in the past not recognised threats of persecution from non-State entities as entitling individuals to the status of Geneva Convention refugees. The Directive would make it clear that individuals can qualify as refugees on that footing.

66. JUSTICE described Article 9(1) as “the most controversial issue in the drafting of the proposal. Certain states, Germany in particular, were greatly opposed to a definition that included non-state agents. However, the combined pressure from NGOs and MPs from various EU Member States proved sufficient to ensure that this was done” (p 36). Mr Nicholas Blake QC said: “I think JUSTICE and all the other NGO communities would consider the Directive had lost much of its value if it was not to be included. This is one of the biggest issues on harmonisation”. He drew attention to the different philosophies of the two different regimes currently present in the Union. The common law approach was to treat the Geneva Convention as a human rights instrument and to give it “practical and effective, updating interpretation”. By contrast, some Member States, such as Germany, did not regard the Convention as applying to non-State persecution. Mr Blake said: “That is such a cogent difference in philosophy it affects the way you look at the same words and the way you dissect the grammar of the Convention”. The Directive, if adopted, would bring about a change in Germany, and also France. It “would really set the tone for the new philosophy of looking at protection in accordance with sensible guidelines that would then be harmonised with the subsidiary protection and would allow in certain cases the case law of the ECHR to influence the interpretation of the Refugee Convention” (QQ 158, 161).

67. In the *Adan* case⁴³ Lord Justice Laws described ‘The respective approaches of the French, German and English courts to persecution by non-State agents’ as follows:

“On the material before us the position in France and Germany as regards persecution by non-State agents is as follows. Both subscribe to what has been called the “accountability” theory of interpretation of the Geneva Convention. The United Kingdom and, we understand, a majority of the other contracting States (including a majority of those in Europe, together with the United States, Canada, and Australia) subscribe to the “protection” theory, which is also supported and advocated by the UNHCR, as paragraph 65 of the *UNHCR Handbook* shows. Put shortly the “accountability” theory limits the classes of case in which a claimant might obtain refugee status under the Geneva Convention to situations where the persecution alleged can be attributed to the State. German law requires an asylum seeker to show that he fears persecution (on a Convention ground) by the State, or by a quasi-State authority. If he relies on persecution by non-State agents, it must be shown to be tolerated or encouraged by the State, or at least that the State is unwilling to offer protection against it. The German courts hold that the Convention has no application in cases where there is no effective State authority, as in a situation of civil war. At p.2 of his recent advice given on 17 May 1999, Professor Hailbronner states:

“Attribution requires that a State either supports, encourages or tolerates persecution emanating from non-State actors, or that the State is not willing or ‘able’ to provide adequate protection. The ‘inability’ to provide necessary protection, however, cannot be interpreted in the sense of a factual inability of a State having lost control in parts of its territory ...”

The position in France is similar but not identical. In *Aitsegeur’s* case [1999] INLR 176, 187, Sullivan J. at first instance summarised the position in this way:

“In German law an applicant for asylum falls outside the Convention if there is no *de jure* or *de facto* state authority and thus no possibility of protection. In French law an applicant for asylum falls outside the Convention if the *de jure* or *de facto* State authority is unable to provide protection.”

Thus the distinct approach in France is to deny refugee status in cases where there is a functioning State authority in the country of feared persecution, but it is unwilling to afford protection.

The English courts have looked at the matter quite differently. In *Adan v Secretary of State for the Home Department* [1999] 1 A.C. 293, their Lordships’ House had to consider the case of a

⁴³ *Reg. v Secretary of State for the Home Department, ex parte Adan* [1999] 3 WLR 1274, at pp 1288-9. The decision of the Court of Appeal was upheld by the House of Lords: [2001] 2AC 477.

Somali national. The House held that killing and torture incidental to a clan and sub-clan based civil war did not give rise to a well founded fear of being persecuted within the meaning of Article 1A(2) where the asylum seeker was at no greater risk of such ill-treatment by reason of his clan or sub-clan membership than others at risk in the war; a “differential impact” had to be shown. However Lord Lloyd of Berwick went on to state, at pp. 304-306:

“It was also common ground that Article 1A(2) covers four categories of refugee: (1) nationals who are outside their country owing to a well-founded fear of persecution for a Convention reason, and are unable to avail themselves of the protection of their country... If category (1) were confined to refugees who are subject to state persecution, then I can well see that such persons would, *ex hypothesi*, be unable to avail themselves of State protection. On that view the words would indeed serve no purpose. But category (1) is not so confined. It also includes the important class of those who are sometimes called ‘third party refugees’, *ie* those who are subject to persecution by factions within the State. If the State in question can make protection available to such persons, there is no reason why they should qualify for refugee status. They would have satisfied the fear test, but not the protection test. Why should another country offer asylum to such persons when they can avail themselves of the protection of their own country? But if, *for whatever reason*, the State in question is unable to afford protection against factions within the State, then the qualifications for refugee status are complete. Both tests would be satisfied.” (Emphasis added.)

This accords with other jurisprudence in the English jurisdiction. Our courts recognise persecution by non-State agents for the purposes of the Convention in any case where the State is unwilling or unable to provide protection against it, and indeed whether or not there exist competent or effective governmental or State authorities in the country in question. This is what has been called the “protection” theory. It is, as we have said, shared by a majority of the States signatory to the Convention and the UNHCR.”

68. In UNHCR’s view, Article 9(1) acknowledged and codified the state of international law on the issue - *ie* that it was immaterial whether the feared harm emanates from a State or a non-State agent (p 18). Mr Fortin explained the historical background: “I suspect that at the beginning, when the Geneva Convention was adopted, what everybody had in mind was that the State was the persecutor. In those days, the human rights’ instruments were established to protect the individual *vis-à-vis* the State, that was the origin, so that it was almost normal to assume that it was protection against the State. But the practice of States has evolved very considerably and in 1979 our office issued a handbook⁴⁴ on the examination of refugee status where it is stated that if the threat comes from non-State agents and the State is unwilling or unable to protect the person, then the person should also qualify for refugee status”(Q 99).

69. The Refugee Council was encouraged by the statement in the Minister’s Explanatory Memorandum that the “broader majority interpretation” of non-State persecution is a “key factor in establishing the level playing field for asylum applications and will help ensure the effectiveness of the Dublin Convention and its successor” (p 37). Witnesses spoke of the need to close the gap between those Member States, such as the UK, which recognised non-State actors as a source of harm and those, such as France and Germany, which did not. Professor Goodwin-Gill did not believe that the Directive would be acceptable if the issue of non-State actors was not resolved (Q 23). ILPA believed that without agreement on Article 9(1) the cohesion of the European asylum system would be severely undermined (p 32). Neither JUSTICE nor the Refugee Council wanted to see any compromise on this issue—there should be no possibility of an opt out of Article 9(1) (pp 36, 38). The Directive could be “a rare example of the harmonisation process setting standards that do not merely legitimise the status quo, but instead force some States to raise their game” (p 38).

70. The Minister welcomed this provision of the Directive and was cautiously optimistic that it would remain. She said: “Certainly the Vienna Action Plan thought this was a very insurmountable problem, which is why I suspect the Qualification Directive came in after the others. It is becoming less of a problem, I think”. There had been changes. Germany was expected to come into line with the majority. The position of France was, however, less clear (QQ 237-8).

71. One of the key features of the proposed Directive is that it would address well-known problems with some Member States, especially France and Germany, as to how one defines “refugees” for the purposes of the Geneva Convention, in particular different approaches taken

⁴⁴ The importance of the role played by the UNHCR in the application of the Geneva Convention and of the Handbook was noted by Lord Steyn in *R v Secretary of State for the Home Department, ex parte Adan and Aitseguer*, [2001] 2AC 477. Lord Steyn said: “It is not surprising therefore that the UNHCR Handbook, although not binding on States, has high persuasive authority, and is much relied on by domestic courts and tribunals”.

as regards the position of non-State actors. It is a politically sensitive issue and the Commission is to be praised for confronting it. Article 9 would resolve the issue in favour of the majority (including the UK) viewpoint. Insofar as changes are not already under way the Directive would require them to be made. As mentioned above, a common approach to non-State actors would be one of the main gains to be had from the Directive. It would not, in our view, be satisfactory if the position of Member States were left unharmonised. The concept of persecution should include threats by non-State actors.

Non-State actors as 'protective' agents

72. Article 9(3) views certain non-State actors as 'protective' agents: international organisations and stable quasi-State authorities are deemed to provide effective protection, being "able and willing to give effect to rights and to protect an individual from harm in a manner similar to an internationally recognised State". A number of witnesses questioned the assumption that such organisations could discharge such obligations. They did not consider that non-State or quasi-State bodies could provide "protection" equivalent to that provided by a State. They argued that international organisations and quasi-State authorities were not parties to international human rights instruments, were not able to give meaningful human rights guarantees and were unaccountable in international law. They also drew attention to past experience, particularly in Africa and the Balkans.

73. The Refugee Legal Centre considered Article 9(3) "dangerous" and argued that the Geneva Convention required protection to be provided "not by some legally unaccountable entity with *de facto* control, but rather by a government capable of assuming and being held responsible under international law for its actions" (p 84). The Refugee Council said that neither international organisations nor "State like authorities" were subject to international law in the sense that they could not sign international human rights instruments and so be held accountable for safeguarding individuals' human rights. In the Council's view, the very absence of a State authority was an indication of political instability and it was hard to conceive of a situation where an authority that was not a State could be regarded as enjoying sufficient, durable stability and as having the political, military and civil police capacity that would enable it to offer a level of protection consistent with the Geneva Convention or the ECHR. Recent history of international organisations providing "safe havens" was not a proud one, notably in Bosnia, but also in Kosovo, where UNMIK was dependent on NATO to provide military and civil security and had been unable to protect individuals, in particular minorities, from gross human rights violations (p 38).

74. JUSTICE noted that the Directive contained no definition of a "quasi-State" and restricted the concept of protection in the Geneva Convention to protection from persecution. That was insufficient. Protection embraced all the functions that a State had to ensure: law and order, respect for human rights and diplomatic and consular protection abroad. Quasi-States were incapable of performing these functions, were not subject to international human rights obligations and were not legally accountable. JUSTICE said: "These problems may be redressed where an international state with full accountability provides protection in an enclave of another State such as Kosovo. However to equate the squabbling factions of the Kurdish Autonomous Region in Iraq with state protection is impermissible and inappropriate". Further, while JUSTICE welcomed the requirement that non-State protection be effective, the term was controversial and open to different meanings. It begged the question of protection from what. "Current debates on returning Kurds to the Autonomous Region of Northern Iraq, or Somalis to parts of Somalia or Somaliland show the inherent problems in this approach" (p 36).

75. ILPA spoke of "numerous examples in the last century of the inadequacy of protection offered by international organisations" and referred to Rwanda, Sierra Leone and Kosovo (p 33, Q 164). Professor Goodwin-Gill said that experience (*eg* in Southern Sudan) suggested that understandings negotiated with non-States were not worth the paper they were printed on. Further the UK had been wary about dealing with non-State agents in a way which might seem to imply recognition of their claim to government or statehood, particularly if they had a poor record of human rights. But Professor Goodwin-Gill was prepared to accept that a distinction might be drawn between non-State protection through the UN, where there would be accountability, and other forms of protection (p 2, Q 64).

76. UNHCR did not consider the protection provided by States could be equated with control over territory by international organisations or quasi-State authorities. An international organisation might (as in Kosovo or East Timor) have a certain administrative authority and control over territory on a transitional or temporary basis but such functions were no substitute for the full range of measures normally attributed to the exercise of State sovereignty. Similarly, quasi-State authorities might indeed control parts of territory. But such control (often disputed and rather fluid) could not replace the

protection provided by States. Mr Fortin explained that UNHCR's approach was a pragmatic, not a legalistic, one. What was important was the *de facto* protection actually available to the individual in the country in question. If the person had a fear of persecution for a Convention reason and there was nobody to prevent that fear becoming a reality, then the person would have a good claim for refugee status. If the State or any other entity could prevent the materialisation of the threat then the fear would not be well-founded and the claim for refugee status would fail. UNHCR recommended that Article 9(3) be deleted (p 19, QQ 106-11).

77. Ms Nicola Rogers, for ILPA, said that UNHCR was probably right to take the pragmatic approach, but ILPA's position was that it was very dangerous to have this provision in the Directive in the first place. However, the political reality was that Article 9 (3), or something like it, would remain. Safeguards should therefore be added to ensure that the body to be regarded as the protector was able to undertake the functions of a State. Including in the Directive criteria for adequate protection would reduce the possibility of differentiation between Member States and help reduce secondary movement (QQ 165, 169).

78. The Minister supported the approach taken by the Directive, which was trying to recognise developments in international peace keeping, and that the best way of dealing with threats of persecution on a large scale was to try to stabilise the area in question rather than deal with a huge influx of displaced persons and refugees. She said: "Peace keeping and nation-building is a new area of policy and I expect that it will continue to evolve ... It is right that they are recognised as potentially a solution. I do not think that the draft Directive says any more than that". Article 9 did not remove the need to look at the effectiveness of the protection provided by the non-State body before it could be considered adequate (QQ 239-42).

79. There is some force in the argument that the recognition of quasi-State authorities and international organisations as protective agents is problematic. They are not parties to international human rights instruments, are not able to give effective human rights guarantees and are unaccountable in international law. Moreover, as the practical examples provided by a number of witnesses show, the experience of recent history is not encouraging. The existence of international peace-keeping forces does not prevent human rights abuses, sometimes, as Mr Peers reminded us, on a major scale as at Srebrenica. On the other hand, regard should be had to contemporary developments in peace-keeping and stabilisation and possible participation of the EU itself in future peace-keeping operations. We believe that a pragmatic view must be taken. If it can be shown that the individual or individuals concerned would be protected by the non-State actor so that there was no longer a well-founded fear of persecution (the essential criterion for refugee status under the Convention), it should not matter if the protector does not have all the attributes and powers of a State. Nor should it matter whether the protection is afforded by an international organisation or a quasi-State authority. It is by no means clear that an international organisation can offer a higher level of protection than a quasi-State authority.

80. Article 9 is consistent with this approach. It does not remove the need for determining authorities to examine the protection to be afforded to the individual concerned. The practical issue for us is whether the Directive should lay down, albeit in broad terms, criteria to assist Member States in determining whether sufficient protection exists. At present the Directive contains no rules or mechanisms to ensure consistency between Member States. Consideration should be given to adding to the Directive minimum requirements as to the capabilities and responsibilities that the non-State actor, whatever its precise character, should have. There would be some benefit in the Directive setting a common yardstick or means by which Article 9 would in practice be interpreted consistently across the Union.

Internal protection

81. Article 10(1) permits Member States to reject applications for international protection where it can be shown that effective protection is available in at least part of the country of origin to which the applicant can be returned. There is a "strong presumption" against such a finding where the agent of persecution is, or is associated with, the national government.

82. ILPA cautioned against the use of the internal flight alternative concept. "The concept is too readily used by Member States without a good understanding of the interconnection between different State and non-State bodies within a country of origin and without an understanding of the difficulties that an individual faces in internally relocating in a country in which he has been persecuted or faces a risk of persecution" (p 33). JUSTICE contended that the "strong presumption" against finding internal protection to be a viable option when the persecutor is the State itself or is State-sponsored betrayed a weakening of the Geneva Convention concepts of protection in favour of *ad hoc* arrangements of debatable stability and validity. To avoid the risk that States would return applicants to situations in

their country of origin where they might face danger further criteria should be added to the Directive. States should be required to ensure that applicants' human rights under international law would be guaranteed in the area to which they are returned. Further, any protection available internal to the State should be accessible in safety and dignity. There should also be an element of durability (p 37, QQ 177-8).

83. Other witnesses were less critical of Article 10. UNHCR welcomed the Directive's attempt to put a more uniform structure and meaning to a notion which has been applied in widely differing ways by various States for some years (p 19). In Professor Goodwin-Gill's view, the essential question remained that of the risk of persecution, having regard to the particular facts: "if the source of your persecution is, say, a guerilla movement which has sway in only one third of your country then it does make sense to require you to seek the protection of your government in the two-thirds that it still controls" (Q 35).

84. The Minister again supported the approach taken by the Directive. The UK was developing policies for the return of asylum seekers or refugees to parts of Somalia and of Sri Lanka which, following political developments, had now become safe. Ms Eagle said: "We think it is entirely legitimate to do that, so long as we know that it is safe for particular individuals" (QQ 244-5). She appeared to accept that Member States might adopt different approaches to whether a particular part of a particular country was or was not safe (Q 246). Lord Filkin later informed the Committee that under the 1996 Joint Position,⁴⁵ Member States agreed that where it appeared that persecution was clearly confined to a specific part of a country's territory, it might be necessary to ascertain whether the person concerned could not find effective protection in another part of his own country, to which he might reasonably be expected to move (p 75).

85. Article 10 deals with a question not dissimilar to that raised by Article 9 (3). It deals with the case where there are parts of the country of origin where the individual having a fear of persecution would be safe. The practical issue is determining whether there is in fact sufficient protection in the particular circumstances. The Committee agrees with the Government in supporting the approach taken in the Directive. It is, however, a matter of concern that the Directive would seem to permit Member States to adopt different approaches in determining whether a particular part of a country is safe for the individual or individuals concerned. The Directive should seek to minimise the risk that States might return applicants to situations in their country of origin where they may face persecution. As in the case of Article 9, the Directive should set out criteria to safeguard those concerned and to secure consistency of approach across the Union.

Cessation/withdrawal of refugee status

86. Article 13 sets out the circumstances when refugee status may cease: (a) voluntary re-availment of national protection; (b) voluntary re-acquisition of nationality; (c) acquisition of new nationality; (d) voluntary re-establishment in country of origin; (e) change of circumstances in country of origin; (f) change of circumstances in country of habitual residence. They mirror those circumstances set out in Article 1C of the Geneva Convention. The Directive expressly provides that a Member State wishing to withdraw protection bears the burden of proof in establishing it is justified to do so.

87. Ground (e), as the Commission's Explanatory Memorandum⁴⁶ points out, requires "that such a change of circumstances is of such a profound and durable nature that it eliminates the refugee's well-founded fear of being persecuted. A profound change of circumstances is not the same as an improvement in conditions in the country of origin. The relevant enquiry is whether there has been a fundamental change of substantial political or social significance that has produced a stable power structure different from that under which the original well-founded fear of being persecuted was produced. A complete political change of circumstances is the most obvious example of a profound change of circumstances, although the holding of democratic elections, the declaration of an amnesty, repeal of oppressive laws, or dismantling of former services may also be evidence of such a transition".

88. A number of witnesses pointed out that Article 13 emphasised the fact that refugee status is itself a temporary one. In the view of the Refugee Council, given that full Convention status could itself be temporary there seemed no reason for the distinction drawn by the Directive between refugee status and secondary protection (Q 202). But in practice, Mr Fortin (UNHCR) said, subsidiary protection tended to be shorter. For example, it might be easier to identify where the end of the need

⁴⁵ Joint Position on the harmonised application of the definition of the term "refugee" in Article 1 of the Geneva Convention. The Joint Position is described in paras 18-9 above.

⁴⁶ Explanatory Memorandum, at p. 23.

for protection arose in the case of escape from war than in the case of escape from persecution (Q 123).

89. All protection with which the Directive is concerned is potentially temporary.⁴⁷ The Geneva Convention, on which Article 13 is closely based, envisages that circumstances can change for the better and render unnecessary the maintenance of refugee status in particular cases. We return to the question of the temporary nature of protection under the Directive when considering the distinction proposed in this regard as between refugee status and subsidiary protection.

Subsidiary protection—general

90. Article 15 sets out the grounds on which a person may be granted subsidiary protection. Witnesses generally welcomed the inclusion of subsidiary forms of protection within the Directive. JUSTICE said that it was “the most logical and coherent approach, which reflects the rights of individuals under international human rights law”. However, the fact that in the Commission’s asylum package the Directive was the only one of the four measures that recognised the need for subsidiary protection created potential for inconsistency. Failure to deal with subsidiary protection in the Procedures Directive would allow differences in Member States’ practices to continue (p 36). JUSTICE strongly supported the Commission’s view, which encouraged Member States to apply the Procedures Directive to all applications for international protection. Although this might not be as much an issue in the UK it was, in JUSTICE’s view, crucial to the harmonisation process (p 36).

91. The Government supported the inclusion of the “content” of refugee status and subsidiary protection. But it added: “in order for the inclusion of content to be meaningful it is considered necessary that the level of rights and benefits given to those granted a protection status is sufficiently high” (p 63). The Minister thought that it was: “The list of things in the Directive as it is currently drafted give us a far more level playing field than we have now. Given that that is a minimum standard from which we can build in the future we are reasonably happy with it. What we would not want to do is try to create higher standards at the risk of losing agreement on the minimum standards”. The Minister believed that it would be “difficult and quite challenging for some Member States to put into effect” (QQ 267-8).

92. UNHCR welcomed the Directive’s attempt to put a more uniform structure and meaning to a notion which had been applied in widely differing ways by various States for some years. But UNHCR was critical of how the criteria of subsidiary protection were defined in this text. The definition of subsidiary protection was so broad that it might subsume the definition of refugee (p 20, Q 120). Some witnesses pointed out that the grounds of subsidiary protection set out in Article 15 (especially in (a) and (b)) indicated a strong presumption of refugee status. They perceived a risk of a “lowering” of protection by Member States granting subsidiary protection rather than full refugee status. In ILPA’s view, it was necessary to ensure that subsidiary protection was not used where refugee status would in fact be applicable. A large number of cases could fall into both refugee status and subsidiary protection categories. ILPA argued that given the lesser rights accruing to those with subsidiary protection status under the Directive, it should only be granted where the person clearly fell outside of the Geneva Convention (p 34).

93. The Minister accepted, as a theoretical possibility, that Member States might be tempted to opt for subsidiary protection instead of refugee status. She had no evidence that it happened “but clearly if there is more than one protection regime and one appears to grant more rights than another then there are incentives for people to apply to the top of the hierarchy of rights when they may not qualify in case they get through and equally there are temptations for governments to seek to push people on to the lower level, that is inevitable” (Q 276).

94. It is a common feature of the other elements of the Commission’s proposed asylum package (the Procedures Directive, the Reception Conditions Directive and the Dublin II Regulation) that their scope is fixed by the definition of “refugee” within the meaning of the Geneva Convention and only deal with applications of persons claiming protection under the Convention. They do not, though we have argued that they should, encompass applications made by persons who would not qualify as refugees but might otherwise be entitled to protection. It will be recalled that Member States have responsibilities for dealing with claims falling to be determined under Article 3 ECHR, Article 3 of the UN Convention against Torture, and Article 7 of the International Covenant on Civil and Political Rights. The approach of the present proposal is therefore most welcome. It places subsidiary protection close to the centre of

⁴⁷ Though not in the sense of the special regime provided by the Directive on temporary protection of displaced persons agreed in July 2001, described in paras 22-4 above.

the Community's asylum policy and offers the opportunity to obtain a significant degree of harmonisation across the Union.

95. **The Directive (Article 36) requires the Commission to report to the European Parliament and the Council on the operation of the Directive. Having regard to the concerns expressed by witnesses, the Commission should carefully monitor the application of Article 15 and if it appears that Member States are granting subsidiary protection where refugee status should be recognised should report accordingly.**

Subsidiary protection—serious and unjustified harm

96. Articles 5(2) and 15 establish as a condition for the granting of subsidiary protection the existence of a well-founded fear of suffering serious and unjustified harm. A number of witnesses queried what the draftsman had intended by the requirement that the harm should be “unjustified”. They expressed concern that the term “serious and unjustified harm” implied that “serious harm” could potentially be justified. They also questioned whether the criterion was compatible with international human rights instruments.

97. The Commission's Explanatory Memorandum said: “there are circumstances in which a State may be justified in taking measures that cause harm to individuals, such as the event of public emergency or national security ... it would be contrary to human rights instruments, such as the European Convention on Human Rights and Fundamental Freedoms, to exclude the possibility that some proportionate derogation from human rights standards may, in limited and particular circumstances, be justified, most commonly in the interests of the wider common good”.⁴⁸ ILPA found the explanation “wholly unconvincing”. It made no reference to the fact that Article 15 ECHR permitted no derogation whatsoever from Article 3 (p 31). ILGA Europe (the European Region of the International Lesbian and Gay Association) expressed concern at the potential for “national security” reasons to be interpreted widely in order to justify discriminatory treatment of homosexuals (p 80). Mr Fortin, for UNHCR, said that the words “and unjustified” were correctly included when defining persecution as in Article 11 of the Directive—for harm to be persecution it must be unjustified. But they were not appropriate in relation to Article 5(2), defining the criteria for subsidiary protection (QQ 112-7).

98. Professor Goodwin-Gill thought the draftsman was trying to provide some shorthand description of all the international obligations which might be relevant to European countries in the provision of protection to those who are not Convention refugees. He accepted that Article 15 went some way in listing types of serious and unjustified harm, but doubted whether anything more than “serious” was needed. Professor Goodwin-Gill wondered what governments and tribunals might make of the addition of “and unjustified” and was concerned that the words might take on a life of their own. They were unnecessary and would open the door to arbitrary decisions by State authorities (p 3, QQ 37, 46, 48, 52-4). Statewatch had similar concerns. Mr Peers said: “To add the word “unjustified” leads to the risk automatically that the well-established concepts in the Geneva Convention and the ECHR will not be properly applied, but will be applied in some sort of new test”. If it was intended to say that criminal convictions were not necessarily persecution under the Geneva Convention then alternative wording should be used (p 46, Q 181). Retention of the phrase would be likely to cause practical problems for decision makers and lead to litigation. For JUSTICE, Mr Nicholas Blake QC suggested that if “unjustified” had to remain in the text then defining it to mean legitimate in accordance with international human rights norms might be helpful (QQ 181, 183).

99. The Minister saw a purpose in including the term “unjustified”: “somebody can suffer serious harm quite legitimately as a process of law if they are jailed”. She thought that “unjustified” was included “to get at the difference between persecution and prosecution and where it is legitimate and not legitimate”. “Serious harm” needed to be qualified in some way so as not to include people who had been legitimately punished under the rule of law. The Minister said that the UK would be seeking clarification of what the draftsman had intended by including “unjustified”. She noted that, as the Commission's Explanatory Memorandum (quoted above) suggested, another issue that unjustified harm might refer to might be situations where a Member State derogated from certain human rights during the course of a public emergency (QQ 215, 247-8).

100. **The requirement for harm to be “unjustified” in order to trigger subsidiary protection has been heavily criticised. And rightly so. “Unjustified” should be deleted from the text of Articles 5(2) and 15. It should suffice for harm to be serious in order to justify subsidiary protection. The term “unjustified” is in any event unclear. Unjustified by what standard? It is not a word of absolute meaning. There would be a risk of different Member States adopting a**

⁴⁸ Explanatory Memorandum, para 13.

different view of what “unjustified” covered. It is difficult to see the need for the “unjustified harm” addition, unless it is simply directed towards the inability of a person to claim he is going to be suffering serious harm just because he has been sent to prison. If that is the only point, it is a hammer to crack a nut and the point could be adequately dealt with by adding an appropriate sentence in the preamble to the Directive.

Subsidiary protection—content of the status

101. The Directive distinguishes between refugees and those entitled to subsidiary protection, giving rather lesser rights to the latter than to the former. UNHCR could see no justification for this. Mr Fortin said: “there should be no difference in treatment because what matters are the needs and the needs are the same. Both categories need to work, to have education, to have medical care, etc, so there should be no difference between them” (Q 122). The Refugee Council argued that the rights attached to each status should be identical. Once an individual had been recognised to be in need of protection, it seemed perverse to treat them differently according to their motivation for fleeing their country. The Council quoted in support the Government’s Explanatory Memorandum: “an individual’s needs are the same regardless of the status granted; it would help limit the number of appeals by those refused refugee status but granted subsidiary protection; and meaningful rights, including full access to employment, are significant factors in encouraging genuine integration” (p 38).

102. Professor Goodwin-Gill questioned why the Directive was seeking to make the distinction. The “primary” character of the Geneva Convention was an inadequate reason for a lesser standard of treatment for those with subsidiary protection status. He said: “I tend to think it might be a rather sort of political point than any legally well-thought-through point” (p 3, QQ 59-61). Other witnesses expressed concern at the distinction drawn by the Directive. They also spoke of the practical implications, including those for the appeal process. In the Refugee Legal Centre’s experience the grant of leave to remain in the UK on ECHR grounds rather than under the Geneva Convention often led to appeals by those wishing to establish an entitlement to the latter status. These appeals were brought by persons dissatisfied with their lack of access to rights accruing to Convention refugees (p 84). Mr Peers, for Statewatch, said: “as long as you have a gap between the content of Geneva Convention status and subsidiary protection status, you are creating an incentive for people to appeal purely because they would rather have one than the other” (Q 197). The Minister acknowledged the fact that people often attempted to upgrade from subsidiary protection to refugee status (Q 275).

(i) temporary character

103. Compared to refugee status, subsidiary protection under the Directive would have a more temporary character. Article 21(1) provides for refugees and their accompanying family members to be granted residence permits valid for five years and renewable automatically. Under Article 21(2), persons granted subsidiary protection status are to be granted a residence permit valid for one year and automatically renewed until such time as the authorities establish that protection is no longer required. Most witnesses did not believe this distinction to be justified.

104. The Commission’s Explanatory Memorandum noted that many Member States consider subsidiary protection to be temporary in nature. The Commission also noted that the need for subsidiary protection was often just as long-lasting as the need for protection under the Geneva Convention.⁴⁹ UNHCR said that there was nothing that led logically to the conclusion that subsidiary protection should be shorter in time, though in practice it might be more difficult to establish the end of the condition giving rise to refugee status (fear of persecution) than that giving rise to the need for protection (eg the existence of a war). Both were temporary in the sense that they could come to an end with a change of circumstances (QQ 123-5).

105. ILPA considered that annual residence permits would create unacceptable insecurity amongst people recognised as being in need of international protection and lead to their social exclusion. The annual renewal of residence permits would also place an undue administrative burden on the authorities leading to delays and further insecurity for the individuals concerned. ILPA said: “The reality is that persons in need of international protection who fall outside of the Refugee Convention often have protection needs which are as long lasting in duration as refugees” (p 35). UNHCR proposed that the residence permit provided to subsidiary protection beneficiaries should be for the same duration as that for Convention refugees. If in a particular case it appeared before the expiry of

⁴⁹ See the Explanatory Memorandum, at p. 4, where it is noted that while the regime of subsidiary protection starts from the premise that the need for such protection is temporary in nature, “...in reality the need for subsidiary protection often turns out to be more lasting”.

the residence permit that subsidiary protection was no longer necessary, the cessation provisions of Article 16 would apply (p 20). The Refugee Council argued that people with subsidiary protection status should not be placed in a state of insecurity through having to renew residence permits every year, a requirement that would also place an unnecessary bureaucratic burden on national authorities (p 39).

106. The Minister said that the difference reflected the fact that there was “such a patchwork of difference in approach to [subsidiary protection] in Europe at the moment”. In general the view was that subsidiary protection was concerned with situations likely to end sooner than circumstances leading to refugee status, and therefore the period of protection was shorter in order to facilitate a return to the country of origin at the appropriate time. In the Minister’s view the key requirement was to achieve agreement in the Directive on the recognition of the need for subsidiary protection. That would be an essential first step in creating a more coherent pattern of subsidiary protection across the Union (QQ 270-1).

(ii) other differences

107. While the content of the rights granted by the Directive to refugees and to persons enjoying subsidiary protection is broadly similar, there are notable differences regarding the time when some of these rights are granted. This is the case with access to employment (Article 24) and to integration facilities (Article 31), which can be exercised by persons granted subsidiary protection only 6 months (employment) or 12 months (integration) after the granting of their status. Witnesses questioned whether the distinction the Directive drew between refugees and persons enjoying subsidiary protection was justified. In Statewatch’s view, the Commission had not convincingly defended its draft. Since both categories of persons were fleeing human rights violations, there was no logical reason to have different rules on residence permits (described above), access to employment and vocational training, or access to integration programmes (p 46).

108. The Refugee Council said that delaying access to the labour market, vocational training and integration facilities was “unfair, impractical and undermines the sensible long term of integration or voluntary return”. It had long been the Refugee Council’s view that such activities gave people the confidence, independence and skills required, not just to integrate into the UK, but also to return to their country of origin, when the conditions were appropriate. The unfairness lay in making an artificial distinction between the different categories of people in need of protection, irrespective of their needs (p 39). UNHCR could see no valid reason to treat beneficiaries of subsidiary protection differently from Convention refugees as regards access to employment (Article 24). UNHCR argued that beneficiaries of subsidiary protection should be entitled to work, and to benefit from available vocational training, workplace experience and other employment-related educational opportunities, once granted that status (p 21).

109. Under Article 31 (access to integration facilities), refugees would be eligible for programmes of integration once granted asylum, but access to such programmes by beneficiaries of subsidiary protection status could be postponed for up to one year after that status had been granted. UNHCR did not consider such difference of treatment warranted (p 21). ILPA described it as “unjustifiable and unacceptable. It is essential that all person in need of international protection are given facilities to promote their integration within society as soon as possible in order that they maintain their dignity and are able to participate in all aspects of society as soon as possible” (p 35).

110. It is difficult to see what justification there is for the Directive establishing more limited rights for persons granted subsidiary protection compared to those available to refugees. Any notion that the Geneva Convention accords some form of “primacy” or superiority for refugees is misconceived for the reasons given by witnesses and set out most clearly in the Government’s Explanatory Memorandum: why a person has had to flee his country and seek protection is irrelevant in this context; an individual’s needs are the same regardless of the status granted; meaningful rights, including full access to employment, are significant factors in encouraging genuine integration.

111. We do not believe that the difference of treatment made in Articles 21, 24 and 31 is justified, even if it may be explicable by reference to divergent national practices. We urge the Government to push for the extension of the same rights to everybody entitled to international protection. Not only would this remove an apparently unjustified discrimination between Geneva Convention refugees and beneficiaries of subsidiary protection, it would also, as the Government itself recognises, have practical advantages. It would help limit the number of appeals by those refused refugee status but granted subsidiary protection.

Subsidiary protection—family protection

112. The Refugee Council noted that the Refugee Qualification Directive made no mention of the right to family reunion for people who have subsidiary status. In the Council's experience, one of the main reasons why those granted exceptional leave to remain (ELR) in the UK appeal their refusal of asylum is because of differing rights to family reunion. The fact that neither the Directive nor the Family Reunion Directive mentioned the right to family reunion for persons with subsidiary status was a significant gap in the asylum package. As soon as a person is granted refugee status, his spouse and dependent children may join him without having to show that they will not be a burden on the State. A person granted ELR, on the other hand, must wait for four years, except in the rarest of compassionate circumstances, and the relative's passport is stamped on arrival with "no recourse to public funds". In some cases children had grown up and become ineligible before their parents had won the right to have them join them. The Refugee Council believed that the rights attached to subsidiary protection status should be the same as for refugees. Mr Hardwick said: "As the Home Office memorandum itself has noted, if you have this disparity between two forms of protection, you will have people who have been given subsidiary protection applying to have full status and you will create an unfair division in the way that they are treated, quite apart from in this case the sort of human suffering involved" (p 38, QQ 189-91).

113. In the Minister's view there was no realistic prospect that family reunion for those claiming subsidiary protection would be covered in the Refugee Qualification Directive. She explained that the Commission had originally wanted to include the right to family reunification for persons with subsidiary protection in the Family Reunion Directive but they dropped it following the opinion of the European Parliament. The Minister suspected that it would come in the second stage on a common asylum policy and not in the present minimum standards directives. She added: "I understand people's disappointment but that is the reality of the situation in Europe at the moment" (QQ 261-2).

114. The absence of common rules on family reunification is a significant gap in the Union's immigration and asylum policy. While the European Council at Laeken (December 2001) confirmed that the establishment of such rules was an important component of a common policy on immigration,⁵⁰ progress on the proposed Directive on the right of family reunification (the Family Reunification Directive) has been slow. That Directive contains specific provisions dealing with the family reunification of refugees, but persons with subsidiary protection status are excluded from the scope, and therefore the benefits of that Directive. That exclusion was not accidental and, as the evidence we received made clear, the issue is controversial.

115. As indicated above, there is, in our view, no real reason why the position of those with subsidiary protection status should, without objective justification, be different for those with refugee status. We therefore believe that the Family Reunification Directive should include provisions on family reunion for persons with subsidiary status similar to those for refugees and that the UK should be a party to the instrument.⁵¹ It was suggested that special family reunion provisions might be inserted in the Refugee Qualification Directive. That is unlikely to be an answer to the problem. Choosing a different legislative vehicle is unlikely to be helpful if Member States are generally reluctant to accord such rights.

⁵⁰ Presidency Conclusions, point 40.

⁵¹ The Family Reunification Directive, like the Refugee Qualification Directive, is brought forward under Part IV of the EC Treaty and is therefore a measure in respect of which the UK has a right to opt in, as described in footnote 11 above.

PART 4: SUMMARY OF CONCLUSIONS

116. We have reached the following conclusions.

- **The Directive is to be welcomed. It is firmly based on the Geneva Convention and contains a number of helpful and positive measures. Most significantly, it potentially offers two main gains; a uniform approach on “non-State actors” where none exists today and, second, a measure of harmonisation of the principles of secondary protection. The Directive provides an opportunity to remove differences of law and practice and lay down meaningful common standards and by so doing to assist in the reduction of secondary movement of asylum seekers in the Union. But there are a number of places where some amendment is needed and some matters on which there should be no compromise (paras 29-30).**
- **The relationship between the Directive and existing refugee and human rights international instruments needs further clarification in the text, in particular acknowledging the primacy of the Geneva Convention (para 34).**
- **The Directive is important for two main reasons. First, it contains fundamental provisions (such as definitions of refugee and of subsidiary protection) which may determine the scope and affect the interpretation of the other three elements of the Commission’s asylum package. Second, it deals with subsidiary protection. Securing agreement on the definition and content of subsidiary protection would be a significant step on which to build (para 42).**
- **The Directive should in principle apply to all persons without distinction as to nationality. This would be consistent with Member States’ international obligations under the Geneva Convention. While it may be unlikely that nationals of EU Member States would have any valid claim to asylum, this should not affect the way in which the universal refugee definition of the Geneva Convention is defined in the legal systems of the Community and of its Member States. This view is reinforced by practical considerations of the Enlargement process (paras 54-6).**
- **The assessment of the existence of a well-founded fear of persecution should not be conditional upon the motivation of the applicant, as is required by Article 8(2). The Directive appears to provide less protection for the asylum applicant than the Geneva Convention requires. Article 8(2) should be deleted (para 64).**
- **A common approach to persecution by non-State actors is, as mentioned, one of the main gains to be had from the Directive. It would not be satisfactory if the position of Member States were left unharmonised. The concept of persecution should include threats by non-State actors (Article 9 (1)) (para 71).**
- **As regards the role of non-State actors as protective agents (Article 9 (3)), a pragmatic approach should be taken. If it can be shown that the individual would be protected by the non-State actor so that there was no longer a well-founded fear of persecution, it should not matter if the protector does not have all the attributes and powers of a State. Nor should it matter whether the protection is afforded by an international organisation or a quasi-State authority. Consideration should be given to adding to the Directive minimum requirements as to the capabilities and responsibilities that the non-State actor, whatever its precise character, should have (paras 79-80).**
- **The Committee supports the approach taken in Article 10 (internal protection). But the Directive appears to permit Member States to adopt different approaches in determining whether a particular part of a country is safe for the individual concerned. The Directive should seek to minimise the risk that States might return applicants to situations in their country of origin where they may face persecution (para 85).**
- **The Directive places subsidiary protection close to the centre of the Community’s asylum policy and offers the opportunity to obtain a significant degree of harmonisation across the Union (para 94).**
- **“Unjustified” should be deleted from the definition of subsidiary protection text of Articles 5(2) and 15 (“serious and unjustified harm”). It should suffice for harm to be serious in order to justify subsidiary protection (para 100).**
- **The difference of treatment between Geneva Convention refugees and beneficiaries of subsidiary protection contained in Articles 21 (residence permits), 24 (access to employment) and 31 (access to integration facilities) is rationally unjustified. The same rights should be given to all entitled to international protection (para 111).**

- The Family Reunification Directive should include provisions on family reunion for persons with subsidiary status similar to those for refugees. The UK should be a party to the instrument (para 115).

Recommendation

117. The Committee considers that the proposed 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 raises important questions to which the attention of the House should be drawn and makes this Report to the House for debate.

APPENDIX 1

Sub-Committee E (Law and Institutions)

The members of the Sub-Committee which conducted this inquiry were:

Viscount Bledisloe
Lord Brennan
Lord Fraser of Carmyllie
Lord Hunt of Wirral
Lord Lester of Herne Hill
Lord Mayhew of Twysden
Lord Plant of Highfield
Lord Richard
Lord Scott of Foscote (Chairman)
Baroness Thomas of Walliswood
Lord Thomson of Monifieth

Declared interests:

Lord Hunt of Wirral	Senior Partner, Beachcroft Wansbroughs (Solicitors)
Lord Lester of Herne Hill	Married to a Special Adjudicator; Council Member of JUSTICE

APPENDIX 2

List of Witnesses

The following witnesses gave evidence. Those marked * gave oral evidence.

- * Angela Eagle MP, Parliamentary Under Secretary of State at the Home Office
European Council on Refugees and Exiles (ECRE)
European Region of the International Lesbian and Gay Association (ILGA-Europe)
- * Professor Guy S Goodwin-Gill, University of Oxford
Agnès Hurwitz, Refugee Studies Centre, University of Oxford
Immigration Advisory Service
Immigration Appeal Tribunal
- * Immigration Law Practitioners' Association (ILPA)
- * JUSTICE
- * Refugee Council
Refugee Legal Centre
- * Statewatch
- * United Nations High Commissioner for Refugees (UNHCR)

MINUTES OF EVIDENCE

TAKEN BEFORE THE EUROPEAN UNION COMMITTEE (SUB-COMMITTEE E)

WEDNESDAY 10 APRIL 2002

Present:

Bledisloe, V
Hunt of Wirral, L
Plant of Highfield, L

Scott of Foscote, L (Chairman)
Thomas of Walliswood, B

**Memorandum by Guy S. Goodwin-Gill, Professor of International Refugee Law, University of Oxford, and
Agnès Hurwitz, Refugee Studies Centre, University of Oxford**

INTRODUCTION

1. This draft directive is an important step on the way to more coherent and inclusive European practices in the provision of international protection. Nonetheless, as the draft recognizes, subsidiary protection is as much a matter of international law, as is protection under the 1951 Refugee Convention. Given the existence of clear rules in this field, expressions of confidence in the ability of EU Member States to fulfil their international obligations are no substitute for concrete measures of implementation.

2. Convention refugee status and subsidiary protection are both linked by the principle of refuge, commonly expressed as the principle of *non-refoulement*. In the contemporary practice of many States, subsidiary protection is in fact often covered by the use of “compassionate”, “humanitarian”, or “exceptional” categories that either fail adequately to implement the duty of protection, or are used to deny or restrict protection-related rights, such as family reunion.

3. The draft usefully underlines the international legal basis for protection (see the Preamble and Article 2), while the preambular reference (paragraph 7) to the EU Charter of Fundamental Rights is a new and welcome addition. Other human rights instruments, including the European Convention (ECHR50), the Covenant on Civil and Political Rights (ICCPR66), and the Convention on the Rights of the Child (CRC89), should also be cited, for these are the acknowledged sources of subsidiary protection (Explanatory Memorandum, 5).

SUBSIDIARY PROTECTION AND “SERIOUS AND UNJUSTIFIED HARM”

4. Article 2(f) defines subsidiary protection status as “a form of international protection status, separate but complementary to refugee status, granted by a Member State to a third country national or stateless person who is not a refugee but is otherwise in need of international protection and is admitted as such to the territory of this Member State.” In order to be granted subsidiary protection, a third country national or stateless person must show that he or she has a well-founded fear of suffering serious and unjustified harm on grounds not covered by the Refugee Convention, 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 him—or herself of the protection of that country (Article 5(2)). The Commission has thus decided to extend the “well-founded” fear test to subsidiary protection, even though the case law of the European Convention on Human Rights refers to the existence of “substantial grounds for believing that the person concerned faces a real risk of being subjected to ill-treatment” and the Convention Against Torture to “substantial grounds of being subjected to torture”.

5. This is a welcome and sensible interpretation, which conforms with general practice and is likely to keep decisions on protection more closely in touch with the reality of risk of relevant harm.

6. However, the introduction of the notion of “unjustified harm” is a matter of concern. The Commission explains that “there are circumstances in which a State may be justified in taking measures that cause harm to individuals, such as the event of public emergency or national security”. It continues by saying that “it would be contrary to human rights instruments, such as the European Convention on Human Rights and Fundamental Freedoms, to exclude the possibility that some proportionate derogation from human rights standards may, in limited and particular circumstances, be justified, most commonly in the interests of the wider common good”. (Explanatory Memorandum, 13)

7. Is the Commission suggesting that the authorities of a State may be entitled to torture an individual in a situation of public emergency or on national security grounds? This seems unlikely, but if so, the Commission has overlooked the fact that Article 3 ECHR50 cannot be derogated from by State parties, even in situations of public emergency or where there is a danger to national security (Article 15(2) ECHR50; *Soering v United Kingdom* (1989) 11 EHRR 439 paragraph 88; *Vilvarajah and ors v United Kingdom*, (1992) 14 EHRR 248 paragraph 108; *Chahal v United Kingdom* (1997) 23 EHRR 413 paragraphs 79-80; *Ahmed v Austria* (1997) 24 EHRR 278 paragraph 40).

8. There is also wide agreement that the prohibition of torture is a *jus cogens* norm, and cannot be derogated from in any circumstances: *R. v. Bow Street Metropolitan Stipendiary Magistrate and ors, ex p Pinochet Ugarte* (No.3) [2000] 1 AC 147. In the case of less severe forms of ill-treatment, evaluating whether

10 April 2002]

[Continued

treatment or punishment was proportional to the offence would be sufficient to ensure the protection of States' interests. In other words, the notion of "unjustified harm" should be rejected as dangerous and incompatible with fundamental norms of public international law. While claiming that the provisions of subsidiary protection represent a "clarification and codification of existing practices" (Explanatory Memorandum, 26), the Commission nevertheless fails to provide substantial evidence regarding recourse to the "unjustified harm" test in State practice.

DETERMINING ELIGIBILITY FOR SUBSIDIARY PROTECTION

9. The various elements which should be taken into account for the determination of the existence of a well-founded fear of a serious and unjustified harm, and the various elements of the sources of the harm, are similar for both types of international protection (Article 7).

10. Article 7 endorses the "reasonable possibility" standard of proof, both for Convention refugees and those considered for subsidiary protection; this is welcome. However, paragraph (d), so far as it deals with age in the case of children, does not sufficiently acknowledge the effective paramountcy of Article 3 CRC89. In every decision affecting the child, the best interests of the child shall be a primary consideration, and where children are concerned (particularly the unaccompanied), a duty to protect may arise, absent any well-founded fear of persecution or possibility of serious harm.

11. Although the Explanatory Memorandum (16-17) provides some assurances as to intended meaning, Article 8 could be better drafted so as to minimize any qualification of the duty to protect from persecution and harm, and so as to recognize the individual's right to freedom of expression.

12. Article 9(3) declares that for the purposes of the Directive, "State protection" may be provided by international organizations and stable, quasi-State authorities. This has no basis in international law. International organisations and quasi-State authorities, by definition, are not party to international human rights instruments and consequently not able to give meaningful human rights guarantees.

13. Article 11 provides welcome recognition of the conscientious objector. The commentary in the Explanatory Memorandum (20) is inaccurate, however, and does not appear to relate to the present draft. Paragraph (d) might be clearer if actions on the basis of deeply held convictions were located in the political relationship between citizen and State.

14. Article 12 provides useful guidance on the reasons for persecution. Paragraph (d), however, does not sufficiently reflect today's jurisprudence, in its limiting reference to groups who "are treated as 'inferior' in the eyes of the law". In reality, the social perception of particular groups (which *includes* how they are treated at law) is frequently a determinative factor; cf. the judgment of the House of Lords in *Islam and Shah* [1999] 2 AC 629.

15. While the commentary to Article 13(e) (cessation of status by reason of change of circumstances in the country of origin) recognizes the special situation of persons who have compelling reasons arising out of previous persecution or other serious and unjustified harm, their continuing protection should be formally included in the Directive. The numbers will always be small, and this interpretation has already been adopted, sometimes by legislation, in States aware of the reality of the refugee experience.

16. Chapter IV of the Proposal lays down the conditions for the grant of subsidiary protection and sets out three different categories of serious and unjustified harm as the basis of eligibility for subsidiary protection (Article 15):

- Torture or inhuman or degrading treatment or punishment;
- Violation of a human right, sufficiently severe to engage Member State's international obligations;
- A threat to life, safety, or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systematic or generalised violations of their human rights.

17. The Commission recognizes that these three categories may overlap (Explanatory Memorandum, 27). With regard to the first category, the explanatory memorandum assures that this should not be interpreted in a stricter way than it has been by the European Court of Human Rights and Fundamental Freedoms. As to the last category, it is made clear that the applicant will be required to show the existence of a well-founded fear on an individual basis, that is, "that the fear is well-founded in that particular case" (Explanatory Memorandum, 27).

18. Article 16 mirrors Article 13(1)(e) which deals with the withdrawal of refugee status, and stipulates that if the circumstances in the country of origin have changed in a profound and durable manner, subsidiary protection may be withdrawn. Article 16 also mentions the withdrawal of the residence permit on the cessation of subsidiary status; this should be qualified by reference to States' other obligations under international law. The grounds for excluding an individual from subsidiary protection status in Article 17(1) are similar to those set out under Article 14(1)(c).

19. The rights and benefits granted to persons enjoying subsidiary protection are broadly similar. One major difference is the assumption that subsidiary protection has a temporary character. Individuals who are granted subsidiary protection will be issued with a one year residence permit renewable every year (Article

10 April 2002]

[Continued

21(2)), while recognised refugees are granted a five year residence permit automatically renewable. The Explanatory Memorandum (4) attempts to tread the fine line between the premise of subsidiary protection (temporary) and the reality (often more lasting). However, there is no empirical basis for such a distinction; apparently based on a sense of the “primary” character of the 1951 Convention, if not on wishful thinking, it is a poor reason for a lesser standard of treatment.

20. While refugee status determination will be subject to procedures laid down under the future Directive on minimum standards on procedures, in the case of subsidiary protection, the application of the Directive will be optional (Article 3(3) of the Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status COM(2000) 578 final, 20 September 2000). This will create an important gap in the harmonization enterprise and maintain current differences in protection standards applied in the various Member States. The problem is openly acknowledged in the Explanatory Memorandum, and the European Commission therefore encourages Member States to apply the Directive on procedures to claims based on subsidiary protection. In most cases, subsidiary protection will be considered within the procedure for recognition of refugee status, unless an individual expressly indicates that his claim is based on subsidiary protection (Article 2(h)).

21. Article 28 appears to contain a drafting error. Paragraph (1) refers to ensuring the representation of unaccompanied minors “enjoying” international protection, while the Explanatory Memorandum refers to minors “applying for” such protection. Clearly, the need for representation arises before it is determined that protection is or is not due; unless, of course, the Directive is intended to recognize the status of child as an internationally protected status...

SUMMARY OF PRINCIPAL CONCERNS

22. The concept of “unjustified harm” added by the Commission to the “serious harm” test of ECHR50 should be rejected; it is unnecessary and would open the door to arbitrary decisions by State authorities. If it is maintained, it should be qualified by reference to States’ other obligations under international law; that is, the implicit limitations should be made explicit.

23. The status of children, particularly unaccompanied minors, should be revisited in light of the obligations assumed by Member States party to the 1989 Convention on the Rights of the Child. The “error” in Article 28 should be corrected.

24. Drafting improvements should be made to Articles 8,9,11,12 and 13 to bring the text into closer harmony with jurisprudence on the refugee definition and/or with international human rights standards.

25. Otherwise, this Proposal offers an appropriate level of protection and status for people who cannot avail themselves of the protection granted under the Refugee Convention. However, practice with subsidiary status in the past suggests that States may well be tempted to opt for granting subsidiary protection, instead of the more beneficial Convention refugee status, which entails wider rights. Although it can be assumed that any risk of such policy could be corrected by the Court of Justice, it is a consideration that the Commission should have addressed in its explanatory memorandum.

8 March 2002

Examination of Witness

PROFESSOR GUY GOODWIN-GILL, Professor of International Refugee Law, University of Oxford Institute of European Studies, examined.

Chairman

1. Professor Goodwin-Gill, good afternoon. Thank you on behalf of the Committee very much for coming and giving us your time this afternoon. I must thank you also for the instructive written evidence which you have supplied us with, and I see that we have some extra reading which you have given us today.

(Professor Goodwin-Gill) I am afraid so, yes.

2. Your article in the *International Journal of Refugee Law* on *Danian v the Secretary of State*, which, I have to confess, is a case I have not yet read. I shall read it with more enthusiasm, having had your commentary.

A. It is a remarkably sensible judgment, my Lord.

3. If I may start off the questions, how do you regard the relationship between the proposed status

Directive and the various relevant international instruments such as the Geneva Convention, ECHR, the Convention against Torture and so on? Does the relationship need any further clarification in the text or can it simply be taken as part of the background?

A. I think, my Lord, it could certainly benefit from further clarification. What we have here, after all, is an attempt by or on behalf of the 15 Member States, each of whom has independently ratified a whole variety of international human rights instruments, an attempt to express a common position, a consensus on interpretation and application of these international instruments. But I think that that does not always come cleanly or clearly through the language chosen for this Directive.

4. But there are some inconsistencies as well, are there not? The one which struck me particularly, both referred to in your evidence and in the written

10 April 2002]

PROFESSOR GUY GOODWIN-GILL

[Continued

Chairman *contd.*]

evidence of some of the other contributors whose evidence we have heard, is that the Directive applies to third party nationals and Stateless persons. Therefore, it does not apply to nationals of Member States of the European Union, whereas the Geneva Convention of course applies to everybody.

A. Yes.

5. Is that likely to create a problem, do you think?

A. It is one of these questions, I think, where one hopes not. But, from a strictly legalistic point of view, the asylum protocol which was adopted at the time of Amsterdam effectively amounts to an *ex post facto* reservation to the territorial effect of the 1951 Convention, a qualification, if you like, of the refugee definition in Article 1 which is expressly prohibited by the terms of the Convention. That is the strictly legal approach to the issue, but I think that the European Union—I mean, the fact of its existence—throws up rather new questions and poses some rather interesting and not necessarily negative challenges to traditional conceptions of international law and obligation. At the same time, I do not think that these implications have necessarily been thought through. To give you an example, it seems to me that the logic of an ever closer union, which seems to be part and parcel of the Community direction at this time, has not been taken to where it inevitably leads, which is, as it were, to a single territorial unit in which refugees enjoy a single common status and common rights, much as do EU workers. I think that is where we ought to be going: recognition in any one State of the Union should imply recognition in all States of the Union.

6. It seems to me there is a sort of underlying assumption that there cannot be such a thing as a Geneva Convention refugee from any of the European Union Member States, because, all having signed the ECHR, and the Geneva Convention for that matter, how can they then be in a position that citizens of their own countries are seeking refuge from them?

A. I think that is also what is novel, the assumption that in effect we are, through abandoning a measure of our statehood, as it were, becoming more and more a single territorial and political unit. I think, theoretically, that is incorrect. We know that the situation of human rights protection does vary from Member State to Member State—not necessarily in great degree, but it does—and of course I think we are also aware that just as a State may endorse a democratic form of government, it may, on another occasion, endorse measures which would on any reckoning be considered to amount to persecution, for example, of dissidents or—

7. I suppose there is a limit to the extent to which one can look into a crystal ball for the future.

A. There are balances in the area of human rights protection, so I think it is very important that we have the separate system of human rights protection under the European Convention.

8. There are some eastern European States queuing up for membership of the European Union from which large numbers of Geneva Convention refugees have in the not very recent past emanated.

A. Indeed. There is a lot of wishful thinking, I think, attached to this protocol. I think it is one reason why the protocol was objected to, indeed, by several Member States of the Union who were only prepared to accept it when recognising that it was non-binding.

9. The problem is, as I think is implicit from what you have said, there cannot be much one can do about that aspect of the proposed Directive other than to note it and await events.

A. Indeed.

Viscount Bledisloe

10. Surely no sane refugee from a Union State would seek refuge in another Union State because, when we have got the arrest warrant, that country will merely issue a warrant for his arrest and take him back to his country of origin immediately.

A. I rather think, my Lord, it depends on the nature of the arrest warrant and the nature of the circumstances. I think that any Member State would be somewhat concerned at an arrest warrant overtly issued for political reasons in relation to a citizen of a Member State of the European Union. But that would seem to be one implication of a Europe-wide arrest warrant, that it would allow a Member State with despotic tendencies to go after its enemies in any part of the region. On the other hand, of course, we are forever being told that refugees should seek asylum in the nearest country to their place of origin, so they too, it seems to me, are going to get caught on the horns of a political dilemma.

Chairman

11. Professor, the Directive we are considering forms one part of a package of which there are three other parts, as you will know: the procedure Directive, the reception conditions Directive and the proposed regulations for reforming Dublin 2. This proposed Directive deals both with the Geneva Convention refugees and with other people seeking protection (subsidiary protection, as it is called) and other international conventions, whereas the reception conditions Directive and the procedure Directive rather particularly concentrate only on Geneva Convention refugees. Is there not going to be some imbalance in that State of affairs?

A. That is absolutely right. In many respects, this very important Directive should be leading the pack. It seems to me that the other Directives should be formulated or reformulated in light of the objectives rather clearly set down in the present directive. I think that is one of its strengths, that it does actually recognise the reality which many individual States have been reluctant to admit, that their obligations to protection go beyond the 51 Convention. But this Directive, it seems to me, should be leading the rest, and, just as convention refugees need reception assistance, so, clearly, do those who are to receive subsidiary protection.

12. It would follow, then, if that line is accepted, that having settled the content of this one would need

10 April 2002]

PROFESSOR GUY GOODWIN-GILL

[Continued

Chairman *contd.*]

to revisit the others in the context of what has been agreed for the status Directive.

A. Yes. Very much.

Lord Hunt of Wirral

13. That is very interesting. So if the adoption of this Directive precedes the adoption of the other, primarily three, measures, what in your view are the main overlaps/tensions between this Directive and the other proposals which would need to be addressed?

A. Apart from the point about reception which has already been mentioned, this is one of those questions on which I would like to spend more time. The area in which, it seems to me, it is most likely to find instances of overlap and possible tensions is the procedural area. But I have not done that sort of comparison which I think needs to be done, between what is proposed procedurally and what is proposed substantively, to get a sense of the big picture. It would be very useful indeed to review the whole package as a package and see where it has led or where it is likely to lead.

Chairman

14. There may be some suspicion that the difficulties in this regard are not entirely logical ones but more diplomatic ones. The difficulty in getting some Member States to agree to the degree of protection for persons seeking protection who are not Geneva Convention refugees might be quite difficult.

A. Yes.

15. Might be quite substantial. I suppose, if one gets agreement to this, one might have to rest content with that for some time and then in the future push for the logical development in the other Directives.

A. I think realistically that is the case. Once States are happy with this, as it were, then they will be prepared to recognise what will be the inevitable recognition.

16. If one asks for too much all at once, one might get nothing.

A. Yes.

17. Thank you. I wonder if I could ask you a question about international protection "*sur place*". I am not quite sure what "*sur place*" means, but that is the expression used in the Directive, the proposition that the fear of persecution may be based not so much on what the position was in the country of origin when the individual left but on what the reaction of the country of origin will be to what he has done since he has left. In regard to that, the proposal is that these post-leaving-country-of-origin activities should not be allowed to entitle a person to claim protection, whether as a Geneva Convention refugee or other protection, if the activities were engaged in for the purpose of creating the need for that detention. Do you have any comment on that aspect of the proposed Directive?

A. Yes. Let me preface it by recognising that, as it were, the self-created refugee is someone who always seems to put decision makers' backs up. Decision

makers, whether they be officials or judges or tribunal members, do not like to think they are being taken for a ride or that the country in which they are working is being taken for a ride and therefore tend to view with a measure of scepticism those who appear suddenly to have become politically aware as soon as they arrive in a country or as soon as they were threatened with removal. So I recognise that there is an issue there which is not necessarily entirely rational. But I think Article 8(2), to which you refer, is overly simplistic. It talks about the "sole purpose of creating the necessary conditions" as if that was something which could be easily determined. I think what experience shows—and I have reviewed quite a few of the cases in different jurisdictions—is that ultimately, as you would probably expect, it is very difficult to find out and determine with certainty, with confidence, whether the activities in question were undertaken solely for the purpose of remaining in the country. The Swiss, the Germans and the Austrians have developed a whole theoretical base for examining these sorts of cases which they refer to as *Nachfluchtgründe* and they, indeed, almost legislate their scepticism about the likelihood of such individuals being at risk of persecution. I think that that is wrong—another area where we differ from some of the continental approaches—because the important objective consideration is always whether someone would or would not be at risk of persecution and we have to face the reality that someone may, indeed, create the circumstances which require that he or she be recognised. In practice, I do not think this is likely to be a serious problem in terms of numbers and, in many cases where we have found courts having to deal with this issue, they have either accepted the inevitable in a few cases or found that overall the case failed for lack of evidence of serious risk, notwithstanding the various activities in which the individual might have engaged. It is also worth recalling in parallel that you can be a refugee even if your persecutor mistakenly believes that you hold a certain political opinion. You do not actually have to hold that opinion, but if you are at risk of persecution because your persecutor thinks you are a person of that type then you are as much entitled to refugee status as if you genuinely held that view.

18. I probably should know but I do not know whether there has been much jurisprudence in this country on this particular point, whether there have been cases where the Secretary of State, having decided not to accept asylum applications, has given as the reason that the persecution derives from things done by the individual in this country for the purpose of producing the risk in question.

A. The numbers of cases, to my knowledge, are few and far between and when the Secretary of State refers to those sorts of activities it is usually as part and parcel of a set of reasons, the general thrust of which will be to challenge the existence of risk. Before the adjudicators in the Immigration Appeal Tribunal there have been some cases, which have recently been resolved by the Court of Appeal in the *Danian* case, in which the court recognised that the central issue is risk and advised decision makers to be astute not to

10 April 2002]

PROFESSOR GUY GOODWIN-GILL

[Continued

Chairman *contd.*]

bring in extraneous considerations but to focus upon credibility and assessment of risk.

19. I suppose if there was a risk and it was a well defined risk, whatever its origin, it would be contrary to obligations under the Geneva Convention to return the individual.

A. But the fear that there might be great numbers of persons involved is misplaced. I think in any jurisdiction I have never seen evidence to suggest that they are in large numbers.

Viscount Bledisloe

20. You described it, I think, as irrational. Supposing somebody comes over here because he thinks his business is going to fare better here, or for some totally commercial reason like that, and is told, "You cannot stay," and then somebody ticks him off that if he goes in front of his embassy and burns the flag and throws tomatoes at pictures of the president and so on he can then say that he is at risk of persecution. Are you saying it is irrational to say, "We are not giving you refugee status"? I do not think many of the men in the street would agree with you on that.

A. I do not know at that point whether it is rational or irrational. It might be unlawful; that is to say—let me take that one step further because I think there are other, as it were, obligations down the line that cannot be ignored—the question comes up at the level of enforcement: Are we then to send that person back to where he or she may be persecuted?

21. Yes, if he has chosen to insult the president of the country he comes from and he is therefore likely to be persecuted, and he has chosen to do that for no political reason but merely for personal and commercial gain, I personally would send him back very quickly and hope that he was punished.

A. There you and I must differ.

Baroness Thomas of Walliswood: I think the point is that burning flags is not an offence in most countries. If I stand outside the Palace of Westminster and I burn the Union Jack, my colleagues within this House would be astonished, they may even be highly critical, but I would not be persecuted. I might suffer some minor penalty for, I do not know, blocking the pavement or something, but it is not something for which I am going to be persecuted, it is just that I would be made to feel rather uncomfortable for a bit or two. Whereas, in some other places, if you burn the flag of whatever it is, you will actually be persecuted. That is the difference, is it not? Is that not what human rights are about?

Chairman: I would have thought there are two points that have to be borne in mind. One is the extent of our obligations under the Geneva Convention, where motivation is a relevant factor. The second is the guaranteed rights under the ECHR which do guarantee you, in this country, the right to criticise people.

Baroness Thomas of Walliswood: Exactly.

Viscount Bledisloe: But not to criticise people when you do not mean it and for ulterior motives.

Chairman: I am not sure that is a limitation on the right of freedom of expression that would be easily accepted.

Baroness Thomas of Walliswood: One might do it for sheer *joie de vivre* or sheer bad temper, neither of which are good reasons for doing it but would seem quite justified.

Chairman

22. The point is that we are trying to examine the Directive with in mind our international obligations under the Geneva Convention, which for good or ill we have adhered to for a long time now.

A. Absolutely.

23. Can I now move on to another topic. The Directive recognises that a person may be entitled to protection if the persecution he or she gets is not State persecution but is persecution from some activity within the State from which he is escaping which is threatening him. There are some Member States—and I think Germany is usually mentioned in this connection—which do not recognise the threats of persecution from non-State entities as justifying individuals to the status of Geneva Convention refugees. This proposed Directive is seeking to deal with that by making it clear that they can qualify on that footing. If that was not the case, if this particular provision relating to non-State threats were not there, where would we be left with the acceptability of the Directive across the European Union with a view to harmonising the approach?

A. I think, my Lord, we would have a very serious gap—indeed, almost a credibility gap—between those who are in fact in a minority in Europe who do not recognise persecution by non-State actors as giving rise to a valid claim for Convention refugee status and the majority who do. It nearly caused a serious division in 1996, when the ministerial decisions adopting some guidelines on interpretation were adopted. Because they were non-binding, fortunately, no such division did emerge. So I think the Directive would not be ultimately acceptable if the issue of non-State agents were not resolved, and my understanding is that the Germans have indicated a willingness to change their practice on this issue, which has no basis in international law or in the *travaux préparatoires*, which I have combed extensively, or, indeed, in the practice of most States/parties of the 51 Convention. I understand that the German intention has been stymied somewhat by political problems relating to the adoption of the *Einwanderungsgesetz* (the immigration law) but that, nonetheless, their intention is to bring their practice into line with the rest of Europe.

24. Would that be bringing it into line with all the parts of Europe? Germany is a federation, is it not?

A. Yes, it would do, because responsibility for the determination of refugee status rests with the *Bundesamt*, which is the federal authority.

25. So that could be made State wide.

A. Indeed, yes.

10 April 2002]

PROFESSOR GUY GOODWIN-GILL

[Continued

Lord Plant of Highfield

26. Could we then know why the Germans take this view?

A. My own view is that it has a historical origin and it is driven by a provision of the German constitution which dates from 1949 which says, "*Politisch Verfolgte genießen Asylrecht*" (the politically persecuted enjoy the right of asylum). It is that reference to "political" in the German Constitution which, to my mind, has driven the interpretation of the 51 Convention which came thereafter, which has seen persecution as necessarily having to have a political basis and which sees politics as the role of the State rather than of non-State actors. I think that is where it comes from.

27. Could this Directive, even if the German government were minded to adopt it, be overturned by the German constitutional court?

A. It could, certainly, yes. That is a good point I had not thought about.

28. The other side of the same coin is that of States which have every intention of protecting the citizens but are simply too weak or too resource-starved to do it, such as Algeria.

A. Yes. I think that does pose a very difficult problem for States, of actual or potential reception. But, again, if we come down to the question of risk, which to my mind is the essential question in refugee determination, then the willingness/unwillingness of the State does not fall by the wayside but begins to occupy a less important position. If the individual is at risk of persecution, notwithstanding the best intentions of the government of his or her country of origin, it seems to me there is a basis for recognition of refugee status—remembering always that this is not necessarily a commitment to permanent refuge, because if things change and the State becomes able to project human rights then the basis for refugee status disappears.

Chairman

29. Should the approach not be a pragmatic one? You are looking pragmatically at whether the individual is at risk in the place from whence he is escaping. The alternative to being pragmatic is that you look at the legal structures in the State in question.

A. Yes. I think, again, refugee determination is so very much a matter of fact that we cannot ignore that and just simply apply legal rules, like look to the existence in fact or in law or other of a government and assume that that implies legal protection. We know it does not necessarily.

Viscount Bledisloe

30. Is there no limit to the person who is going to be making the risk? Supposing you have fallen out with the Kray gang and you are likely to be topped if you stay here, so you want to go away, does that make you a refugee?

A. Not necessarily, no. We have always got to get, of course, the link to a Convention reason, be it race, nationality, political opinion, social group and so forth. We then have to look at the availability of State protection; for example, no State is under an

obligation to provide absolute security to its citizens but it is certainly obliged to show due diligence in the provision of protection and the provision of damages.

Chairman

31. Falling out among thieves is not in the Geneva Convention agreement.

A. No.

Baroness Thomas of Walliswood

32. Would it in fact cover the situation in, let us say, Colombia, where you might be as much in danger from rebel as from government forces? It covers that sort of situation.

A. It is potentially capable of covering that sort of situation too, yes.

33. I mean, I do not mean in all cases, but that is what it is there for.

A. Yes.

34. Or partly there for.

A. Yes.

Chairman

35. A rather related topic is the question of a part of the country being safe but other parts being unsafe. I think the view was taken by some commentators—and I cannot remember now whether this was a view you took or not—that if in the whole of the country the person would not be safe, it was unsatisfactory to say that he would be safe if he stayed in a part.

A. Yes. I have never been too keen upon some of the jurisprudence in this area. I think it has unnecessarily complicated the picture. The picture in my simplistic view is, again, that of risk of persecution. It is argued, though, that if you, for example, fear persecution from an agent of your government then it does not make any sense to require you to return to any part of your State, but if the source of your persecution is, say, a guerilla movement which has sway in only one third of your country then it does make sense to require you to seek the protection of your government in the two-thirds that it still controls. And that is commonsensical, it seems to me, because we have here a situation in which quite clearly the government is able and willing to provide protection in the area under its control. For example, if you think about Sri Lanka as a possible example, we have almost lines drawn on the ground, on one side of which you would have the protection of the government and on the other side of which you would not. So I think there is a commonsense side to it, but I think some of the jurisprudence has become a little too sophisticated for me. It boils down to a question of fact again.

36. Do you think the way the Directive deals with it is satisfactory?

A. Yes, I do.

37. One of the features of the Directive which has already been commented on and which has been very widely welcomed by those who have sent us evidence

10 April 2002]

PROFESSOR GUY GOODWIN-GILL

[Continued

Chairman *contd.*]

here, including yourself, is the addition of the subsidiary protection provisions with the criterion of serious and unjustified harm.

There has been a certain amount of attention concentrated upon the criterion of the harm being not only serious but also unjustified. The suggestion is that if it is serious that ought to be enough and that unjustified is an unnecessary addition. What position do you take on that?

A. I share that disquiet. Not knowing the drafter, I think I understand the intention, which was to come up with some shorthand description of all the international obligations which might be relevant to European countries in the provision of protection to those who are not Convention refugees. Serious unjustified harm perhaps gives us an understanding of what the drafter intended. Article 15, of course, does give us certain pointers to what was in the drafter's mind: the references to torture, for example, and other serious types of harm. My concern primarily arises for fear of what decision makers, whether in government or in tribunals, might make of this. Where we see new terms interposed between, in this case, the individual applicant for protection and the grant of protection, they tend to acquire a life of their own, and I am worried that we might find an overly legalistic approach to the individual elements of this phrase, like "unjustified", and I am concerned that we might find, for example, arguments being developed which I do not think are well-founded; that, for example, civilians must expect to be harmed in any operations conducted against a so-called terrorist movement. There is a gateway there which is of some concern

38. I suppose also in the area of criminal procedures. There are some countries, for example, which permit the infliction of corporal punishment and capital punishment. I think the view generally is taken that we would never send a person back to a country where he was at risk of capital punishment, but would the same apply to any degree of corporal punishment so far as human rights obligations of Geneva Convention persecution is concerned?

A. Corporal punishment could certainly amount to persecution, yes.

39. Independently of the guilt of the crime in question.

A. Yes. But if, for example, it is not related to a Convention reason—Is the fear of corporal punishment as, for example, a criminal sanction in the normal course of events in your home country sufficient to justify subsidiary protection?—that is a difficult question to answer. I think interpreting, say, Article 3 of the European Convention shows just how problematic it is for us in Europe when faced with those sorts of eventualities.

40. Amputations would be one thing but more moderate forms of corporal punishment, which used to be carried out in this country, would perhaps be another.

A. Yes.

Viscount Bledisloe

41. If you take a country like Singapore, where they have caning for a large quantity of offences most of which have nothing to do with political offences, but suppose burning a flag is, as I suspect it is, criminal in Singapore, unless you put in "unjustified" the fear is that the fact that they would be caned for burning the flag would be a refugee reason, is it not?

A. Well, a subsidiary protection reason, yes. I probably would like, although it is not my remit to do so, to ask how you would interpret the phrase "unjustified" in those circumstances. I think many decision makers would be somewhat unhappy about attempting to determine whether the laws and conduct of another State were just or unjust or justified or unjustified. I wonder whether there is not an alternative form of words which might encapsulate what is intended to be said here that does not open that door.

42. You accept that there has got to be something which says it has not got to be the normal penalty under the criminal law but you do not like the word—and that I see.

A. I would have reservations about embracing the normal penalty under the criminal law in all circumstances, because I think that quite clearly we draw a distinction in this country between what is an acceptable penalty irrespective of whether it is legally justified in a particular country we are looking at—and amputation is one of them—but lesser issues of corporal punishment do raise serious problems for us.

43. Presumably one distinction could be between whether the penalty is a common penalty, whether it is for political offences or non-political offences, or whether it is a penalty exclusively based upon those who are political offenders.

A. I think that has been one of the strengths of the 1951 Convention, that it has actually allowed us to make those sorts of distinctions between criminals.

Chairman

44. Do you think here that this Committee or other scrutiny committees ought to be looking for some alternative form of words here?

A. I think that would be actually a very useful exercise, yes.

45. Have you done it.

A. I wish I had done it! I have not learned my lesson, I am afraid.

Lord Plant of Highfield

46. Why do we need additional words other than "serious"? It is clear that amputation is a serious harm. Whether it is justified or unjustified according to the legal system in the country where it is practised is another matter which obviously we want to try to side step in so far as we can. Why do we need an alternative word to just "serious" harm.

A. Yes.

10 April 2002]

PROFESSOR GUY GOODWIN-GILL

[Continued

Chairman

47. Suppose—and I am just thinking aloud—you have imprisonment conditions which we would not regard as satisfactory—and there has been a lot of criticism of prison conditions in many prison conditions in this country, but supposing something worse than that was the norm in a particular country—would it follow that a person could claim protection here because if he was sent back he would have to go back to this horrible gaol?

A. At the end of the day, that may well be the case. Conditions in this particular gaol in this particular country for this particular prisoner may be so bad that it would be inhumane to send him or her back. That is the bottom line.

Viscount Bledisloe: Is not the answer to Lord Plant's question that, again in Singapore, it is designed to impose serious pain. That is the point of it. But it is a standard penalty for most things in Singapore. If you only had serious harm, even though the sentence was fully deserved you would get your protection, would you not?

Chairman: I think it is an extremely difficult question. My own instinct is that "unjustified", or whatever substitute adjective one chose, would have to be the criterion which was interpreted in accordance with what we think is right rather than simply following what was prescribed in the foreign country in question. Otherwise one would be walking straight into any number of breaches of our Geneva Convention obligations, out other international instrument obligations.

Lord Plant of Highfield

48. But is there any way of making the idea of unjustified harm ... I mean, can it somehow be linked to the European Convention—harms which are incompatible with the standard set out in the European Convention—so that it becomes less country specific as to what we regard as abnormal?

A. I think Article 15 does make a stab at that by listing certain types of serious and unjustified harm, so maybe my fears are not entirely well placed, although I do recognise the strength of your suggestion that justified does not really belong here, or does not necessarily belong here, the aim could be achieved otherwise.

Baroness Thomas of Walliswood

49. We do sometimes make pleas, do we not, on behalf of non nationals in other countries which are based on the fact that either capital punishment or very severe corporal punishment are not within the Convention? That is quite a common thing to be done by people in this country, including the members of the Government of this country.

A. Yes.

50. We make a plea for some character in a totally different country, with which we have no connection at all really, on the grounds that that punishment is not a Geneva Convention or an acceptable form of punishment. Whether it is justifiable in the local code is not at issue at that point, is it?

A. No.

51. That is really the situation we are talking about, is it?

A. I think that is right.

Chairman

52. Would you say it is going to be practicable to try to get some sort of common standard across the European Union of a matter of this sort?

A. Without knowing exactly what led the drafters to put in that word "unjustified", I am not sure. Whether it was pressure from one or other Member State, I am not certain, or whether it was just a drafter's attempt to come up with a convenient shorthand which said it all. I think I would need to look more into the background on that.

53. It is intended to be an additional criterion to the serious criterion.

A. It seems to be that, yes.

Chairman: Thank you very much.

Viscount Bledisloe

54. I think the Professor's answer is right. If you look at Article 5(2) and 15, unjustified harm is defined. It is not a phrase standing on its own. It has to be within (a), (b) or (c) of 15 to be unjustified, and 5(2) refers to "unjustified as described in Article 15". So it is not a phrase that is slopping around undefined. And (a) and (b) in Article 15 are pretty well ECHR concepts, are they not?

A. Yes.

Chairman

55. Can I move onto another topic, Professor. The proposed Directive not only says who is to be a refugee and deals with that but also makes some attempt to deal with the content of the rights that persons who are accepted as refugees or as persons entitled to subsidiary protection should enjoy. There have been some questions as to the *vires* problems of that part of the Directive. Have you looked at the *vires* difficulty?

A. Not in detail, no, but I think the Minister is absolutely right in her comment at paragraph 21 of her explanatory memorandum, where she says, "... in order for the inclusion of content to be meaningful it is necessary that the level of rights and benefits given to those granted a protection status is sufficiently high." Quite clearly, it is important. I have not looked at the *vires* issue, but I think putting it in is justified.

56. The *vires* issue, I suppose, is capable of being dealt with; it depends on the route you are going down.

A. Indeed, yes.

57. The approach of the Directive to the rights which the persons entitled to protection are to enjoy is distinguished between refugees and persons entitled to subsidiary protection, giving rather lesser rights to the latter than to the former.

A. Yes.

58. That has been criticised on the footing that the persons entitled to protection should have common rights across the board.

10 April 2002]

PROFESSOR GUY GOODWIN-GILL

[Continued

Chairman *contd.*]

A. Yes.

59. What is your view of that?

A. This does give me cause for concern. Why are we making the distinction? I tend to think it might be a rather sort of political point than any legally well-thought-through point. The Minister herself hints at some recognition of the sorts of problems that may emerge in paragraph 22 of her comment in her explanatory memorandum. But perhaps I could give a recent example of the problems that can arise from making distinctions between categories of refugees. It comes out of the very unhappy experience in Australia just before Christmas, when amongst those who drowned attempting to enter Australia illegally were three children, who were the children of a recognised refugee in Australia but one who, because he had arrived uninvited, was denied family reunion forever. He was allowed to remain in Australia but he would never be allowed to see his wife or children. He had no right to have them join him. Quite clearly one can see the consequences of such a hard and fast policy, which was intended to dissuade illegal movements but which clearly drove that family into the hands of the smugglers and ultimately passed them onto the boat which led to their loss of life. The family reunion dimension to distinction is very, very worrying indeed. All the evidence tells us that, if you are a refugee, you will settle in best, whether it be in the short, medium or long term, if your family are with you. We know from our understanding of children's rights that children need a family and ought not to be separated from their parent or parents. To maintain these sorts of distinctions is likely to lead to violations of the rights, the obligations, which we have accepted towards children, towards the family.

60. I wondered whether the distinction was also partly diplomatic/political in order to try to persuade some Member States to accept the subsidiary protection part of this Directive.

A. I am sure that is right, my Lord. We have seen the same sort of issues arising in regard to temporary protection as well, where States appear to be very reluctant to accept temporary protection unless they can restrict the rights which are to be attached to those who enjoy that status, and one of the most serious limitations, as I say, is this family reunion restraint.

61. Again, it is difficult to know whether one should push for the more logical extension of the same rights to everybody entitled to protection at the risk of losing the subsidiary protection—because I think this is an area which requires unanimity—or whether one should accept the present position and then later look to improve it.

A. I think one would certainly be justified in asking upon what basis the distinction is made. Is it a purely formal basis: These people are convention refugees, these are not, or is there something else there. I very much doubt there is any empirical justification for maintaining that distinction and it might be worthwhile asking that question.

62. Thank you for the suggestion. Just pausing for a moment on the content of the proposed rights which persons qualifying for protection would have,

I find myself quite puzzled by the Article 23 travel document provisions. "Member States shall issue travel documents to persons enjoying subsidiary protection status who are unable to obtain a national passport." It is not clear from that what recognition other Member States have to give to these travel documents. Do you have a view about this? I was contemplating the persons camped outside the Channel Tunnel. Once they get travel documents, if they get them, from France, I imagine they will be wanting to come straight to this country, which is where they wanted to come in the beginning.

A. I must say I had not thought that one through, but there is a long-established practice which we have had in this country, and which other countries also have, of issuing aliens' passports to individuals who have not been able to obtain travel documents for whatever reason from the authorities of their country of origin. The Home Office certainly has, in my 25 years' experience I know, regularly issued such documents to refugees in the broad sense, those who are not entitled to a Convention refugee document. Now, would such a document be accepted? In practice, they are accepted by other States; first of all, for visa purposes—because you will not enjoy visa-free travel if you have an alien's passport but it will be accepted for visa-ing purposes – and it will also be accepted if it has a return clause. Those are the two critical elements in practice. If the document issued by the French or the British or the Germans guarantees the holder's return to the country of issue, then it will in practice be accepted by other countries for travel purposes.

63. And that might be the same for the proposed travel documents.

A. I think that is the practice on which it is based, yes.

64. Article 9(3) has produced a number of worries and expressions of concern. It is dealing with the protection issue and provides that "... State protection may also be provided by international organisations and stable quasi-State authorities ...". That has been criticised on the footing that international organisations and quasi-State authorities will not be able to discharge the full responsibilities towards citizens that a State may be expected to discharge. Do you share that view?

A. Technically, I think that is absolutely correct. We have seen the move towards this sort of position, driven, again, by the desire on the part of many States to find any avenue by which to return an asylum seeker and failed asylum seeker and any justification for so doing. But there are obviously extreme types of cases in which this issue might arise. We have the return of Kosovars, for example, to Kosovo, which is currently governed in large measure by UNMIK and where protectional security is generally assured by KFOR. That is one example in which it may be relatively uncontroversial to assert, "There is no basis for your fear of persecution absent exceptional circumstances." On the other side, of course, we have situations like Somalia, where Somalia in fact is governed by a variety of warlords exercising power as long as the range of their weapons but, nonetheless, where it is argued that if you go to the right warlord's domain you will be safe. I think that is much more

10 April 2002]

PROFESSOR GUY GOODWIN-GILL

[Continued

Chairman *contd.*]

worrying, on a number of levels. Firstly, if we are talking about protection of human rights, then clearly non-State agents or organisations are not parties to treaty, and whether they comply with human rights or undertake to comply with human rights becomes essentially a negotiable issue. This is what we would do with them. We would negotiate an understanding with them that, although they are non-States, they would nonetheless comply with human rights. You could have some measure of success, but experience again suggests that these sorts of understandings are not really worth the paper they are printed on. The United Nations tried this over many years in Southern Sudan, with an operation called Operation Lifeline, in which the provision of relief and humanitarian assistance was, as it were, linked to an undertaking on the part of the non-State actors involved to abide by the Geneva Conventions on the laws of war. It worked up to a point but it never really had the force or the authority which UNICEF, who was responsible for this, hoped that it would have and it eventually fell apart. From the States' perspective, from our perspective as a removing country, we also have problems attached to recognition. We are still, I think, in principle wary about dealing with non-State agents in a way which might seem to imply recognition of their claim to government or Statehood, acceptance of them as international actors, particularly if they have a rather poor record of human rights behind them.

65. I follow that, but should the concentration not be a pragmatic one? If in fact the individual can be protected in the place that he has come from, would that not be enough to disqualify him from being a Geneva Convention refugee or a person entitled to subsidiary protection?

A. I think a global answer is difficult to endorse. One can certainly envisage a situation in which the individual would return to an unrecognised government-held area (that is to say, an area held by an unrecognised government) in which, to all intents and purposes, civil society functions as it used to do before, shall we say, the cessation movement. That is one possibility. But I think more often than not these situations are much more fluid and it is very difficult to say with confidence that someone will, indeed, enjoy the protection of their human rights, protection against the persecution that they feared, in a situation which perhaps is characterised by conflict or ongoing violence, particularly at a community level.

Viscount Bledisloe

66. Article 9(3) applies only where the persecutor is himself a non-State actor. If you have a country where there is a non-State body which may persecute you and in another part of the State an equally strong or more viable non-State body to protect you, then surely you are no more refugee than you are if you could move to an area where the government could protect you. Supposing you have a country which has no government, it has four warlords. I agree your Somali warlords do not control a clearly defined territory and are not stable nor able and willing to protect the rights, but, be that as it may, a country

divided into three parts, each governed by a non-State actor, if you are frightened of persecution by one, why are you not all right if you can happily go and live in number 2 or 3?

A. With respect, my Lord, I think we are begging one or two questions about stability, continuity mechanisms and the fact or non-fact of protection.

67. It has got to qualify, it has got to be stable, it has got to control clearly defined territory and so on, but, assume those rather unlikely circumstances, I do not see why, if the persecutor is a non-State, the protector should not be clearly a non-State.

A. I would not necessarily disagree with you, particularly on the facts as you represent them, because you come very close in fact to describing a fully functioning government which happens to lack one aspect: recognition by others.

Chairman

68. I suppose North Cyprus might be an example.

A. Yes. Again, coming back to the internal flight alternative, that other aspect that we looked at earlier, the question ultimately is one of risk. If you can say with confidence, "This person would not be at risk in this area which happens to be held by a rebel government," then the basis for a claim to persecution may, all other things being equal, have been removed.

Chairman: Item 3 does say "may also", it does not say "shall also". It is permissible. It does not oblige the country from which the protection is being sought to treat the international organisation or the stable quasi-State authority as providing adequate protection, it just says it may do. I suppose that would depend on the actual facts of the particular case.

Lord Plant of Highfield

69. Chairman, would it not be worthwhile, at least for our purposes, trying to distinguish between international organisations and quasi-State authorities. It seems to me there is quite a big difference between the way a country is being governed under some kind of UN mandate—let us say, where a UN force has gone in because of the breakdown of law and the infrastructure of society and something stable has been created under the UN's auspices and the UN is the source of many of these human rights concepts of prescriptions and so forth—and, as it were, the fact that, within a society, a group of some sort has managed to become a sort of quasi-State within the national boundaries. It seems to me those are rather different sorts of organisations and one might be more sympathetic to seeing non-State protection through the UN rather than non-State protection through a gang that happens to control a bit of territory and is able to keep the peace in that territory. One of the reasons why the distinction might be useful to pursue is precisely the point you have made: that we are wary of recognising small groups of people like that as quasi-States.

10 April 2002]

PROFESSOR GUY GOODWIN-GILL

[Continued

Lord Plant of Highfield *contd.*]

A. That is right. Also we have the other advantage that the United Nations administration of territory is subject at least to a measure of accountability, and if things go wrong in that area then the UN administration or whatever can be called to account by either the General Assembly or the Security Council.

Chairman

70. The other side of the coin in 9(3) is perhaps in Article 13, Cessation of Refugee Status. In setting out the various circumstances in which refugee status may be lost, subparagraph (e) says that the refugee "... can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse ...". Is one looking there simply at the State of affairs which, if they had existed in the first place, would have prevented the individual from claiming protection? Or is one looking at something more? Some of the comments on this cessation of status article have said that the condition in the country in question should be one which would guarantee human rights, for instance. That is something quite different from the sort of pragmatic protection that one is looking at under 9(3).

A. 9(3) is a true reflection of the provisions of Article 1(c) of the 1951 Convention. I do not have any problem with the terms used there—or, indeed, with the way in which changed circumstances are interpreted in practice. Most decision makers in most countries with which I am familiar do not look for a single event like an election; they look beyond that to see whether, indeed, the measure or level of protection generally due is sufficient to remove the well-foundedness of the fear. So it is pragmatic but also practically oriented to the facts on the ground.

71. I find it quite difficult, reading 13(e), to be sure what the criterion was that was being looked for in order to see whether the requirements of the paragraph were satisfied: "... can no longer ... continue to refuse ...". Plainly someone can continue to refuse. Can no longer reasonably continue to refuse, but then, again, what is the criterion of reasonableness one is looking at?

A. I have been looking at these words so long that I do not even see the oddity in them!

72. I was tempted to look at it more, as it were, as a judge, wondering how I would react if someone said, "I don't want to go back. Conditions may be much better, but they are not perfect and I am doing very well here." What should one be looking at? The individual has been accepted as a refugee entitled to subsidiary protection, he has made use of his rights and has got a job and so forth, but conditions in his country of origin have improved and have improved to a State where, if that had been the position at the beginning, he would never have been accepted as a refugee in the first place. But, all the same, it is not western Europe, it is not a country which has signed the ECHR. What is the criterion that one should be looking for, I wonder?

A. In practice, it is a change in circumstance that is sufficient to remove the fear of persecution, period.

73. It is that and no more than that.

A. No.

Viscount Bledisloe

74. Is that not made plain by the last three lines of paragraph 1: "In considering point (e), Member States shall have regard to whether ..."

A. Yes.

Chairman

75. "... can no longer be regarded as well-founded."

A. Yes.

Viscount Bledisloe: If he no longer has a well-founded fear of persecution, then (e) clicks in.

Chairman

76. The consequence of this is that every refugee who is accepted as entitled to protection—let us suppose it is a Geneva Convention refugee not a subsidiary protection refugee—has a temporary status.

A. Yes.

77. It is only recognised and allowed to continue for as long as conditions in his own country remain.

A. That is absolutely right.

78. If there is a coup of a satisfactory sort, back he should go.

A. If there is a coup of a satisfactory sort, his status as a refugee comes to an end. Whether back he should go or not may depend upon other things—sometimes equities, the fact of non-residence in the country. It may depend upon other legal rights, such as family connections.

79. There may be ECHR rights as well which come in at that point.

A. Yes. But as regards refugee status, yes, there is the basis for its termination. What follows thereafter may be a little more complex. For example, if that has all happened in a relatively short space of time, then there is no problem with those other issues—or may be no problem.

80. Professor, you have helped us with a number of these articles. Are there any other issues which we have not touched on that you think we ought to be addressing and considering?

A. There is one issue, my Lord. This struck me last night—and I do not know why I had missed it before—and I have therefore not really thought it all the way through. There is a provision in Article 1 of the 1951 Convention which relates to Palestinian refugees. It does not name them. It is Article 1(d) and it refers to refugees who are currently receiving protection and assistance: "This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations, other than the UN High Commission for Refugees, protection or assistance." That was introduced specifically to leave Palestinian refugees under the umbrella of UNWRA (United Nations Relief and Works Agency) for Palestinian refugees and the

10 April 2002]

PROFESSOR GUY GOODWIN-GILL

[Continued

Chairman *contd.*]

UNCCP, which was then expected to resolve the issue. Paragraph (d) then goes on to say: "When such protection or assistance has ceased for any reason without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, those persons shall *ipso facto* be entitled to the benefits of this Convention." The application or interpretation of Article 1(d) is an issue which has divided European States almost as much, I would say, as the argument over non-State agents, but for some reason has not come into the present draft. It seems, at the present time, rather important perhaps that it should do.

81. How would you put it in?

A. That there should be an amendment to Article 2 in some place to incorporate the substance of Article 1(d).

82. In the definitions?

A. Yes. As I said, this only occurred to me last night. I would be perfectly happy to put a little

paragraph¹ in writing instead of my flummoxing through now.

83. I am sure I speak for all Members of the Committee in saying we would be very grateful indeed for a suggested amendment to incorporate that point.

A. It is certainly something that needs to be issued and either explained away or acted upon.

84. At any rate, raised and pursued.

A. Yes.

85. I think, Professor, you have given us enormous help this evening. I am very grateful to indeed. You have given us a number of things we are going to have to think about and pursue. That is exactly what we had hoped from your coming here this evening. Thank you very much.

A. It has been a pleasure.

¹ Submitted separately.

**Supplementary memorandum by Guy S Goodwin Gill, Professor of International Refugee Law,
University of Oxford**

1. At the 1951 Conference of Plenipotentiaries it was decided, for political reasons, to exclude Palestinians from the application of the 1951 Convention relating to the Status of Refugees. Article 1D of the 1951 Convention therefore provides:

This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.

2. In practice, assistance has been provided to Palestinian refugees by the United Nations Relief and Works Agency (UNRWA), within its area of operations and subject to certain conditions.

3. Article 1D premises inapplicability of the Convention on the continuing receipt of protection *or* assistance, and entitlement to the benefits of the Convention on the cessation *ipso facto* of protection *or* assistance, without the situation of such persons having been resolved, for example, through a political solution involving statehood and a separate nationality. Palestinian refugees outside UNRWA's area of operations who are without protection and no longer in receipt of assistance, fall by that fact alone within the Convention. Article 1D of the 1951 Convention is therefore not so much an "exclusion" clause, as a contingent inclusion clause.

4. Of course, the incorporation of Palestinian refugees within the Convention protection regime may or may not result; it depends on (1) the cessation ("for any reason") of protection or assistance, for example, if UNRWA were wound up, or its operations prohibited or frustrated; and (2) the lack of any definitive settlement of the refugees' situation.

5. Part only of the text of Article 1D is cited in Article 14 of the Commission's draft, which deals generally with *exclusion* from refugee status. The "contingent inclusion" elements of Article 1D are not mentioned in the draft directive itself. The explanatory memorandum (pp 24-25) does provide context and some help, but the *ipso facto* or automatic inclusion of Palestinian refugees, contingent on certain events, will need to be recognized in law if it is to be effective.

6. In my view, therefore, Article 2(c) of the draft directive ought to be amended to read as follows:

"Refugee" means a third country national or a stateless person who fulfils the requirements laid down by Article 1(A) of the Geneva Convention and set out in Chapters II-III of this Directive, *or to whom the second paragraph of Article 1(D) of the Geneva Convention applies;*

11 April 2002

WEDNESDAY 24 APRIL 2002

Present:

Bledisloe, V	Plant of Highfield, L
Brennan, L	Richard, L
Fraser of Carmyllie, L	Scott of Foscote, L (Chairman)
Lester of Herne Hill, L	Thomas of Walliswood, B
Mayhew of Twysden, L	Thomson of Monifieth, L

Memorandum by United Nations High Commissioner for Refugees (UNHCR)

INTRODUCTION

1. On 12 September 2001, the European Commission issued a 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. In putting forward this proposal, the Commission has completed the entire set of legislative measures in the field of asylum set out in Article 63 of the Amsterdam Treaty and envisaged by the Tampere European Council as the first legislative step of developing a common European asylum system.

2. The Commission's proposal lays down a common interpretation of the criteria for determination of refugee status under the 1951 Convention and 1967 Protocol, introduces criteria for qualification for subsidiary protection status, and establishes minimum standards of treatment applicable to persons falling under the above categories.

3. UNHCR has often stressed that, since one of the main features of refugee status is its international character, and since recognition of refugee status under the 1951 Convention and 1967 Protocol has certain extraterritorial effects, it is essential that States parties to these international instruments apply the substantive criteria of the refugee definition in a harmonised and mutually consistent manner.

4. It has generally been acknowledged that, however properly the refugee definition contained in the 1951 Convention and 1967 Protocol may be applied, there are some categories of persons in need of protection who do not fall under the strict scope of these instruments. Such refugees of concern to UNHCR include, for example, those fleeing the indiscriminate effects of violence arising in situations of armed conflict, with no specific element of persecution. UNHCR has, accordingly, promoted the adoption of complementary or subsidiary regimes of protection to address their needs.

5. UNHCR generally welcomes the Commission's proposal, and hopes that the Community instrument eventually adopted will effectively ensure the realisation of the objectives affirmed by the Tampere European Council, as regards the full and inclusive application of the 1951 Convention and the granting of protection to all those who need it. Inherent in the notion of "full and inclusive application of the Convention" is also ensuring access for all persons seeking protection to fair and efficient procedures for the determination of refugee status or subsidiary forms of protection, irrespective of nationality or country of origin. UNHCR therefore hopes that Member States will continue to examine any asylum application that may be submitted to them by any person who is not a national of the Member State concerned.

OVERALL ASSESSMENT OF THE PROPOSAL

6. Generally speaking, UNHCR is pleased with the orientation of many of the key provisions of the text. In particular, UNHCR welcomes that the proposal:

(i) Reaffirms that the 1951 Convention and its 1967 Protocol are the cornerstone of the international legal regime for the protection of refugees, and emphasises that the subsidiary protection regime that the draft Directive provides for is complementary and additional to the refugee protection regime enshrined in those instruments.¹

(ii) Acknowledges that the recognition of refugee status is a declaratory act.²

(iii) Recognises that the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status provides valuable guidance for Member States when determining refugee status.³

(iv) Recognises that, for a person to qualify as a refugee under the 1951 Convention, it is immaterial whether the persecution feared stems from the State, or from parties or organisations controlling the State,

¹ Preamble, paragraphs 3 and 17.

² Preamble, paragraph 10.

³ Preamble, paragraph 11.

24 April 2002]

[Continued

or from non-state actors—provided, in the latter case, that the State is unable or unwilling to offer effective protection.⁴ This approach is in conformity with the practice of the vast majority of States, and also reflects UNHCR’s long-standing position as set out not least in the Handbook.⁵

(v) Further recognises that, for a person to qualify as a refugee under the 1951 Convention, 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.⁶

(vi) Recognises that the risk of punishment for draft evasion or desertion may, by itself, provide grounds for a refugee claim if the reason for the evasion or desertion is the person’s unwillingness to participate in military actions incompatible with his or her deeply held moral, religious or political convictions.⁷

(vii) Recognises that cessation of refugee status must be declared on a case-by-case basis and that the burden of proof lies with the Member State which has granted such status.⁸

(viii) Contains special provisions for the protection of unaccompanied minors, and provides that the “best interests of the child” should be a primary consideration of Member States when implementing the Directive.⁹

(ix) Recognises that persecution may be gender-related, and that a social group may be defined, *inter alia*, by gender or sexual orientation.¹⁰

(x) Provides that the notion of “members of the family” of the refugee encompasses not only the spouse and minor children, but also 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 the time.¹¹

(xi) Emphasises that Member States have the power to introduce or maintain more favourable standards of treatment both in respect of the qualifying criteria and of the rights and benefits attached to the possession of the relevant status.¹²

(xii) Generally provides for an adequate level of treatment of refugees and beneficiaries of subsidiary protection, taking into account not only the provisions of the 1951 Convention, but also the development of international human rights law.¹³

7. UNHCR is, however, concerned about the fact that some of the definitions provided in the proposed Directive differ from those embodied in relevant international instruments.¹⁴ It is also of concern that some of the proposed Directive’s provisions and commentaries thereon do not, in UNHCR’s view, correctly reflect the legal position. Moreover, some of the provisions as currently drafted are not in line with principles of international refugee law or with UNHCR’s policy positions.

SPECIFIC COMMENTS

8. The following observations focus on those aspects of the proposed Directive that UNHCR believes require clarification or amendment in order to ensure full conformity with international standards. The observations follow the actual structure of the proposed Directive.

Article 2(a)

9. The expression “international protection” is used here to refer to the protection accorded by a Member State, either in the form of refugee status or of subsidiary protection status. While acknowledging that this use of the term is common, UNHCR would like to point out that from an international law perspective, international protection is the protection that the international community accords to individuals or groups through special organs and mechanisms.

10. The regime of international refugee protection exists independently of any State having accepted responsibility to protect the refugee in question. In conformity with paragraphs 1 and 8 of the Statute of UNHCR, adopted by General Assembly resolution 428(V) of 1950, the responsibility for providing

⁴ Articles 9(1) and 11(2)(a).

⁵ UNHCR Handbook, paragraph 65.

⁶ Article 11(2)(b).

⁷ Article 11(1)(d)(ii).

⁸ Article 13(2).

⁹ Article 28 and Preamble paragraph 23.

¹⁰ Article 12(d) and Preamble paragraph 15.

¹¹ Article 2(j).

¹² Article 4.

¹³ Chapter V.

¹⁴ UNHCR acknowledges that the definitions contained in the draft Directive are given for the sole purpose of that instrument and, as such, they do not—and indeed cannot—affect the interpretation of other instruments. It, nevertheless, submits that, in the drafting of legal instruments, it is strongly advisable to adhere to accepted language and terminology in order to avoid confusion of concepts.

24 April 2002]

[Continued

international protection to refugees lies with the High Commissioner for Refugees.¹⁵ The protection that States extend to refugees is not, properly speaking, “international protection,” but national protection extended in the performance of an international obligation.¹⁶ This form of national protection is better described, in UNHCR’s view, as “asylum.”

Article 2(c)

11. The term “refugee” is defined in this provision as a “third country national or a stateless person who fulfils the requirements laid down by Article 1(A) of the Geneva Convention...” This definition does therefore not replicate the precise wording of the refugee definition contained in the 1951 Convention and its 1967 Protocol in that it excludes from its ambit nationals of EU Member States. While indeed it is extremely unlikely that nationals of EU Member States would have any valid claim to asylum, this consideration should have no effect on the manner in which the globally accepted refugee definition of the 1951 Convention and 1967 Protocol is being defined in the domestic legal system of 15 States parties. The scope of the refugee definition embodied in these binding international treaties cannot be reserved from, by virtue of the provisions of Article 42 of the Convention; nor can the provisions of the Convention be restricted on grounds of nationality, by virtue of the non-discrimination principle enshrined in Article 3. To ensure full compatibility with the 1951 Convention, UNHCR therefore recommends that the proposal refers not merely to “third country nationals” but to aliens.

Article 2(d)

12. The expression “refugee status” is defined as “the status granted by a Member State to a person who is a refugee and is admitted as such to the territory of the Member State and/or permitted to remain and reside there”.

13. UNHCR wishes to point out that the term “refugee status” may, depending on the context, cover two different notions. Paragraph 28 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status reads: “[a] person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined.¹⁷ In this sense, “refugee status” means the condition of being a refugee. In contrast, the proposed Directive appears to here use the term “refugee status” to mean the set of rights, benefits and obligations that flow from the recognition of a person as a refugee. This second meaning is, in UNHCR’s view, better described by the use of the word “asylum.”¹⁸

Articles 2(g) and 2(h)

14. For the reasons set out above with respect to the wording of Articles 2(a) and 2(d), UNHCR would recommend that the term “asylum” be used in preference to “international protection”. If this were adopted, these two articles could be combined into one subparagraph, and the term “asylum” in the fifth line of the present 2(g) could be replaced with the term “Convention refugee status”. There would then, in UNHCR’s view, be no need for the present 2(h).

¹⁵ The General Assembly has also reaffirmed UNHCR’s international protection function and responsibilities in a series of resolutions since 1957.

¹⁶ The expression “international protection” was proposed by the French delegate during the discussions at ECOSOC and the General Assembly of the Statute of UNHCR (instead of the expression “legal protection” which was used in the text under discussion). The French delegate explained that the purpose of the proposal was to mark the difference between international protection extended by UNHCR and national protection extended by States (Official Records of ECOSOC, Ninth session, 1949, Summary Record of the Three Hundred and Twenty-Sixth Meeting, pp.628-629; and GAOR, Fourth session, Third Committee, Summary Record of the 256th Meeting). The relationship existing between international protection extended by UNHCR and national protection extended by States—in the form of asylum—is illustrated in the “Note on Asylum” submitted by the High Commissioner to the Twenty-eighth session of UNHCR’s EXCOM (Document EC/SCP/4 of 24 August 1977). In that Note, the High Commissioner pointed out: “A person who leaves his country of origin because of persecution or a well-founded fear of it has a primary and essential need to receive asylum in another country. (...) In the exercise of his function to provide international protection, the High Commissioner seeks to ensure that refugees receive asylum and to promote liberal asylum practices by States . . .”

¹⁷ UNHCR’s Handbook, paragraph 28. It is noted that, in this respect, the draft Directive appears to use the phrase in two different ways, in so far as paragraph 10 of the Preamble acknowledges the declaratory character of the decision that determines refugee status.

¹⁸ This meaning is reflected in a wealth of works on international law, in numerous international instruments, and in numerous national Constitutions and legislations, including those of Member States of the EU (See for instance Article 16 of the German Constitution and Section 51 of the German Aliens Law; Preamble of the French Constitution, and Laws of 11.05.98 and of 25.07.52 of France; Article 3 of the Asylum Law of Spain; Article 10 of the Italian Constitution and article 1 of Law 39/90 of Italy; and Article 1 of Law 15/1998 of Portugal).

24 April 2002]

[Continued

Article 2(j)(ii)

15. According to this provision, the family unit of the applicant includes the children of the applicant as well as the children of the couple (ie those of the applicant and his or her spouse or unmarried partner in a stable relationship), but does not include the children of the applicant's spouse or stable partner. UNHCR considers that this distinction is unjustified and should be corrected.

Article 2(k)

16. UNHCR understands the final phrase of this provision, "in relation to the application for asylum" to mean, in effect, that "accompanying family members" are only those family members who are present in the country, but are not themselves applicants for asylum. UNHCR recommends that this terminology be used in preference to the current wording, to avoid confusion, particularly with respect to Article 6(1).

Article 3

17. UNHCR wishes to draw attention again to its comments formulated under Article 2(c), regarding the unwarranted restriction of access to asylum to third country nationals and stateless persons. For UNHCR, it is necessary to ensure that all persons who seek protection, no matter their country of origin, are entitled to have their claims considered.

Article 5

18. UNHCR welcomes the proposed Directive's holistic approach to international protection as embodied in Article 5, save for the unwarranted nationality-based limitations commented upon above.

19. UNHCR wishes to point out that the last part of Article 5(2) referring to "is unable or, owing to such fear, is unwilling to avail himself of the protection of that country" may be misplaced in the context of subsidiary protection. Under the refugee definition of Article 1(A) of the 1951 Convention, "availment of protection" of the country of nationality has a special meaning that is intrinsically linked to the notion of "well-founded fear of persecution." UNHCR would therefore recommend that the definition with respect to beneficiaries of subsidiary protection should refer rather to unwillingness or inability to return to the country of nationality or former habitual residence. UNHCR would also like to caution that the use of the "well-founded fear" test in respect of subsidiary protection may potentially lead to unnecessary confusion with refugee definition contained in the 1951 Convention and 1967 Protocol.

20. UNHCR further wishes to point out that, in order to duly reflect the text of Article 1(A)(2) of the 1951 Convention, the last sentence of the commentary on Article 5(1), should read: "The fear must be such that it makes the applicant unwilling or unable to avail him or herself of the protection of the country of nationality or, if the applicant has no nationality, unable or unwilling to return to the country of his or her former habitual residence."

Article 6(1)

21. This article provides that "Member States shall ensure that accompanying family members are entitled to the same status as the applicant for international protection." UNHCR would like to draw attention to its comments under Article 2(k), where a recommendation was made to clarify that the term "accompanying family members" refers only to persons who are not applicants for asylum in their own right.

22. In addition, UNHCR wishes to point out that not all the dependent members of the family of a refugee, or of a beneficiary of subsidiary protection, are automatically eligible for derivative refugee or subsidiary protection status. Recognition of derivative status would not be appropriate if the member of the family is a national of a State other than that of the applicant. In such a case, the member of the family should be granted a residence permit, and should be entitled to continue to maintain normal relations with his or her country of nationality. Granting of a residence permit would, of course, not be necessary if the member of the family is a national of the country of asylum. Automatic recognition of derivative status is indeed called for only where the member of the family is either a national of the same country as the applicant, or is a stateless person.¹⁹ UNHCR therefore recommends that "unless such status is incompatible with their existing status" or words to that effect be added to Article 6(1).

¹⁹ Cf. UNHCR Handbook, paragraph 184.

24 April 2002]

[Continued

Article 7(b)

23. UNHCR notes the reference to a “reasonable possibility” and assumes that this is in line with the UNHCR standard.²⁰ However, to ensure that the standard of proof is not unrealistic given the special nature of the refugee, UNHCR recommends to replace “will” with “might” (which would also more generally be in line with Article 7(c) of the proposed Directive).

Article 7(e)

24. UNHCR is concerned that the provision in Article 7(e) may be read into as a general evidentiary requirement. A person claiming to be in need of protection must not be required to produce “credible evidence that laws or regulations are in force and applied in practice in the country of origin which authorise or condone the persecution or the infliction of other serious harm to the applicant.” Information as to whether or not such laws or regulations exist is part of the fact-finding process provided for in Article 7(a), which requires the decision-makers to examine “all relevant facts as they relate to the country of origin...” In some instances, it may well be the case that existing laws (as such in line with international law) could have the effect of condoning persecution, if applied, for instance, in a discriminatory or arbitrary manner. To avoid any potential misinterpretation, this provision could therefore be deleted.

Article 8(2)

25. Article 8(2) provides that “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.”

26. UNHCR acknowledges that there may be instances where an individual outside his or her country of origin acts in a certain way for the sole purpose of “manufacturing” an asylum claim, when that person would otherwise not have a well-founded fear of persecution. UNHCR appreciates that States face a certain difficulty in assessing the validity of such claims, and agrees with States that the practice should be discouraged. At the same time, UNHCR needs to insist that the principle at stake is whether the person consequently would face a risk to his or her life or liberty upon return, and is not primarily a question of how the risk comes about. There is no logical or empirical connection between the well-foundedness of the fear of being persecuted or of suffering serious unjustified harm, and the fact that the person may have acted in a manner designed to create a refugee claim.²¹

27. If the aim of Article 8(2) is to assist States in addressing so-called self-serving claims, which sometimes raise difficult evidentiary and credibility issues, it would be preferable, in UNHCR’s view, to address the issue from the perspective of making appropriate credibility assessments and looking into burden of proof issues in the individual case.²² For UNHCR, therefore, a proper analysis of such cases demands not an assessment of whether the asylum-seeker acted in “bad faith” (as noted in the explanatory memorandum) but rather, as for every case, whether the requirements of the definition are in fact fulfilled taking into account all the relevant facts surrounding the claim.²³

28. As regards beneficiaries of subsidiary protection, UNHCR finds it difficult to see how a person may have a well-founded fear of suffering serious unjustified harm as a result of activities undertaken after leaving his or her country of origin. For example, it is difficult to imagine that activities engaged in by the applicant while in the country of asylum could be cause for a well-founded fear of being subjected to serious and unjustified harm resulting from “indiscriminate violence arising in situations of armed conflict”.²⁴

Article 9

29. The provision in Article 9 dealing with sources of persecution is most welcome in so far as it acknowledges and codifies what UNHCR views as the state of international law in this regard—ie that it is immaterial whether the feared harm emanates from a State or a non-State agent. There are, however, two aspects of Article 9 that are cause for some concern.

²⁰ UNHCR Handbook, paragraphs 37-50.

²¹ It is noted that this is recognised in the Commission’s commentary on this article.

²² For instance, the reference to continuity of convictions is, in UNHCR’s view, an assessment which goes to credibility and not a principle or requirement in and of itself.

²³ In this sense the explanatory memorandum paragraph on this provision is somewhat difficult to interpret, as it asserts that Member States are entitled to start from the premise that the impugned activities do not in principle furnish grounds for recognition, but goes on (correctly, in UNHCR’s view) to point out that if a risk or persecution or serious harm nevertheless is produced, the protection need must be recognised.

²⁴ This is one of the grounds of subsidiary protection listed in Article 15 of the proposed Directive.

24 April 2002]

[Continued

30. Firstly, UNHCR would sound a note of caution with respect to the statement in Article 9(2) that where effective State protection is available, the fear of being persecuted or otherwise suffering serious unjustified harm “shall not be considered well-founded”. In UNHCR’s view, this assertion is too categorical and fails adequately to express the complexities of the assessment.

31. Secondly, as regards Article 9(3), the question of availability of State protection (or lack thereof) comes in as a factor for consideration where the threat of persecution emanates from non-State actors.²⁵ This provision equates national protection provided by States with control over territory by international organisations or quasi-State authorities. In UNHCR’s view, such an equation is inappropriate. An international organisation may indeed (as has been the case in Kosovo or East Timor) have a certain administrative authority and control over territory on a transitional or temporary basis but such functions cannot be interpreted to substitute for the full range of measures normally attributed to the exercise of State sovereignty. Similarly, quasi-State authorities may indeed control parts of territory. This control (which is often disputed and rather fluid) cannot, however, be meant to replace the exercise of national protection provided by States, not least because international obligations stemming from international human rights law would not necessarily tally with those of States parties to international human rights instruments. UNHCR recommends therefore that this provision be deleted from the proposed Directive.

Article 10

32. UNHCR welcomes this attempt to put a more uniform structure and meaning to a notion which has been applied in widely differing ways by various States for some years. In general UNHCR agrees with the proposed analysis, including in particular its recognition that it will not normally be a consideration where the feared harm emanates from agents of the State, and that the reasonableness of finding such an alternative will depend both on circumstances in that part of the country put forward as furnishing the alternative and the individual personal circumstances of the asylum-seeker.

33. In UNHCR’s view, though, the expression “internal protection” as introduced in this context is not defined and may be confused with other notions of protection referred to in the proposed Directive. The expression most commonly used to refer to this situation is “internal flight alternative” or “internal relocation alternative”. Consideration of this would only require a change in the second paragraph of Article 10(1) by replacing “against finding internal protection to be a viable alternative to international protection” with “in favour of international protection”.

34. As regards the Commission’s commentary on Article 11(1)(d), the second sentence lists a reason for refusing to perform military obligations (“conscientious objection”) alongside different manners in which those obligations may be avoided (“absence without leave, evasion, or desertion”). Moreover, the assertion made in that sentence that prosecution or punishment for refusal to perform military service for reasons of conscience “will not usually amount to persecution” is in direct contradiction with the text of Article 11(1)(d).

35. In addition, in relation to Article 11(2)(c), the Commission’s commentary gives the impression that persons in flight from civil war or armed conflict could hardly be recognised as Convention refugees. However, experience shows that most civil wars or internal armed conflicts are rooted in ethnic, religious or political differences, which specifically victimise those fleeing. War and violence are themselves often used as instruments of persecution.

Article 12

36. UNHCR also welcomes this elucidation of the meaning of the reasons for being persecuted set out in Article 1 of the 1951 Convention, and is in general agreement with the draft’s clarifications of the meaning of these terms. UNHCR would recommend, however, that Article 12(c) relating to the meaning of “nationality” should also contain, after the word “citizenship” in the first line, the words “or lack thereof” in order to fully reflect its meaning. In addition, UNHCR recommends that Article 12(d) dealing with the “membership of a particular social group” ground also expressly provide for external factors as one of the identifying and defining characteristics of the particular social group.²⁶

Article 13

37. UNHCR is pleased that this provision takes in the Article 1C cessation clauses of the 1951 Convention and that it places the burden of proving the cessation of refugee status on the State asserting it.

²⁵ Where persecution emanates from the State, the question of availability of State protection (or lack thereof) does not arise. Lack of State protection is not a general requirement of the refugee definition.

²⁶ The reference in Article 12(d) to “. . . groups of individuals who are treated as ‘inferior’ in the eyes of the law” could be more accurately portrayed to encompass all externally-defined social groups.

24 April 2002]

[Continued

38. UNHCR would, however, recommend that the commentary on this Article be amended to reflect the generally accepted position that, in certain circumstances, the refugee may be able to obtain or renew his or her national passport without forfeiting his or her refugee status.²⁷

Article 14

39. UNHCR welcomes that this provision takes in the language of Article 1F of the 1951 Convention and that certain fundamental principles of accepted doctrine and State practice with respect to exclusion are codified here, including the need for personal and knowing conduct to trigger exclusion and that procedural rights should be preserved.

40. With respect to the commentary on Article 14(1)(a), however, UNHCR wishes to note that the assertion that "... the protection or assistance available from the United Nations agency must have the effect of eliminating or durably suppressing the individual's well-founded fear of being persecuted" does not have any legal or empirical basis. Nor is there any legal basis for making the applicability of this exclusion clause contingent upon a requirement of continuity in the protection or assistance received from the United Nations.

41. UNHCR further wishes to note that the commentary on Article 14(1)(c)(i), is at variance with the text of the 1951 Convention, insofar as the Convention does not require that the instruments defining the international crimes to which the provision refers should have been acceded to or accepted by each State concerned.

Article 15

42. UNHCR notes the approach taken by the proposed Directive to set out the grounds for subsidiary protection, which would only come into play when an examination of the asylum claim has indeed led to the conclusion that the applicant would not qualify for refugee status under the 1951 Convention and the 1967 Protocol. UNHCR would like to point out that in most cases the type of threats that are enumerated in Article 15 may indeed indicate a strong presumption of Convention refugee status, except perhaps for those fleeing the indiscriminate effects of violence and the accompanying disorder in a conflict situation, with no element of persecution or link to a specific Convention ground. And it is for the latter category of persons that subsidiary protection indeed fulfils an important function. Against this background, the elements listed under Article 15 would need to be revisited to ensure that the applicability of the 1951 Convention and the 1967 Protocol is not in effect undermined by resorting to subsidiary forms of protection.

Article 17(1)(b)

43. The provision under Article 17(1)(b) relating to serious non-political crime (which refers to beneficiaries of subsidiary protection) should be amended to remove the words "as a refugee" at the end of the subparagraph.

Article 20

44. While UNHCR welcomes the provision of information to persons recognised as needing international protection, the Office queries the use of the terminology "in a language likely to be understood by them." UNHCR would recommend that the provisions in this regard should mirror those of the Commission proposal for a Council Directive on minimum standards on procedures for granting and withdrawing refugee status, where the wording used is "in a language which they understand."²⁸

Article 21

45. UNHCR appreciates that, as noted in the commentary on this provision, many Member States consider subsidiary protection to be temporary in nature.

Nevertheless, as is also pointed out elsewhere in the explanatory memorandum,²⁹ the reality is that the need for subsidiary protection is often just as long-lasting as that for protection under the 1951 Convention. In recognition of that fact, UNHCR would recommend that the residence permit provided to beneficiaries of subsidiary protection should be for the same duration as that for Convention refugees. If it appears that subsidiary protection is no longer necessary in advance of the expiry of the residence permit, the cessation provisions of Article 16 would in any case apply.

²⁷ Cf. UNHCR Handbook, paragraph 120.

²⁸ See Articles 7(a), (e) and (f) of the proposal, COM(2000)578 final (2000/0238(CNS)).

²⁹ See the Explanatory Memorandum, at page 4, where it is noted that while the regime of subsidiary protection starts from the premise that the need for such protection is temporary in nature, "...in reality the need for subsidiary protection often turns out to be more lasting."

24 April 2002]

[Continued

Article 24

46. Access to employment and employment-related educational opportunities is another area where the proposed Directive treats Convention refugees and beneficiaries of subsidiary protection differently. UNHCR takes the view that, just as the proposal provides for equal treatment to all beneficiaries of international protection as regards access to housing, social welfare and health care, there is no valid reason to treat beneficiaries of subsidiary protection differently from Convention refugees as regards access to employment. UNHCR therefore submits that beneficiaries of subsidiary protection should be entitled to work, and to benefit from available vocational training, workplace experience and other employment-related educational opportunities, once they are granted that status.

Article 28(3)

47. With a view to aligning this provision with similar provisions contained in the Proposal from the Commission for a Council Directive laying down minimum standards of reception of applicants for asylum in Member States,³⁰ UNHCR would propose that the words “in order of priority” be added at the end of the phrase “Member States shall ensure that unaccompanied minors are placed” in the first line of Article 28(3).

Article 31

48. According to this provision, Convention refugees are eligible for programmes of integration once they are granted asylum, whereas access to those programmes by beneficiaries of subsidiary protection status may be postponed for up to one year after that status has been granted. Again, for the reasons set out above in the comments to Article 21, UNHCR considers that this difference of treatment is not warranted.

Article 33

49. The mechanism envisaged under Article 33 to facilitate “direct co-operation and an exchange of information between the competent authorities” could also usefully build in opportunities for co-operation and information exchange with UNHCR. Such a role for UNHCR would be in line with the mandate of UNHCR to supervise the application of international conventions for the protection of refugees and with Article 35 of the 1951 Convention.

CONCLUSION

50. As is evident from the foregoing comments, UNHCR generally welcomes the present proposal from the European Commission. The proposal provides adequate basis for the discussion of the relevant issues, and constitutes an important step in the process of building a common European asylum system.

51. UNHCR considers, however, that there are some aspects of the Commission’s proposal which need to be revised in order to ensure the desired full conformity with international protection principles, as well as the realisation of the fundamental aims of the proposed Community instrument.

52. It is in the spirit of its on-going, close co-operation with the Commission and Member States that UNHCR has offered the foregoing observations and suggestions. UNHCR trusts that they will be duly taken into consideration and will be appropriately reflected in the final text of the proposed Council Directive.

November 2001

³⁰ See Article 25(2) of the proposal, COM(2001) 181 final (2001/0091(CNS)).

24 April 2002]

[Continued

Examination of Witnesses

MR MICHAEL KINGSLEY-NYINAH, MR ANTONIO FORTIN and MR DAVID BLUNDELL, representatives of the United Nations High Commissioner for Refugees (UNHCR), examined.

Chairman

86. Mr Kingsley-Nyinah, we are most grateful to you and your colleagues for coming to help us with oral evidence on the refugee status proposals this afternoon. We know that you are all extremely busy and you have given up valuable time to come here and we are grateful to you for doing that. I wonder whether you would like to start by introducing yourself and your colleagues before we ask the questions we have in mind.

(*Mr Kingsley-Nyinah*) Thank you very much. My Lord Chairman I would like to express UNHCR's thanks to you and your Committee for inviting us to exchange views on this very important draft Directive. The importance of this Directive cannot be overstated. In terms of its subject matter, it goes to the very heart of refugee protection and, given the standing of the European Union on the world stage, this Directive is likely to have great impact not just in Europe but even beyond. I am very pleased that I am here. My name is Michael Kingsley-Nyinah and I am the deputy representative in the UNHCR office in London. That means that I am responsible for legal issues. I work closely with Mr David Blundell in the legal unit in London but I am especially pleased that Mr Antonio Fortin is here with us to assist us today. He is the head of the legal unit in Brussels, in the UNHCR office in Brussels, and in that capacity he has been directly involved in formulating UNHCR's positions on draft Directives and other EU matters. I should also mention that no less than 15 years ago he occupied the post that I am occupying now, which goes to the point I am about to end with, my Lord Chairman, which is that by internal agreement, given Mr Fortin's status and familiarity with the subject, we would ask that he address most of the questions, if not all of them. Thank you very much.

87. Thank you very much for that. I was in fact going to say that when we ask questions we are entirely impartial as to which of you answers, so, please, any of you feel free to answer the questions as you may think most appropriate.

(*Mr Kingsley-Nyinah*) Thank you.

88. May I start by asking your view on the relationship between this Directive we are now considering and the other relevant international law instruments such as the Geneva Convention, the European Convention on Human Rights and the Convention Against Torture. Does the position need further clarifying for the purpose of giving effect to the provisions of this refugee status Directive?

(*Mr Fortin*) Thank you very much, my Lord Chairman. I think this is a very important issue because we take the view that the Convention is, so to speak, the constitution and there must be some implementing legislation that has to be adopted, either at regional level or at national level, but this implementing legislation to applying the Convention must always be in conformity with the Convention. If there is any contradiction, any conflict, between the Convention and the Directive, the provision of the Convention should certainly prevail, should take

preference, over any legislation adopted at European level or at national level. We think that the Convention has a mechanism for its interpretation that is established in Article 38, which says that if there is any problem as to the application of the Convention it is for the international court of justice in the Hague to decide on differences of interpretation. So we take it that if there is any potential difference between the interpretation under the provisions of an EU Directive or between the interpretation of those provisions that could be given by the Court of Justice in Luxembourg, at the end the only interpretation that should be taken as the authoritative interpretation under the terms of the Convention is that that might be provided eventually by the international court of justice. We have assumed that the Directive will not in any way contradict the Convention, and perhaps, since you are putting the question to us, it might be good to say that. Although in the Treaty already it is said that the Directives will have to give full and effective interpretation to the Convention, so that it is understood in the Treaty that the Directives are meant to implement the Convention it may be a good idea perhaps to say this.

89. Spell it out a little. Yes, I think it would not be possible for the Directive, other than inadvertently, perhaps, to contradict the Convention. The Convention is binding as a treaty on all those who signed it. But the Directive does, does it not, in some respects not go as far as the Treaty?—particularly having regard to the people to whom it is to apply It limits eligibility for refugee status, for example, according to its terms, to third country nationals and stateless persons. But the Convention is not thus limited. The Convention would apply also to citizens of the European Union itself. Does that produce a problem in your mind?

(*Mr Fortin*) There is a problem indeed. The Convention has no geographical limitation of any kind applied, together with the protocol adopted in 1967. The states have an obligation under the Convention to consider all applications for asylum and recognition of refugee status that may be submitted to them. To introduce a geographical limitation would be contrary to the text of the Convention, in effect. Now, we have and I have discussed the matter with the legal service at the Commission and their answer has been as follows. They have said: "The Directive is not saying that there could not be a refugee who is a citizen of the EU; what the Directive is saying is that these rules will apply whenever a third country national applies for asylum. We are not saying that others cannot or should not" which is in our view a bit anomalous, because what rules are to be applied to potential EU citizens who apply for asylum is unknown, is undetermined, but, in reality, there is a recognition that EU citizens may apply for asylum but these rules do not apply to them. The recognition is not only given in these sort of private exchanges, but it is given in the Treaty itself, in the sense that protocol 6 to the Treaty specifically says that a state may refuse to deal

24 April 2002]

MR MICHAEL KINGSLEY-NYINAH, MR ANTONIO FORTIN
AND MR DAVID BLUNDELL

[Continued

Chairman *contd.*]

with an application submitted by one EU citizen—so they allow countries not to—and in that case the country has to communicate this to the Council. A number of countries have already declared that they are going to consider all applications regardless of the national origin of the applicant. So the Treaty itself recognises the fact that EU citizens can apply for asylum and states normally would deal with their applications, but the problem with this Directive is that, by limiting it to third state nationals, it leaves in a vacuum really what is going to be the treatment of non-nationals.

Chairman: Yes. I suppose there is an assumption—and it may be an over-optimistic assumption—that there simply will not be anyone within the European Union, each member of which will have signed up to the ECHR, who will be in a position of needing asylum. But that may be over-optimistic.

Viscount Bledisloe

90. Surely the Commission's answer is perfectly reasonable, even without this assumption. What this Directive is saying is that all members of the club shall treat outside applicants in the same way. You would not expect a club rule to explain how one member of the club is to treat applicants from the other. A Jew persecuted in Germany—God forbid that should ever happen again—would still have his Geneva Convention rights, would he not? It would be very curious if a convention assumed that members of the club itself may break the rules.

(*Mr Fortin*) I would say that the Geneva Convention is also a sort of club.

91. I am sure, but my club is the European Union.

(*Mr Fortin*) Yes, but the same logic, I think, would apply to that. The basic assumption is that states respect their international obligations and treat their citizens very reasonably and fairly, but these conventions are precisely made up for the possibility that there is an exception and a country may not do that and, if that is the case, there should be a procedure to deal with that case and a certain type of guidelines to assess the claim and a certain type of standard of rights that may be recognised. If a national of a non-EU country applies for asylum in an EU country, that applicant will be considered in accordance with the Directive and will be decided in accordance with the Directive. If a national of an EU country applies for asylum, that application has to be considered still, because the protocol to the Treaty says so, but the possibility of not considering it exists to. But then the question is: What is going to happen? What will be the treatment? Which rights will be attached to recognition of refugee status?

Chairman

92. It may be this is going to be simply a hypothetical problem because if the individual, the Geneva Convention refugee, is a citizen of a Member State of the European Union, then he is entitled to go where he likes, is he not, within the European Union? You cannot keep him out. He does not have to go

through the aliens' gate at the airport; he goes through the European Union gates at the airport. He arrives in the country and he has the rights that everybody else has. No discrimination.

(*Mr Fortin*) We understand that from a practical point of view these are very, very unlikely situations to occur. However, we have raised a series of objections to this provision for another reason, because we think that this may copied in other parts of the world and there may be other regions of the world where human rights do not attract the level of respect that exists in Europe and they may say, "Why not countries, members of the organisation of American states, decide that no national of one of these states should apply for ...?" and so on and so forth. For us it is a question of giving the right example to the rest of the world rather than any concern that applies to the situation in Europe today.

93. Moving on to a slightly related question: Do you take the view that some special mention is needed in the Directive on the position of Palestinian refugees, having regard to the manner in which they are dealt with in, I think, Article 1(d) of the Geneva Convention?

(*Mr Fortin*) We think that there is something missing in the Directive because that article has two parts. One of them excludes Palestinian refugees from the benefits of the Convention but the second paragraph provides that they should automatically be granted the benefit of the Convention under certain circumstances, so that it is an exclusion and an inclusion at the same time. But the text as it stands at the moment only contains the exclusion. It is true that it needs to be complemented with the second part of the article, otherwise there would be a violation of the text of the Convention in effect.

94. At the moment Palestinian refugees are being catered for by another United Nations branch, are they not?

(*Mr Fortin*) Yes.

95. As long as that continues, there is not a breach of the Convention.

(*Mr Fortin*) The UNHCR interpretation of that provision is as follows, my Lord Chairman. We think that if a Palestinian refugee leaves the area of the operation of UNRA and comes to Europe, and if that person cannot—as is different from will not or does not want to—go back to that country, in that case, in respect of that person, the assistance will cease *de facto*. That person should be entitled automatically to the benefits of the Convention. That is not said in the text.

96. He would then be a stateless person, I suppose.

(*Mr Fortin*) Yes, but should be granted the benefits.

97. Can I move on to ask your view on the way in which the Directive deals with the case where the fear of persecution in his country of origin which is expressed by the asylum applicant is a fear which is derived from what he has done in the country from where he is seeking asylum. The way the Directive deals with it in Article 8(2) is to say that if he has done whatever he has done in the host country for the purpose of making himself a refugee, for the purpose of creating the likelihood of his persecution if he goes

24 April 2002]

MR MICHAEL KINGSLEY-NYINAH, MR ANTONIO FORTIN
AND MR DAVID BLUNDELL

[Continued

Chairman *contd.*]

to his country of origin, in those cases his claim for refugee status should not be recognised. Do you have any comment on that?

(*Mr Fortin*) This is indeed a very difficult question, a difficult problem to deal with. What the Convention requires is that the person has to demonstrate that he or she has a well-founded fear of being persecuted for one of the reasons. No mention is made in the text of the motives or the good faith that the person could hold.

98. In the Geneva Convention text?

(*Mr Fortin*) In the Geneva Convention. So the objective fact that the individual may face persecution on return for one of the reasons should be sufficient for recognition of his or her status as a refugee. We have insisted that this is the only interpretation that can be given to the text. We also understand that it is detrimental to the system of asylum that people should abuse and should resort to self-serving activities in order to get recognition as refugees and start making all sorts of noises against the regime in their country of origin with this specific purpose. But I think that there is a practical way in which this could be somehow modified, this strict interpretation of the Article, and what I would suggest to you is the following. When somebody is clearly manufacturing a claim, making things in order to get a claim, that is often evident to all, to the authorities of the host country as well as to the authorities of the country of origin, and, since the person has to prove that there is a reasonable likelihood of a fear of persecution in the country, it could be argued that the authorities of the country of origin will not really have great interest in persecuting people who are doing these foolish things and making these type of statements when it is apparent that this does not represent a genuine political threat to the regime. Something is clear that it has nothing to do with that, so that, in assessing the likelihood of a persecution, that could be used, and said, "The fact that you protested in front of your embassy will not create a serious problem for you, therefore your fear is not well-founded."

99. That is a very interesting approach, if I may say so. It is entirely pragmatic and perhaps that is what it should be. Thank you. What about the question where the threats emanating from the country of origin are threats not by the state, not by the recognised authority, but by non-state actors in the country of origin? I think there are some members of the European Union which do not regard threats of persecution, otherwise than from the state, as constituting the right sort of threat to justify Geneva Convention status. There is an attempt in this Directive to cater for that and to make clear that threats from non-state actors may be sufficient. That produces a problem with Germany, does it not, which I think has traditionally fairly consistently not accepted threats from non-state actors.

(*Mr Fortin*) Yes. In effect, my Lord Chairman, I suspect that at the beginning, when the Geneva Convention was adopted, what everybody had in mind was that the state was the persecutor. In those days, the human rights' instruments were established to protect the individual *vis-a-vis* the state, that was the origin, so that it was almost normal to assume

that it was protection against the state. But the practice of the states has evolved very considerably and in 1979 our office issued a handbook on the examination of refugee status where it is stated that if the threat comes from non-state agents and the state is unwilling or unable to protect the person, then the person should also qualify for refugee status. I must perhaps add that there are two different situations here. If non-state agents are threatening the person for a Convention reason and the state is unwilling or unable to protect, then the person may qualify as a refugee. If the threat is not for a Convention reason—it may be settlement of a promise of criminal activity, Mafia type of threats—but the state is unwilling to protect for a Convention reason then there is persecution. The Convention reason must be in the mind of somebody. But if the threat is not for a Convention reason and the state is unable—truly unable, willing but unable—then there is no refugee claim.

100. Do you think Article 9(1) in the proposed directive deals with this problem adequately?

(*Mr Fortin*) We think it does. It covers this.

Lord Lester of Herne Hill

101. I wonder if I may just go back to Article 8. My Lord Chairman referred to your answer as being pragmatic, which I think is correct. But may I just say that I, for my part, cannot understand how one can interpret Article 8 in any principled or consistent sense. I will not waste time going through the whole thing now but it seems to me to contain a number of completely inconsistent propositions. If one takes the case of a political dissident who makes very strong statements attacking the regime of the country from which he left and then applies under Article 8, I find it impossible to see how anyone could come to a principled decision on the basis of it, and I wonder whether you share that view or whether you can explain how one could apply these different criteria in a principled way to a strong and extreme expression of political dissent.

(*Mr Fortin*) Thank you for your question. I would say that we do agree that this text is not clear and is even contradictory as it is—the more so if one looks at the explanatory memorandum that accompanies it, because that says the contrary, in effect. It was, we understand, a difficult political balance that had to be made. The issue is very difficult to resolve and this suggestion that I was making is not a legal one but rather is a pragmatic one. I can understand it is difficult for a legal text to include these considerations, but it is ...

102. Could I supplement my question. If one is looking at this in human rights terms and the right to free speech under the Human Rights Convention, and reading the Directive in accordance with that, it becomes even more difficult to understand how Article 8 can operate. It seems to me that it is not very well designed in terms of free speech and human rights, but I wonder whether you think that is rubbish or not.

(*Mr Fortin*) I think that is a very pertinent point. If I may take one minute to address that point. We tend to think that, yes, the right of freedom of expression

24 April 2002]

MR MICHAEL KINGSLEY-NYINAH, MR ANTONIO FORTIN
AND MR DAVID BLUNDELL

[Continued

Lord Lester of Herne Hill *contd.*]

is an absolute right and people should not be denied that right, but, on the other hand, not everybody has a need to express his or her views in the same forceful manner. If, let us say, a professor of philosophy is prevented from expressing his or her views, that may amount to persecution. If somebody who has a completely different activity is afraid of something where expression of opinion has no particular relevance, he cannot just leave the country and say, "I apply for asylum because I cannot say the things that I want to say in my country." It depends on the individual. The subjective effect of the limitation of the right is very important and must be judged. Freedom of the press may not be as relevant for a person who is illiterate than for the person who is a journalist. The same limitation may affect different people.

Lord Brennan: It is very important for the Commission, if I may suggest to you, Mr Fortin, in dealing with the question of persecution by non-state actors, to give examples of the submissions you might make to the Commission in Brussels. And, to rescue Germany's reputation in this regard, you maybe remember the Colombian judges who were persecuted by drug traffickers or right-wing extremists or FRAC, who went to Germany, where there was a programme of asylum relief given to them by the German judges which paid for several years of residence in Germany and training whilst they were outside Colombia. I think giving those examples is a very effective way of concentrating the drafter's mind on the reality of life. I think the argument about non-state actors is entirely academic. Practically speaking, states do that already, if only through their citizens.

Chairman: I hope I was not unkind in mentioning Germany. I had Somalia particularly in mind, because my understanding is that Germany has reduced refugee status under the Convention to people coming from Somalia, on the grounds that the persecution they fear from the warlords who are opposed to the group to which they belong is not state and therefore their fear does not qualify. However, be that as it may, I think Lord Mayhew had a question.

Lord Mayhew of

103. Thank you, my Lord Chairman. Just at the risk of being a little untidy, could we go back to Article 8 again. I think it is important that we should understand your organisation's approach to it. I have understood your view that it is nothing really practically to worry about because, if somebody for the sole purpose of creating the conditions that would entitle him to asylum were to behave in the right way, people at the other end would say, "We are not really very concerned about this" and therefore no well-founded fear would exist. But one can visualise circumstances, can one not, where so liberal a view would not be taken? I wanted to know whether the view is taken by UNHCR that the sole purpose is actually rather offensive because it imports a subjective element into what hitherto has always

been tested objectively. If you do—which is what I gathered from your own memorandum, I think in paragraph 26—I would like just to ask whether you do not think that it is entirely reasonable that a requested state should say, "You have done this absolutely deliberately with this 'sole purpose'"—which is the wording of Article 8—"and therefore we regard you as having disqualified yourself because of what you have sought to do. You came here without a well-qualified fear, well-founded fear, and, hey presto, you have now created one yourself." Is that not a reasonable attitude to take?

(*Mr Fortin*) I personally think it is reasonable but the thing is that there are some exclusion clauses in the Convention. There are circumstances which exclude individuals who otherwise have a fear of persecution from the protection of the Convention and that should have been probably one exclusion clause, if that line is adopted—that people who create fear of persecution voluntarily should not be protected—but, in effect, no exclusion clause to that effect was included in the Convention. The Convention says that if you have a well-founded fear of persecution, you should be recognised as a refugee. You will be excluded if you have committed a serious crime or if you have committed crimes against peace or crimes against humanity, etc—the exclusions are very specific—but nothing was said about, "You will be not protected if you have manufactured your claim." That is our main argument.

104. Could I ask a supplementary on that point. At the very beginning of this afternoon, you suggested, as I understand it, that there might be written into the Directive an assertion that it is in conformity with the Convention. But if it is not in conformity with the Convention, saying that it is will not help, will it?

(*Mr Fortin*) The application of the Directive may be challenged before the court in Luxembourg, the European Court of Justice, and the application of the Convention may be challenged by States Parties. Before the International Court of Justice in the Hague. What I was suggesting, if there is any doubt about the interpretation—and I am sure that there will be – is that should be the last and the final opinion or decision on the authentic interpretation.

Viscount Bledisloe: Is there not really a simple answer to this. The man who is about to be sent home goes outside his embassy and shouts a lot of slogans and tears up the flag and this sort of thing, but he is not actually being persecuted on account of political opinion at all because he does not hold that political opinion. He is just shouting those words in the hope of getting refugee status.

Chairman

105. I think that is the point Mr Fortin has already made. That was the distinction you were drawing between a manifestation of animosity to the regime which is genuinely held and a manifestation of animosity which is spurious.

(*Mr Fortin*) Yes.

Lord Lester of Herne Hill: How on earth one determines that question, whether one is a carpenter, a professor or a journalist, with different free speech

24 April 2002]

MR MICHAEL KINGSLEY-NYINAH, MR ANTONIO FORTIN
AND MR DAVID BLUNDELL

[Continued

Chairman *contd.*]

rights, I cannot imagine. If someone is a political dissident from a political place and comes to this country, for example, and then is very outspoken in seeking the overthrow of a totalitarian regime, I find it very hard to imagine how one ascertains whether his strongly held political views are for the purpose of manufacturing a claim or are genuinely held.

Viscount Bledisloe: This person, by definition, has not held those political views in this country.

Chairman

106. May I draw this to a conclusion. The opportunity we have is to have Mr Fortin's views, not to argue among ourselves. Mr Fortin, can I take you on to Article 9. You have been kind enough to make some comments about Article 9(1). Article 9(3) is another side of the same coin. (Another side? Coins generally have only two, but there we are!) It deals with non-state actors as being protectors in the country of origin, as opposed to persecutors in the country of origin. Would you regard it as adequate from the Geneva Convention point of view for refugee status to be refused where the person was fearing persecution by the state in his country of origin but the proposition was that there would be non-state actors who could offer the requisite protection to him in his country of origin? That is the proposition implicit in Article 9(3). The proposition is that—again perhaps a pragmatic approach – that he would not be a refugee because he would be able to get effective protection within his own country from his own state.

(Mr Fortin) We do not really agree with the way in which this is presented in the Directive. First of all, the Convention requires that the person has a well-founded fear of being persecuted. The question of protection or not is not an element in the Convention but it is an element to assess whether the fear is well-founded or not. Because if the person has a threat and there is sufficient protection provided that will eliminate or make the materialisation of the threat unlikely, the fear is not well-founded and therefore that person cannot claim truthfully that he or she has a well-founded fear of being persecuted.

107. Can I try to put the example more closely by reference to Somalia. There are number of warlords controlling various parts of the country. An individual arrives in this country, let us say, or some other Member State, and claims refugee status on the ground that one band of warlords is persecuting him and he is under threat. Would it be an answer to his claim, if in other respects it was well-founded, to say, "If you go to another part, there is a warlord there who will effectively protect you"?

(Mr Fortin) It could be under certain circumstances, but rather the answer should be, "If you move to another part of the territory, the fear of persecution will disappear because you will not have a well-founded fear of being persecuted in other parts." It is not that you "will be protected against a threat" because, basically, the threat will no longer be there, it will disappear. But we consider that the state, when we talk about state, also includes state-like entities. So whoever has control over the territory

and over the population and *de facto* exercises the normal functions of a state should be considered as sufficient protection, if you wish, but should be considered as sufficient authority, even though that may not be, from the legal point of view, the state authority. We have talked about the situation in Somali land, for instance, where it may not be a recognised state but there is the *de facto* state and that is sufficient. There is no need for more.

Lord Richard

108. What about in a civil war situation?

(Mr Fortin) In a civil war situation there may be different parts of the territory that are under control.

109. In relation to this state protection point, where part of the state has been taken over by insurrection or civil war, if somebody is being persecuted by the authorities in that part of the state but the state itself is doing its best to prevent the persecution.

(Mr Fortin) We think what has to be judged—and this is depending on the facts of the case—is the effectiveness of that protection, if the state, even in the case of a situation of war, may ensure that at least there is a minimum guarantee or minimum respect for certain rights. But it is difficult to give an answer applicable to all situations.

Lord Plant of Highfield: Really following up this point, I am rather worried about this sort of provision and it does seem to me that it is worthwhile drawing a distinction between, in the context of warlords in Somalia, a sort of quasi-state run by a warlord and, say, the protection afforded by a UN force which may presumably be acting under some kind of mandate. The UN is not a state, nevertheless, if you are living within the boundaries of a territory where the UN have the mandate to act and to keep peace and so forth, that seems to be quite different from a warlord operating in a particular kind of area. I can see the case for recognising the lack of founded claim in relationship to something like the UN. I find it much more dubious in the case of a sort of warlord situation.

Chairman

110. Mr Fortin, would it be a fair summary of your position to say that here too you take a very pragmatic approach. It is not a legalistic one. It is dependent on the *de facto* protection that is available to the individual in fact in the country in question.

(Mr Fortin) Absolutely.

111. And that would be sufficient, in your view, to satisfy whatever the Convention requirements were in regard to that person.

(Mr Fortin) I would say that I fully agree, and I think that if the person has a fear of persecution for a Convention reason and there is nobody who can prevent that and protect to the extent that this fear will not become a reality, then the person has a good claim for refugee status. If there is the state who is able to protect or to prevent the materialisation of the threat, or if there is any other entity who can do

24 April 2002]

MR MICHAEL KINGSLEY-NYINAH, MR ANTONIO FORTIN
AND MR DAVID BLUNDELL

[Continued

Chairman *contd.*]

that, the fear will be not well-founded and therefore the claim will not have a basis. In that sense it is very pragmatic.

112. Thank you. Can I now move on to another matter and ask for your help on it. Under the proposed refugee status Directive an individual can qualify not only if he is a Geneva Convention refugee but also if he is a person entitled to protection under some other international instrument. Subsidiary protection, it is described as. The criterion for giving subsidiary protection is said to be “serious and unjustified harm” if the protection is not given. What are your views as to the second of those criteria? What is “unjustified”? What does “unjustified” add to “serious” do you think?

(*Mr Fortin*) We think that this is a confusion in the Directive. It is a mistake, in effect. We say that for persecution to be relevant, the harm that the person fears must not be justified. The reason is this: If a person who commits a crime is sent to gaol, there is no doubt that this is a harm that is inflicted and that freedom of movement is restricted severely, but it is perfectly justified. So that it is not persecution but punishment. It is something different. Persecution is always an unjustified harm. It cannot be justified. If it is justified, then it is not persecution. But that applies to persecution, and I think that there was a confusion on the part of the drafters of the Directive because when we talk about a situation which is not persecution—people who are fleeing a situation of conflict, of violence, or who are feeling the possibility of being tortured—you cannot justify that. Nobody can be tortured under the law. People may be sent to gaol under the law, but not tortured. Nobody can justify that people are killed in a bombing of a town or are victims of violence. So that is an element completely irrelevant in the case of subsidiary protection, in our view.

113. You would argue that the words “and justified” ought to be deleted from the criterion.

(*Mr Fortin*) I would, yes.

Lord Lester of Herne Hill

114. If one looks at Article 15, that is because, in the first paragraph, paragraph (a), there are no circumstances in which “torture or inhuman or degrading treatment or punishment” can be justified. In paragraph (b) there is this curious concept of “violation of a human right, sufficiently severe to engage the Member State’s international obligations”—and I do not understand what that means at all—and in (c) there is the notion of an unjustified “threat to his or her life, safety or freedom as a result of indiscriminate violence ...” and so on. Is the problem that they are mixing up here in the same provision absolute protection (as with torture) and relative protection (as with other human rights where an interference may sometimes be justified) and they are seeking to do it just by putting in the words “unjustified harm” in a way which is inconsistent when applied to the various human rights. Is that the vice of this?

(*Mr Fortin*) Yes, and I would say more because I cannot see that the violation of human rights might be justified. What they want to say is that there are

limitations or restrictions that may be justified, but then we do not talk about the violation. The whole thing is very, very strange in that formulation.

Lord Mayhew of Twysden

115. I just want to be clear about one thing—I expect I should be already, but I am not, I am afraid. This question of unjustified harm arose in my Lord Chairman’s question to you in connection with Article 5 and subsidiary protection. I have taken on board and, if I may say so, completely agree with what you have said about the logic of adding those words there but “unjustified harm” appears in Article 11, does it not, in 1(a), where it is describing the nature of persecution. Your point is, have I got this right, that it should come out wherever it is to be found?

(*Mr Fortin*) Except where it refers to persecution. Persecution is unjustified harm always. If it is justified, it is not persecution. It may be something else. In the cases under the subsidiary protection regime, the harm cannot be justified or unjustified. It is always unjustified, in a way. As I said, if you send a person to gaol for having committed a crime, that is not persecution. That is perfectly justified, although it is harm to the rights of the person. So that, for harm to constitute persecution, it must be always unjustified.

Lord Mayhew of Twysden: I do not, I am afraid, at the moment understand how any infliction of serious harm on any of the grounds set out in 1(a) in Article 11 could be other than unjustified. Can you visualise circumstances in which it could?

Baroness Thomas of Walliswood: We are talking about persecution here.

Lord Mayhew of Twysden: I know we are talking about persecution. The argument which is brought forward to justify removing the words “unjustified harm” in Article 5 seems to me to be inapplicable, unless I am quite wrong—and I am quite prepared to believe I am—to persecution. What I am anxious to establish is whether you think that justified harm could be inflicted of a serious character in circumstances described in 1(a) of Article 11.

Chairman

116. I think the logic is that it could not.

(*Mr Fortin*) My understanding is that it would be correct in Article 11 because we are talking about persecution and persecution is always unjust. But the rest is ...

Chairman: But then you do not need it. Then it is strictly superfluous, having regard to what you say, in Article 11 1(a). Then the meaning would be adequately expressed if it said the “infliction of serious harm”. The words add nothing.

Viscount Bledisloe

117. Supposing membership of the IRA is a criminal offence in a country and a man is then going to be sent to prison for that. It is wholly justified in

24 April 2002]

MR MICHAEL KINGSLEY-NYINAH, MR ANTONIO FORTIN
AND MR DAVID BLUNDELL

[Continued

Viscount Bledisloe *contd.*]

accordance with the law of the country. Is that persecution?

(*Mr Fortin*) I would not say so.

118. So you do need “Unjustified harm” in Article 11.

(*Mr Fortin*) Yes.

Viscount Bledisloe: You do not need it in Article 15 because all the things in Article 15 are things which are themselves wrongful.

Lord Lester of Herne Hill: With respect to Viscount Bledisloe, in that case the IRA would not be being subjected to serious harm on the grounds of political opinion, but because of terrorist violence.

Viscount Bledisloe: It says “or membership of a particular social group.”

Chairman: Is the IRA a social group? I would doubt it. Here, again, this is *nisi* and we do not need it.

Baroness Thomas of Walliswood

119. My Lord Chairman, I thought I had understood the explanation that we had been given, that the words “and unjustified” are correctly included when you are talking about persecution, because that is simply the definition of persecution—that is what this Article 11 is about: it defines what persecution is—but they are not correctly inserted in Article 5(2) when we are talking about people who have subsidiary protection rights. Is that correct?

(*Mr Fortin*) Exactly.

Baroness Thomas of Walliswood: Thank you.

Chairman

120. Lady Thomas, I am much obliged to you. Thank you. Is there any drawback, in your opinion, in combining in this same Directive protection under the Geneva Convention, resulting from refugee status under the Convention, with the subsidiary protection that they are speaking of? Is this going to lead to any unnecessary confusion?

(*Mr Fortin*) My Lord Chairman, I would think that it is going to cover both situations and to ensure that protection is given to both categories of people. We have problems with the way in which the features of subsidiary protection are defined in this text. The Convention was meant to protect people who are the victims or the potential victims of persecution – and that is a very well-defined notion. The Convention was not meant to protect people who have to flee their countries because there is a situation of war that does not include a persecutory element—as in many cases. But in both cases these people need protection. If a person is going to be killed by the persecutor, or by a bomb the result will be, we think that both of them should be entitled to protection. But the way in which subsidiary protection is defined here is so broad that at the end it may subsume the whole refugee definition. One thinks about, for instance, the “violation of a human right, sufficiently severe to engage a Member State’s international obligations” apart from the criticism that may be made to the text itself. Well, persecution is always a violation of

human rights, a very severe one, and it is difficult sometimes to see where is the difference. One could say, “Well, this violation is not motivated on any of the grounds of the Convention,” that is true, but in practice may—

121. The effect on the individual is the same.

(*Mr Fortin*) Yes.

122. If one follows that on, is there any justification in your opinion for distinguishing between the content of the rights that are made available to Geneva Convention refugees and the content of the rights that are made available to those who can show they are entitled to subsidiary protection.

(*Mr Fortin*) We have expressed the view that there should be no difference in treatment because what matters are the needs and the needs are the same. Both categories need to work, to have education, to have medical care, etc, so there should be no difference between them, in our view.

Baroness Thomas of Walliswood

123. Does that also apply to the different length of time that is provided for granting of residence status for refugees and people with this subsidiary protection status? I do not have it in front of me, but I think it is four years for the first and one year. In both cases it can be carried forward. I did not quite see what the reason behind that was unless the writers of the Directive felt that people looking for a subsidiary level of protection might only need it on a more temporary basis. Is there any justification for that, do you think?

(*Mr Fortin*) That is a very generally held view, that subsidiary protection is shorter in time. There is nothing that would logically lead to that conclusion, I would say, but I would think that from a practical point of view there may be a difference. Where there is a state which persecutes individuals for reasons of race, religion, etc, the fact that persecution has ceased to exist and there is a change of circumstances may not be as clearly evident as in the case of the other reasons where the people are applying for subsidiary protection. Even sometimes there have been changes of regime—and I am thinking about when the Romanian regime changed—but the individuals were more or less the same, for a certain time at least, and the fear of persecution remained for some people. If people are escaping from a situation of war, the day that the war ends you can say, “There is no longer a war therefore you have no longer a reason.” It may be clearer to identify cases where the end of the need arises in the case of escaping war than when you are escaping persecution. Persecution is a very insidious thing and may happen in many ways. It is difficult to say, “From today on there is no longer persecution in this country.”

Chairman

124. But all that is saying is that as an issue of fact it may be more difficult to establish the end of the condition that has given rise to the need for protection. There have been references to subsidiary protection as giving temporary protection in a sense

24 April 2002]

MR MICHAEL KINGSLEY-NYINAH, MR ANTONIO FORTIN
AND MR DAVID BLUNDELL

[Continued

Chairman *contd.*]

that the refugee status does not. But the refugee status itself gives only temporary protection.

(*Mr Fortin*) Yes, exactly.

125. If the circumstances that bring the person within the Geneva Convention requirements cease, then he has no longer any right to remain.

(*Mr Fortin*) Absolutely. Exactly.

Lord Richard

126. Could I ask perhaps a more practical question. You have been discussing this with the Commission. Is there any give in the Commission on the drafting of this?

(*Mr Fortin*) I must say that the Commission was really very receptive to all our views. There were, I think, nine different drafts, successive drafts, and the first one was very different from the one that you have in front of you, so that they incorporated a number of our suggestions – not all, but there is a lot of influence of our—

127. This draft, you think, is the sort of semi-permanent one, if I can put it that way. It is the one that will go to the Council.

(*Mr Fortin*) We do not really have very definite indications about what the Council and the Member States are going to do with this, so that there may be changes but, in principle, it appears that they have considered it quite useful and a good basis for discussion and they have no major—except for the issues that may be controversial, like non-state agents of persecution, etc—

Chairman

128. My understanding is that it is thought that some Member States may have some reservations about the subsidiary protection part of this Directive in particular. That may perhaps be an explanation why it has received the treatment it has, giving rights

of rather reduced value compared with the rights given to those who are Geneva Convention refugees. Whatever lack of logic there may be, there may be a political reason for this. We have had the advantage of, and we are grateful for, your written comments on the Directive. Are there any other points that you think we should be bearing in mind as we scrutinise this Directive than those which have been drawn attention to this evening?

(*Mr Fortin*) My Lord Chairman, we had raised some concerns in our comments with regard to the terminology, the way in which the terms are used. “Refugee” is a term of art defined in the Convention and therefore we expected that the Directive would reproduce that definition as it is. They use the expression “international protection” wrongly in our view. What they mean is asylum, really. Asylum is the protection of the state. International protection is the protection of the UNHCR—on behalf of the international community, of course. We have questioned. We understand that the legal document may adopt whatever definition it wishes but, for the purposes of legislative technique, I would say that it is better to try to use the same terms to mean the same things in different documents. This is completely different from what we use really.

129. You want it to be more compatible with the language in the Convention.

(*Mr Fortin*) Exactly. Yes.

Chairman: Mr Fortin, Mr Kingsley-Nyinah and Mr Blundell, thank you all very much indeed for the very great assistance you have given us, and with your answers, Mr Fortin, this evening. It will be of value to us when we have to consider what comments we make about the Directive when we report to the House. We are very grateful to you indeed for coming.

WEDNESDAY 1 MAY 2002

Members Present:

<p>Bledisloe, V. Fraser of Carmyllie, L. Hunt of Wirrall, L. Lester of Herne Hill, L. Mayhew of Twysden, L.</p>	<p>Plant of Highfield, L. Richard, L. Scott of Foscote, L. (Chairman) Thomson of Monifieth, L.</p>
---	--

Memorandum by the Immigration Law Practitioners' Association

INTRODUCTION

1. ILPA welcomes the Commission's Proposal for a Council Directive laying down minimum standards for the qualification and status of third country nationals and stateless persons as refugees, in accordance with the 1951 Convention relating to the status of refugees and the 1967 Protocol (the "Refugee Convention"), or as persons who otherwise need international protection (the "Proposed Directive") as a significant step in the creation of a common European asylum system. It is clear that harmonisation of interpretation of international obligations as regards those seeking asylum is necessary given the wide divergence in interpretation across Member States at the present time.

2. However ILPA is anxious that any harmonisation should be at the highest levels only. Whilst ILPA considers that harmonisation of the asylum systems across EU Member States could potentially provide for better protection for refugees, fairer procedures and more uniform access to reception conditions, we are concerned that this will not ultimately be the case.

3. It is unsatisfactory that this directive, arguably the central plank to the asylum system, has been the last of the asylum directives to be proposed by the Commission. However, of greater concern is the fact that it appears to be one of the last to be considered by the Council. Given the number of issues that need to be resolved which underpin all the directives such as the ambiguity in whether any of the other proposed asylum directives will apply to those who are seeking protection outside the ambit of the Refugee Convention, it is essential that a full discussion of this directive takes place immediately.

4. ILPA welcomes the apparent reaffirmation of commitment to the Refugee Convention in the preamble to the proposed Directive and the fact that the proposed directive is made without prejudice to Member States' obligations under international human rights instruments. However, ILPA is concerned that the proposed directive appears to laying down rules for the interpretation of the Refugee Convention which may fall short of the requirements of Article 1(A) of the Refugee Convention and that primacy is not given to the Refugee Convention in cases of conflict between the Refugee Convention and the proposed directive. ILPA considers that it is essential that the proposed directive is amended to make specific reference to the primacy of the obligations of Member States under the Refugee Convention.

5. ILPA considers that the inclusion of "subsidiary protection" categories in this proposed directive is essential. However, we are concerned at the references to the temporary nature of subsidiary protection and the limitation of rights afforded to those in need of such protection. Given the fact that the proposed directive defines the scope of those in need of subsidiary protection in a limited way, it is entirely unjustified that protection afforded should be any more temporally limited than that protection afforded to those under the Refugee Convention, or that the rights accruing to such person should be any less than that which accrue to those qualifying as refugees.

6. Whilst the Explanatory Memorandum makes reference to the primacy of the Refugee Convention as justification for the temporal and qualitative difference in the protection offered, this does not provide a reason to grant those who are in need of subsidiary protection any lesser standard of protection. It is entirely undesirable and unjustifiable that those who may not be *refouled* as a result of the protection afforded by Article 3 of the European Convention on Human Rights (ECHR) for instance are provided with a lesser standard of protection than those protected by the Refugee Convention.

DETAILED COMMENTARY BY ARTICLES

Article 2 (Definitions)

7. Article 2(c) defines a refugee as a third country national or stateless person who fulfils the requirements of Article 1(A) of the Refugee Convention as interpreted by the rules laid down in the proposed directive. ILPA's concerns about this definition are two fold: firstly the restriction by nationality of the applicant and secondly the limitation to qualification by reference to the rules laid down by the proposed directive.

1 May 2002]

[Continued

8. ILPA considers that limiting the definition to third country nationals or stateless persons does not accord with the definition of a refugee as set out in the Refugee Convention itself and observe that this definition does not replicate the precise wording of the refugee definition contained in the Refugee Convention. Whilst it is acknowledged that it is very unlikely that nationals of the present EU Member States would have a need for refugee protection, this does not justify restricting the definition of an international instrument.

9. It should be recalled that in the coming years the European Union will be expanding to include a number of States, some of which are still refugee producing. Furthermore, the European Union should consider the “exportability” of its concepts and definitions in this field and consider the repercussions for other regions of the world if some States were to refuse to receive refugees from their neighbours.

10. As regards ILPA’s second concern, we consider that the qualification by reference to requirements of the rules laid down in the proposed directive itself does not give sufficient primacy to the Refugee Convention. If the rules laid down in the proposed directive were to conflict with the Refugee Convention then the latter would need to be given supremacy. The definition of a refugee is a person who fulfils the requirements of Article 1(A) of the Refugee Convention without any further qualification.

11. Article 2(e) defines international protection for persons not entitled to refugee status but who are otherwise in need of international protection as “subsidiary protection”. ILPA regards the term “complimentary protection” as more preferable, reflecting the fact that those who are in need of international protection do not form a lesser category of persons than Refugee Convention refugees, but are a category of persons protected by complimentary international human rights instruments, which are legally binding on Contracting States.

Article 4 (More favourable provisions)

12. Article 4 provides that Member States may retain or introduce more favourable standards in determining who qualifies as a refugee or as a person in need of subsidiary protection. As with all the other proposed directives in the asylum field, ILPA strongly believes that a standstill clause be included within the directive, to specifically preclude Member States from lowering their standards. Given the fact that there are weak provisions giving a great deal of flexibility to Member States included in all the proposed directives and there remains underlying the ultimate desire of Member States to protect themselves against “secondary movements of asylum seekers”, it is essential that the harmonisation process does not become a process whereby existing rights are eroded and standards are lowered in a race to the bottom. If Member States are committed to the highest standards of refugee protection, as many would claim, then a standstill clause should present no difficulties to them.

Article 5 (Elements of international protection)

13. Article 5 defines the “elements of international protection”. In Article 5(1) the personal scope of a refugee is again restricted to third country nationals and stateless persons. ILPA repeats its concerns about such restrictions and considers that Article 5(1) should be amended to reflect Article 1(A) of the Refugee Convention more accurately.

14. Article 5(2) makes provision for those who might qualify for subsidiary protection. ILPA is concerned at the reference in this paragraph to necessity of demonstrating that the applicant has suffered “**serious and unjustified harm**”. ILPA finds this qualification somewhat extraordinary given the fact this provision would purport to give effect to international human rights law and more particularly the European Convention on Human Rights. With regards to the ECHR serious harm may never be justifiable under Article 3, for instance, no matter what the circumstances in the country of origin or the behaviour of the applicant concerned. The explanation offered for the inclusion of the word (“that there are circumstances in which a state **may** be **justified** in taking measures that cause harm to individuals such as in the event of a public emergency or national security”) is wholly unconvincing in this respect and is given without reference to the fact that Article 15 permits no derogation whatsoever from Article 3 in any event.

Article 6 (Extension of international protection to the accompanying family members)

15. Article 6 provides that accompanying family members should be entitled to the same status as the applicant for international protection. Whilst ILPA welcomes this proposal, we consider that this provision must be amended to include those members of the applicant’s family who seek to join the applicant.

16. Furthermore it is essential that family members of a person seeking international protection should have access to the asylum procedure and procedure for applying for subsidiary protection in their own right if they so wish.

1 May 2002]

[Continued

Article 7 (Assessment of applications for international protection)

17. Article 7 sets out the matters to be taken into account when assessing a claim for international protection. ILPA is anxious that when assessing such claims that there is close adherence to the evidentiary standards and burdens laid down in the UNHCR Handbook and that applicants are given “the benefit of the doubt”.

18. To this end ILPA is concerned that the reference in Article 7(e) to whether there is “credible evidence that laws or regulations are in force and applied in practice in the country of origin which authorise or condone the persecution or the infliction of other serious harm to the applicant” might be taken as an evidentiary burden on the applicant. There will be many instances where laws or regulations on their face appear to be in line with international standards but in fact mask persecution of certain groups of persons.

19. Indeed ILPA is concerned that Article 7 as a whole does not reflect the substantive consideration which should be given to statements made by the applicant himself and that there may be an over-emphasis on an assessment of “objective” evidence concerning the applicant’s country of origin, which may be difficult to obtain and may in any event be out of date or inaccurate.

Article 8 (International Protection needs arising sur place)

20. Article 8 provides that a claim for international protection may be based on events which have taken place since the applicant has left his country of origin. Article 8(2), however, excludes from protection those who have engaged in activities for the sole purpose of creating the necessary conditions for making an application for international protection.

21. ILPA is acutely concerned at this qualification which is contrary to established case law and principle. Put shortly the assessment of a claim for international protection must be based on the need for that protection and the repercussions for the applicant if they are to be *refouled*, not on why that need comes about. Whilst there will doubtless be close scrutiny of an application that is based on “self serving” activities, if risk of harm is nonetheless established international protection must be given. There is no “good faith” requirement as such in the Refugee Convention or the ECHR. There is a very real danger that this provision will result in an over-emphasis in assessment of the motivations of the applicant rather than the assessment of the well foundedness of the claim that the applicant faces a risk of persecution on return to his country of origin. In any event ILPA considers that the assessment of motivation is extremely difficult for decision-makers.

Article 9 (Sources of harm and protection)

22. ILPA welcomes the provision in Article 9(1) outlining the sources of persecution in that it accords with the internationally accepted view and common jurisprudence of the majority of Member States that non-state actors may be agents of persecution for the purposes of Article 1(A) of the Refugee Convention. In ILPA’s view there is nothing in the language of the Refugee Convention that can support a suggestion that persecution must emanate from the State or be attributable to the State. ILPA’s experience suggests that the opposite view taken by a few Member States in the European Union is causing great difficulty in the working of the Dublin Convention, demonstrated by the number of cases taken to the courts in the UK, for instance, on the difference in approach. If this provision is not preserved by the Council, the cohesion of the European asylum system will be severely undermined.

23. ILPA has serious concerns about the remainder of Article 9 however. As regards Article 9(2) the Explanatory Memorandum explains that for the system to offer effective protection the State must be able and willing to operate it, such that there is no significant risk of persecution or other serious harms being realised. Unfortunately the wording of Article 9(2) itself does not reflect this and instead presents a rather more categorical and inflexible standard which does not address the complexities of the assessment that needs to be made.

24. ILPA is alarmed by the provision in Article 9(3) that international organisations and stable quasi-State authorities maybe considered as “State” protection for the purposes of the proposed directive. ILPA does not consider that non-State or quasi-State bodies can provide “protection” which is equivalent to that provided by a State. International organisations and quasi-State authorities are not parties to international human rights instruments and are therefore unaccountable in international law.

25. There are numerous examples in the last century of the inadequacy of protection offered by international organisations (eg Rwanda) which is unsurprising given that an international organisation is only likely to have limited control and authority over territory and will not be able to carry out the full functions of a State. Indeed we can think of no examples where international organisations have been given a sufficiently broad mandate over a sustained period of time to ensure sustained compliance with international human rights standards and full systems of law and order. Following the case of *Bankovic v Belgium and others* (European Court of Human Rights, December 2001) the question of the accountability of international organisations in international human rights law remains unresolved.

1 May 2002]

[Continued

26. Quasi-State authorities tend to be similarly transient, they may be unstable and their control will not necessarily even be accepted. Their political instability and the fact that they are not parties to international human rights instruments make them entirely unsuitable as protectors of human rights standards.

Article 10 (Internal protection)

27. Article 10 provides for the circumstances in which an applicant might be reasonably expected to return to another part of their own country. ILPA welcomes the provision which provides that there shall be a strong presumption against finding an internal flight alternative if the agent of persecution is, or is associated with, the State. ILPA further welcomes the inclusion of the personal circumstances which should be taken into account when considering the viability of internal flight alternative.

28. However, ILPA does caution generally against the use of the internal flight alternative concept. The concept is too readily used by Member States without a good understanding of the interconnection between different State and non-State bodies within a country of origin and without an understanding of the difficulties that an individual faces in internally relocating in a country in which he has been persecuted or faces a risk of persecution.

29. ILPA is concerned that the assessment of whether an applicant can be “reasonably” returned to another part of the country must ensure that the applicant can safely access the area of internal protection; that the internal flight alternative offers durable protection so that the applicant will not be forced back into the area where there is a risk of serious harm and that the protection afforded to the applicant is by a State body and not a non-State actor.

Article 11 (The nature of persecution)

30. Article 11 outlines the nature of persecution to be included in the qualification for refugee status. ILPA welcomes the fact that this provision does not preclude the further development of the law in this area and lays down only minimum standards. ILPA further welcomes the inclusion of prosecution and punishment in Article 1(1)(c) and the inclusion of conscientious objection to military service (Article 11(1)(d)).

31. ILPA has concerns, however, that Articles 11(1)(a) and (b) may be too prescriptive insofar as they purport to limit persecution to circumstances where there is a risk to a certain limited set of rights, namely “life, freedom or security” as being the only areas of concern or worthy of protection. ILPA considers that the serious infringement of any core human rights would constitute persecution.

32. ILPA is further concerned at the absence of reference to civil war and internal armed conflict as being a type of persecution in Article 11. Whilst it is accepted that not all civil wars or armed conflicts would give rise to persecution within the meaning of Article 1(A) of the Refugee Convention, it must be acknowledged that war and violence may be carried out in a way which victimises people on ethnic or religious grounds and that they may be instruments of persecution.

Article 12 (Reasons for Persecution)

33. Article 12 outlines the reasons for persecution which may give rise to refugee protection. ILPA welcomes the fact that these appear to be broadly interpreted and are couched in sufficiently permissive language so as to allow for further development in the law in this area.

34. ILPA is concerned, however, that the concept of “political opinion” may not be sufficiently broadly construed to take into account a person’s beliefs or thoughts rather than simply their “opinion” and would suggest the need for clarification of the term “political opinion” to include thoughts and beliefs.

Article 13 (Cessation of refugee status)

35. Article 13 outlines the circumstances in which refugee status may be revoked. ILPA welcomes the fact that this provision broadly concurs with Article 1C of the Refugee Convention and that the burden of proving that a person has ceased to be in need of protection is placed on the Member State.

36. However, ILPA is concerned at the absence of any reference to humanitarian or compelling reasons for a refugee refusing to avail himself of the protection of his country of origin. These might be due to the social, family and other ties that the refugee has made in the Member State and also due to the serious nature of the harm suffered by the refugee in the past making it unacceptable for him to ever return to his country. ILPA suggests that this provision is amended to include the provisions of Articles 1(c)(5) and (6) of the Refugee Convention.

1 May 2002]

[Continued

Article 14 (Exclusion from refugee status)

37. Article 14 outlines the circumstances in which Member States may exclude a person from attaining refugee status. ILPA accepts that this provision broadly concurs with Article 1F of the Refugee Convention. However, ILPA is concerned that family members of persons excluded under this provision should be given the opportunity to claim asylum in their own right.

Article 15 (Grounds for subsidiary protection)

38. Article 15 outlines the grounds on which a person may be granted subsidiary protection. ILPA welcomes the inclusion of subsidiary protection categories in this proposed directive which gives effect to Member State's obligations under a range of international human rights law instruments, most particularly Article 3 ECHR but also the UN Convention against Torture. However, ILPA considers that it is essential to ensure that subsidiary protection is not used where refugee status would in fact be applicable. There are a large number of cases which could clearly fall into both refugee status and subsidiary protection categories. However, in ILPA's view, particularly given the lesser rights that accrue to those with subsidiary protection status under this directive, it should only be granted where the person clearly falls outside of the Refugee Convention.

Article 16 (Cessation of subsidiary protection status)

39. Article 16 provides for the circumstances in which subsidiary protection status may be withdrawn. As with the cessation of refugee status, ILPA considers that the burden of proof for establishing that the circumstances in the country of origin have changed or cease to exist must lie with the Member States.

Article 17 (Exclusion from subsidiary protection status)

40. Article 17 provides for the circumstances in which a person is to be excluded from attaining subsidiary protection status. The provision specifically obliges Member States not to grant subsidiary protection to an applicant in specified circumstances which mirror those dealing with exclusion from refugee status. ILPA is extremely concerned at this provision. As the subsidiary protection status is intended to give effect to Member States obligations under international human rights law and most particularly Article 3 ECHR, the exclusion from status is unjustifiable and if applied will bring States into breach with international law instruments.

41. The European Court of Human Rights has, on a number of occasions, made clear that to remove a person to face torture or inhuman or degrading treatment or punishment would be a breach of the sending State's obligations under Article 3, no matter what the conduct of the applicant has been or what crimes he is accused of. Whilst the proposed Article 17 does not oblige State to remove applicants who fulfil the exclusion criteria, the failure to grant any status to such persons, who as a result of international law are irremovable, may in itself be inhuman or degrading and may lead to suffering and destitution by the applicant and his family members. Since in relation to Article 3 ECHR it is now trite law that such protection is wider than that contained in the Refugee Convention (see for example *Ahmed v Austria* (1997) 24 EHRR 278) ILPA can see no justification whatsoever for this provision.

Article 21 (Residence permits)

42. Article 21 provides that refugees and their accompanying family members be granted residence permits which are valid for five years and renewable automatically. It further provides that persons granted subsidiary protection status should be granted a residence permit valid for one year and automatically renewed until such time as the authorities establish that protection is no longer required. ILPA objects to the short duration of the residence permits granted to those afforded subsidiary protection status.

43. ILPA considers that residence permits of such duration will create unacceptable insecurity amongst people recognised as being in need of international protection and lead to their social exclusion. ILPA also considers that the annual renewal of residence permits places an undue administrative burden on the authorities which will lead to delays and further insecurity for the individuals concerned. The reality is that persons in need of international protection who fall outside of the Refugee Convention often have protection needs which are as long lasting in duration as refugees. Given the fact that the proposed directive already provides for the cessation of subsidiary protection status where the protection need no longer exists (Article 16) ILPA does not see that there is any justifiable reason for the short duration of the residence permits.

1 May 2002]

[Continued

Article 24 (Access to employment)

44. Whereas Articles 24(1) and (2) provide that refugees should be granted access to employment and vocational training immediately upon being granted refugee status, those granted subsidiary protection status may be required to wait six months before being permitted to work and one year before being permitted to access vocational training. ILPA finds the differentiation between the treatment of refugees and those with subsidiary protection status unacceptable and unjustified. Access to employment and vocational training are essential for the integration of persons within a community, allowing them to live with dignity in society and to provide for themselves.

Article 31 (Access to integration facilities)

45. Article 31 provides that refugees are eligible for integration programmes as soon as they attain refugee status, whereas those gaining subsidiary protection status may be precluded from such programmes for up to a year. ILPA again finds the difference in treatment between refugees and those with subsidiary protection status unjustifiable and unacceptable. It is essential that all persons in need of international protection are given facilities to promote their integration within society as soon as possible in order that they maintain their dignity and are able to participate in all aspects of society as soon as possible.

Article 33 (Co-operation)

46. Article 33 provides for measures to be taken to establish co-operation and exchange of information between Member States. ILPA is concerned that such co-operation and information exchanges should be carried out in a transparent manner enabling non-governmental organisations to be able to obtain information easily. Furthermore, Member States and the Commission should ensure that there is co-operation with non-governmental organisations so that their knowledge and resources are used.

April 2002

Memorandum by JUSTICE

1. JUSTICE is an all-party law reform and human rights organisation, with a long-standing interest and concern in asylum law and practice. We welcome the opportunity to comment on the proposed Directive. We have set out our main comments to the draft in the following few pages.

2. The proposed Directive is the final Proposal from the Commission on asylum. It is ironic that this was chronologically the last draft to be produced by the Commission, as the central issue in the asylum harmonisation process is deciding on a harmonised interpretation of the definition of a refugee under the UN Convention on Refugees (UN Convention). A harmonised definition would give applicants the same chance of protection being granted in each EU Member State. Had this Directive been drafted and agreed first, it would have been clearer to whom the draft Directives on minimum standards on procedures and on reception conditions applied.

3. JUSTICE in particular welcomes:

- the inclusion of non-state agents of persecution among the sources of persecution in the Directive;
- the specific reference to gender-specific and child specific persecution and the wide definition of the reasons for persecution, which includes under the concept of “social group” groups defined by sexual orientation, age or gender, amongst others; and
- the inclusion of subsidiary form of protection in the Draft Directive.

4. Our main concerns in relation to the Directive are the following:

- that it includes amongst the sources of protection, international organisations and stable quasi-State authorities;
- the internal protection provisions require Member States to only “have regard” to circumstances and respect for human rights in the part of the country to which people are to be returned. It does not require States to ensure that applicants’ human rights under international law will be guaranteed in the area to which they are returned;
- that the two provisions above may betray a weakening of the UN Convention.

SUBSIDIARY PROTECTION

5. JUSTICE welcomes the inclusion of subsidiary forms of protection within this Directive. This is the most logical and coherent approach, which reflects the rights of individuals under international human rights law. However, the fact that in the harmonisation process this is the only draft Directive which includes subsidiary protection, creates potential for inconsistency. The Commission itself pointed out that as the draft

1 May 2002]

[Continued

Directive on procedures does not cover subsidiary protection, and only covers applications under the UN Convention, this allows differences in States' practices to continue. If the Directives are agreed in their present forms this would mean that governments may apply a harmonised definition of subsidiary status, but may process these applications by different means.

6. JUSTICE strongly supports the Commission's view, which encourages governments to apply the procedures Directive to all applications for international protection, and suggest that to do otherwise may make the goal of limiting secondary movement, one of the aims of harmonisation, less achievable. Although this may not be as much an issue in the UK we believe it is one that is crucial to the harmonisation process.

NON-STATE AGENTS OF PERSECUTION

7. JUSTICE welcomes the inclusion of non-State agents of persecution among the sources of persecution in the draft. This was the most controversial issue in the drafting of the proposal. Certain States, Germany in particular, were greatly opposed to a definition that included non-State agents. However, the combined pressure from NGOs and MPs from various EU Member States proved sufficient to ensure that this was done. However, the major hurdle to overcome will be reaching agreement on the Directive drafted in these terms. As Germany, the only remaining EU Member State, which completely excludes non-State persecution, included non-State persecution within its draft Immigration Bill in November 2001, we hope there will be no compromise on this issue.

8. An interpretation of persecution which includes non-State agents of persecution is welcome, as it reflects the case law and current practice of the UK, which accepts such forms of persecution in limited circumstances, and most other EU Member States.

NON-STATE PROTECTION

9. JUSTICE is, however, concerned that the Directive provides for "quasi-State authorities", to be accepted as capable of providing "State" protection. There is no definition of what is a "quasi-State", and the draft Directive, may improperly restrict the concept of protection in the UN Convention to protection from persecution. Protection goes much further than that and embraces all the functions that a State has to ensure: law and order, respect for human rights and diplomatic and consular protection abroad. Quasi-States have no personality in international law and are thus incapable of performing these functions. We support the view espoused by UNHCR that a mere local administrative authority cannot substitute for the extensive measures of protection normally attributed to the exercise of State sovereignty.

10. JUSTICE believes that non-State protectors are not a logical converse to non-State agents of persecution. Non state persecution arises where victims are persecuted in circumstances when there is no State or State willing or able to protect them. But States protect from more than just persecution. "Quasi-State authorities" are not subject to international human rights obligations such as those under any UN Convention on Civil and Political Rights, the Convention Against Torture, The Convention Against Discrimination and the Convention on the Rights of the Child or regional human rights treaties. Having no international personality or status they cannot therefore be legally accountable for violations that might occur in the territories they control. These problems may be redressed where an international State with full accountability provides protection in an enclave of another State such as Kosovo, however to equate the squabbling factions of the Kurdish Autonomous region in Iraq with State protection is impermissible and inappropriate.

11. Whilst we welcome the requirement that non-State protection is effective, this term is controversial and open to a nuance of meanings. Further in the present context it begs the questions of protection from what? Current debates on returning Kurds to the Autonomous Region of Northern Iraq, or Somalis to parts of Somalia or Somaliland show the inherent problems in this approach. The UN Convention also does not recognise the protection of entities other than States, with the exception of Article 1(D) where protection or assistance is being provided by UNHCR.

INTERNAL PROTECTION

12. JUSTICE is concerned that the Directive contemplates that there may be an internal protection alternative where the State itself is the persecutor. We note that there is a "strong presumption" against finding internal protection to be a viable option when the persecutor is the State itself or is State-sponsored. However, this again betrays a weakening of the UN Convention concepts of protection in favour of ad hoc arrangements of debatable stability and validity. There is a risk that States will try to return applicants under this provision to situations in their country of origin where they may face danger, in order to reduce the number of applicants.

13. We consider that to mitigate this risk, as a minimum, further criteria should be added to the draft Directive requiring States to ensure that applicants' human rights under international law will be guaranteed

*1 May 2002]**[Continued*

in the area to which they are returned. The Draft merely requires States to “have regard to” respect for human rights in the alternative area. We recommend that criteria be added to the draft to ensure that:

- (i) there can be internal protection if the claimant is to be returned to an area where the persecutor or his servants or agents has access;
- (ii) that internal protection requires full respect for the claimants human rights as well as freedom from persecution from an established authority;
- (iii) that such an area of protection is safely and practicably accessible by the claimant; and
- (iv) there is no real possibility of removal from the safe areas, directly or indirectly to an unsafe area.

25 March 2002

Memorandum by the Refugee Council

1. THE REFUGEE COUNCIL

The Refugee Council is one of the largest non-governmental organisations in Europe working with refugees and asylum seekers. Our 180 members range from small, refugee community organisations to international NGOs, such as Oxfam and Save the Children. We are grateful for the opportunity to comment on this draft “definitions” directive, the keystone of the European Commission’s package of proposals relating to asylum.

The Refugee Council is itself a member of the European Council for Refugees and Exiles (ECRE), a network of 70 non-governmental refugee-assisting organisations in 28 countries. As we have provided the Committee with ECRE’s comments on the proposal, which represent the views of all those organisations, including the Refugee Council, we will confine ourselves to areas of particular concern to the Refugee Council or of special relevance to the UK.

2. OVERVIEW

The Refugee Council argued in our comments on the Proposal on minimum standards on asylum procedures that it is not appropriate to negotiate such standards without first agreeing upon a basic definition of who is or is not a refugee. Similarly, a common understanding of non-refugees in need of protection is needed urgently. In its absence, States have found it difficult to agree on the scope of other proposals, leaving serious holes in the asylum package.

We welcome the Commission’s initiative in uniting refugees and other persons in need of protection in a single instrument, rightly dubbed “the heart of a common European asylum system” in the Explanatory Memorandum (EM). We are pleased that the interpretation of the definition of a refugee, is reasonably “full and inclusive”, in line with the conclusions of the Tampere summit and that the rights attached to subsidiary protection are similar to those for refugees, with some important and regrettable differences.

This only reinforces our view on the order of negotiations. We regret that Spain, on assuming the Presidency of the European Council, has chosen to prioritise negotiations on minimum standards on reception and Dublin II, when it had the opportunity to focus on what is described in the Explanatory Memorandum: a common understanding of who qualifies for international protection under the Refugee Convention and an EU-wide complementary protection scheme.

We are encouraged by the statement in the Home Office EM that the “broader majority interpretation” of non-State persecution is a “key factor in establishing the level playing field for asylum applications and will help ensure the effectiveness of the Dublin Convention and its successor”. Given the lack of transparency of Council negotiations, we would be keen to learn the extent to which this enlightened self-interest will persuade the government to resist the kind of compromises that we have seen diluting other proposals in the asylum package.

Our view is that the role of a “level playing field” in refugee protection in Europe goes well beyond ensuring the effectiveness of the Dublin Convention and Dublin II in its current form. Unless the protection gap between EU States is addressed, Dublin becomes a potentially life-or-death lottery, as well as tearing at the fabric of EU solidarity by forcing courts to assess whether other EU States are meeting their protection obligations.

3. DEFINITIONS AND SCOPE

The definition of a refugee and others in need of protection should not be restricted to “third country nationals and stateless persons”. This appears to follow the Spanish Protocol to the Amsterdam Treaty in attempting to rule out asylum applications from nationals of EU Member States. We believe that no country can be declared safe for all its nationals for all time, let alone a group of 15 States that is soon to expand. Indeed it was the opinion of the Select Committee on the European Union itself that “there seems little value in the concept of ‘safe country of origin’”. (Report on Minimum Standards in Asylum Procedures.)

*1 May 2002]**[Continued*

The imminent enlargement of the Union raises the question of how groups, such as the Roma, who have been fleeing countries such as the Czech Republic and Poland and finding protection within the EU, would fare once those countries have become Member States, particularly in light of proposals to delay for some years the right of their nationals to move freely within the Union.

The apparent geographical restriction of the scope of the 1951 refugee convention to nationals of States outside of the EU is incompatible with the Convention and establishes a dangerous precedent for the rest of the world. EU policies have proven export value and other groupings of States might well decide to follow suit.

4. REFUGEES

The definition of sources of harm (Article 9.1) that includes non-State actors, where the State is unable or unwilling to provide effective protection is particularly welcome, in that it will close a significant “protection gap” between the UK and Germany and France, providing neither country succeeds in securing an opt out or other compromise prior to the proposal’s adoption by the European Council. The recognition of non-State persecution in new legislation currently before the German Bundestag may be an indication that this will be a rare example of the harmonisation process setting standards that do not merely legitimise the status quo, but instead force some States to raise their game.

We welcome the recognition that persecution may take a gendered form or be gender-specific (Article 7.4); that religious persecution can be targeted at atheists and those who abstain from formal religion (Article 12.2); and that “membership of a particular social group” includes groups defined by “relation to certain fundamental characteristics, such as sexual orientation, age and gender”, or comprising of persons who share a common background or characteristic [. . .] fundamental to identity or conscience” or groups treated as “inferior in the eyes of the law” (Article 12.4).

Our principal concern is the proposal that “‘State protection’ may also be provided by international organisations and stable State like authorities” (Article 9, paragraph 3). Neither international organisations nor “State like authorities” are subject to international law; they cannot therefore sign international human rights and so cannot be held accountable for safeguarding individuals’ human rights. The very absence of a state authority is an indication of political instability, at least in the long term.

It is hard to conceive of a situation where an authority that is not a State could be regarded as enjoying sufficient, durable stability and as having the political, military and civil police capacity that would enable it to offer a level of protection consistent with the 1951 refugee convention or the European Convention on Human Rights (ECHR). The recent history of international organisations providing “safe havens” is not a proud one, notably in Bosnia, but also in Kosovo, where UNMIK was dependent on NATO to provide military and civil security and has been unable to protect individuals, in particular minorities, from gross human rights violations.

5. SUBSIDIARY PROTECTION

The Refugee Council entirely supports the Home Office EM where it makes the case for limiting the difference between subsidiary protection and refugee status. We would argue that the rights attached to each status should be identical, and therefore think that the term “subsidiary” should be replaced with “complementary”. Once an individual has been recognised to be in need of protection, it seems perverse to treat them differently according to their motivation for fleeing their country. As the Home Office EM puts it, “an individual’s needs are the same regardless of the status granted; it would help limit the number of appeals by those refused refugee status but granted subsidiary protection; and meaningful rights, including full access to employment, are significant factors in encouraging genuine integration”.

It is our experience that one of the main reasons why people granted ELR in the UK appeal their refusal of asylum is because of differing rights to family reunion. This directive makes no mention of the right to family reunion for persons with subsidiary status, nor is it covered by the Family Reunion directive—a significant gap in the asylum package.

For many years the Refugee Council has drawn attention to the suffering of people who are separated from their families. As soon as a person is granted refugee status, their spouse and dependent children may join them without having to show that they will not be a burden on the State. A person who is granted ELR, on the other hand, must wait for four years, except in the rarest of compassionate circumstances, and the relative’s passport is stamped on arrival with “no recourse to public funds”. Once the years spent waiting for a decision on their asylum claim prior to the grant of ELR have been taken into account, it is easy to imagine how many children grow up and become ineligible before their parents win the right to have them join them. The distress this causes is rather harder to imagine.

For all the reasons mentioned in the Home Office EM, in particular the desirability of facilitating rapid integration, we believe that the rights attached to subsidiary protection status should be the same as for refugees. People with subsidiary status should not be faced, for example, with the insecurity of having to

*1 May 2002]**[Continued*

renew residents permits every year, as proposed in this directive, a requirement that would also place an unnecessary bureaucratic burden on the Home Office.

Delaying access to the labour market, vocational training and integration facilities is unfair, impractical and undermines the sensible long term of integration or voluntary return (it has long been the Refugee Council's view that such activities give people the confidence, independence and skills required, not just to integrate into the UK, but also to return to their country of origin, when the conditions are appropriate). It is unfair in that it makes the artificial distinction between the different categories of people in need of protection, irrespective of their needs. It creates practical difficulties by conflicting with the proposed minimum standards on reception. For example, an asylum seeker granted the right to work under the reception directive (after six months, according to the current draft) would be barred from working for six months upon being granted subsidiary protection.

Finally, we believe that Article 28 (unaccompanied minors) should make a specific reference to the Convention on the Rights of the Child, to which it owes much of its language. We also suggest that "an organisation which is responsible for the care and well-being of minors" should be seen as additional to a legal guardian, not as an alternative. The Refugee Council's Panel of Advisers, is such an organisation and widely regarded as an example of best practice in Europe. Nevertheless, panel advisors find themselves unable to make medical decisions in the best interest of the child and can have difficulty in obtaining essential documents or even in gaining access to the child, because they lack the status of legal guardian.

March 2002

Memorandum by the European Council on Refugees and Exiles

INTRODUCTION

The European Council on Refugees and Exiles (ECRE) is a network of some 70 non-governmental refugee-assisting organisations in 28 European countries. ECRE welcomes this opportunity to comment on the 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 presented by the Commission in September 2001 (henceforth the "Proposal")¹.

SUMMARY OF VIEWS

The Commission's proposal lays down rules for determining which applicants for international protection qualify for refugee status and which qualify for subsidiary protection status. It further establishes minimum standards of treatment for persons qualified for refugee status or subsidiary protection.

ECRE has long advocated that a harmonised interpretation of the Refugee Convention is "possibly the single most important factor in the creation of a common European asylum system and should be dealt with sooner rather than later"². Within this context, we welcome the introduction of the Commission Proposal. We are concerned, however, that Member States do not plan to seek an agreement on who qualifies for refugee or subsidiary protection before deciding on the other asylum directives currently under discussion. We believe that the foundation of a common asylum system must be a common understanding of who qualifies for refugee or subsidiary protection before deciding on the other asylum directives currently under discussion. We believe that the foundation of a common asylum system must be a common understanding of who qualifies for international protection under the Refugee Convention and an EU-wide complementary protection scheme. The adoption of a common definition should precede a final agreement on common standards for asylum procedures and reception conditions.

ECRE welcomes the affirmation in paragraph 3 of the Proposal's Preamble that "the Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees". In particular, we note with appreciation paragraph 12 of the Preamble confirming that "minimum standards . . . should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention". This formulation is important as it serves to highlight the relationship between the 1951 Refugee Convention and the Draft Directive on the qualification for refugee status and firmly sets out the Convention's primacy as the standpoint where the development of minimum standards should proceed from.

ECRE considers that in many aspects, the proposal on qualification for refugee or subsidiary protection is close to a "full and inclusive" interpretation of the Refugee Convention as advocated by the Conclusions of the Presidency at the Tampere European Council in October 1999. It is sensible to have combined the interpretation of who is a refugee and the definition of others in need of protection in a single proposal. Any agreement on a complementary status will in itself be a recognition of obligations under human rights law

¹ See also, ECRE's Positions on the Interpretation of Article 1 of the Refugee Convention and on Complementary Protection, (September 2000).

² ECRE Observations on the Presidency Conclusions of the Tampere European Council, 15–16 October 1999.

1 May 2002]

[Continued

and we welcome the proposal to grant similar rights to those people as enjoyed by refugees. ECRE has noted a number of positive features of the draft directive and would highlight the following as being its main strengths:

- the recognition of refugees status is a declaratory act (Preamble, paragraph 10);
- the duty of protection inheres “at the border or on the territory” of a Member State (Article 3);
- past persecution is considered to be strongly probative of forward looking risk (Article 7.3);
- persecution may take a gendered form or be gender- or child-specific (Article 7.4);
- a correct definition of sources of harm is adopted that includes non-State actors where the State is unable or unwilling to provide effective protection (Articles 9.1 and 11(2)(a));
- a strong presumption against finding “internal protection” is recommended if the agent of persecution is or is associated with national government (Article 10.2). In considering whether it is reasonable to return applicants to another part of the country, “reasonableness” is qualified to require consideration of both respect for human rights and particular personal circumstances (Article 10.3);
- a well-founded fear of being persecuted has to be objectively established, thereby eliminating the risk of denying refugee status to a person who is deemed not to be sufficiently subjectively fearful (Articles 7(b) and 11);
- a claim based on “membership of a particular social group” includes groups defined by “relation to certain fundamental characteristics, such as sexual orientation, age and gender”, or comprising of persons who share a common background or characteristic . . . fundamental to identity or conscience” or groups treated as “inferior in the eyes of the law” (Article 12.4);
- exclusion from refugee protection is to be based solely “on the personal and knowing conduct of the person concerned” (Article 14.3);
- the grounds for qualification for subsidiary protection status are reasonably broad and inclusive (Article 15);
- the refugee rights set out in the draft directive are “without prejudice” to the rights provided by the Refugee Convention (Article 18.1); and
- the level of rights set out in the draft directive for persons granted subsidiary protection is adequate with some exceptions, which will be outlined below.

ECRE believes that the proposal as drafted by the European Commission represents a solid basis for the adoption of EU minimum standards for the qualification and status of persons as refugees or as persons who otherwise need international protection. Our main concerns relate to the following provisions:

(i) *Paragraph 3, Article 9*

ECRE is firmly of the view that neither stable State-like authorities nor international organisations can be considered to be sources of protection from persecution or serious harm. They are not bodies that are subject to international law and therefore are not and cannot be parties to international human rights instruments. Further, State-like authorities are not stable enough to warrant full respect of human rights as enshrined in international legal instruments. We urge the deletion of Article 9(3).

(ii) *Article 10*

ECRE considers that in applying the “reasonableness” test for the internal protection alternative, additional criteria need to be used to avoid the risk of administrative or judicial subjectivity. In particular, consideration should be given to whether the claimant is able to access the area of internal protection in safety and dignity and legally, and whether the area of internal protection is free from conditions which could force the rejected claimant back into the area where there is a risk of serious harm for a Convention reason.

(iii) *Articles 21, 24 and 31*

ECRE believes that any rights accruing to Convention refugees should be granted to all persons afforded subsidiary protection. These should include the right to a residence permit of the same duration as that granted to Convention refugees, the right to employment and self-employment without any restrictions and the right of access to integration programmes upon status determination. They should also include the right to family reunification, a right which regrettably is unlikely to be extended to persons with subsidiary protection under the future Directive on the right to family reunification.

(iv) Finally, ECRE is concerned by the absence of any provisions in the Proposal in relation to Article 34 of the Refugee Convention on the naturalisation of refugees.

*1 May 2002]**[Continued*

Comments on the Articles are presented in greater detail below. They follow the order of the Proposal.

CHAPTER I: SUBJECT MATTER AND DEFINITIONS

Article 2 (Definitions)

In this article, a “refugee” is defined as a “third country national or stateless person who fulfils the requirements of Article 1(A) of the Geneva Convention”. ECRE would wish to express concern about the wording in this definition which does not fully reflect Article 1A of the Refugee Convention and therefore risks effectively removing the right of EU citizens to claim asylum in a neighbouring EU State. This might have greater repercussions once the EU enlargement process has been completed than at the present moment. Given the export value of EU asylum policies, it also sets a very bad precedent for other regions of the world.

ECRE recommends that the wording of this Article is amended and the term “third country national or stateless person” is replaced by the term “any person”. Articles 3 and 5 should also be amended accordingly.

Further, ECRE is disappointed by the choice of term “subsidiary protection” in the draft directive. ECRE prefers “complementary protection”; a term that clearly highlights the supporting nature such a status plays to the Refugee Convention and that non-Refugee Convention refugees are not in a lesser need of international protection.

Article 6 (Extension of international protection to the accompanying family members)

Article 6 proposes that accompanying family members should be entitled to the same status as the applicant for international protection. ECRE would recommend that in addition to accompanying family members, **joining members should also be granted the same legal status and facilities as the head of the family.** If this is undesirable or incompatible with their personal legal status, family members should be granted a residence permit which confers on them the same rights as those granted to the principal applicant.

Further, family members of a person granted subsidiary protection should have access to the asylum procedure and potentially to refugee status “if they can invoke reasons on their own account for applying for recognition as refugees under the 1951 Convention”.³

Article 7 (Assessment of applications for international protection)

This article outlines the factors that need to be taken into account when assessing an applicant’s fear of being persecuted or exposed to serious and unjustified harm. **In ECRE’s view, consideration should also be given to the statements made by the asylum applicants with the purpose of substantiating his/her claim.**

ECRE believes that in the absence of evidence to substantiate some aspects of the applicant’s statement, the benefit of the doubt should be given provided that all available information has been examined and the applicant has been able to show that his/her fear of persecution is a reasonable one.⁴

Article 8 (International protection needs arising sur place)

Article 8 proposes that refugee status should be denied if the applicant engages in activities for the sole purpose of creating the necessary conditions for making an application of international protection. In contrast, however, the Commentary to the Articles correctly observes that Member States should ensure that applicants are recognised as persons in need of international protection if the activities referred to in Article 8.2 “may reasonably be expected to come to the notice of the authorities of the individual’s country of origin, be treated by them as demonstrative of an adverse political or other protected opinion or characteristic, and give rise to a well-founded fear of being persecuted”. ECRE would like to firstly note that a person can genuinely take up a political conviction whilst outside his/her country of origin. We further consider that a political conviction may be attributed to the refugee claimant by the persecutor, notwithstanding a lack of real political conviction on his part. A well-founded fear of persecution can also arise where the persecutor in the country of origin knows or reasonably suspects, that someone has claimed asylum abroad. **Within this context, we endorse the position put forward in the commentary and recommend that the text of Article 8.2 be amended accordingly.**

³ UNHCR Handbook, paragraph 185. See also ExCom Conclusion No 24 (XXXII)—1981 paragraph 8.

⁴ See also, UNHCR Handbook, paragraph 203–04.

1 May 2002]

[Continued

Article 9 (Sources of harm and protection)

ECRE fully supports the inclusion of non-State actors of persecution among the sources of harm outlined in paragraph (c) of Article 9(1). It considers that this is in full agreement with the Refugee Convention and in particular Article 1(A)(2), the purpose of which is to provide protection to those who do not have the protection of their state of nationality or habitual residence. In ECRE's view, there is nothing in the wording of the Refugee Convention that suggests that persecution must emanate from the State or be attributable to the State due to complicity or toleration. With regard to the specific wording of Article 9(1)(c), ECRE would recommend that an additional point is added to explicitly account for cases of failed States where central government institutions have ceased or virtually ceased to exist.

ECRE would urge Member States to lend their full support at Council level to the Commission's inclusion of non-State actors of persecution among the sources of harm.

ECRE notes that in assessing the effectiveness of State protection, the Commentary correctly states, "for the system to offer effective protection, the State must be able and willing to operate it, such that there is no significant risk of persecution or other serious harm being realised". This position is regrettably not reflected in Article 9(2) which proposes a formalistic standard validating a denial of protection if the State takes reasonable steps to prevent the infliction of persecution or harm. **ECRE recommends that Article 9(2) be amended so that the actual effectiveness of State protective measures is taken into account when assessing the need for protection.**

ECRE is concerned by the provisions of paragraph 3 of Article 9. This proposes that "State" protection from persecution or serious unjustified harm may be provided by international organisations and stable State-like authorities who control a clearly defined territory. ECRE is firmly opposed to this view. State-like authorities are not and cannot be parties to international human rights instruments and therefore cannot be held accountable for non-compliance with international refugee and human rights obligations. Their lack of accountability in international law makes it impossible for persons living within their jurisdiction to hold them responsible at international level for ensuring that human rights standards are safeguarded. Further, ECRE would question whether State-like authorities can be stable and therefore in a position to ensure full compliance with human rights obligations. State-like authorities are often unable to claim undisputed control of a given territory on a continuous basis nor can they claim that they have the monopoly of exercise of legitimate power within the territory they control. By definition the preconditions necessary for political stability cannot be present in the case of State-like authorities given that these are the very preconditions that are characteristic to statehood.

With regard to the role of international organisations providing "State" protection, recent history has highlighted the ineffectiveness of such organisations in maintaining peace and security and guaranteeing human rights in conflict areas. This is far from surprising to the extent that to date no international organisation has been given the broad political mandate that is necessary for guaranteeing the protection of human rights and fully ensuring law and order. The problems in Kosovo provide the most current example. Further, important questions relating to the accountability of international organisations in international law remain unresolved.

ECRE recommends that paragraph 3 of Article 9 is deleted.

Article 10 (The Internal Protection Alternative IPA)

ECRE supports certain provisions of this article in particular with regard to the introduction of "a strong presumption against internal protection being a viable alternative to international protection if the agent of persecution is or is associated with the national government". We also endorse the provision that in examining whether an applicant can be reasonably returned to another part of the country, Member States shall consider "the security, political and social circumstances prevailing in that part of the country including the respect of human rights and . . . the personal circumstances of the applicant."

ECRE considers, however, that in applying the "reasonableness" test for the internal protection alternative, additional criteria need to be used in order to establish whether it would be "unduly harsh" to expect a person to go to such an area:

- the protection must be afforded by a *de jure* not just *de facto* authority. This is necessary given that *de facto* authorities are under no international legal obligation and often not in a position to safeguard human rights;
- the absence of a risk of serious harm for a Convention reason in the proposed site of internal protection must be objectively established, rather than being considered reasonably unlikely to occur;
- the claimant must be able to access the area of internal protection in safety and dignity and legally;

1 May 2002]

[Continued

- the area of internal protection must be free from conditions which could force the rejected claimant back into the area where there is a risk of serious harm for a Convention reason, ie it must offer a durable protection alternative and provide effective protection from *refoulement* to the area where the person fears persecution; and
- conditions in the area of internal protection must afford at least the same standard of protection of core human rights as the Refugee Convention does.

ECRE recommends that the above additional criteria are added to Article 10(2).

Article 11 (The nature of persecution)

ECRE welcomes the provision that the well-founded fear of being persecuted should be “objectively established”. It believes that this will eliminate the risk of denying protection to persons deemed not to be **sufficiently** subjectively fearful. ECRE also supports the inclusion of conscientious objection to military service among the grounds which might be used as a basis for recognition of refugee status. (Article 11(1)(d)). It finally endorses the provision that the risk of generalised oppression should not preclude the recognition of an applicant as a refugee (Article 11(2)(c)). This is in line with ECRE’s position that “generalised violence does not preclude the existence of a well-founded fear of persecution by an individual or a group of people”.⁵

One aspect of the proposed definition of persecution is of concern to ECRE. Article 11(1)(a) and (b) refers to harm or measures that constitute “a significant risk to the applicant’s life, freedom or security”. Here, we would recommend that in determining the existence of persecution, rather than focusing on a vague subset of human rights violations, namely life, freedom or security, consideration should be given to a risk of sustained or systematic denial of core human rights which all States are bound to respect as a minimum condition of legitimacy. The International Bill of Rights consisting of the Universal Declaration of Human Rights and the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights is central to an understanding of the minimum duty owed by a State to its nationals. We believe that the wording in Article 11(1)(a) and Article 11(1)(b) should be amended as follows “... **to constitute a denial of core human rights as enshrined in the International Bill of Human Rights . . .**”.

Furthermore, so as not to confuse interpretational issues relating to the nature of persecution with the reasons for persecution, we would suggest that the words “on the grounds of race, religion, nationality, political opinion or membership of a particular social group” be deleted from Article 11(1)(a).

Article 12 (The reasons for persecution)

ECRE is in agreement with the description of the four first elements which need to be taken into account when considering whether a well-founded fear of persecution is based on reasons of race, religion, nationality, membership of a particular social group or political opinion. In the definition of a social group, we agree with the Commentary that the concept “needs to be interpreted in a broad and inclusive manner” in order to evolve in line with society’s understanding of groups within it. We also support the Commentary’s view that “the concept is not confined to narrowly defined, small groups of persons and no voluntary associational relationship or *de facto* cohesion of members is required”. **We would recommend that these views are reflected in Article 12(4).**

With regard to the definition of “political opinion” however, ECRE considers it to be too limited, for it fails to take into account the true ambit of political opinion, which extends to the full spectrum of political rights entertained by the International Bill of Rights, to which the Refugee Convention itself makes reference in its Preamble. The need for the political opinion ground to be construed in this manner clearly arises from the role of the Refugee Convention in the protection of fundamental human rights, which prominently include the rights to freedom of thought and conscience, of opinion and expression and of assembly and association. Thus, even in contexts where the persecutor may be simply another private individual, if his persecutory actions against a claimant are motivated by an intention to stifle his or her beliefs, the opinion being imputed can be seen as political. Hence, in ECRE’s view, Article 12(e) ought to be amended as follows: **“the concept of political opinion shall include the holding of, or the being perceived as holding, an opinion, thought or belief 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.”**

Article 13 (Cessation of refugee status)

ECRE agrees with the provisions of this article which in most aspects reflect those of Article 1C of the Refugee Convention. We would propose that a provision is added to paragraph (e) **to ensure that Member**

⁵ Paragraph 3, ECRE Position on the Interpretation of Article 1 of the Refugee Convention.

1 May 2002]

[Continued

States exempt from the application of Article 13(e) refugees who are able to invoke compelling reasons arising out of previous persecution for refusing to avail themselves of the protection of the country of nationality or persons who cannot be expected to leave the Member State due to a long stay resulting in strong family, social and economic links in the country. This is referred to in the Commission's Commentary on Article 13 and should be reflected in the main text of the proposal.

Further, ECRE recommends that the Commentary's description of what constitutes "a profound and durable change of circumstances" should also be incorporated in the Proposal's main text.

Article 14 (Exclusion from refugee status)

ECRE agrees with this provision which fully reflects Article 1F of the Refugee Convention. Here, we would like to emphasise the importance of interpreting the exclusion clauses of the Refugee Convention restrictively and after extreme caution has been exercised given Article 1F's nature as a limitation on a human rights provision.

ECRE would also like to highlight the importance of ensuring that no provision in Article 14 results in the automatic exclusion from refugee status of family members of persons subject to exclusion under this Article. Family members should have the right to apply for and granted asylum on the basis of the merits of their individual application. **An amendment in Article 14 should be made to this effect.**

Article 15 (The grounds for subsidiary protection)

ECRE warmly welcomes the grounds for subsidiary protection set out in this Article. Here, however, we would emphasise that persecution for a Convention reason can and does occur in the situations described by Article 15. ECRE considers that a person who is outside his or her country of origin and cannot return owing to a well-founded fear of being subjected to serious and unjustified harm on the basis of torture or inhumane or degrading treatment or punishment (Article 15(a)), or violation of a human right (Article 15(b)) should only be granted subsidiary protection if it is not possible to demonstrate that the fear of torture or other treatment or violation of a right is for reason of race, nationality, religion, membership of a particular social group or political opinion. The same test should also apply in the case of persons fleeing armed conflict, a point explicitly acknowledged in Article 11(2)(c). In ECRE's view therefore subsidiary protection should only be seen as a residual status for categories of people in need of protection who clearly fall outside the Refugee Convention.

Article 16 (Cessation of subsidiary protection status)

ECRE believes that the language in this article should reflect that employed in Article 13(2) (Cessation of Refugee Status). There, it is stated that the Member State, which has granted refugee status, bears the burden of proof to establish that an individual has ceased to be in need of international protection. **ECRE therefore recommends that an additional paragraph be added to that effect.**

Article 21 (Residence permits)

This provision states that beneficiaries of subsidiary protection status and their family members should be granted a residence permit valid for at least one year with the residence permit being renewed at intervals of not less than one year until it is decided that such protection is no longer required. ECRE is concerned by this provision, as it will result in creating high levels of insecurity among persons in need of international protection for a non-Convention related reason. It believes that persons with complementary protection status should be treated in terms of duration of protection in the same way as Refugee Convention refugees, bearing in mind that both categories of protected persons have similar needs and circumstances and that successful integration into the asylum country requires a status that enables persons to develop a sense of long-term perspective for the future.

Article 22 (Long-term residence status)

ECRE notes with appreciation the language used in the Commentary on Article 22 where it is stated "beneficiaries of subsidiary protection are to be treated in the same way as refugees for the purposes of long-term residency because their needs and circumstances are much the same". It recommends that accordingly Article 3.2 of the Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents be amended.

*1 May 2002]**[Continued*

Article 24 (Access to employment)

This provision states that beneficiaries of subsidiary protection will be able to engage in employed and self-employed activities no later than six months after such status is granted. It also provides that holders of a subsidiary protection status should have the same access as nationals to employment-related education opportunities for adults “no later than one year after such status is granted”. ECRE affirms that employment restrictions upon status determination seriously hinder refugee integration in the long term as they risk pushing people into illegal work or encouraging dependency on public assistance. It also believes that restrictions in relation to access to vocational training have the negative effect of delaying considerably the process of acquisition of the skills and knowledge by persons in need of international protection that are necessary to access the labour market and live independently. In our view, **any rights accruing to Convention refugees should be granted to all persons afforded subsidiary protection. These should include the right to employment and self-employment without any restrictions as well as the right to vocational training and employment-related educational opportunities.**

Article 28 (Unaccompanied minors)

ECRE notes with appreciation the provisions of this article aiming specifically at the needs of unaccompanied minors. It would welcome, however, **a specific reference to the obligations under the Convention on the Rights of the Child under this article.** It would further recommend with regard to paragraph 1, that unaccompanied minors should be represented at all times by a legal guardian with the option of “representation by an organisation which is responsible for the care and well-being of minors”, being only considered as an addition rather than an alternative to a legal guardian. This is important given that the absence of legal guardianship can impede a person or organisation from acting in the best interests of a child (for example, they might be prevented from authorising medical treatment, obtaining necessary documents or even gaining access to the child). Legal guardianship should continue until the child is 18.

Article 31 (Access to integration facilities)

ECRE disagrees with the proposed provision that beneficiaries of subsidiary protection should have access to equivalent integration programmes to those available to refugees not later than one year after their status is granted. It considers that immediate access to integration services upon status determination is very important for promoting independence and facilitating refugee participation in all aspects of the economic, social, cultural, civil and political life of the country of asylum. **ECRE proposes that Article 31 should be amended to allow for persons with subsidiary protection to have the same access as refugees to integration programmes.**

Article 32 (Voluntary return)

ECRE is rather perplexed by the inclusion in this Directive of an article on voluntary return. There is no doubt that many refugees would wish to go back to their homeland as soon as the conditions are safe. In ECRE’s view however, it is inappropriate to address this issue in a document that aims at setting out the legal framework for granting and withdrawing international protection. Instead, this issue should be taken up as part of the Commission’s discussions on the development of the EU’s return policy.

Section 5.2 Actions envisaged and arrangements for budget intervention. Legislative Financial Statement

ECRE would welcome clarification as to the remit, composition and scope of the Contact Committee the Commission intends to establish to oversee the implementation of this directive.

*March 2002***Memorandum by Statewatch**

1. The Commission’s proposal is broadly very welcome. It is a comprehensive attempt to address the definition of refugee and subsidiary protection status and to define the content of that status, and generally aims at a high level of protection. It would therefore, subject to certain improvements discussed below, achieve the aim of reducing “secondary movements” of asylum-seekers without damaging the Community’s or Member States’ human rights obligations. The UK’s support for the proposal is therefore also very welcome.

2. The principal risk with this proposal is that some Member States might wish to reduce the minimum standards in the proposal to a lower level, or might lower their standards to the level set out in the Directive (if the standards are presently higher). The Commission should at the outset have suggested a “standstill” clause which would prevent the Member States from reducing the standards applicable in these areas from

*1 May 2002]**[Continued*

the date at which the Directive is adopted. This will be particularly necessary if the minimum standards in the final version of this Directive fall below the level which the Commission has initially proposed. For the same reasons, it is unfortunate that the Commission did not propose “standstill” clauses in the other asylum and migration proposals which it has made to date (in particular, the proposals on asylum procedures, reception conditions for asylum-seekers, family reunion, migration for employment or self-employment and long-term residents).

3. The biggest absence from this proposal is the lack of provisions concerning subsidiary protection other than rules on the definition and content of subsidiary protection status. The Commission has previously justified the absence of rules on procedures for determining such status, on reception conditions and on family reunion for persons with subsidiary protection, on the grounds that such matters could not be addressed until Member States had common rules on the definition of the status. Now that the Commission has proposed such common rules, there is no justification for waiting until the “second stage” of the Common European Asylum System to address such issues. This proposal should therefore contain an additional chapter containing rules on such issues, placing persons with subsidiary protection status on an equal footing with recognised Convention refugees.

4. Similarly there is no longer any convincing need to wait until the second stage of the Common European Asylum System to address the relationship between Geneva Convention status and subsidiary protection status. This proposal should therefore have included provisions providing for an “one stop” application (the simplest and most efficient way of considering claims for either form of status) and a simplified procedure for appealing a decision to refuse Geneva Convention status if subsidiary protection status is recognised instead.

5. Several aspects of the specific details of the proposal could be improved. The concept of “serious unjustified harm” implies that “serious harm” could potentially be justified, and an alternative phrase should be used to indicate that, for example, criminal sanctions against a person are not necessarily tantamount to persecution on Geneva Convention grounds or a risk of treatment covered by Article 15 of this proposal.

6. The concept of “internal protection” could be satisfied, according to proposed Article 9(3), include a concept of “non-state protection”. This concept would be difficult to apply in practice, because non-state agents controlling some or all of state territory are not signatory to human rights treaties and have intrinsic problems guaranteeing safety upon the entire territory. These entities would not have been trusted with the job of administering a territory if there were not a risk or a reality of conflict in the relevant territory to begin with, and moreover, their role is in principle transitional.

7. The “cessation” clause applying to persons with subsidiary protection (Article 16) does not specify (as does Article 13(2)) that Member States have the burden of proof when applying the clause. Moreover, neither Article 13 nor Article 16 refer to the principle in the UNHCR Handbook on refugee status that cessation should not be applied to a person whose experiences in the country of origin were so traumatic that return would be psychologically impossible, regardless of any change in circumstances.

8. The distinctions suggested between persons with refugee status and subsidiary protection status are not convincingly defended. Since both categories of persons are fleeing human rights violations, there is no logical reason to have different rules on residence permits, access to employment and vocational training, or access to integration programmes.

9. The “freedom of movement” clause (Article 30) only concerns movement within one Member State. At present, the residence permits which some Member States grant to beneficiaries of subsidiary protection are not recognised by the Schengen rules for the purpose of freedom to travel in the Schengen area. Similarly, the documents which the UK grants to persons with exceptional leave to remain are not necessarily recognised as valid travel documents by other Member States. This proposal should therefore have addressed in tandem the recognition of travel documents issued to persons with subsidiary protection (Article 23(2)) for both freedom to travel within the Schengen states and travel to and from the UK and Ireland and the Schengen states. Article 23(2) should also be amended to cover the situation where it would be dangerous to attempt to obtain a national passport; the current wording appears to cover only those cases where it would be legally or physically impossible to obtain one.

10. Finally, the proposal does not address the status of persons who would be excluded from both Convention refugee status and subsidiary protection status on grounds of their activities, but who still have a claim under international human rights instruments (such as the ECHR and the UN Convention Against Torture) to protection from removal to their country of origin (Articles 14 and 17). This absence could be significant if Member States take a wide view of the application of the “exclusion” clauses following the attacks on the United States. It would have been preferable either to address the status of such persons in this proposal, indicating what status should be extended to such persons, or to indicate that a separate proposal on such persons would be made in the near future.

8 March 2001

1 May 2002]

[Continued

Examination of Witnesses

MS NICOLA ROGERS, Immigration Law Practitioners' Association, MR NICHOLAS BLAKE QC, JUSTICE, MR NICK HARDWICK, the Refugee Council, and MR STEVE PEERS, Statewatch, examined.

Chairman

130. Thank you all very much indeed for coming this afternoon to help us with our scrutiny of the proposed Qualification and Status of Persons as Refugees Directive. As I mentioned outside, I think the best way of proceeding would be for me to identify the person who seems from the reading which we have had of your very helpful papers to be the person who should take the lead in answering a particular question and then when he or she has done that if any of the others want to add then that would be the moment to do that. I hope that seems satisfactory to you. May I start by asking a question about the relationship of the proposed Directive with the other EU instruments making up the package of four that are supposed to produce common treatment of asylum applicants across the European Union. This Directive dealing with status of refugees comes the last of the four, which some have thought a little odd. Mr Blake, do you want to comment on that?

(Mr Blake) Yes, my Lord Chairman. We observe that it creates the difficulty that if one has other measures, such as the Directive on which country should consider the asylum claim, in place before one has what an asylum claim is essentially, the Directive defining the common criteria of asylum, you are still going to get, different concepts of who deserves protection inside the EU. That leads to the problem that arose in a case that went to the Appellate Committee of your Lordship's House in the *Adam & Aitseger* case where Germany take one conception, we want to send the claimant back to Germany, they are returnable there under the Dublin Convention criteria which will come into the Directive, but the claimant is getting a different decision and, therefore, there is not one bite of the same cherry, which is the laudable object of these Conventions taken as a whole, but a simply different cherry. So to be told by Germany "you are not a refugee" when on the same facts and same criteria you would be here, it creates a problem.

131. And France as well, I recall.

(Mr Blake) And France as well. Shades of difference and ambiguity still operate between different countries on certain of those issues but the non-state issue of course is one critical issue which was identified as an issue of principle. At least these measures ought to be brought in together at the same time so there is an overall scheme whereby asylum seekers are being dealt with broadly fairly and consistently inside the EU States. At the moment, of course, they are getting the worst of both worlds because the Dublin Convention is to some extent in place as a governmental practice but it is not regarded as EU law, it does not give rise to any enforceable rights, so if there is a breach of its terms the individual claimant cannot go to the domestic courts and say "this decision is unlawful because it violates the Convention", but the Minister has now in mind legislative measures, or the Government has said "even if you are being returned to Germany there is nothing the courts can do about it", so there

is a protection gap at the moment which could create problems still in certain cases.

132. I think one of the features of this proposed Directive is that it resolves the problems with France and Germany as to how one defines refugees for the purposes of the Geneva Convention.

(Mr Blake) Certainly as regards this Directive one feature which is considered to be highly welcome is that there is encouragement for certain Member States to elevate up, as it were, the criteria and then there can be some degree of harmonisation of the essential concepts or a level playing field of not the lowest common denominator but an appropriate level of protection. That is desirable but until that is done you are still left to national case law, so the argument is perhaps you should not introduce the other Directives saying it is a requirement of Community law to send X to France and Germany until you have got the whole package in place.

133. Ms Rogers?

(Ms Rogers) If I might pick up on one point there, my Lord. In your Lordships' own report in the investigation into the Dublin II Convention your Lordships did point out that there was perhaps a more laudable alternative to that that is suggested in the Regulation to replace the Dublin Convention and that is that a person ought to be able to have their claim determined in the country in which they claim asylum. One of the reasons why the Commission is at the present time adverse to that is because they say there is not sufficient harmonisation in the systems of the Member States and until there is sufficient harmonisation it is not possible to come up with a better and a more workable Dublin solution. Would it not be better, more logical, to try and harmonise that criteria first and then deal with coming up with a proposal to replace the Dublin Convention rather than coming up with this Dublin II, quite a cumbersome piece of legislation and undoubtedly it is going to cause a lot of political difficulties as they argue between themselves as to what is or is not negotiable, and then two years, perhaps four years, down the line to have to go through the negotiation process all over again once in an attempt to achieve greater harmonisation? In our view it is illogical and time wasting to not determine what the criteria are, and who the criteria should be applied to first before going about devising all these very complicated systems to deal with asylum applications within the EU.

134. I find that quite interesting because within this Committee and the Select Committee as well when we were considering the new Dublin Regulation we thought it would be quite a good idea if only everyone could agree to much simplify it and simply to have a rule that looks at family considerations and took that as the first criterion and after that said the country where the application is made should deal with it. We were given to understand that there were strong objections from some countries at adopting that. Is it your impression that those objections might

*1 May 2002]*MS NICOLA ROGERS, MR NICHOLAS BLAKE, MR NICK HARDWICK
AND MR STEVE PEERS*[Continued]*Chairman *contd.*]

go if the harmonisation of the definition of refugees that this proposes were accepted?

(*Ms Rogers*) That is right, my Lord. Indeed, the Commission in its Explanatory Memorandum to that Regulation specifically points out that it is not possible to move to my Lord's suggestion because there is not sufficient harmonisation and we have to keep with this other system first because there is not sufficient harmonisation and there is still a sense in which people might forum shop.

Chairman: Thank you.

Lord Richard

135. In terms of the procedure inside the EU for actually getting decisions through, do you think it would be easier to get the Dublin II through first rather than getting bogged down in this argument, which is obviously going to be very substantial? I am just looking at it from the practical point of view. I would not want one of them held up while protracted negotiations took place on this one.

(*Ms Rogers*) Undoubtedly my Lord is correct in pointing out that there may be some political realities going on here and it might be that the Spanish Presidency has prioritised reception conditions, which has been agreed in a political sense although not adopted formally yet, and Dublin II because it saw it as politically able to get those agreed at this stage. However, I am not sure if it is as simple as that because Dublin II is a very controversial measure for some Member States. There are some Member States who will hold up the process and in my submission it would be better to have that debate when the harmonisation process has developed more.

136. Can I just follow that on for a moment. You are not suggesting that one should hold up the adoption of the two that you can get pending the adoption of this one, are you?

(*Ms Rogers*) I am suggesting that it would have been more desirable, and perhaps it is a little late to be saying so now. It is something that ILPA and other organisations have said right from the beginning, "why are you not looking at the definition first?" Definition was the last Directive in this package to be adopted by the Commission so it was not possible for the Member States to look at it first, it had to be looked at almost last, although presidencies do on the basis of political reality prioritise measures for consideration. You will know, my Lord, that the Asylum Procedures Directive, for instance, has been held up and pushed to the back, and in fact it has gone back to the Commission for redrafting because the Member States were unhappy with the first draft.

Chairman

137. If I could just move on to a related point. The ILPA paper has drawn attention to the point that the Directive is silent regarding its relationship with other international instruments such as the Geneva Convention, the European Convention on Human Rights, the Convention against Torture, and so on. The point is being made that silence in this regard

could result in the lowering of international standards on refugee protection. That could not happen, could it, because whatever the content of the eventual Directive, and whatever the national law implementing whatever the requirements of the Directive are, countries which are signatories to the Geneva Convention and these other Conventions will remain bound by their Treaty obligations in that respect?

(*Ms Rogers*) They will remain bound. I think the problem is probably most acute with the 1951 Convention rather than, for instance, the European Convention on Human Rights and it is for this reason: the supervisory mechanism for the 1951 Convention is quite weak and, indeed, there is no international court that supervises the interpretation of the 1951 Convention unlike, for instance, the European Court on Human Rights.

138. I thought The Hague had a role in that.

(*Ms Rogers*) Only in inter-state disputes and a reference from states. Other than that there is a very weak supervisory mechanism. That is not the same, for instance, with the European Convention where obviously the individual can charge off to Strasbourg if they do not agree with the national court's interpretation of an international obligation. There is a problem with these Directives not specifically referring to the 1951 Convention or, indeed, giving primacy to the 1951 Convention in that the EU is not a party to the 1951 Convention. I think my concern would be what happens under the Title IV procedure whereby there can be a reference to the European Court of Justice on a point of interpretation of the Directive. Is the European Court of Justice bound to determine the Directive in accordance with its language or is it bound by the international obligations that the Member States are bound by? The Court of Justice may not be answerable in that way because the European Community is not a party to the 1951 Convention. These problems have arisen in other contexts, they have arisen in the context of the inter-relationship between the European Court of Justice and the Human Rights Court. The European Court of Human Rights has always said "it does not matter what international agreements or bilateral agreements Member States, contracting states, enter into, at the end of the day they are still answerable to us" effectively. My worry with the 1951 Convention is there is no international court that is necessarily going to be able to say that. There is a sense in which there could be a little European club that lowers standards. I am not suggesting that it is done in a cynical way but I am suggesting that it might come about as a result of interpretation and as a result of sticking to the words of the Directive which may fall below the 1951 Convention in a certain way if it is interpreted in some way. Then it will be the case that the European Union effectively has a different interpretation from the rest of the world or other Member States and there is nowhere else to go and complain about it.

1 May 2002]

MS NICOLA ROGERS, MR NICHOLAS BLAKE, MR NICK HARDWICK
AND MR STEVE PEERS

[Continued

Lord Lester of Herne Hill

139. I entirely understand the point, and I am sympathetic to it, and of course the problem you are identifying arises because the European Union has not been able to accede to the European Human Rights Convention, notwithstanding the opinion of this Committee and the Select Committee that it should. I wonder how much this is a real point in practice. Is it not right that the Court of Justice would be likely to look at the preamble to the Directive and the references to the Charter of Fundamental Rights and to the Geneva Convention and to look at the Convention and the Protocol being the cornerstone of the international legal regime for protection of refugees and to the Directive being implemented without prejudice to Member States' existing international obligations under human rights instruments? Having done that would it not be purposive rather than literal and make very sure that there is no space between the Directive and the Geneva Convention and the Protocol? In practice is that not the likeliest outcome of any question of interpretation?

(*Ms Rogers*) My Lord is absolutely right and I would hope so but I think ILPA's view is it would have been better to simply state that the 1951 Convention has primacy and thereby giving that effect rather than leaving it to hope. My Lord is quite right, the Court of Justice is likely to interpret it that way, it is fond of interpreting it in that way, but one does not necessarily like to leave those questions to hope. It would just shore it up if there was that specific primacy given to the 1951 Convention.

Chairman

140. Is this a point you are making particularly in relation to the Qualification and Status of Persons as Refugees Directive, the one we are now looking at, or are you making it in relation to the other three associated measures as well?

(*Ms Rogers*) It is in specific relation to this Directive because of the interpretation that flows from it. This is the area where interpretation can lower standards, and lower adherence to the 1951 Convention. I think it is particularly in relation to this Directive that it is important.

141. I think that takes the debate on to the next question I want to ask which is particularly arising out of the Statewatch paper and it is Mr Peers' responsibility to comment therefore. It is a feature that the Directive limits eligibility for refugee status or subsidiary protection to third country nationals or stateless persons and it does not therefore, according to its terms, apply to citizens of Member States of the European Union. There have been points made about this bearing in mind, of course, that the Geneva Convention refugee protection applies to everyone, including citizens of Member States, and some of the applicants for asylum have come from countries which are now applicant members of the European Union. What are the problems in this regard that you foresee?

(*Mr Peers*) I think the problem is as my Lord has just suggested, that there is a clear contradiction between the way the Geneva Convention is worded covering everyone and the wording of the Directive

restricting itself to third country nationals. The same can be said of the European Convention on Human Rights which again is in principle applicable to everyone. The problem is from the point of view of refugee status, but not subsidiary protection status, the EC Treaty itself tries to replicate this distinction where, of course, you have got this Protocol on EC nationals saying in principle their asylum claims should not be considered. All EU countries should be considered safe as countries of origin for their nationals. Also the wording of Article 63(3)(c), which is the power to adopt rules on the definition of refugees, restricts itself in scope to third country nationals. In that sense the problem is not so much in the Directive, the original source of it is the contradiction between the Geneva Convention and the EC Treaty which the Directive cannot cure. For subsidiary protection that is not the case, the Treaty says nothing about excluding subsidiary protection claims for EC nationals and if you look at the powers to adopt subsidiary protection rules in Article 63(2)(a), the second part of it, the subsidiary protection rules are not to be restricted to third country nationals. So the obligation to act within five years in that sphere applies equally to EU nationals and third country nationals.

142. The point I cannot get my mind around is so far as asylum applications from Geneva Convention refugees or subsidiary protection sought under various other Conventions is concerned, where the individual is a citizen of a Member State the issue does not arise, does it? If he is in Ruritania, assuming that Ruritania has been accepted into membership, and he wants to come to England he comes, he does not go through passport control.

(*Mr Peers*) For most of the applicant countries, except Cyprus, there will be a seven year waiting period and some countries like Austria are saying they want to treat the applicant countries as EU Member States even before they join: Romania and Bulgaria, for instance. Austria has put that in a declaration to the new Directive on reception conditions for asylum seekers. Some Member States are already treating the idea of EU nationals as being broader than the current membership. In addition, there would still be a relevance to claiming asylum in an extradition case even for those people who are able to move to another Member State pending the application of the European Arrest Warrant which would abolish the political offence exception.

143. As far as that is concerned Dublin has assured us on a number of occasions that when the primary legislation is brought before Parliament it will allow objection to extradition on anticipation of human rights infringements and no fair trial grounds to be put forward so the difficulty, if that is right, will not apply. Subject to that I cannot understand the concept of somebody wanting to be a refugee who comes from some Member State and says he wants to go to another, he does not have to make any applications, he just comes.

(*Mr Peers*) But, of course, not during that seven year transition period for the new Member States and, of course, other Member States might not do what the UK is doing with the European Arrest Warrant and include those human rights safeguards. The UK's decision to put human rights safeguards in there could be challenged by other Member States

1 May 2002]

MS NICOLA ROGERS, MR NICHOLAS BLAKE, MR NICK HARDWICK
AND MR STEVE PEERS

[Continued

Chairman *contd.*]

before the Court of Justice and we have not opted out of that part of the court's jurisdiction as far as the Third Pillar is concerned, so we may ultimately be forced to change those safeguards because they are not in the main text of the Directive.

(*Mr Blake*) Of course, one does not need the Refugee Convention to give free movement rights to EU nationals, they can come to work and set up business, etc., but to exclude them from Refugee Convention *a priori* assumes that if one has a national of Ruritania who is not in fact working and who says "I am an asylum seeker in the United Kingdom because I am wanted for a political offence in Ruritania", which is frequently the overlap between extradition and refugee status, the EU can say "there is no such thing as political offences in the EU, we are all spotless, and beyond that there is no such thing as an unfair trial", both propositions of dubious veracity. One only has to think of recent events and whether one can be persecuted for having been a plane spotter. That is the problem and that is where the beginning of the tension is. One does not need it for free movement but one needs it for protection particularly if your free movement rights do not protect you from expulsion either because you have failed to find work or because someone is wanting you for a political offence and if you are then out of subsidiary protection there is a major attempt by politicians to, as it were, magic away protection rights.

144. Thank you. I think the Refugee Council in its paper drew attention to the question of how some groups, and I think the Roma were mentioned, who have been seeking asylum fleeing from countries who are applicants to join the European Union would fare if one of these countries became Member States. Mr Hardwick, is there anything you want to add to what has been said on this point?

(*Mr Hardwick*) Just very briefly, my Lord Chairman. If one uses the example of the Roma in the accession states as a case in point I think there is very considerable evidence that there is indeed a protection need for some of those. According to the United Nations High Commission for Refugees there were 7,232 Roma asylum seekers from accession states who were granted refugee status in the EU in the period 1990-99, not a small number, and in the UK itself ten Czech cases were granted refugee status and 20 Polish cases in 2000 alone. I think there is very hard evidence. Perhaps I could also draw your Lordship's attention to the *Horvath* case in the Court of Appeal last May where Lord Justice Latham said "There is, at least on its face, in place in the Czech Republic the appropriate legislative, administrative and enforcement structure to provide for protection of Romanians. The question which has to be asked is whether or not that is effective" and his conclusion was that it was not effective. I think the Roma example does, if you like, illustrate the point that I think all of us have been making.

Viscount Bledisloe

145. Let us look at this from the other way around. You are contemplating a situation where in spite of the fact that various countries are members of this club, a court of another country might say "Oh, Irishmen do not get fairly treated in the courts of England, therefore we are going to give them refugee status because England does not behave properly" and the court is going to slag off other members of the club while they remain members of the club.

(*Mr Hardwick*) Indeed, I am contemplating that possibility. Of course, it is a rare occurrence, no-one would say that in its totality there are very large numbers of people who are involved, but as the case of the Roma illustrates there are occasions when even if there are supposedly safeguards in place in theory, those safeguards are not being effectively implemented and for the individuals concerned, regardless of membership of the club, they are being persecuted in their country and they are not being protected and that is what the courts here, and indeed the authorities in other countries, have found in over 7,000 cases. I do not see that membership of the club in effect changes the facts on the ground *per se*.

146. It is a little odd to draft the rules of the club on the basis that other members of the club will behave very badly, is it not?

(*Mr Hardwick*) It seems to me there might be a number of clubs which would allow for the possibility of some lapse in behaviour by its members. I do not think that would be altogether unheard of.

Lord Richard

147. Could I ask, following on this point that has been made, are you suggesting that this should apply now to the existing Members of the EU or only to the ones who are coming in? Where do you draw a line?

(*Mr Hardwick*) If one takes the specific example of the Roma, which is an issue to the general point of the principle ----

148. Leave the Roma out, the East Europeans, go to the West Europeans.

(*Mr Hardwick*) I think our preferred position would be that the rules apply to any person regardless of where they originated from. Of course, if they came from the EU it would be in very exceptional circumstances in which their case amounted to persecution and they were unable to get protection from their state. Nevertheless, those very rare circumstances do exist in some places. If one thinks in the longer term, given the volatility of European history over the years, one could not rule out there being other examples apart from the Roma at some time in the future in some accession states.

149. I do not want to sound aggressive or offensive but how on earth do you think you will ever get that through?

(*Mr Hardwick*) Of course it will be a difficult thing to do.

150. I think so, yes.

(*Mr Hardwick*) Of course it will be a difficult thing to do but if one comes back to the general issue of

1 May 2002]

Ms NICOLA ROGERS, MR NICHOLAS BLAKE, MR NICK HARDWICK
AND MR STEVE PEERS

[Continued

Lord Richard *contd.*]

principle it does seem to me there is a wider danger that once you have one set of countries, if you like, deciding “we are all right, the international rules do not apply to us” then the precedent that sets for other countries means there is a precedent set there. It does seem to me there is an argument to be put forward in terms of the overall integrity of the international system which on the whole removes much of the burden from the richer European countries that it is important to preserve that overall integrity because if other regions start saying “the rules do not apply to us either” that will have consequences for the movement of people that might not be thought to be in the interests of the EU.

Lord Lester of Herne Hill

151. I should declare an interest as until now I am the Chair and a Board Member of the European Roma Rights Centre in Budapest and also there is a pending case which may well come up before my Lord Chairman in due course about the treatment of the Roma by the UK in Prague. I declare those now. May I just ask a question in the light of that. Is your point that the Roma are an example of a group of several million people in Europe, in Western and in Eastern Europe, whose problems are not related to their nationality alone, it is a transnational problem, and if you immunise states on the basis of EU nationality from securing refugee protection to such a group who may be persecuted on racial or for that matter other groups on religious grounds, this would seriously undermine the effectiveness of Geneva Convention protection within the European States? Is that the point you are making?

(*Mr Hardwick*) Indeed, that is my point but better put than I did myself, my Lord.

Chairman

152. Can I move on to the question of international protection for people who have a fear of persecution based on activities which they have carried out since leaving their country of origin. The way in which this is proposed to be dealt with by the Directive as you will have seen is if there are several reasons why these activities have been carried out in order to qualify as a refugee then you do not qualify as a refugee. It proposes a look at the motivation of the actor in doing whatever is done that has made him, as he says, *persona non grata* in his country of origin. The ILPA paper drew attention to this. Do you have anything to add to the contents of your paper on it? Is this an appropriate line to take where motivation has to be looked at to decide whether the individual can qualify for protection?

(*Ms Rogers*) ILPA believes, my Lord, that it is not an appropriate line and it is not an appropriate line for a number of reasons. Firstly, there is no good faith requirement in the 1951 Convention and, indeed, there is an extent to which most asylum claims are based on deliberate acts. Whether or not they are deliberate in order to achieve refugee status is extremely difficult to determine but they are based on deliberate acts. They may be acts of defiance against the state or acts of defiance on grounds of

religious conviction or otherwise but they are deliberate, although I accept there are circumstances in which they may not be deliberate. However, the question of assessing whether or not an individual is a refugee for the purposes of the 1951 Convention is not a question of assessing his motivation, it is a question of assessing the risk. The problem with the Article 8(2) that is included in this draft Directive is that it moves away from that assessment of risk and it starts to delve into areas of motivation which are not really the essential questions of who is a refugee. In ILPA’s submission it is very dangerous because it is not the question that ought to be asked and actually takes the assessor’s eye away from the ball. The only real questions are does he face a real risk of persecution if he were returned and is that persecution for a Convention reason? Other than that there need be no other questions and it over-complicates the picture to bring in these questions of motivation. In any event, in ILPA’s submission, it is very difficult to test in practice motivation. People’s motivations for doing a whole wide range of things are very complicated and it is very, very difficult to assess.

153. I suppose the problem will go away if one can establish sufficiently expeditious procedures for dealing with applications so it does not become an opportunity for building up false cases in this way?

(*Ms Rogers*) My Lord may well be right.

Viscount Bledisloe

154. You said the risk of persecution has got to be for Convention reasons. If a man who does not want to be sent out of the country, whose reasons for being sent out of the country have got nothing to do with any manifestation of political view, the day the decision is sent to him “you have got to leave” he goes, not because he disapproves of anything that happened to him in his country, and burns his country’s flag outside the embassy, then he is not going to be persecuted for political reasons, he is going to be persecuted because he has committed an act offensive to the state for his own personal ends. Why should he not be expelled? I accept your difficulty in proving this but let us assume that the circumstances conclusively demonstrate that was his reason, he said to 30 people, “I tell you what, I need not be sent home. If I go and burn the flag outside the embassy they will not be able to send me home”, so the proof is there.

(*Ms Rogers*) I think my Lord’s question raises an interesting point and the difference between how a reasonable state would respond to the burning of a flag outside an embassy and how a persecuting state might respond to that. A reasonable state would say “I wish our nationals would not do that outside our embassy, it is terribly embarrassing” and they might even prosecute them under some law about burning flags, but that may not be persecution for the purposes of the 1951 Convention and it is only where there is a risk of persecution for a Convention reason, ie the state in question takes it for instance as a political act, imputes a political act, and there is case law in this country, my Lord, that suggests that imputed political opinion can fall within the remit of

1 May 2002]

MS NICOLA ROGERS, MR NICHOLAS BLAKE, MR NICK HARDWICK
AND MR STEVE PEERS

[Continued

Viscount Bledisloe *contd.*]

Convention reason, takes that act as being an imputed political act and thereby persecutes the individual. That is the difference between reasonable states and unreasonable states. Whilst there might be a very small category of states that act unreasonably in those circumstances and then go and persecute their nationals for that, one still has to take into account that that might be the case.

(*Mr Peers*) Could I add quickly that this clause also applies to subsidiary protection and there the case law of the ECHR in Article 3 says the only test is whether there is a real risk of torture or other inhuman or degrading treatment, so there is no facility there to ask the question did the activity which might be the reason why someone would face that treatment only begin once someone received an expulsion notice. The only question is whether there is a real risk of receiving that treatment at all.

(*Mr Blake*) Could I just add very briefly that to adopt this definition would be directly to reverse at least two decisions of our Court of Appeal on the meaning of the Refugee Convention which has grappled with that issue. Since those cases were decided we have not been flooded with abusive claims of the kind my Lord put. The Court of Appeal there said that the answer to above is you just do not infer the state is going to persecute, you do not believe the case and you do not reward conduct of the abusive variety and that can be accommodated with the existing case law. The danger about starting off on a definition like is, even though well intentioned to prevent abuse of the protection regime, is that you begin to start asking other questions, "why did you do something?" and it has been applied, and there are cases going on today in the Court of Appeal about "If you are being persecuted because you are homosexual the answer is stop being a homosexual, stop practising your sexuality." or "Stop practising your religion as an Ahmadi, just keep quiet about it and no-one will do anything about it. You have now gone to an Ahmadi meeting in London, that was rather foolish, it is going to put you at risk" and so on and so on.

Chairman

155. What is an Ahmadi meeting?

(*Mr Blake*) Ahmadi is a religious group in Pakistan that claims to be Muslim, it is not regarded as Muslim. That was one of our cases in the Court of Appeal.

156. If you go back to Pakistan as an Ahmadi you are in trouble?

(*Mr Blake*) That is right, you are in trouble. "You did not go before but you went along to the London meeting, etc." Those are the kinds of problems you get into and you do not ask the simple question which is about human rights and the genuine need for protection, which is where the argument ought to be focused. Perhaps if something is going to go in at all it needs to be reworded to say where there are serious grounds for believing that is the case then the state can infer that they will not be persecuted but not to, as it were, redefine the definition of persecution.

Lord Lester of Herne Hill

157. In our last session with the UN High Commission for Refugees I asked about this. I wonder whether any of you think that the way in which Article 8(2) is drafted is full of so many apparent inconsistencies and vague expressions that it would be very hard for a judge ever to interpret on the basis of consistent principles?

(*Mr Blake*) I fear that it opens up many more difficulties which will undermine the protection principles.

Chairman

158. Can we move on to some of the points which arise out of Article 9(1) which extends the concept of persecution to include threats by others than the state, non-state actors, where the state is unable or unwilling to protect the individual from these non-state actors. This is where there have been differences of opinion among Member States, and we have mentioned Germany and France already. If Article 9(1) is adopted in the form in which it now is it would appear to me at least to roll out a number of these differences but we do not know to what extent this is going to be accepted in this form by the Member States in question. I wonder what your views would be on how the Directive would look if that particular provision were not to find its way into the final version? I think this was a point particularly in the JUSTICE paper.

(*Mr Blake*) I think JUSTICE and all the other NGO communities would consider the Directive had lost much of its value if it was not to be included. This is one of the biggest issues on harmonisation and it is not just that there is a difference between when non-state harm can be persecution, although that is critical in itself, but behind that possibly are the different philosophies of two different regimes. The common law, whether in the United Kingdom, Canada, Australia, New Zealand, has said the Refugee Convention is a human rights instrument, requiring practical and effective, updating interpretation. Some, certainly the German constitutional court, say it is an inter-state agreement which was signed in 1951 and you have got to show the concept exists there. That is such a cogent difference in philosophy it affects the way you look at the same words and the way you dissect the grammar of the Convention. The issue is to bring on board the German case law, of the constitutional court particularly, and that would probably bring the French on board also, The Directive would really set the tone for the new philosophy of looking at protection in accordance with sensible guidelines that would then be harmonised with the subsidiary protection and would allow in certain cases the case law of the ECHR to influence the interpretation of the Refugee Convention. This is the appropriate way because ECHR has a court to apply and renew it. There is much more at stake than simply one technical question about Somalia, for example, where the Germans say there is no state, therefore there is no persecution, simple; whatever you are suffering it is not persecution, which strikes your Lordship's House as very wrong.

1 May 2002]

MS NICOLA ROGERS, MR NICHOLAS BLAKE, MR NICK HARDWICK
AND MR STEVE PEERS

[Continued

Chairman *contd.*]

159. Does that derive from something in the German constitution do I understand you to say?

(*Mr Blake*) Yes. I will try not to give a discourse on the topic but the German constitution identified persecution before it signed up to the Refugee Convention, and for obviously political reasons in the history of Germany it identified in Article 16 of the German constitution the concept of political persecution which was about persecution by states because that was a particular form of harm that Germany was addressing post-war. Gradually it then recognised the Refugee Convention but inevitably the interpretation of their domestic constitution began to determine the determination of the Refugee Convention although in the first ten years, 1950-60, the kind of problems that Germany was considering as refugees were indeed state persecution from Eastern Europe so there was no problem. So the first generation of jurisprudence was fixed upon a state idea. In the 1970s and 1980s Europe became aware of gender persecution, failing state persecution, the Somalia tribal persecution, the Algerian problem of non-state terrorism, etc., etc., or indeed even armed drug barons controlling sections of the territory in Colombia, which were new forms of problem that probably were not in the minds of either the drafters or the German constitutional court. Within sensible and flexible limits these need to be brought into the definition of refugees.

160. I wonder if it is open to the German Executive to agree this Directive without first amending its constitution?

(*Mr Blake*) It can if it puts its Directive obligations into its law. I think there has been much debate in the German constitutional court about how it harmonises its obligations to the EU with its constitution. Its constitution is superior, as I understand it, in the German constitutional court of law, but I think the fact you have one notion of persecution in the constitution does not prevent you from recognising a broader notion of persecution under other instruments as long as you voluntarily adopt it and the Bundestag agrees.

161. Again, I am sorry, I have to declare an interest as a Council Member of JUSTICE in asking Mr Blake this question. Is it not also the case that Germany and the other EU Member States being bound by the European Human Rights Convention would have under that Convention to satisfy positive obligations and to protect the individual against various forms of persecution, inhuman and degrading treatment and so on whether or not the state itself was liable? Therefore, reading Article 9 of this draft Directive compatibly with the European Human Rights Convention one would expect the wider protection to be there to give effect to those international human rights obligations as well as those in the Geneva Convention.

(*Mr Blake*) One would expect it and one would hope that would happen. The difficulties are particularly between the UK and Germany, and they are demonstrated in the case law, that in certain respects Germany has said “we do not accept what Strasbourg says about Article 3 either, we do not accept the *D* case, we do not accept the *Armed & Austria* case because that interferes with our

conception, so our conception of what Article 3 means dominates, Strasbourg does not”. Strasbourg have said “Well, that is wrong, but as long as Germany does not actually expel them in violation it never gets determined” which has an effect upon status because you can either have Class A refugee, Class B protected under other constitution instruments, or Class C tolerated but cannot yet put you on the plane.

162. I did not know anything about that, I am very grateful.

(*Mr Blake*) It is all set out in the case of *TI v UK*, which is now reported, which was precisely a case of returning someone to Germany.

Chairman

163. Ms Rogers, do you want to come in on this?

(*Ms Rogers*) It is a very short point in response to my Lord’s question about Germany and the constitution. It is the case, I understand from my German lawyer colleagues, that there is now a debate in the legislature to change German law. In fact, it might not be Germany that is the problem when this definition Directive comes up for debate, it may indeed just be France, because they are contemplating a change in their own law to reflect the non-state agent question.

164. Thank you. Can I move on to ask a question on Article 9(3) which also relates to non-State actors, but this time not as persecutors but as protectors. In a case where there is some sort of *prima facie* basis for a well-founded fear of persecution, but it is said that adequate protection can be given, albeit from a non-State agency—it may be some other organisation within the State, or it may be some NGO within the State—is that likely to be adequate as an answer to a claim for refugee status on the basis of a well-founded fear of persecution? Again, I think this is a point addressed to ILPA.

(*Ms Rogers*) My Lord, ILPA’s position is this. Whilst in theory it might be possible for UN bodies or international bodies to provide protection, in practice it is very, very unlikely. There are a number of reasons for this. The first is that UN bodies or international bodies are normally temporarily set up rather than permanently, and we have to look at effectiveness in a permanent State rather than on a temporary basis, otherwise it is very difficult to assess how effective a protection can be. The second point I would make in this regard is this. Usually mandates for international bodies are limited to various roles and not to the full role that a State might be expected to take on. For instance, it might be the case that a UN body is there to provide immediate protection and humanitarian assistance, but is not there, for instance, to set up legal rules as regards the prosecution of people who persecute. That can lead to a problem of effective protection. Our courts have said that effective protection does include the need for there to be a legal system which can call into account bodies, individuals, for persecution or persecutory acts. The third point I would make is that unfortunately it has been the case in the past—and one can point very recently to the case of *Sierra Leone*—where international bodies have individuals

1 May 2002]

MS NICOLA ROGERS, MR NICHOLAS BLAKE, MR NICK HARDWICK
AND MR STEVE PEERS

[Continued

Chairman *contd.*]

working for them who do not act in accordance with humanitarian law. If one looks at the example, if I might take it, of Kosovo, for instance, UNMIK and KFOR, who are the international bodies who operate there, have devised a system for themselves whereby their personnel are not liable to prosecution or to civil actions for any negligent action, for instance, within Kosovo. It is still open to question whether or not, as a matter of international law, the States which send individuals to be part of the KFOR force are answerable to, for instance, the European Court of Human Rights, but as a matter of pure practicality it would seem that if KFOR act negligently in protecting a person at the present time, you cannot sue KFOR in Kosovo, or indeed anywhere else, for failing to act or failing to protect. That is part of the protection package, I would submit. In the case of quasi-States, there is the obvious problem that they are not party to any international instrument and, most importantly, not party to any international human rights instrument, and therefore they are not accountable from that perspective.

165. We had evidence from the United Nations High Commissioner for Refugees on this subject. He took an entirely pragmatic approach, rather than a principled one. He said that if there is evidence that adequate protection can be provided, it does not matter whether the protection is to be provided by a non-State actor as opposed to a State. So the issue was not one of principle. It appears to me, from what you are saying, that you take a point of principle; that if the organisation that is providing the protection is not a State, then it cannot be good enough. Are you going that far?

(*Ms Rogers*) I am not sure if I am going that far, my Lord. I think I am going so far as to say that whilst in theory it might be possible for a non-State body such as a UN body to provide adequate protection, in practice—and history has demonstrated this over and over again—it is very unlikely to be the case. There is a danger in putting in this provision. It would be a departure, I have to say. Although it does arise from time to time in case law as a problem, it is not a point of principled interpretation that has arisen as a problem in the past. In my submission, UNHCR is probably right to take the pragmatic approach, but ILPA's position is that it is very dangerous to have this provision in there in the first place.

Lord Richard

166. Does that apply to the second half, to quasi-State authorities?

(*Ms Rogers*) Quasi-State authorities, my Lord, as I pointed out, are in this difficult position of being not accountable as a matter of international law, they are not party to any international instruments, they are not party to any international human rights instruments.

167. Can I put an idea to you. Take a civil war case in which one half of the country is controlled by one faction and the State controls the rest, or there is a rebellion of A against B. If A is in control of the territory, would not he qualify as a quasi-State or

quasi-State authority and be given the protection as set out in there?

(*Ms Rogers*) The problem with that kind of civil war situation is that they are normally, by their very nature, volatile and temperate, and one has to call into question, therefore, the effectiveness of the protection in that context and how lasting that protection is.

Chairman

168. Take North Cyprus. I do not know what its correct title is. It is generally not recognised as a State, but I imagine it provides protection for people in the territory it controls. Is that a bad example?

(*Ms Rogers*) My Lord, I am not sure if the European Court of Human Rights would agree with my Lord on that particular point.

(*Mr Blake*) Not the same protection to everybody, I suspect would be the answer.

169. If a provision on these lines is going to stay in the Directive, would it be desirable to think about adding to it some sort of minimum requirements that the non-State protector should be able to discharge? You mentioned one which I do not think I would regard as essential, and that is the ability to have negligence actions mounted for damages in the event of breach. One could devise some sort of standards of protection which would be at least required if the non-State actor were to be regarded as satisfactorily fulfilling a role like this.

(*Ms Rogers*) My Lord, you may well be right, and it may be a political reality that this provision stays in, therefore it would be sensible, in those circumstances, to add in safeguards to ensure that the body that is to be regarded as the protector is able to take all the functions of a State. In that sense it may be pragmatic to set out what the tests would be of an adequate protector in those circumstances. Indeed, it would mean that there is less differentiation between States because, my Lord, as I have suggested, this is quite a novel area in one way, and there is a danger that this Directive would do the very thing that it is seeking not to do, which is cause division between Member States and a different level of harmonisation. You might have the case where one Member State is saying, "Well, we don't really accept any UN body to be an adequate protector because it fails to meet some tests that we apply", and the State next door saying, "Well actually for us any UN body; so long as it says UN on the front of its office, that's good enough for us." There you get the differentiation, there you get need for the secondary movements with Europe and the very danger that this Directive is seeking to avoid.

170. So you might need some objective criteria. I wonder, do Statewatch and Refugee Council have any views on this particular matter that you would wish to put forward?

(*Mr Hardwick*) I would not have very much to add to what Ms Rogers has said. I think I agree particularly with the point she made that in theory one could imagine a State providing protection, but in practice history has demonstrated that that is not terribly effective. However, as she said, given the political realities, it may be that a better way forward

1 May 2002]

MS NICOLA ROGERS, MR NICHOLAS BLAKE, MR NICK HARDWICK
AND MR STEVE PEERS

[Continued

Chairman *contd.*]

is to try set some kind of criteria so at least there was a degree of consistency involved in this.

(*Mr Peers*) I think the point I would particularly choose is the example of something like Srebrenica where the existence of an international peace-keeping force does not prevent major human rights abuses. One particular point is about what would happen if the EU itself begins to operate peace-keeping forces, as it intends to do, for instance, in the former Yugoslav Republic of Macedonia. Because it would be doing so in the context of a common foreign security policy, you have a particularly huge gap or absence of judicial accountability and legal or political accountability of the organisation as compared to the established system for the UN or, to some extent, NATO, so that would give rise to particular concerns if it is the EU which is itself giving these assurances as a non-State agent.

Lord Lester of Herne Hill

171. Very briefly, speaking for myself, I could not understand why this provision was in there at all. The Explanatory Memorandum says it follows from the logic employed in Article 9(2), but I do not understand that at all. It seems to me not at all to follow from that logic. Is there this problem as well, though, that Nicola Rogers has referred to, that international organisations enjoy State immunity, sovereign immunity, recognised under the European Human Rights Convention, and are not allowable under the European Human Rights Convention because they are not States. It seems to me there may be a tremendous muddle, therefore, when there is an argument as to whether they are giving proper protection or are in fact responsible for negligence or otherwise for the failure to protect, and there will then be a muddle about the two European Courts and the hole in the middle between them, as well as the problem about the immunity of the organisations. Then if you treat the organisation as though it were a State, which is not for the purposes of State protection, it seems to me it undermines the entire scheme itself in that context. Have I got it roughly right?

(*Ms Rogers*) My Lord, I would entirely agree. I think the case of *Bankovic* against the NATO States demonstrates the problem where, when acting together and outside the territory, States can be unaccountable. That is the danger. There may be a lacuna that is created, as my Lord points out.

Chairman

172. Mr Blake, did you want to come in on this?

(*Mr Blake*) My Lord, may I just add, and moving the debate a little bit on from the UN type of arrangements—because it may well be ultimately, although even theoretically, one can get back to the State behind the UN. There is a problem of principle, because it is easy to say that if non-State agents can be the agents of persecution, then they can be the agents of protection from persecution. As a matter of pragmatic reality, one can see the attraction of that, and I would accept that in certain situations a clan or a tribe can keep out your persecutors and therefore

prevent you from having a well-founded fear. But if one tries the example of the Kurdish areas of Northern Iraq—and this question is coming up next week in the Court of Appeal, as to whether that is an effective State able to grant protection—then there is a different issue, because if there is a fear of persecution from Saddam Hussein, as these Kurds have, then what the international jurisprudence tells us is that the protection is a kind of surrogate protection that you go to the international community for if you cannot get it from your own State. Protection means much more than absence of persecution. It means international diplomatic practice, it means getting a passport, having the right to a police force, all the things that a State can do for you, and a tribe or a clan, even if well intentioned and armed with AK47s or Kalashnikovs, or whatever it may be, to deter your persecutors from coming to your village, may not be able to provide the quasi-State function. So it is quite important that whoever is providing the protection (this means that you do not need to go elsewhere and say, “I’m a refugee” to Germany, or the United Kingdom or somewhere else) is exercising quasi-State authority, that is, behaving like a State, accepting as international instruments whether it can formally be recognised in the UN as a State, and providing the police force, the protection and some form of diplomatic help if you are abroad that a State would do. If one has all that, then one is getting the essence of the Convention in a practical and effective way, but if one does not, and someone is simply saying, “You’re a refugee because there’s a group of people out in the hills who could be termed as your persecutors”, one is again destroying the Convention.

173. If you have an individual who has a well-founded fear of persecution, so the persecution is taking some form and it may be a number of possible different forms but in an individual case it will be more targeted no doubt, if it can be shown that that form of persecution is not to be feared because there is non-state protection, why would it matter if the non-state protector did not have diplomatic embassies across the world? If the protection met the persecution case that was being put forward, why need one look further than that?

(*Mr Blake*) In many cases one probably does not, but if this person is outside his country, as in fact the Iraqis are at the moment, whom do they go to? They cannot actually get back to this little enclave because it is impossible to travel to, so they are in need now of international protection because the safe haven is not a state, it cannot perform the state functions. In that circumstance, that is one particular problem.

174. That, again, if I may say so, is a pragmatic problem, is it not? You could not have, for example, this country returning Kurds from the KAA to Baghdad.

(*Mr Blake*) No.

175. I do not think anyone would suggest that should be done.

(*Mr Blake*) Quite. If they cannot return to Baghdad, and they cannot go to some other enclave because there is no way to access it, they are still in need of international protection. But I do not want

1 May 2002]

MS NICOLA ROGERS, MR NICHOLAS BLAKE, MR NICK HARDWICK
AND MR STEVE PEERS

[Continued

Chairman *contd.*]

to argue a case which may come up in a different context.

176. It will be a week off!

(*Mr Blake*) Yes! It is important to note that when the Convention talks about well-founded fear of persecution and is unable or unwilling to obtain the protection of his state, the guidance that UNHCR provides and all the text book writers provide means that concept of protection is not the same thing as absence of persecution. It includes it but it also includes other things the state does.

177. A slightly associated question arises where the individual who fears persecution only fears it in part of the country, and there are parts of the country where he is, let us say, completely safe from persecution. Is that a separate issue? It is addressed in a separate provision in the proposed Directive. It is 10(1) as opposed to one or other of the 9s. It is really the same point, is it not?

(*Mr Blake*) Yes, it is an intimate aspect of the same point. In a sense the case law has been dealing with this in a practical and effective way, so common criteria here would be of assistance rather than a destruction. What is necessary, however, is to make sure that any protection available internal to the state is accessible in safety and dignity, and it is not simply theoretical protection which cuts you out of a regime in Country A.

Lord Fraser of Carmyllie

178. I just wanted to query the term, “not only effective protection but permanent protection”. I do not see how any court in this country could ever reach a conclusion to return anybody if it has to make some assessment of the permanence of that protection. Take Angola, for instance, there has been a civil war going on there now for 25 years, you would be safe in one part of it but not in another. I do not know how a British court is meant to come to a conclusion on which side is going to win this civil war and thereby render you liable to persecution.

(*Ms Rogers*) My Lord, maybe the word “permanent” was too strong in the context. “Durable” perhaps would be a good word. What I am really safeguarding against is the type of protection which is offered for a very short time period and one can see, looking into the future, it cannot possibly sustain itself because it is sustained for instance on very low resources, if you are looking at a non-state body, sustained on very low resources when the kalashnikovs or whatever they are using to maintain “control” might run out, and at that point the protection cannot be offered any longer. So I think “durable” would be a better word.

Lord Fraser of Carmyllie: I was going to suggest you approached it the other way round and called it “impermanent”.

Lord Richard

179. You cannot ask a court in this country to determine the durability of a regime or parts of a country which is engaged in a civil war. Where do you start? Is Chechnya going to be durable or

indurable, or whatever the opposite to durable is? If you take Bosnia some years ago, if you were a Serb living in a Moslem area of Bosnia you would have undoubtedly a fear of persecution, and the same the other way round. On the other hand, a Serb could go into the Republic of Serbska, and that five or six years ago looked as though it might last for quite a long time. I think you are putting a rather unrealistic burden on any British court in asking them to make such a decision. I do not see how they can do that.

(*Ms Rogers*) My Lord, with the greatest of respect, I disagree that it is unrealistic to ask a court in this country to look at how durable a situation is. I think, my Lord, the courts would have to do so, otherwise the protection is not effective. If protection is only going to last for a very short amount of time, or there is a real risk that it might come to an end in the foreseeable future this is not effective protection—of course crystal ball gazing is not something the courts can do and I would not be suggesting they have to look ten years into the future—but there would have to have an element of durability in order for that real risk to be expelled.

Lord Richard: You have to have the reality of existence, I agree with that.

Lord Lester of Herne Hill

180. I had thought that adjudicators have to decide these questions already, quite frequently, under existing law. Is that right?

(*Ms Rogers*) Yes, my Lord, I agree they do.

Chairman

181. Can we move on to another matter which arises under the Directive, the criteria for entitlement to subsidiary protection. The way in which it is put in Articles 5(2) and 15 is that there must be serious and unjustified harm. There has been a good deal of criticism of the addition of the adjective “unjustified” to the requirement that the harm be serious. This is something that Statewatch has commented on. What do you understand “unjustified” to add to “serious”?

(*Mr Peers*) First of all, there is a serious problem with the idea of that wording from the point of view of comparing the Directive to either the Geneva Convention or the ECHR, which simply talks about, “Is there a risk of persecution, torture or other inhuman or degrading treatment”. To add the word “unjustified” leads to the risk automatically that the well-established concepts in the Geneva Convention and the ECHR will not be properly applied, but will be applied in some sort of new test. I do not think it is clear what the Commission was getting at. If it was getting at the idea that criminal convictions are not necessarily persecution under the Geneva Convention, then it should have dealt with that concept as part of the definition of persecution. There is case law, of course there is the UNHCR handbook which gives an analysis of this issue, which they could have tried to implement by means of additional provisions within the definition of persecution. If they mean you can be disqualified from Geneva Convention status on exclusion grounds, that is already separately there in the

1 May 2002]

MS NICOLA ROGERS, MR NICHOLAS BLAKE, MR NICK HARDWICK
AND MR STEVE PEERS

[Continued

Chairman *contd.*]

Directive, and so there is no need to import this word “unjustified” into the definition of type of harm. If they are trying to also apply this to subsidiary protection cases, again you have the problem that the ECHR as far as Article 3 at least is concerned does not allow for derogations or limitations, therefore the idea of there being a justified removal of someone on Article 3 grounds fundamentally does not make any sense. The word is also liable to lead to symbolic problems; here is the European Union saying to the rest of the world that there can be such a thing as justified harm, and that could be read the wrong way by African countries and by associate EU members and human rights abusers in the rest of the world. So there is a series of fundamental problems with this concept by the Commission.

(*Mr Blake*) A definition of unjustified as meaning legitimate in accordance with international human rights norms might take the sting out of any alarm.

Chairman: It is ambiguous somewhat as it stands. Unjustified by what standard, one might ask. There has to be some standard. It is not a word of absolute meaning.

Lord Richard

182. The Commission does slightly define it in their commentary on Article 5. “The term ‘unjustified’ is added to the definition of ‘serious harm’ in order to reflect that there are circumstances in which a state *may be justified* in taking measures that cause harm to individuals, such as in the event of a public emergency or national security. Such instances of ‘justified’ harm are likely to be rare ...”.

(*Mr Peers*) First of all, that is not in the main text of the Article. Secondly, that is legally inaccurate as regards Article 3 of the ECHR which is not subject to derogation in a national emergency.

Lord Richard: Suppose somebody just said they did not know what “unjustified” covered.

Chairman

183. I think it certainly can be said that there would be a risk of different Member States adopting a different view of what “unjustified” covered.

(*Mr Blake*) A definition clause saying, “‘justified’ means in accordance with international human rights norms” would then bring in when can you restrict free movement or detention rights and derogation rights, and you cannot do that if it is torture or degrading treatment, you have to have a fair trial and everything, etcetera, etcetera. Standing as it is, though, it is of concern and it would lead to judicial debate. It is a problem which was considered in the Court of Appeal in the *Ravichandra* case.

184. What was the issue there?

(*Mr Blake*) About whether illegal detention of Tamils is persecution. There was precisely a debate about whether or not persecution by the State was justified because they were trying to stop terror. The Court of Appeal said that you cannot go too far in stopping terror by illegal measures. It was subject to a judicial review.

185. If there had been the qualification that you have suggested – compatible with human rights norms—would that have affected the decision?

(*Mr Blake*) It would have affected the terms of the decision, yes.

186. But not the result?

(*Mr Blake*) Probably not the result.

Lord Lester of Herne Hill

187. Could I just say that I wonder whether Mr Blake agrees that this is another example of running together a whole lot of rather complicated things in a simplistic way which may produce a great deal of confusion and lack of protection? Looking at the commentary that Lord Richard drew your attention to on Article 5, they run together, do they not, derogation, a proportionate derogation—and “derogation” has a particular meaning—with Article 15 of the European Human Rights Convention, “public emergency or threatening the life of the nation” and all of that? All of this is meant to be interpreted presumably in the last resort by the Court of Justice in Luxemburg which is not the right court to be deciding whether there is a public emergency, whether Article 15 has been satisfied and so on, and all of it is subsumed in the notion of what is justifiable in the context of some rights which are absolute, like non-torture, and other rights that are qualified. Again, I find it very hard to see how the courts are meant to sort out the mess that may be created by throwing in this question.

(*Ms Rogers*) If I might come in there, at the moment unfortunately it is the case that some Member States, contracting States, are not very easily able to differentiate between those rights that are derogable and those rights that are non-derogable. These kinds of phrases, as my Lord correctly points out, merge those concepts and make it very difficult for the decision-maker, who may not be an expert in rights under the European Convention on Human Rights or indeed on derogations under Article 15, to come to a sensible decision that is in accordance with international human rights instruments. There is a real danger that there would be differences in interpretation that ultimately the European Court of Human Rights ought to have to resolve, but it might be that the Court of Justice ends up having to do so because of the mechanisms involved.

(*Mr Blake*) I think that is the danger of an instrument in the EU context which is not precise and clear when it moves across to refer to human rights norms.

Chairman

188. Arising out of the same point, I think it is the Refugee Council which has noted that the Directive makes no mention of the right to family reunions for people who have subsidiary status, is that right?

(*Mr Hardwick*) Yes.

189. You referred to this as a significant gap in the asylum package. Why so?

1 May 2002]

Ms NICOLA ROGERS, MR NICHOLAS BLAKE, MR NICK HARDWICK
AND MR STEVE PEERS

[Continued

Chairman contd.]

(*Mr Hardwick*) Because it is nowhere else, my Lord. The question of family reunification for people with subsidiary protection was, I think, dropped from the negotiations around the Family Reunion Directive because of the point we were noting earlier, that it was not clear at that point to whom it would apply. So the question of family reunification for people with subsidiary status is nowhere else to be found, and there is an enormous human cost involved in that.

190. Is that oversight or deliberate, in your judgement?

(*Mr Hardwick*) It is difficult to say. I think it is deliberate. Certainly it would appear to be deliberate. It is a deliberate decision that has been made. As the Home Office memorandum itself has noted, if you have this disparity between two forms of protection, you will have people who have been given subsidiary protection applying to have full status and you will create an unfair division in the way that they are treated, quite apart from in this case the sort of human suffering involved.

191. It is a feature of this particular Directive which distinguishes it from the other three that this is the only one that deals with subsidiary protection apart from protection for the Geneva Convention refugees. It has been suggested that there would have been objections by some Member States to combining the way in which Geneva Convention refugees are treated and those entitled to subsidiary protection are treated under the other instruments, and that if everything had been made logical in the way you suggest, it might have put at jeopardy getting the recognition of subsidiary protection that one has in this instrument.

(*Mr Hardwick*) Obviously I am not aware of the different considerations that those Member States took, but as I understand it, at the point at which this was being discussed under the Family Reunion Directive there was a fear by some Member States that the definition of who was entitled to subsidiary protection might be drawn more widely than was in fact the case. So I think this is a very good example of why getting things in the wrong order has had a deleterious effect.

192. You and the Refugee Council would recommend that at least the suggestion be made that the scope of subsidiary protection should be widened so as to include family reunion?

(*Mr Hardwick*) Yes. We can see no just reason as to why that distinction should be made. Given the definition of "subsidiary protection" which has been made, which is quite tightly drawn, different from the way the British Government applies ELR at the moment, given the definition that is here, there seems no reason to exclude people.

193. That is something we can ask the Minister about when the Minister gives evidence to us.

(*Mr Hardwick*) It would seem to me, from their own memorandum, I would have no quarrel with the arguments the Home Office put forward on these points about subsidiary protection in their own memorandum, and that they state the case plainly and well.

(*Ms Rogers*) My Lord, I think that the difference between subsidiary protection and the rights that accrue to a refugee, if it is made too acute, leads to the situation where applicants are granted subsidiary protection but then seek to get refugee status because they see that their rights are not as good under subsidiary protection, and that just clogs up the courts, frankly, and the administrative authorities with countless applications which may or may not succeed but none the less have to be considered. The second point is that when you are talking about a right that is so crucial to a person's being—ie being with their family—that must be a real reason for a person moving from one State to another, if it means that they can be together. It is one of the primary reasons for having these harmonised procedures that people will go to one State and stay in that State. These kinds of differences or lack of rights will cause mischief to that and encourage people to make secondary movements to other States where they may be granted family reunion.

194. Speaking entirely for myself, I am entirely persuaded by the logic of that, but I remember when we were having discussions, I think with the Minister, on the other Directives and the Dublin II Regulations, wondering why those concentrated only on the Geneva Convention and did not relate also to the other instruments. The impression given was that this was a deliberate exclusion, so it was very surprising to find subsidiary protection coming in here.

(*Mr Hardwick*) I think there was this point that at those earlier stages it was not clear what the definition of who was entitled to subsidiary protection would be, and that was causing a lot of disincentive for us to do something at that time.

195. If we could get this added to the other Directives, it would be logical and satisfactory?

(*Mr Hardwick*) We would like it somewhere, my Lord. We do not mind where.

<Question> (*Ms Rogers*) One sees, my Lord, in the draft of the Reception Conditions Directive (which has now been agreed at a political level, although not adopted in its final terms, so I think words can be changed, I think that is the sub-text) that there is a provision there that the scope of that Directive—that, is who is included within it, does it include subsidiary protection categories—will be revised or re-looked at in the light of this Directive, the Refugee Qualification Directive. To my mind it will create a whole raft of problems if these Directives are not extended to subsidiary protection categories.

196. If it is looked at for reception conditions it ought to be looked at for the asylum procedures directive and for Dublin II purposes as well.

(*Ms Rogers*) Absolutely.

197. Can I come on to content, the content of the rights those who fall within the requisite definitions as being entitled to protection should have. The Minister has said that in order for the inclusion of the content to be meaningful it is considered necessary that the level of rights should be sufficiently high. Is the level of rights sufficiently high? I think this was a point on which Statewatch commented in its paper.

1 May 2002]

Ms NICOLA ROGERS, MR NICHOLAS BLAKE, MR NICK HARDWICK
AND MR STEVE PEERS

[Continued

Chairman *contd.*]

(*Mr Peers*) There are several points at which it is not sufficiently high because you have additional waiting periods for certain rights to be given — employment in particular for people with subsidiary protection. Access to integration schemes is another example. In that respect there is still a gap between the two types of status, and as long as you have a gap between the content of Geneva Convention status and subsidiary protection status, you are creating an incentive for people to appeal purely because they have one rather than the other. It would be a more efficient system if you simply had a one-stop shop which considered your entire international protection claim and gave you either one status or the other, but where the content of the status was essentially identical. The only difference which is inevitable is that if you have Geneva Convention status you get a travel document which non-EU states which have ratified the Geneva Convention have to recognise, whereas under subsidiary protection that is not the case. I do not think a vast number of appeals would turn on that distinction alone. If you have a gap where family reunion is not covered at all for subsidiary protection but it is for people with Geneva Convention status, as we have just discussed, and if you also have gaps as regards important issues like employment and access to education, vocational training, integration, then you are going to have a system with a considerable number of appeals on that basis.

198. Going back to the point I have made already, I find it difficult, and I would be grateful if you can deal with this, to see what logic there is in distinguishing between the content of rights available under one head and the content of rights available under another. It is not immediately obvious why Geneva Convention refugees should have better rights than subsidiary protection applicants. Is there a point I have missed in this regard?

(*Ms Rogers*) I think in the way in which the subsidiary protection category has been drafted now, there is very little logic in any difference between them, because it would seem that in fact the subsidiary protection categories only reflect Article 3 ECHR and that would mean it is quite a narrow band of people who would be included within the subsidiary protection category. However, it is my understanding that the Commission at the time when they were drafting this Directive were sensitive to the fact that some Member States were very unsure about what the content of subsidiary protection was going to be, who was going to be included and what rights would accrue. This varies a lot from Member State to Member State. They have very different systems for humanitarian status or subsidiary protection, and there would have been a political fear that if too many rights were given to a subsidiary protection category that Member States would just block out subsidiary protection altogether at this stage. Given how tightly subsidiary protection has now been defined, I would have thought that that fear could be allayed. I also think that there is a slight confusion in the minds of some Member States between what is subsidiary protection and what could be normally termed temporary protection. There has been a sense in which some Member States

might think of subsidiary protection as being some kind of temporary status but if you look at the kind of people who are included in the subsidiary protection category as defined by this Directive, they are not temporary people, they are not people who are only going to be there for a very short period of time, they are people who should have the same rights as any other person in need of international protection. Temporary protection as defined by the Temporary Protection Directive is an entirely different kind of matter.

199. But all protection we are speaking of is temporary in a sense.

(*Ms Rogers*) Yes.

200. Including protection under the Geneva Convention.

(*Ms Rogers*) The Geneva Convention itself envisages there might be circumstances in which that status is no longer required.

(*Mr Blake*) As a matter of practice, and this may be the reason for governmental distinction, I think the UK Government at the moment, if they think you get the full works, will now tend to grant you indefinite leave to remain, and if they do that they cannot then revoke your immigration status. They do not have to do that, it is only a matter of practice, but that may be one reason for the distinction in duration of permission to remain. Whatever the two regimes, there has to be at least some comparable level of minimum protection to live a normal life, which is really what one is looking for protection for—to bring up children, so they can go to school, they can join in with their class mates, et cetera, et cetera, which means they do need a travel document because when the rest of the school goes on a day trip to Calais the refugee or the subsidiary protected child does not want to be left behind in isolation, and that actually is one reason why people use the upgrade appeal. So if the Directive said, “And a subsidiary protection document ought to be recognised in the EU as well”, that would be quite useful. The French used to recognise our temporary protection documents but they do not at the moment. But that is the object of the exercise, so you can lead a normal life during the period when you are entitled to the protection of the receiving state.

201. Whichever type of protection you are in receipt of?

(*Mr Blake*) Whichever you are in receipt of.

202. The Directive does go on to deal with circumstances in which the protection can be withdrawn, and of course if an individual has been granted a permanent right to remain by the country concerned that ceases to be relevant, but that may not be the case, it will vary from country to country. I do not know in this country to what extent those who establish their status are always given permanent rights to remain. Are there any criticisms you want to make as to the content of the Directive regarding the circumstances in which protection can be withdrawn on the grounds it is no longer needed? I think the Refugee Council had some criticism in this regard.

(*Mr Hardwick*) I think it emphasises the point we have already made, the difference between the two statuses. Given the way in which the subsidiary status

1 May 2002]

Ms NICOLA ROGERS, MR NICHOLAS BLAKE, MR NICK HARDWICK
AND MR STEVE PEERS

[Continued

Chairman *contd.*]

has been drawn, there seems to be very little case for saying, if you like, the length of time for which it is applicable should be different for people who have full Convention status, given that full Convention status itself is in theory temporary. I do not see myself a reason for making the distinction, as in other matters relating to subsidiary protection.

203. So it is really the same point we have already been discussing?

(*Mr Hardwick*) I think so, my Lord.

Chairman: Before I thank you very much for your help this evening, which has been very considerable,

are there any other points you would wish to draw to our attention particularly arising either because we have not addressed them and we should have or because they have occurred to you in the course of the discussion this evening? Thank you very much indeed for your help this evening. I am particularly grateful because we have not yet had evidence from the Minister, and what you have said provides a great deal of scope and material for us to ask more intelligent and searching questions than might otherwise have been possible. Thank you very much indeed.

WEDNESDAY 15 MAY 2002

Present:

Bledisloe, V
Brennan, L
Fraser of Carmyllie, L
Hunt of Wirral, L
Lester of Herne Hill, L

Mayhew of Twysden, L
Scott of Foscote, L (Chairman)

Harris of Richmond, B

Explanatory Memorandum submitted by the Home Office on 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 (2001/0207 (CNS))

SUBJECT MATTER

1. This Explanatory Memorandum relates to a proposal submitted by the Commission for a Council directive on minimum standards for the qualification and status of refugees and others in need of international protection.

SCRUTINY HISTORY

2. This is a new Directive and as such has no scrutiny history. However, a Commission Working Document (SEC (1999) 271), subject to a Home Office Explanatory Memorandum of 26 March 1999, was deposited for scrutiny. This document was cleared by the European Scrutiny Committee on 11 May 1999 and by the European Communities Committee on 1 July 1999.

MINISTERIAL RESPONSIBILITY

3. The Home Secretary has responsibility for UK immigration and asylum policy.

LEGAL AND PROCEDURAL ISSUES

Legal Base

4. Article 63 TEC is the proposed legal base for this measure. Article 63(1)(c) specifically provides for “minimum standards with respect to the qualification of nationals of third countries as refugees”. Article 63(2)(a) provides for “minimum standards . . . for persons who otherwise need international protection”, and Article 63(3)(a) provides for measures on “conditions of entry and residence”. The proposed legal base is therefore an appropriate one. Measures under Article 63 TEC do not apply to the UK unless we decide to opt in under the provisions of the Protocol on the Position of the UK and Ireland.

European Parliament procedure

5. Article 67(1) TEC requires consultation of the European Parliament for measures adopted under Article 63.

Council Voting Procedure

6. Article 67(1) TEC requires the Council to act on the basis of unanimity for the measures adopted under Article 63 TEC.

Impact on UK Law

7. If the directive were adopted in its current form, implementing legislation would be required.

15 May 2002]

[Continued

Application to Gibraltar

8. Measures under Title IV which the UK opts in to apply to Gibraltar by virtue of Article 299(4) TEC.

APPLICATION TO THE EEA

9. This proposal does not apply to the European Economic Area.

SUBSIDIARITY

10. The proposal is designed to introduce minimum standards on the recognition of refugees and other persons in need of a subsidiary form of protection. This will help promote a balance of effort between Member States in the receipt of asylum seekers. The Treaty Establishing the European Community envisages measures which set such minimum standards being adopted by May 2004.

CONSULTATIONS WITH OUTSIDE BODIES

11. This proposal is subject to consultation with non-governmental organisations.

POLICY IMPLICATIONS

12. The Government welcomes the Commission's attempt to set meaningful minimum standards for qualification for refugee status and subsidiary protection status. A close degree of harmonisation is generally desirable in the asylum field in order to reduce disparities between Member States and so reduce secondary migration. This directive is only one element, albeit an important one, in meeting this objective.

13. In common with earlier measures in this field, the proposed directive seeks to balance the need for meaningful minimum standards against the need to allow Member States an element of discretion to deal with specific national circumstances. As such, the directive does not demand that Member States apply a detailed set of qualification criteria but instead sets out core framework principles consistent with the Geneva Convention and international human rights instruments. The Government considers that the proposal adequately sets out the minimum standards required to determine who should qualify as a refugee and who should otherwise qualify as a beneficiary of subsidiary protection and what rights and benefits should be attached to their status.

14. The Government considers that the interpretation of the Geneva Convention relating to refugees and compliance with international human rights obligations in the UK are already of a high standard and fully in accordance with the guidelines laid down by the United Nations High Commissioner for Refugees. For this reason, we judge that the proposed Directive as currently drafted would have a limited impact on the numbers of applicants granted refugee status or other forms of protection status.

15. The Government is confident that the UK will be able to meet the principles set down in the draft Directive. However, the Government is concerned to ensure that the draft Directive does not inadvertently create delays, which would obstruct our domestic drive towards faster and more efficient consideration of asylum applications. We expect to press for minimum standards which, inter alia, enable rapid resolution of protection claims, which we consider to be to the benefit of all parties concerned.

AREAS OF CONCERN

16. On the basis of the current text, the key areas of concern to the Government are as follows:

Sources of harm and protection

17. Article 9 deals with sources of feared harm and the avenues of protection available in an applicant's country of origin. It rests on the argument that the main rationale behind the Geneva Convention and regimes of subsidiary protection is that everyone is entitled to be free from persecution or other forms of serious harm, and in the face of such harm should be able to access effective State protection. If persecution or other serious unjustified harm stems from the State then an applicant's fear of it is well founded because, *de facto*, there is no viable avenue of protection available in the country of origin. If it stems from non-state agents then any such fear is only well founded if the State is *unwilling* or effectively *unable* to provide protection against such a risk of harm.

18. The Government strongly supports this interpretation, which reflects the case law and current practice of the UK, as well as the vast majority of other Member States and the international community. However, Germany and France have historically supported a different interpretation of persecution, centred on whether victims of persecution by non-state agents should qualify for refugee status. France and Germany

15 May 2002]

[Continued

have maintained that they do not but the overwhelming majority view and practice is the opposite. The Government believes that the UK's interest would be best served by the broader majority interpretation because it is a key factor in establishing a level playing field for asylum applications and will help ensure the effectiveness of the Dublin Convention and its successor.

Subsidiary Protection

19. The proposal lays down the criteria for qualification for subsidiary protection when the conditions for refugee status are not met. The Directive bases this category on existing obligations under international human rights instruments and does not expand the scope of Member States' responsibility. However, not all Member States wanted subsidiary protection in this Directive, either as a matter of principle or because they feared its inclusion would delay agreement. The government believes that it is important to keep the two categories under one heading because they are so closely linked and because it fits well with our own existing single procedure. Its inclusion would also contribute to the harmonisation process and the ultimate aim of adopting a single procedure in a future common European asylum system.

Cessation and Exclusion

20. The proposal follows very closely the cessation and exclusion clauses of the Geneva Convention, designed to ensure that only those deserving and in need of protection are granted it. The proposal explicitly excludes non-deserving cases, such as those who have engaged in terrorist type activities, from the scope of the Directive. However, the government will seek to ensure that the wording of the relevant articles is sufficiently flexible to ensure that there is no scope for abuse.

Content of refugee and subsidiary protection status

21. The Government believes that the inclusion of the content of refugee and subsidiary protection status is essential, despite the arguable lack of an explicit legal basis for the content of refugee status. The rights and benefits attached to a protection status are an important part of levelling the playing field across Europe and represent a crucial step towards harmonisation. Moreover, in order for the inclusion of content to be meaningful it is considered necessary that the level of rights and benefits given to those granted a protection status is sufficiently high.

22. The government also believes that the primacy of refugee status should be reflected in the level of rights and benefits attached to this status relative to those granted subsidiary protection. However, there are a number of reasons for limiting the difference between the two protection statuses: An individual's needs are the same regardless of the status granted; it would help limit the number of appeals by those refused refugee status but granted subsidiary protection; and meaningful rights, including full access to employment, are significant factors in encouraging genuine integration. The government is broadly content with the level of rights detailed in the Directive and will resist any undue dilution called for by other Member States.

Cross reference to immigration instruments

23. In Article 22 the Directive makes a cross-reference to the Council Directive concerning the status of third country nationals who are long term residents. The UK has not opted in to this Directive so will need to secure derogation from complying with this Article.

REGULATORY IMPACT ASSESSMENT

24. No regulatory impact assessment has been carried out. The draft Directive is not expected significantly to change existing UK practice in this field.

FINANCIAL IMPLICATIONS

25. The financial implications will depend upon the extent to which, if adopted, the Directive affects the speed with which asylum claims and any appeals are resolved.

TIMETABLE

26. The proposal was formally presented to the Council on 13 November 2001. Discussion in the relevant Council working groups has not yet begun. It is unlikely that a text will be presented for adoption in Council until the latter half of 2002 at the earliest.

4 December 2001

15 May 2002]

[Continued

Examination of Witnesses

ANGELA EAGLE, a Member of the House of Commons, Minister of State at the Home Office, MR PHIL DOUGLAS AND MR IAIN WALSH, Home Office, examined.

Chairman

204. Minister, thank you very much indeed for coming here this afternoon and helping us again with the latest of the items in the asylum package. We are very grateful to you indeed. We have a number of questions on which we are sure you can help us. The minimum standards for qualification and status of persons as refugees is the latest draft, as you will know, that has been produced by the Commission in a four-part package. I wondered if we might start by asking you, if you can, to bring us up to date on where matters stand with the other three proposals. I know that the reception conditions proposal has recently had some amendments to it but a number of the people from whom we have taken evidence have questioned the order in which these things have been dealt with and have suggested that it is this one, the status Directive, that ought to be the foundation stone from which the others then proceed. Where do matters stand on the others and might it be possible to get them back into what might appear to be a logical order?

(*Angela Eagle*) I can certainly tell you where we are with them and I have some sympathy with what is being said by the people who have given evidence to you before. EU business and procedures do not always go in the logical way that we would all like. There have been changes which have meant that qualification might actually have more of a chance of coming to the fore than was thought of when the Vienna Action Plan was drawn up. I think originally the view on qualification was that it would be the hardest to get agreement on because of the difficulties of non-state actors or non-state players, and the problems with France and Germany, and also the issues around subsidiary protections. There is no uniform pattern of approach to subsidiary protection in Europe. Taking those two things together, I think originally when the Vienna Action Plan was drawn up, it was thought that qualification would probably be the most difficult, and so it was put in a slower track. What has actually since emerged is that procedure has probably been the most important. That has been sent back and it is in the middle of being re-written by the Commission at the moment. They are lagging behind. They are meant to have produced it as a new text and it has not quite appeared yet, so we are still waiting for that. We have made good progress on reception during the Spanish Presidency, and there was a general approach agreed at the last JHA Council. I do not want to get into a discussion about what "general approach" means. I know we have all been having very interesting correspondence about that. An agreement of sorts we hope will be able to be ratified at the June Council. Dublin II is still enmeshed firmly in the working group, but I know that the Danes wish to give qualification their priorities. The Spanish look as though they will get at least one of the two that they made a priority, and procedure now is in the back of the race.

205. That is helpful. All the people from whom we have taken evidence have been very encouraged and

pleased by the fact that this particular instrument, the status instrument, deals not just with Geneva Convention refugees, but also with people who are seeking protection under other international agreements, the subsidiary protection people. The absence of provision for these people, as you will recall, is one of the leading objections to the Procedures Directive and to the Reception Conditions Directive. Is it possible that the movement that there must be to have brought in subsidiary protection on the status Directive might lead to some comparable addition to the others?

(*Angela Eagle*) I think time will tell on that one. It is welcome that this Directive does deal explicitly with that, but I think there was, certainly at the beginning, a view in the European Parliament that the subsidiary protection was such a patchwork of different behaviour across the EU and there is not an obvious body of international law that is as well developed as there is for the refugees convention with subsidiary protections. I think the European Parliament felt that it is too early to try to have a common approach to subsidiary protection before there is more coming together of the way that that is dealt with across Europe. We naturally welcome the fact that it is in the Qualification Directive, as it does recognise that there are non-Geneva Convention reasons why people may need to be protected. The practicalities of trying to establish a common approach to subsidiary protection when there is virtually no pattern across Europe in the way that it is branded at the moment means that it is probably a bit too early. I think the Commission is trying to look at subsidiary protections as part two of this phase of the move towards common asylum and they think it is biting off more than they can chew to try to deal with the two things together across the piece. Nevertheless, we welcome the fact that there is more recognition in the draft Directive before us of the importance of subsidiary protection, and that it is recognised in this Directive.

Lord Lester of Herne Hill

206. I was very interested in the answer the Minister gave. Of course, Article 3 of the European Convention on Human Rights is quite clear. It is absolute: prohibition against torture, inhuman or degrading treatment or punishment. So there is a common understanding. Is it not very troubling that, so far as subsidiary protection is concerned, it is based on a notion of unjustified harm, which is much less clear than an express link with Article 3 of the Convention? How does the Minister think that these two can be properly fitted together if there is no link in the Directive itself?

(*Angela Eagle*) If you are objecting to the idea of "unjustified", I know that some people who have given evidence to you have objected to that word.

207. I am making the point about the absence of a link. Subsidiary protection was guaranteed, especially in Article 3 of the European Convention.

15 May 2002]

ANGELA EAGLE, MR PHIL DOUGLAS AND MR IAIN WALSH

[Continued

Lord Lester of Herne Hill *contd.*]

(*Angela Eagle*) We have this discussion every time we meet each other about whether we ought to quote directly from international conventions in Directive language. You know my views on it and I know yours. If the point you are making is that you wish that the Articles that are relevant to subsidiary protection in the draft Directive ought directly to quote from Article 3, then we are back where we are in our discussion about whether we should make specific reference to the Geneva Convention and specific reference perhaps to the European Convention on Human Rights in all of the Directives that we promulgate.

208. If my question sounded like that, I apologise. (*Angela Eagle*) I kind of expect it from you.

209. What I was trying to ask you was how the courts in particular across Europe, the national courts and the European Court of Justice, in the absence of a link, are to be expected to interpret this Directive in a way that is compatible with Article 3 of the European Convention. I quite understand what you have said in the past about the political reasons for not making the link. I am really asking you a much narrower question, which is: how can we make subsidiary protection as courts and for that matter governments fit with the absolute prohibition against torture and inhuman or degrading treatment or punishment? That is really what I am trying to get at. I am not repeating earlier questions on that subject, I hope.

(*Angela Eagle*) Are you worried about the definitions which talk about the existence of a well-founded fear of suffering and serious unjustified harm?

210. Yes, that coupled with the absence of any cross-over link seems to me to create a worrying ambiguity. I just really wonder whether the Government are also concerned about that and, if not, why they are not concerned.

(*Angela Eagle*) Firstly, there is always a general compliance with the whole of the European Convention on Human Rights across the Directives, which is implicit in everything that we do as a result of the European Treaties, particularly Article 6 of the European Treaty. Article 5(a) already covers the wording of Part III of the European Convention on Human Rights and Article 5(b) and Article 5(c) are additions. They do not substitute.

Chairman

211. Can I ask a question arising out of that, which has just this second occurred to me? The Government, once this Directive and the other associated Directives are finally agreed, is going to be taking steps to implement them into national law. I think it will not need to do that in relation to the Regulations; it will need to do it in relation to the Directives. Will it be doing that by subordinate legislation under the 1972 Act or will it be doing it by some primary Act, or has that decision not yet been taken?

(*Angela Eagle*) That decision is nowhere near being taken. We have, first of all, to get the final wording of all the Directives as agreed and then we

have to take a look to see how we can do it. If there was a need for primary legislation, then we would have to have primary legislation, but clearly, given that we recognise the European Convention on Human Rights and we have the Human Right Act, it is preferable, if we can do it, to do it by secondary legislation. That would be a much easier and faster way of doing it. So long as we can do that without compromising the effectiveness of the Directives, that is what we would do. As you will know, Lord Scott, there is no simple way of putting into effect the fourth pillar measures without primary legislation, if that is what we need at the moment because of the extension that the Treaty of Amsterdam made to competence.

212. Particularly, if I ask the question arising out what Lord Lester said, was the reflection that there is no reason why, domestically speaking, the Government should not make the linkages imposed in the implementation that it undertakes, following the agreement of these measures?

(*Angela Eagle*) There is not but again, as I have just said in answer to Lord Lester, 15(a) does explicitly mention Article 3 of the ECHR and I would say that it is already in there.

Lord Lester of Herne Hill

213. Can I just clarify that because it may be that this answers my question completely. Is it the Government's position that when it refers to "unjustified harm," that does not in any way qualify the absolute prohibition against torture and inhuman or degrading treatment or punishment in Article 3 of the Convention and therefore, if the right approach to this Directive comes into force in this form, it must be read by every national court and the European Court of Justice to comply with Article 3?

(*Angela Eagle*) As I always say when I come here, we do comply with the European Convention on Human Rights, including Article 3, and I do not think there is any intention to qualify that good advice.

214. I was not asking whether the Government will comply. I understand you will comply because Parliament will make sure you do. I am asking whether the interpretation of the Directive we are looking at, in the view of Her Majesty's Government, is that when it says "unjustified harm", that does not in any way derogate from Article 3 and must be read in accordance with Article 3 of the European Convention to that extent being paramount?

(*Angela Eagle*) As a non-lawyer and someone who has never served in a court, much less as a judge, that would be my lay person's opinion.

Chairman

215. The answer is that the Government would interpret "unjustified harm" as at least covering any harm that is contrary to Article 3.

(*Angela Eagle*) Of course. I think people sometimes get too worried about little words. I know it is the lawyers' business but my interpretation of "unjustified", which is causing a problem here, is that

15 May 2002]

ANGELA EAGLE, MR PHIL DOUGLAS AND MR IAIN WALSH

[Continued

Chairman *contd.*]

somebody can suffer serious harm quite legitimately as a process of law if they are jailed. I think the idea of “unjustified” is to get at the difference between persecution and prosecution and where it is legitimate and not legitimate.

216. We have had enough on that point. Can I get on to another subject? The eligibility for refugee status, or for that matter for subsidiary protection, under the proposed Directive is extended to third country nationals and stateless persons. That is Article 2(c) and (e). Therefore, according to its terms, it would not be applicable to national EU Member States, but Geneva Convention refugees of course are not so limited. You may find, and we have had, individuals from other Member States, and we may have more when the applicant countries become Members, applying for asylum in this country or in other Member States. Why is that limitation, which is not in the Geneva Convention, being maintained in the Directive? Why do we not have the same definition of refugees as would be applicable under the Geneva Convention, rather than cutting out European Union asylum seekers?

(*Angela Eagle*) I think there are some practical issues there. Firstly, if you are a citizen of a European Union state, then you are allowed to freely live and work in any one of those states and travel about freely. Therefore, there are very, very few asylum applications that happen from Members of European Union states. The second issue is about the fact that all Members of the European Union sign up to proper protections of rule of law, democracy and freedom of expression, having an independent judiciary, all of the things that enable rights to be protected and minimise to almost minuscule the chances that they will be subject to persecution by their own state and that they will not have any means of pursuing that and getting justice in their own states. So the number of European Union asylum seekers that we have is minuscule, I have to say. We have done a search.

217. I was going to ask what the numbers were.

(*Angela Eagle*) We have had 320 since 1999 but the vast majority, and I am sorry that I cannot give you an absolute number, have been third country nationals on board European Union documentation. We get a few vexatious claims from European Union citizens who perhaps are not totally aware of what they are doing. We also get claims from people who are seeking at the last ditch to avoid extradition. Those are the only ones. The vast majority of the seemingly European Union claims actually turned out to be third country nationals who had false identity documents.

218. What it comes to it is that it is really a paper problem?

(*Angela Eagle*) It is absolutely a technical problem.

Viscount Bledisloe

219. Minister, you have quite rightly made the point that, let us say a German does not need refugee status to be allowed to come here but he is allowed to do so as a European citizen, if one can use that word. Does having refugee status make any difference to

extradition? Suppose a German comes here, particularly under the new arrest warrant or something, he can be whipped back to Germany very quickly if he was accused of a crime there. If he has achieved refugee status over here, would that in any way give him greater protection from being whipped back to Germany to be falsely prosecuted for persecution reasons?

(*Angela Eagle*) There are extradition arrangements in place between all the European Union Member States. What the arrest warrant in its current draft form suggests or puts in place is a mechanism for achieving that more quickly. The refugees status I do not think would matter too much if there were extradition arrangements in place and the nationality was maintained. Sometimes, when people claim refugee status in Britain, they become naturalised later, and therefore they would be treated as UK citizens.

220. Refugee status does not give you added protection against being extradited?

(*Angela Eagle*) No.

Chairman

221. We had a question about the position of Palestinian refugees, having regard to the particular terms of Article 1(D) of the Geneva Convention and the absence of anything in the Directive to deal with these people who technically will not be Geneva Convention refugees. Can we amend the Directive so as to cater for them?

(*Angela Eagle*) Article 14 does make mention of them, and there is then some commentary. We do not know why it is not in the main Article, and we will be exploring that as part of our questions on the text. There is also a difficult position at the moment with UNHCR refugees simply because there is a current Court of Appeal case in the UK which is trying to set boundaries and answer some questions about how UNHCR cases ought to be dealt with: firstly, whether the exclusion in the Geneva Convention under Article 1(D) actually applies only to UNHCR Palestinians who are were alive in 1951 or their descendants. There are some other issues about whether leaving an UNHCR-protected area then allows you to avail yourself of Geneva Convention rights, even if it is safe for you to return back to that area. We will have to await the Court of Appeal case here then to check whether the clarification of law provides us with that.

222. This is a pending case?

(*Angela Eagle*) It is a pending case but I expect it before the summer. We need to keep an eye on this whole area in case the Court of Appeal decides in a certain way that becomes incompatible with the Directive. So it is something that we are focussing on.

223. When are the meetings going to take place to finalise the new Directive?

(*Angela Eagle*) The Danes are hoping in their presidency to bring the Directive to agreement. Their presidency is for the last six months of this year. We are hoping we will get the Appeal Court case in a timely fashion.

15 May 2002]

ANGELA EAGLE, MR PHIL DOUGLAS AND MR IAIN WALSH

[Continued

Chairman *contd.*]

224. Going back slightly to a question I asked before, but particularly directing it to the position of the applicant countries, we have had a number of asylum applications in this country from Roma from eastern Europe. They will, I imagine, be nationals of new Member States, as and when the new Member States are admitted in to the Union. Does your previous answer mean that the Government expects, once that happens, that all these applicants can come to this country by force of their rights as European Union citizens?

(*Angela Eagle*) Certainly they would. Any European Union citizen would be able to use the advantages of common labour and travel area to work, live and reside wherever they wanted. So there would not be immigration reasons for them not to avail themselves of that right, but I think before any enlargement states join, they will be expected to adhere to the principles of Article 6 of the Treaty of the European Union which establishes a respect for human rights. They would not be allowed to join if it was not judged in their implementation of the *acquis* that they had not sorted that out, and that implies that if they were allowed to join, then issues about human rights problems and lack of access to a free and independent court system would have been solved.

225. On experience over the past few years, what sort of numbers are we speaking of?

(*Angela Eagle*) Of Roma, I know it is going down. I will write to you with the details. I know that a few years ago there were some Roma who were granted asylum. It is just not happening as much now. I can give you the figures.

Lord Fraser of Carmyllie

226. Minister, it seems to me that if the European Union did not have to have in contemplation enlargement to the east, this would be a relatively simple Directive to put together. What we are trying to do, or what you are trying to do, is to put together a Directive that will meet the situation when the EU is indeed enlarged to the east. Much of the representation that we have is not to do with the existing EU but what are the problems that might be encountered if we have to contemplate its application at a time when it is enlarged: as Lord Scott has indicated, what do we do about people like the Roma? As I understand it, the way the key definitions in this Directive are contained, those who, by the time it comes into force, are actually EU nationals would not enjoy any protection under this Directive. It is for third state persons who would be coming. That seems to me to be taking quite a big risk because the political decision may be to allow for enlargement before we have really got round to making sure that all of Article 6 and the provisions that we would like to see in place are actually achieved.

(*Angela Eagle*) I hope that will not happen. The Treaty of the European Union has to be taken literally and that means that Article 6 has to be put into effect. If it is not, then there ought to be opportunities for citizens of that particular country to be able to take action in that particular country in the courts to ensure that it is. If there is a problem

with Article 6, Article 7 of the Treaty of the European Union allows the Council to suspend or withdraw or take action in a way which would ensure that these assumptions about the rule of law, democracy, freedom of expression and all the things that protect against persecution would presumably then not apply. Somebody, I suppose, could have said that a few years ago about the Spanish before they came into membership of the European Union. Nobody would want to say it about the Spanish now. So I think we have to have trust that there will not be a cynical dash to enlarge for the sake of it before the rules and regulations which allow you to join the European Union are actually put into effect and in place adequately in individual countries. That is why there are different timetables for particular different countries to contemplate joining. I know, having visited some of the enlargement states, that there is a great deal of work going on there to make the protections in Article 6 a reality.

227. Much of the concern that has been expressed to us is not about the Spanish, it is not about the French.

(*Angela Eagle*) But it might have been a few years ago, is what I would have said to you about your question.

228. It seems to me that you are trying to make sure that you have an effective Directive in the context of an enlarged European Union. As I understand it, much of the criticism that we have had addressed to us is: why have we got such a clearly defined distinction between EU nationals, which would include enlarged EU nationals, and third state persons? Is there not a drafting way that we could accommodate the concerns that there are about the enlarged Community that would seem to me might blow away a lot of the criticisms that we have had voiced to us.

(*Angela Eagle*) As I said before, there are very, very few current European Union asylum applications from citizens and most of them are either false or vexatious. I am not aware that any has been granted. The second thing to say is that there is a thing in the Treaty of Amsterdam called the Spanish Protocol, which obliges European Union members to consider applications for asylum from European Union citizens as manifestly unfounded by definition. The definition is there because of Article 6 and there are protections that that grants. That does not mean that individuals from Germany, France and Italy cannot apply to the UK for asylum. They still have their Geneva Convention rights, but clearly because of the structures in place and the protections that there are in law in those countries, it is highly unlikely that any such application would actually be entertained. Given that there is freedom of movement and people can live and work in any European Union country, there are only very few occasions, I would have thought, when any one would contemplate making an asylum claim of that kind, and it is usually because they are seeking to avoid extradition, in our experience.

15 May 2002]

ANGELA EAGLE, MR PHIL DOUGLAS AND MR IAIN WALSH

[Continued

Chairman

229. Can I move on to an issue arising out of Article 8, which has been a matter of concern to a number of those who have given evidence to us, the proposition that if somebody is in this country and engages in activities which are designed, using the word in its literal meaning, to make himself or herself very unpopular and open to persecution in his or her country of origin, then those activities cannot be relied on to support an asylum case. The objection has been that the Geneva Convention approach to genuine fear of persecution does not look at the motivation of the activities that have given rise to the fear but simply looks at what the actual current state of play is. Therefore, the provisions of the Directive in Article 8 are providing less protection than the Geneva Convention requires and some amendment ought to be introduced.

(*Angela Eagle*) I do not think so personally. I think that when considering an individual asylum claim, clearly both our case workers here and the courts subsequently in any appeal, whether they are adjudicators or if it goes to judicial review, have to consider the case on its merits. There are some objective facts that need to be established about the nature of the regime that is being fled from, what is likely to happen if the individual returns, their particular history and political beliefs, nationality, race and social grouping, all those kinds of things, but also the credibility of the applicant. If the applicant was not known to have political involvement prior to fleeing but suddenly turned up outside the embassy and burnt flags and drew attention to himself, an inference may be able to be drawn. On the other hand, they may have had a genuine conversion to political activity, which has manifested itself in this way. Each case has to be looked into on its merits. Credibility and whether an individual indulged in a course of behaviour after they got to safety to bolster up an asylum claim would presumably be part of that test of credibility in an individual case.

230. I quite see that the credibility of the individual might be severely undermined if it were shown that these activities were deliberately designed to achieve the result. I see that, but you would not actually need this provision in the Directive to have that lack of credibility; that would appear in the oral hearing and the evidence being given anyway. The difficulty, it seems to me, is that if the design has been successful, then we will be faced in this country with people who will be subject to persecution if they return.

(*Angela Eagle*) They may have indulged in that course of behaviour but they may still have to be granted asylum because there was a fear that they would be subject to persecution if they returned. The two actually are not mutually exclusive. It would depend on a particular country's situation as to what they had done and all of that. I am not saying that someone who behaves after they have escaped from freedom in a way which is more likely to draw themselves to the attention of their home authorities could not actually be granted refugee status. That does and has happened.

231. This is setting standards for the Union as a whole?

(*Angela Eagle*) Yes. We are not certain how big a problem self-reared refugees—I think that is the phrase—is. It is very hard to know. It is very difficult without looking at individual cases to try to see a pattern of behaviour. It is highly unlikely, I would have thought, that somebody —

232. I respectfully agree with that. It just seems to me that there is a danger in the text which encourages concentration on motivation rather than encouraging concentration on what the actual position is, however caused.

(*Angela Eagle*) I see your point. I am not here to defend the text.

233. We were trying to encourage you that there might be some ameliorating amendments that the Government might put forward.

(*Angela Eagle*) I can certainly give you an indication that we can keep an eye on it. As I have said here, even if somebody did behave in that way, then it is not necessarily the case that they would not be a genuine refugee. We can keep an eye on it.

Viscount Bledisloe

234. Can we descend from the extreme legal niceties to the realities of life in the power being Britain or France or Holland. In the light of recent electoral events, it is fairly clear that people feel very strongly about excessive immigration. Do you think it is desirable that people should not be able to attempt to achieve refugee status by the deliberate self-creating act that is inevitably going to cause enormous headlines in the papers if they do, and is it not going to fuel, and in my view on this particular point justified fuel, resentment against immigrants?

(*Angela Eagle*) It is important that we look at the motivation of people and what happened to them before they left the country and what they have done subsequently, but it is also the case that if somebody is of a particular political belief, which for example is protected in the Geneva Convention, it would be unlikely if they had to flee their country and they were politically committed that they would not continue their political activities in some way without that impinging; they ought, within the rules of law, to be allowed to do that without having to worry about being summarily sent back. There are always grey areas at the edges of these things. Whatever system you have, there is bound to be somebody who thinks they can find a way to exploit it. All we can do in running this system is to look at the motivation of individuals, to look at their credibility, look at their behaviour and find out the facts about what happened to them before they left and what the context was, and make a decision as best we can. That decision is reviewable in the courts. That is all we can do.

235. Surely what this is getting at is not the person who had a belief and came over here but the person who is about to be deported because he is an illegal immigrant and then says, "Oh, I can buck that one. I will go outside my embassy and throw stones and burn flags, and then they will not be able to deport me".

(*Angela Eagle*) I would like to think that if that was the conduct that he or she had indulged in, that would be seen for what it was by the adjudicator. The

15 May 2002]

ANGELA EAGLE, MR PHIL DOUGLAS AND MR IAIN WALSH

[Continued

Viscount Bledisloe *contd.*]

system, regardless of the phrase “self-reared refugees” in this draft text or our system as it exists now, ought to be able to take account of that and say, “That is incredible. This person really does not have a well-founded fear” and act accordingly in the asylum hearing.

Lord Lester of Herne Hill

236. Could I say, and being married to an adjudicator perhaps I cannot give her evidence, that my understanding is that this problem does arise and adjudicators are perfectly capable of dealing with it and they do so quite often.

(Angela Eagle) It is quite interesting that if you go and listen to some appeal hearings being heard, if you sit in for an afternoon or something, you will hear evidence of people who are saying what they think they need to say in order to qualify. Sometimes that does not actually lead to a behaviour that they think will help them qualify, but you can certainly, if you go and listen to an adjudication hearings and appeal hearings going on, hear people with a story that they think will help them qualify, which is not always true.

Lord Hunt of Wirral

237. Can we ask you some questions about the position of non-state actors. This arises both in regard to threats by them and also the possibility of protection being afforded to them. Starting with the threats, threats of persecution by non-state actors has not been recognised by some of our colleagues in the European Union as sufficient to qualify for Geneva Convention refugee status. The draft Directive appears to extend that protection to people who are under threat of persecution by non-state actors. I think it is Germany and France in particular who in the past have not recognised this or not done so in the way that we think they should. Therefore, this has been welcomed by commentators as an advance in this area. I imagine that Germany and France have indicated their willingness to accept it.

(Angela Eagle) We never know until we get the final meeting, but I do know that the Germans seem to be moving to the majority view and have actually just finished consulting the Lander with a view to changing their law. We do not know quite how they are going to change their law, but they are expected to come into line with the majority view. The French know they have to. There is a positive move from a few years ago. Certainly the Vienna Action Plan thought this was a very insurmountable problem, which is why I suspect the qualification Directive came in after the others. It is becoming less of a problem, I think.

238. You will, I am sure, have noticed the extent this was welcomed by all the commentators from the NGOs who have given evidence to us.

(Angela Eagle) We welcome it too.

239. The other side of the coin relates to protection offered by non-state entities, NGOs or whoever it may be within the state. There have been some reservations expressed about this by people who have given evidence to us as to the adequacy. If you start

with a threat of persecution, what is the adequacy of saying, if you are right, that whoever it is not being a state will give you effective protection. How does the Government view that?

(Angela Eagle) My reading of this is that firstly we have to establish some facts about the individuals facing possible persecution: are they adequately protected against it by this non-state body? The bodies I am thinking of are things like the UN Mission in Kosovo, which was an obvious example, something like that. We would have to establish whether they were in need of protection, whether they were adequately protected in a particular area. I think it is trying to recognise developments in international peace keeping and also recognise, which I think many of us do, that the best way of dealing with threats of persecution on a grander scale rather than individual ones is to try to stabilise the areas where that is happening and try to sort that out, rather deal with a huge influx of displaced persons and refugees. Article 9 is trying to deal with and recognise the idea of peace keeping and see whether in individual cases there is an adequate protection against persecution and some of that will have to be about how effective the non-state body is. Clearly that will include things like guarantees for safety, access to criminal justice, accessible justifiable behaviour by an individual who felt he was being persecuted and that could be protected. Clearly in individual cases if somebody claimed that they had to leave Kosovo under the UN Mission, those are the kinds of things that would have to be established to find out whether they qualified for refugee status in the new circumstances.

Chairman

240. Presumably this will have to be done on a Union-wide basis. If there is to be a common asylum approach across the Union, which is the whole purpose of this package, then one would need to have Union-wide agreement that a particular NGO, a particular peace-keeping force, provides the requisite protection. Otherwise, if only some countries recognise that and others do not, then the whole package would be undermined.

(Angela Eagle) That is the advantage of having a common approach. Clearly we could all take individual national approaches now in any circumstances but there would be an advantage in having a common approach. We may also be able to say that if the peace-keeping mission is going on and there is a common approach, there would be a common EU approach to supporting the peace mission as well.

241. Is some sort of machinery going to be necessary so that it can be clear that in a particular area a particular organisation is recognised for that purpose, and a list kept and kept under review so that organisations can come on to it and go off it?

(Angela Eagle) That is one way of doing it. I suspect, rather than particular organisations, it would have to apply and be looked at in particular circumstances. So one would have to look to see whether the protections that are available in northern Iraq or those in Kosovo allow an adequate

15 May 2002]

ANGELA EAGLE, MR PHIL DOUGLAS AND MR IAIN WALSH

[Continued

Chairman *contd.*]

protection for individuals there. I see it very much as operating on a case-by-case basis.

242. The problem about that is that you may have the courts in Germany coming to one conclusion on a set of facts, "Yes, that is adequate so you cannot come here", whereas of course in, say, this country we would come to a different conclusion and say, "That is not adequate, so you can come here". You will, once again, have imbalance across the Union as to how asylum applicants are treated.

(*Angela Eagle*) These are minimum standards. Peace keeping and nation-building is a new area of policy and I expect that it will continue to evolve. I do not think there is a lot of experience particularly with how these things work. It is right that they are recognised as potentially a solution. I do not think that the draft Directive says any more than that. Certainly our own case law would suggest that we had to look at the effectiveness of the protection before we could regard it as adequate.

243. The courts would certainly say that.

(*Angela Eagle*) There is already case law that says it as well.

244. A slightly associated question relates to parts of countries. You may have countries where there is a risk of persecution in one part of the country, but if you pack your bags and go to another part, then you will be free of that risk. As to the approach that a country should take when they have asylum applicants who were under a risk where they come from but could have gone somewhere else within the same country where they would have been safe, and that is an approach which has been subjected to a certain amount of criticism, I wondered if you could help us with regard the Government's approach to that?

(*Angela Eagle*) We are in a circumstance where there are some examples of past countries that people may be able to return to and are beginning to return to: Somalia is an example and Sri Lanka is now is an example as well with the moves recently towards peace there. It may be that certain asylum seekers or refugees, if they wish, could be returned to particular parts of countries as they recover from whatever it was that happened to them that caused there to be persecution in the first place. Clearly that will depend on the individual's history and where they went and we would not return anyone who was still in fear of their lives or in fear in persecution. But if you look at Somalia, there are now a couple of provinces of Somalia where it is safe to return. We are developing return policies for those countries. Again, the Directive mentions that. We think that is entirely proper.

245. Is this being dealt with on a state-by-state basis, Union Member by Union Member basis, or is it being dealt with co-operatively between the Member States as a whole?

(*Angela Eagle*) Currently each Member of the European Union would have its own approach to that. There is also a different pattern of arrivals and asylum claims by nationality in the European Union states. Certainly we are looking to return to areas of Somalia and we are looking to return to areas of Sri

Lanka which have become safe now, following political developments there. We think it is entirely legitimate to do that, so long as we know that it is safe for particular individuals.

246. Are there, also far as you know, existing differences between Member States with some refusing to accept asylum applications from third country nationals on the grounds that there is some part of the country where they would be safe, whereas ourselves for instance do not take that view and therefore accept them as refugees?

(*Angela Eagle*) I do not know, to be honest. Each country will deal with particular areas. Again, we come back to areas like Afghanistan, Somalia and Sri Lanka. I would have to get back to you on that.

247. You have already helped us with subsidiary protection. I think Lord Lester referred to the unjustified harm criterion for subsidiary protection—serious and unjustified harm is the expression. You will have seen there has been a great deal of criticism of the addition of the "unjustified" criterion for the requirements for the harm to be serious. It is difficult to see why one needs the "unjustified harm" addition, unless it is simply directed towards the inability of somebody to claim they are going to be suffering serious harm just because they have been sent to prison. If that is the only point, it is a hammer to crack to nut.

(*Angela Eagle*) We are going to discuss it. We do not know what was in the drafters' minds or what we are getting when we look at persecution and prosecution. It really could be argued that that was what was in their minds. It is no good us second-guessing them. It is one that we underlined when we saw it in the draft. But we do think that "serious harm" needs to be qualified in some way so that it does not start including people who have been quite legitimately punished under the rule of law for things that they have done. We would not want to allow them to claim subsidiary protection because of it.

248. I understand the legitimate punishment point but the nature of the punishment may constitute something which we would find abhorrent but which, under the law of the country concerned, may be a penalty which is available to be imposed. Would that be unjustified just because they have been convicted of a crime they had committed?

(*Angela Eagle*) In certain circumstances that one could think of it would be unjustified by our standards and we could think of how that might work. I was not trying to say that the only definition in that context was to be whether there was a legal system, however illegitimate, in place in the country that we are talking about. The other issue that unjustified harm might refer to might lead to situations where a Member State has derogated from certain human rights during the course of a public emergency. We do not know whether it is one of those *in extremis* clauses. It is that kind of area we are going to be discussing when we bring up the wording and what it means and what has been achieved by it.

15 May 2002]

ANGELA EAGLE, MR PHIL DOUGLAS AND MR IAIN WALSH

[Continued

Lord Fraser of Carmyllie

249. It seemed to me there might be some sort of distinction to be drawn between what is unjustified in terms of international law and international conventions and unlawful within the domestic context, that you can chop peoples hands off for seditious writings, which might be lawful within the country but would be regarded in the international context as being quite unacceptable. It is not clear to me what sort of distinction is trying to be driven towards. If that is the distinction, I understand it. I share the Lord Chairman's concern that it might be narrowing things or bringing into it a set of different considerations that hitherto we have not really had.

(*Angela Eagle*) It is not clear to us either, which is why it is one of the things we have underlined for discussion. The suggestions I have made today are our speculation rather than knowledge about what might have been in the Commission's mind.

Lord Lester of Herne Hill

250. I wonder whether the Minister could comment on my difficulty about the whole of this. If I am being too rational, please forgive me for putting forward what I think is an attempt to sort out a muddle. Is not the problem that, for political reasons no doubt in Brussels, the starting point is that we must not refer to the European Human Rights Convention in the preamble for some reason. We are allowed to refer to soft law in things like the Charter of Fundamental Rights. We then look at the European Convention and, because we cannot mention it for some reason, we then muck about with language which may or may not reflect the bits and pieces of the Convention. For example, you have mentioned Article 15 of the Convention dealing with derogations in situations of great public emergency threatening the life of the nation and so on. If that is what it is about, is it not very clumsy and unsatisfactory and in the end going to create muddle and problems for the courts and lawyers and, for that matter, those who are affected by this in government, public officials and so on. Would it not be far better to clarify it properly in the text itself, so that everyone knows where they stand?

(*Angela Eagle*) I have absolutely no idea what was in the drafter's mind. It is pointless for me to speculate. I do not think I have the mind of an EU drafter of European law and Directives. The Article 3 of the ECHR is mentioned explicitly in respect to grounds for subsidiary protection in 15(a). I go back to my argument that all of the protections of the European Convention are implicit in everything that is promulgated because of the Treaty. I am not sure how much further we can take the discussion before we try to have a discussion with the Commission about what they mean by the term "unjustified" and what they are trying to get at. We have speculated today. We might be wrong.

Chairman

251. Minister, would it not be appropriate for the Government, either at a Council meeting or in discussions with the Commission before the Council meeting and then at the Council meeting, to suggest

amendments or clarifications to this so as to correspond with what certainly I think most members of this Committee, and I am sure the Government too, would think was justifiable and what was not?

(*Angela Eagle*) Of course, but before I speculate about what that might be, I would like to know what they were trying to achieve by using the word in the first place. Then we may be able to be of more help to them,

252. Except that it seems there is a great deal of further discussion and negotiation to be done before this can be considered satisfactory.

(*Angela Eagle*) I understand the concern. We have noted it and we will be paying attention to this part of the test. Clearly we want as much clarity as possible. We will try to achieve some wording that gets us to that space.

Lord Mayhew of Twysden

253. My own feeling and recollection of these affairs was that there were things called preparatory works which one looked at and they were quite helpful. I wondered whether any scrutiny of those leads to some light on what they wanted to achieve. If I may say so, I rather agree with you, that the intention of European legislators who have produced this language is to exclude only serious and such harm as is not justified by reference to a system of law obtaining in the part of the world with which we are concerned. I think you agree, from some of the anxieties which have been expressed by the Committee, that it does in the English language and in English jurisprudence open a great soggy area where we would not want to have one?

(*Angela Eagle*) I am not in favour of any soggy areas, apart from in my back garden. I agree that the more clarity we can get into it, the better. We have speculated about what it might mean. There clearly will be working group meetings ahead of any ministerial meeting. We will be able to focus on it. I have noted the Committee's concerns but also the concerns of people outside and we will certainly see if we can get an approach that captures what the Commission are getting at but does not leave us open to misinterpretation.

Lord Brennan

254. Mine is a simple question, Minister. Are the drafts of these Directives first produced in French or in English?

(*Angela Eagle*) I think it varies depending on who is actually doing the work. They can be done in either. I do not know, off the top of my head, whether this one was translated from French into English or whether it was done originally in English. No doubt I could find out. It comes out in all languages, but I do not think that answers your question. I do not know in what language the drafter drafted it but I suspect you are right, that it would be French or English. I can find out for you.

255. Let us find out what the words mean in these Directives.

(*Angela Eagle*) We have interesting debates on that in the Council.

15 May 2002]

ANGELA EAGLE, MR PHIL DOUGLAS AND MR IAIN WALSH

[Continued

Lord Brennan *contd.*]

256. Do you have staff in the Home Office who are especially equipped to advise you about this form of drafting, legal staff, or do you use parliamentary draftsmen or do you work to an understanding?

(*Angela Eagle*) The UK representatives and all the officials that we have in the European Union are very knowledgeable about these things. We also have lawyers and are more than bilingual, multi-lingual, people at the Home Office who can assist us when it gets to us there. We have plenty of coverage in terms of meanings. What also happens after a Directive is agreed is that it goes for special translation and people then check that there have not been mistranslations in the different language which change the nature or meaning of what is in the Directive. So quite a careful process is gone through to ensure that lack of an accurate translation does not lead to a major problem for whatever Member State we are talking about.

Lord Hunt of Wirral

257. Just following up my friend, Lord Mayhew, on preparatory meetings, could you just read us through the chronology of what is now going to happen? There has been a lot of concern expressed about the wording of "serious and unjustified" and whatever else. Are you planning bilaterals with the Commission and with the Presidency? What is the timescale within which we are operating and when do you think you will be able to come back to us to give us some sort of explanation of what is in the minds of drafter, and indeed those instructing the drafter?

(*Angela Eagle*) There will be a series of meetings in the working parties which happen at official level where very detailed things are done. At ministerial level, I am travelling to Denmark ahead of the Danish Presidency, and we will certainly talk about their priorities. This is one of their priorities. I will be making the points to the Danish Minister about the issues and problems that we have with drafts as they currently are. So what happens is almost a parallel process. The Danes will then go away, having talked to everybody else, and come up with a re-draft, but that will be checked through the working parties. There will be compromises made on various things. If it can be agreed at working party level, it will be put up to the Council for political and formal agreement. If there are problems at working group level, then it tends to go up to the Council for political discussions and talks before it goes back to the working group to be ironed out again. This process can happen quite a lot or it can happen quite easily, depending on how the Member States view the current state of the draft.

258. Can you just give an idea of the timescale we are now operating under?

(*Angela Eagle*) All I can say is that the Danes have decided they wish to prioritise this one and they will want to bring it to agreement before the end of the year, so they will be speeding up the process which in the past has gone quite slowly. I think you had an initial deposit of the draft a year or two ago.

Chairman

259. Which draft?

(*Angela Eagle*) There was an original memorandum, was there not, in 1999.

260. Before my time.

(*Angela Eagle*) It has gone slowly since then but will now clearly speed up because the Danes have said they wish this to be a priority, so we are very, very happy to work with them to get a draft as quickly as possible.

261. Minister, can I ask you about the position of family reunion in relation to applicants for subsidiary protection. There is not any provision in the Directive for the right to family reunion for people applying for subsidiary protection and it appears that it is not covered by the Family Reunion Directive either. This has been described by the Refugee Council in their evidence to us as "a significant gap" in the Directive. Is there anything that can be done about it or are there any particular reasons for this omission?

(*Angela Eagle*) Again, originally it was thought that there might be a subsidiary status Directive that was separate from this process. The view of the European Parliament was that there were too many differences between how Member States deal with subsidiary protection at the moment to justify an EU instrument which would have any meaning. The Commission originally wanted to include originally the right to family reunification for persons with subsidiary protection in the Family Reunion Directive but they dropped it following the opinion of the European Parliament and I suspect realistically now that this will come in the second wave of Directives on a common asylum policy rather than the minimum ones. The four that we have talked about are meant to establish minimum standards across the board. I understand people's disappointment but that is the reality of the situation in Europe at the moment.

262. It seems a fairly low minimum that excludes the right to family reunion.

(*Angela Eagle*) For those on subsidiary protection, not for those with refugee status. Some of the arguments are that subsidiary protection can be more temporary than refugee status. There are arguments on either side. The realistic prospects are that this area is not going to be covered in the full Directive that we are considering at the moment.

Lord Lester of Herne Hill

263. I wonder if I could just ask a question about this. The UN High Commission for Refugees in their commentary on this in paragraph 15 of their document of November criticised the definition in Article 2(j)(ii) of "family members" because the definition does not include children of the applicant's spouse or stable partner, for example stepchildren. The UNHCR considered that distinction to be unjustified and suggested it should be corrected. I realise that you have not had advance notice of this question and it may well be better, therefore, not to deal with it off the cuff. I just wondered whether consideration had been given to their criticisms to see

15 May 2002]

ANGELA EAGLE, MR PHIL DOUGLAS AND MR IAIN WALSH

[Continued

Lord Lester of Herne Hill *contd.*]

whether the definition could be made a bit more generous in the concept of family. I just add for good measure that I have also noticed that there has also been criticism from the European Region of International Lesbian and Gay Association as well on a different aspect that we do not have time to go into. Are considerations being given to certainly the first criticism made by UNHCR?

(*Angela Eagle*) Certainly on your latter point we have to get unanimity to promulgate these Directives and one of the ways to destroy any prospect of unanimity at the moment, unfortunately, is to introduce issues of partnership recognition, or same sex partnership recognition, with which all countries in the European Union do not agree and are quite controversial in some places.

264. In a welcome way it does to some extent go to unmarried couples of either sex, same sex or opposite sex if they are stable.

(*Angela Eagle*) Yes, but it also says that "This is only applicable in Member States where such relationships are treated in the same way as married couples for legal purposes." The difficulty when we get into this area, I am afraid, if I can caricature it, which is unfair of me but I will, we get the catholic south up against the liberal Scandinavia and the prospects of having a unanimous agreement disappear.

265. That was a throw away remark I made about the Gay and Lesbian Association, I was really concentrating on traditional family relationships between opposite sex spouses and so on which was the focus of the UNHCR memorandum.

(*Angela Eagle*) We have some difficulties as well in the areas of divorce and various other things for the reasons I have just talked about in terms of stepchildren and things like that. Whenever we try to define "family" it causes difficulties. The tighter the definition the easier it is not to have a row about it in one part of the European Union and then the looser in another part the harder it is to get agreement from other areas. There is always a balance in trying to define "family relationship" for these purposes. Clearly there are also many areas where families are extended and you have cousins, second cousins, far more generous definitions of family in different cultures. It is an area that is difficult for us. The current text is probably one that we can maintain but if we attempted to extend it, and we can certainly discuss this in the working parties, things do sometimes unravel.

266. If I could just ask a subsidiary question. Presumably again the European Human Rights Convention may come to the rescue because Article 8 of the Convention talks about the right to respect of family life.

(*Angela Eagle*) Yes. I think the other issue to remember is that this is only a minimum standard so it is up to Member States, and many do, to employ a more generous definition of "family" than is required in the legislation. You can build up from the minimum. If we agree to have quite a restrictive definition of "family" it is still in our power as a Member State to be more generous in our own laws.

Chairman

267. One of the features of the proposed Directive is that it does include reference to "content" of the benefits that are going to be made available to refugees and those who can obtain subsidiary protection. The Government said "in order for the inclusion of content to be meaningful it is considered necessary that the level of rights and benefits given to those granted a protection status is sufficiently high." I wondered what your view was on that, is it sufficiently high? Is the Government satisfied with its level?

(*Angela Eagle*) We do not think it is too bad. It is not below the Refugee Convention, so it is consistent with that. We have more generous provisions, for example, on employment, access to education, social welfare, etc., than some Member States. In some there is a time delay before people can have access to things. It is clearly an important part of the level playing field. The list of things in the Directive as it is currently drafted give us a far more level playing field than we have now. Given that that is a minimum standard from which we can build in the future we are reasonably happy with it. What we would not want to do is try to create higher standards at the risk of losing agreement on the minimum standards.

268. I see that provided there is support and consensus—I hope there would be support and consensus—among Member States that we are dealing here simply with minimums which could be lifted up as and when the occasion dictates.

(*Angela Eagle*) But even these are going to be difficult and quite challenging for some Member States to put into effect, so we have to take account of their worries about that too whilst welcoming the fact that we managed to get agreement on this level.

269. Are the levels directed at all to what the position will be when the applicant countries become Members?

(*Angela Eagle*) The formal position in the way that the European Union works is no, the *acquis* which they have to put into effect simply gets posted off to them as it changes with the agreement of Directives.

270. Thank you. The Directive provides a different duration of protection for refugees and for those who have subsidiary protection. What is the point of a distinction? There is five years for refugees, there is one year for the subsidiary protection people, why not have the same protection for both?

(*Angela Eagle*) I think it is simply that we have such a patchwork of difference in approach to this in Europe at the moment.

271. These are all political difficulties, are they?

(*Angela Eagle*) For example, some of our subsidiary protections we would grant extended leave to remain ahead of granting perhaps indefinite leave to remain and then granting citizenship or naturalisation rights in due course, or certainly resettlement rights. In other European Union countries, for example France has a form of recognition which I do not think it wants to call subsidiary protection which lasts a year and then can be renewed twice. There are all sorts of different current practices that the Directive before us is attempting somehow to get into the same agreement.

15 May 2002]

ANGELA EAGLE, MR PHIL DOUGLAS AND MR IAIN WALSH

[Continued

Chairman *contd.*]

My view is that if you can get it into the same agreement you can then look at how you might create a more coherent pattern of subsidiary protection in the European Union. Getting the agreement on recognising subsidiary protection formally is the first essential step to doing that.

272. I quite see that if you grant naturalisation rights or citizenship rights to somebody who has been given refugee status or subsidiary protection status then that takes them out of the bracket but this is not dealing with that, this is considering their position on whether they remain refugees, subsidiary protection status, whatever the case may be. As far as that is concerned, as I understand it the approach is really if the conditions in the country change so there is no longer a risk of persecution, there is no longer a risk of torture or whatever may have been the factor that entitled them to this status in the first place then they can be sent back.

(*Angela Eagle*) The Geneva Convention allows that.

273. So what is the point of the distinction? I return to it.

(*Angela Eagle*) I cannot speak for the European Union countries, I suspect it is simply the way that it has grown up over time. The Geneva Convention is always the one that is tested for first, so that is top of the hierarchy of protections. If people fail that for whatever reason they can be granted in circumstances subsidiary protection. There has emerged temporary protection which we have an EU instrument on which has been designed specifically for mass influxes on a short stay basis. I think in general the view is that subsidiary protections often are about protecting from a situation that could actually end sooner than the issues that may lead to refugee status, and therefore the period of protection is shorter in order to facilitate returning when the appropriate time arrives.

Lord Lester of Herne Hill

274. Two of the points that have been made against this view, I think by Professor Goodwin-Gill among others, is first of all having this two-tier system will lead many at least to seek to upgrade to refugee status which will clog up the courts unnecessarily.

(*Angela Eagle*) It does happen, yes.

275. Secondly, that States may be tempted to opt for subsidiary protection instead of the more

conventional refugee status. I wonder what the Minister thinks of those two points?

(*Angela Eagle*) It is certainly the case that people do often attempt to upgrade from subsidiary protection to refugee status. I suppose we have the Geneva Convention we have and if you fall outside of one of the defined areas which lead to protection under the 1951 Convention then there are other conventions that you may then rely on. I suspect that the differences can only be solved by negotiations at international level to create a more coherent basis for subsidiary protection but we are not in that position yet clearly. Some countries are more generous with the way they deal with subsidiary protection than others.

276. Do you agree that there may be a temptation for some governments to grant subsidiary protection instead of the more traditional one?

(*Angela Eagle*) It is a theoretical possibility. I do not know personally whether that happens. I do not have any specific examples of it happening but clearly if there is more than one protection regime and one appears to grant more rights than another then there are incentives for people to apply to the top of the hierarchy of rights when they may not qualify in case they get through and equally there are temptations for governments to seek to push people on to the lower level, that is inevitable.

Lord Lester of Herne Hill: I only mention it because it was a point made by Professor Goodwin-Gill.

Chairman

277. Has anybody got any other questions? Minister, thank you very much indeed, you have been extremely patient and you have given us a great deal to think about. We are all very grateful to you for spending that time this evening. You were kind enough every now and again to say that you would send us some further material and we would be very grateful for that. I wonder if it would be possible to put a timescale on it because we will be writing a report, or trying to do. Would two or three weeks do?

(*Angela Eagle*) That would be plenty of time, I am sure. They are all nodding.

Chairman: Thank you very much, we will look forward to it.

Letter from Lord Filkin, Parliamentary Under Secretary of State at the Home Office, to Lord Scott of Foscote, Chariman of Sub-Committee E of the European Union Committee

Thank you for your letter of 20 May enclosing the transcript of Angela Eagle's appearance before the Committee. I understand that she undertook to return to you with additional information on a few points. I am sorry that I have been unable to do so until now.

You asked for the total number of EU nationals who had claimed asylum in the UK since 1999. As Angela Eagle explained at the time, that information has been difficult to access as many of those applicants initially recorded as EU nationals later turn out to hold another nationality. Our records show that there were 90 EU nationals recorded as seeking asylum in the UK in 2000 and 2001.

15 May 2002]

[Continued

You also asked for the total number of Roma asylum seekers from EU candidate countries from that time. In the UK we do not collate information on the ethnicity of asylum seekers. Since 1999 the UK has received 17,925 applications from nationals of EU accession candidate countries excluding Malta.

Additionally Angela Eagle said she would provide you with further information on what differences existed between Member States regarding whether someone could be returned to part of a country where another part of that country was considered unsafe. In 1996 Member States of the EU agreed a joint position with regard to a harmonised application of the 1951 Convention. Member States agreed that where it appears that persecution is clearly confined to a specific part of a country's territory, it may be necessary to ascertain whether the person concerned cannot find effective protection in another part of his own country, to which he may reasonably be expected to move. Discussions at Working Group level confirm that that remains the case for Member States.

9 July 2002

WRITTEN EVIDENCE

Memorandum by Immigration Advisory Service

MAIN ISSUES

1. In general IAS welcomes the Draft Directive and endorses it.
2. IAS endorses the Government's view (set out in paragraph 12 of the UK Explanatory Memorandum that a close degree of harmonisation is generally desirable in the asylum field in order to reduce disparities between Member States. Although there will always remain particular linguistic, historical, community and other reasons why asylum seekers will seek to choose some Member States rather than others in which to lodge their claims this should not be on the basis that there is perceived or in fact preferable procedures and application of the Convention in some Member States as against others.
3. Just as IAS has urged on the UK Government to establish an independent documentation centre for the assembly of disinterested and widely accepted information on countries of origin, to which both governments and claimants could have access (a Government decision on this is imminent¹) so IAS feels that a European Documentation Centre on the same principles would be beneficial and would help harmonise decisions on refugee status and subsidiary protection.
4. We acknowledge that "rapid resolution of protection claims" (UK Explanatory Memorandum paragraph 15) is desirable but only if this is commensurate with a proper examination of the claims and with natural justice. This would include early access to disinterested and competent free legal advice and representation for all asylum seekers and sufficient time allowed for the full preparation of a claim, including gathering evidence of medical reports and from countries of origin where necessary. For alleged victims of torture, for example, where it can take several weeks for a medical report to be obtained or where time is needed for immediate trauma to diminish in a safe environment before evidence of inhuman and degrading acts or torture can be elicited from the claimant, the process cannot be a speedy one. We are concerned that the UK Government does not appreciate this. This principle applies equally not just to the initial claim but also to any appeal. The present attempt to speed up the appeals process in the UK can be counter-productive as hearings are conducted in the absence of the appellant or with insufficient time to marshal evidence contrary to the rules of natural justice.
5. We are concerned at the disparity in treatment of asylum seekers in different Member States before a decision is taken on their claim for protection. Such an initial environment can have a considerable effect on the ability to make a claim and to prepare it fully. Questions of isolation, support and accommodation, early access to free legal advice, freedom from racial harassment or intimidation from authorities to persuade claimants to abandon their applications are all issues which cannot be separated from minimum standards within the Draft Council Directive yet insufficient attention has been paid to these. They are, of course, entirely different considerations from the fifth set of rules which lay down the minimum obligations towards those granted international protection.
6. Notwithstanding the wording of Article 63(1)(c) TEC wherever possible the Council should be considering optimum rather than minimum standards. We submit that the Article does not preclude this but prescribes a base line of minimum standards. Those EU Member States which already have some standards higher than the proposed minimum should not be expected to reduce those standards to a lower common norm (referred to in Chapter I Article 4 of the Draft Directive: page 41). Those with lower standards should aspire to achieve the higher standards of Member States that have them.
7. IAS is pleased that in accordance with the Protocol on the Position of the UK and Ireland the UK can decide not to opt into these measures where the standards are less than those already practised in the UK but would be concerned if the UK did not opt in because it wished to exercise lower standards than those proposed.

¹ 31 Jan 2002 Asylum Seekers: Country of Origin Reports

Earl Russell asked Her Majesty's Government: Whether they will consider setting up an independent unit to consider the safety of countries to which refugees may be returned.

The Minister of State, Home Office (Lord Rooker): My Lords, we have already undertaken to do so. The decision was announced to Parliament by way of a Written Answer on 5th April 2000.

Earl Russell: My Lords, I thank the Minister warmly for that reply. I believe that we all realise that the Home Office has a very wide range of responsibility. We respect that. But will the Minister remind the Home Office that it is not the Foreign Office?

Lord Rooker: My Lords, the Foreign Office is the Foreign Office. It works for the British Government and not for foreign governments. I cannot add to the Answer that I gave. The Home Office announced nearly two years ago that it would consider having independent documentation of the in-country reports. We are satisfied with the quality of the reports, but a research effort has been undertaken and we shall shortly publish the results. Our own in-country reports are quoted by all western governments and, indeed, by the United Nations High Commissioner for Refugees. Therefore, I do not accept that they are defective. Nevertheless, in April 2000 we undertook to consider whether there was a role for an independent documentation office to produce these reports. They do not contain Home Office policy and they do not contain Foreign Office policy either.

8. There should be a common definition of what constitutes refugee status. This means seeking a common interpretation of the 1951 Convention as to what may amount to persecution and those issues subject to wide international juridical interpretation such as what might be regarded as a “social group” (Draft Directive Article 12 (d) sets out a useful amplification with which we concur). In particular, there should be acceptance by those EU Member States that do not so accept that persecution within the Convention can arise from activities of non-state agents (Draft Directive Article 11.2 (a)). IAS supports the Government view that this can arise only where the state of the country of origin is unwilling or unable to provide protection and that the “broader majority interpretation” (UK Explanatory Memorandum paragraph 18) is correct. IAS notes that there is a legislative proposal in Germany to adopt the broader interpretation and feels that the French position may contribute to the reluctance of asylum seekers to seek protection in that country.

9. IAS supports the Government view that the criteria for subsidiary protection should be incorporated in the Directive (UK Explanatory Memorandum paragraph 19). It is IAS’ experience that in matters of such importance to claimants’ life and limb and freedom from abuses of internationally agreed human rights the credibility of an asylum seeker, subjectively assessed by an Integrated Casework Directorate caseworker and/or adjudicator sitting alone, can be the difference between success or failure of the claim for protection. In those circumstances it is proper that subsidiary protection should be granted if there is a widespread view that the country of origin is unsafe. We refer above to the desirability of a European Documentation Centre.

10. In principle we have no difficulty with the term “serious unjustified harm” as the basis for protection (Draft Directive Article 11: page 45) but are concerned at what might be used by governments as a wide definition of what constitutes “justified” harm in the absence of clearer guidance. A disinterested, objective assessment of justification, rather than a subjective one of the government concerned, should be applied. It should be remembered that Article 3 of European Convention on Human Rights is absolute and permits of no derogation.

11. Article 5 of the Draft Directive refers to “consideration of whether an applicant qualifies for subsidiary protection shall only normally take place after it has been established that he or she does not qualify as a refugee.” IAS does not see why consideration as to the appropriate form of protection, whether as refugee or secondary, cannot be undertaken at the same time, especially in view of a common desire to see the issues resolved as speedily as possible.

12. We share the Governments concern about the cessation and exclusion clauses (UK Explanatory Memorandum paragraph 20) but for broader reasons. We are concerned not only at potential abuse of protection by those who have engaged in terrorist type activities but also at abuse of these provisions by governments. We are mindful that often one government’s terrorist is another government’s freedom fighter yet protection under the Convention should be applied equally and universally. This may be difficult to achieve in the wider world but should be an aspiration of the European Union. To that end there should be agreement that terrorist type activities should have a common definition according to international instruments, that evidence should be adduced (albeit in hearings in camera if its nature and provenance is sensitive) in support of a government’s contention that protection should be removed and that there should be an independent right of appeal against the proposed cessation or exclusion itself (Article 14.3 of the Draft Directive refers: page 48). IAS commends the UK’s Special Immigration Appeals Tribunal which was instituted itself as a result of the case of *Chahal* which showed that the absence of such appeal was in breach of the European Convention on Human Rights.

13. IAS fully endorses the Government’s sentiments that there should be little difference in the level of rights and benefits between refugee status and subsidiary protection (UK Explanatory Memorandum paragraph 22). As is pointed out, there is a practical effect of limiting appeals by those granted subsidiary protection against refusal of full refugee status and greater facility in integration. We have remarked earlier about the often thin evidential and credibility dividing line between refugee and subsidiary protection status. In addition, subsidiary protection may have to exist for many years and the inability to be joined by immediate family will be harsh. Moreover, the judgement that a country of origin is unsafe for the applicant may well mean that it is equally unsafe for the applicant’s immediate family and by which the applicant would wish to be joined. IAS feels that protection should be indivisible as it is based on the need to prevent abuse of human rights. There should be no difference in the rights and benefits afforded to those granted different types of protection. The only difference should be in recognition of actual fear of persecution within the meaning of the Convention definition and the unsafe nature of the country of origin: the protection of both statuses might need to be of long or short term duration depending on the circumstances and evolving situation in a country of origin. Indeed, this is acknowledged in the Explanatory Memorandum to the Draft Directive: “in reality the need for subsidiary protection often turns out to be more lasting” (page 4). IAS is concerned that Article 3 of the Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status is optional and can lead to disparity in approach to those with subsidiary protection.

14. IAS welcomes the provisions for issuing travel documents to those with subsidiary protection as well as refugee status (Draft Directive Article 23: page 50) but feels that this should be supplemented by the adverb “immediately” (as is found in Article 24.1 on Access to Employment) in order to avoid delay, which is IAS’ experience in the UK.

15. IAS welcomes Draft Directive Article 24 on Access to Employment for both refugees and those granted subsidiary protection but fails to see why the latter should suffer a delay of up to six months when there is an acceptance (for reasons advanced above) that there should be little difference between the rights and benefits of both statuses. Likewise, there should not be a delay of up to one year for adult education etc. There is no such distinction in Articles 25 (access to education) and 26 (social welfare). IAS feels that there should be guaranteed immediate access to employment on grant of either status and goes further: there should be access to employment within no later than six months for all applicants whose claims have by that time not been decided initially.

6 April 2002

Memorandum by the Immigration Appeal Tribunal

INTRODUCTORY POINTS

1. We note that the summary of the Conclusions of the Presidency at the Tampere European Council in October 1999 set out at page 2 of the explanatory memorandum speaks of the *approximation of rules* on the recognition and content of refugee status to be *supplemented with measures* on subsidiary forms of complementary protection (our italics). Although we acknowledge the reasons for embodying the two aspects in one Directive the proposal seems ambitious particularly given that it is acknowledged that no specific EU *acquis* directly related to subsidiary protection exists (see explanatory memorandum at page 26). The proposals on complementary protection are insufficiently thought through to be satisfactorily applied. It would cause less confusion if the status of complementary protection was conferred on those who made out a claim under the ECHR. The European Court of Human Rights would then help to ensure common standards (see our comments under Article 15, below).

2. The imposition of a minimum is not standardisation and will not lead to any decrease in migration **not** motivated by well-founded fear of persecution. See our comments on Articles 8 and 11. The objective mentioned at page 8 of the explanatory memorandum (limitation of secondary movements of asylum applicants *et seq*) will therefore only be attained if there is a consensus at national level to reduce the standards to the minimum.

3. The endeavour of this directive, and the definitions under which it operates, need to be seen in the light of the international situation. All EU countries are signatories to the Refugee Convention and all have a process for the recognition of refugees. There is a considerable phenomenon of recognition of refugees from Eastern European States, for example, according to UNHCR figures, 265 nationals of Bulgaria, 131 of the Czech Republic, 80 of Hungary and 53 of Poland were recognised as refugees in 1999; the figures for 2000 were 181, 88, 339 and 108. Following expansion of the EU, nationals of some of these countries may not be “third country nationals” for the purposes of this Directive. We appreciate that it is possible for national and Community law to provide that nationals of EU countries are deemed not to need international protection. We doubt whether, in all circumstances, such a provision would meet international obligations under the Refugee Convention. In that case, after expansion, national courts might find themselves operating two systems of refugee law—one for “third country nationals” under the Directive, and one for EU nationals, being the Refugee Convention alone. An alternative would be not to confine the Directive to third country nationals.

Under preamble, paragraph 11

Decisions of the court, including *Sivakumaran* and *Sepet and Bulbul* call into question parts of the guidance given in the UNHCR Handbook. Suggesting it gives valuable guidance may lead to even greater uncertainty if the Directive is in conflict with the Handbook.

Article 2

In the definition of family member

Do the words “stable relationship” govern spouses as well as cohabitantes? The explanatory memorandum suggests that this was not intended. Is it intended to cover marriages of convenience? The language needs to be clearer.

Article 7

Does the Article reflect the two stage process required in UK law: (a) has the applicant a fear of persecution—the subjective element and (b) is that fear well-founded on an objective basis? The intention behind paragraphs 7(a) and (b) appears not to be wholly clear.

As a separate matter, where the applicant's story is plainly lacking in credibility, an evaluation of background evidence is not always called for.²

(c) In some instances previous ill treatment may not be causative of the applicant's departure. Where the ill treatment has occurred many years in the past it may be totally irrelevant. Alternatively, there may have been a change of regime. There may, however, be instances where the ill treatment is highly probative. The words "would strongly" should be replaced by "may" for example.

Article 8

Paragraph 2

The Court of Appeal decision of *Danian* makes motivation irrelevant. However, as this directive is concerned with minimum standards it would be open to the United Kingdom to continue to apply the law as stated by the Court of Appeal. That would, however, give rise to the potential for the less meritorious asylum seekers seeking a haven in the United Kingdom. The commentary on this Article is legally very complex and it would be surprising if the Article itself could be found to contain or imply all that the commentary suggests.

Article 10

There does not seem to be any logical reason for requiring examiners to find that a fear is well founded before investigating the internal flight option.

There may be some instances where the government is the cause of the persecution but the persecution is nevertheless confined to one area of the country. The government may have a security problem in that area but be unconcerned if the applicant removes to another area. It is arguable therefore, that the word "strong" should be deleted.

Article 11

Paragraph 1(d) The decision of the Court of Appeal in *Sepet and Bulbul* may be in conflict with this (although an appeal to their Lordships' House is pending). Persons in this category might be eligible for subsidiary protection.

Paragraph 2(c) the purpose of this is understood. However, it may give rise to the suggestion that generalised oppression is sufficient to establish a claim to international protection under the Refugee Convention.

Article 12(e)

Political opinion is restricted to the policy of the government or the State. Suppose the government is in loose coalition with the opposition and an applicant (who is a member of a minority party) criticises the opposition? Also, theoretically at least, an applicant might have an opinion on a matter on which the government does not have a policy (eg environmental issues). The definition may be too narrow.

Article 13

Paragraph 2

The member state in which an individual resides rather than the state which granted refugee status should bear the burden of proof. This is indeed what the commentary appears to imply: it is not what the Article says, however.

Article 15

Is this not going to increase confusion? Is it intended to mirror ECHR law and practice? If so, what is the point of it? If not, then there is a tension between the ECHR and the Directive. The task of municipal courts is complex enough since they have to consider (at least) two Conventions and the Directive adds an extra layer.

² See, eg, *Shokrollahy* [2000] Imm. A. R. 580.

Article 16

This Article is very badly drafted. 16.1 appears to be in conflict with 16.2.

Article 17

The exclusion from subsidiary protection status would not appear to be achievable in any circumstances where the applicant is to be returned to be exposed on return to Article 3 type harm (see *Chahal*). Art 17.4 mentions international obligations. Why not simply put in a caveat about Article 3? This is an example of the difficulties of incorporating the concept of subsidiary protection status in this Directive.

Paragraph 1(b) Why is the word “refugee” here? This Chapter is concerned with subsidiary protection, not with the Refugee Convention.

11 March 2002

Memorandum by the European Region of the International Lesbian and Gay Association (ILGA-Europe)

GENERAL EVALUATION

ILGA-Europe welcomes the presence of a horizontal anti-discrimination clause in Article 35 of the draft Directive:

“Member States shall implement the provisions of this Directive without discrimination on the basis of sex, race, nationality, membership of a particular social group, health, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation”.

We particularly support the prohibition of any discrimination on the ground of sexual orientation in the implementation of this Directive. We believe that such anti-discrimination clauses are a positive example of mainstreaming equality norms and we would encourage this practice to be followed throughout EU law and policy. However, we believe that the non-discrimination clause should be a non-exhaustive list of grounds, following the example in Article 21(1) of the Charter of Fundamental Rights. Moreover, we recommend explicit reference to non-discrimination on grounds of gender identity (ie transgender persons).

Amended Article 35

“Member States shall implement the provisions of this Directive without discrimination on **any ground such as** [text deleted] sex, **gender identity**, race, nationality, membership of a particular social group, health, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation.”

GROUND FOR THE AWARD OF REFUGEE STATUS

Evidence confirms the continuing existence of widespread persecution of LGBT people in many parts of the world. A report from the Parliamentary Assembly of the Council of Europe in 2000 noted that in 40 states worldwide same-sex relationships between either men or women remain illegal, and that in a further 40 states same-sex relationships between men also remain unlawful.³

It is also important to consider that in many cases involving LGBT persons, the persecution arises not only from the actions of State authorities, but also from discrimination and persecution in society generally, combined with the State being either unwilling or unable to protect effectively individuals from such persecution.⁴ Amnesty International conclude that “much of the violence faced by lesbian and gay people occurs within the community or in the family . . . this does not absolve the State of responsibility”.⁵

The definition of grounds for the award of refugee status proposed in the Directive is based on that found in the 1951 Geneva Convention: the existence of a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion . . .”⁶ The Directive clarifies the definition of membership of a social group. Crucially, Article 12(d) states that “the concept of social group shall include a group which may be defined by relation to certain fundamental characteristics, such as sexual orientation, age and gender . . .”. ILGA-Europe strongly welcomes this explicit recognition of sexual

³ Council of Europe, Parliamentary Assembly, “Situation of gays and lesbians and their partners in respect to asylum and immigration in the Member States of the Council of Europe” Doc. 8654, 25 February 2000, paragraph 28.

⁴ For example, see the following UK cases: *Jain v Secretary of State for the Home Department* [2000] Imm AR 76; *R (on the application of Ragman) v Special Adjudicator* [2000] All ER 1634.

⁵ Amnesty International, “Crimes of hate, conspiracy of silence—torture and ill-treatment based on sexual identity” (London: Amnesty International, 2001) 39.

⁶ Article 5(1).

orientation as a possible ground of persecution. In the interests of absolute clarity, we propose to add explicit reference to social groups defined by reference to gender identity or health status—for example, persons who are HIV positive or living with AIDS.

Amended Article 12(d)

“The concept of social group shall include a group which may be defined by relation to certain fundamental characteristics, such as sexual orientation, age and gender, **gender identity, health status . . .**”

Article 9(1) of the proposal specifies that the source of persecution can be “the State, parties or organisations controlling the State, non-State actors where the State is unable or unwilling to provide effective protection.”⁷ Moreover, Article 11(1) defines persecution as also including acts of discrimination, discriminatory laws or the discriminatory implementation of laws.⁸ ILGA-Europe firmly supports and endorses the broad approach adopted by the Commission. It very much hopes that the Member States will ensure these aspects of the proposal are fully maintained in order to provide effective protection for those fleeing persecution based on sexual orientation or gender identity.

SUBSIDIARY PROTECTION

Article 15 provides for subsidiary protection for individuals who do not qualify for refugee status, but who cannot be returned to their home state “owing to a well-founded fear of being subjected to . . . serious and unjustified harm”. This is defined as including “torture or inhuman or degrading treatment or punishment”. ILGA-Europe supports the provision for subsidiary protection mechanisms. Some applications for asylum based on sexual orientation or gender identity persecution fail because whilst there is evidence of widespread social hostility towards LGBT persons, this is regarded as falling short of “persecution”. For such individuals, subsidiary protection mechanisms can be an essential alternative source of international protection.

In its explanatory memorandum, the Commission clarifies that the expression “unjustified” harm is designed to cater for “circumstances in which a State *may be justified* in taking measures that cause harm to individuals, such as in the event of a public emergency or national security”.⁹ ILGA-Europe is concerned at the potential for “national security” reasons to be interpreted widely. For example, the 52 men arrested in Egypt in summer 2001 and charged with offences linked to alleged homosexuality were tried in state security courts.¹⁰ In order to make it clear that any discriminatory treatment is an unjustified harm, the following amendment is proposed.

Amended Article 15—new subparagraph

“Member States shall grant subsidiary protection to an applicant for international protection who is outside his or her country of origin, and cannot return there owing to a well-founded fear of being subjected to the following serious and unjustified harm: [. . .]

(d) serious and/or persistent discrimination on any of the grounds mentioned in Article 35.

FAMILY MEMBERS

Article 6(1) provides that “accompanying family members are entitled to the same status as the applicant for international protection”. Therefore, where one family member is awarded refugee status, the other accompanying family members will also be extended that status. This can be essential to ensure the right of other family members to remain within the territory of the receiving state, as well as access to employment, education, social welfare, etc.

Article 2(j) defines family members as:

“(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 the condition that they are unmarried and dependent and without distinction as to whether they were born in or out of wedlock or adopted.”

ILGA-Europe firmly opposes this approach. The underlying objective of EU Justice and Home Affairs Policy is to realise an “Area of Freedom, Security and Justice”. One of the cornerstones of this Area is

⁷ Article 9(1).

⁸ Article 11(1).

⁹ Page 13.

¹⁰ See further, Amnesty International, “Egypt: Verdict due in unfair trial of 52 men prosecuted for alleged sexual orientation”, 12 November 2001, AI Index MDE 12/030/2001—News Service Nr. 197. Available from: <http://www.amnesty.org>

“freedom from discrimination”¹¹. Nonetheless, this proposal would enshrine in law discrimination against lesbian, gay, bisexual and transgender persons and their family members. The basic problem with the current approach is that respect for the fundamental right to family life (guaranteed for “everyone” in Article 7 of the Charter of Fundamental Rights) will vary depending on the state in which the applicant for asylum arrives.

Family members will only fall within the scope of Article 2(j) where States treat unmarried couples “in a way comparable” to married couples, either in law or in practice. Whilst it is difficult to assess exactly to which States this applies, it can be presumed that the intention is to cover States such as the Netherlands where same-sex marriage or registered partnership are available. Therefore, a person awarded refugee status in the Netherlands can also have this status (and protection) extended to their same-sex partner and any children of the couple. In contrast, a person awarded refugee status in Spain will not have this status extended to their same-sex partner, because Spanish law does not recognise non-marital partnerships as comparable to marital partnerships.

Taking this example further, for LGBT refugees in States such as Spain, there is also a risk that any children in the family may be separated from one of their parents. If the refugee is the biological parent or legal guardian of any children, then the children will gain refugee status, whilst the other parent could be denied this status. Alternatively, if the refugee’s partner is the biological parent or legal guardian of the children, then the children also may be denied refugee status. Denial of refugee status could ultimately mean that the partner and children will be deported. This is arguably contrary to the UN Convention on the Rights of the Child. Article 9(1) states:

“States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child . . .”

Moreover, the Convention obliges States to:

“. . . respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of *any kind*, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth *or other status*.”¹²

ILGA-Europe also draws attention to the European Parliament’s 1992 Resolution on the European Charter of Rights of the Child that opposes any child being subject to discrimination on the grounds of, *inter alia*, his or her parents’ sexual orientation.¹³ It is unacceptable that the protection of the fundamental human rights of refugees and their family members will vary across the Member States. Moreover, if this approach is maintained, it will remain an incentive for LGBT asylum applicants not to apply in the EU State in which they first arrive, but to attempt to reach other States where their families will be fully recognised.

Amended Article 2(j)

“Family members” means:

“(i) Irrespective of sex, the spouse, registered partner or unmarried partner in a stable relationship of the applicant. In assessing whether a stable relationship exists, Member States shall consider as evidence of the relationship factors such as the length of the relationship, previous cohabitation, shared parental responsibilities and any other means of proof.”

MAINSTREAMING LGBT ISSUES

We believe the mainstreaming approach to equality norms cannot be confined to the insertion of a non-discrimination clause. On the contrary, equal treatment considerations must permeate the entire body of any legislative proposal. Consultation with all relevant organisations is an essential part of this process. The Commission details some of the groups it consulted on page 3 of its explanatory memorandum. ILGA-Europe is willing to be an active participant in the shaping of EU immigration and asylum policies, however, this requires full information and consultation from the Commission in the future, particularly in advance of the publication of proposals.

Throughout this proposal there are several instances where reference is made to a range of “vulnerable” groups, but without explicit reference to sexual orientation or gender identity.

Given the potential for LGBT issues to be overlooked or excluded in the absence of specific mention, we propose the following amendments and clarifications:

¹¹ See Commission, “Towards an area of Freedom, Security and Justice” COM (1998) 459,5.

¹² Article 2, emphasis added.

¹³ [1992] OJ C241/67, paragraph 8(5).

Amended Article 7 (assessment of applications for international protection)

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

(d) the individual position and personal circumstances of the applicant, including factors such as background, gender, **gender identity, sexual orientation**, age, health, and disabilities so as to assess the seriousness of persecution or harm. Where the form of persecution is **specifically related to gender, gender identity, sexual orientation or being a child**, account shall be taken of the fact that persecution, within the meaning of the Geneva Convention, may be effected through sexual violence or other means **specific to gender, gender identity, sexual orientation or age;**”

Explanation: the Commission note in the explanatory memorandum that sexual violence is a form of persecution that can be targeted specifically at women, depending on the nature of the violence.¹⁴ ILGA-Europe points out that sexual violence is often a frequent source of persecution of LGBT persons and consequently gender identity and sexual orientation must be explicitly included in this subparagraph. For example, Amnesty International identify the case of a Zimbabwean lesbian who was repeatedly raped on order of her parents because they believed this would make her pregnant and “correct” her lesbianism.¹⁵

The explanatory memorandum also notes here that Guidelines on assessing applications from women or minors should be developed at the national level in consultation with UNHCR. This is an approach that could also be usefully extended to dealing with LGBT applications.

Amended Article 10 (the internal protection alternative)

“(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 the respect of human rights, and to the personal circumstances of the applicant, including age, sex, gender identity, sexual orientation, health, family situation and ethnic, cultural and social links.”

Amended Article 18 (Content of international protection)

“(3) When implementing the provisions of this Chapter, Member States shall take into account the specific situation of persons who have special needs such as: minors, unaccompanied minors, disabled people, elderly people, **lesbian, gay, bisexual and transgender people**, single parents with minor children and victims of torture or sexual abuse or exploitation and persons suffering from infirmity, whether mental or physical, and pregnant women. Member States shall also take into account the specific situation of single women who are subject to substantial gender or **gender identity** related discrimination in their country of origin.”

Article 28—Unaccompanied minors—new subparagraph (7)

“(7) **All decisions affecting minors shall be taken in accordance with the best interests of the child and the UN Convention on the Rights of the Child. There shall be no discrimination against any child or his or her parents on any ground such as of sex, gender identity, race, nationality, membership of a particular social group, health, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation.**”

BACKGROUND INFORMATION

Laws governing applications for asylum and the award of refugee status impact on lesbians, gay men, bisexuals and transgender (LGBT) individuals. In particular, where individuals face persecution because of their sexual orientation or gender identity, this can be a reason for claiming asylum in another State. However, many countries—including within the European Union—do not recognise persecution based on sexual orientation or gender identity as legitimate grounds for granting refugee status. Moreover, some countries only grant refugee status where an individual is under threat of persecution from the State authorities in their country of origin. Yet, sexual orientation and gender identity persecution can often be a result of general social hostility and oppression, as well as State-initiated actions.

ILGA-Europe monitors and evaluates asylum law proposals from the European Union to ensure that these take account of the particular needs of lesbian, gay, bisexual and transgender asylum applicants.

This proposal from the Commission aims to lay down minimum standards on the grounds for awarding refugee status. It establishes also minimum standards for the award of subsidiary protection. This is another form of international protection where persons are not entitled to refugee status, but cannot safely be returned to their country of origin. Finally, this proposal would also establish rules relating to the reception and

¹⁴ Page 16.

¹⁵ Amnesty International, above n 3 p. 39.

integration of those individuals awarded refugee status or benefiting from subsidiary protection. Therefore, there are basic rules regarding the access of refugees and persons benefiting from subsidiary protection to health care, housing, education, social welfare and the labour market.

This is an important proposal for LGBT asylum applicants. First, it will determine the circumstances under which refugee status may be awarded because of persecution based on sexual orientation or gender identity. Second, certain provisions apply to the members of a refugee's family, including unmarried partners. Finally, LGBT refugees may have particular healthcare or accommodation needs and these issues fall within the scope of this proposal.

Pursuant to the Treaty of Amsterdam, Denmark cannot participate in this proposal. The UK and Ireland may choose to participate in this proposal. The proposal is currently pending the opinion of the European Parliament. After this is produced, the Council of Ministers will have to decide whether to adopt the law based on unanimous agreement.

February 2002

Memorandum by the Refugee Legal Centre

INTRODUCTION: THE REFUGEE LEGAL CENTRE

1.1 The Refugee Legal Centre is a voluntary sector agency with charitable status directed by an independent board of trustees. The Refugee Legal Centre is an independent body, funded principally by the Secretary of State for the Home Department (pursuant to section 81 of the Immigration Act 1999) with an important historic contribution from the United Nations High Commissioner for Refugees. Pursuant to powers conferred by our Memorandum of Association, the Refugee Legal Centre is one of the agencies which implements the training project of the United Nations High Commissioner for Refugees in the United Kingdom.

1.2 RLC welcomes this opportunity to comment on the 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 presented by the Commission in September 2001 (the "Proposal").

1.3 RLC takes the view that the European Commission's proposal constitutes a sound foundation for the adoption of EU minimum standards for the qualification and status of persons as refugees or as persons who otherwise need international protection. Much of the text is in accordance with the dominant trend in the international interpretation of the Refugee Convention. Nevertheless, we have certain concerns, which we now set out.

CHAPTER I: SUBJECT MATTER AND DEFINITIONS

Article 2 (Definitions)

2.1 This article defines "refugee" as a "third country national or stateless person who fulfils the requirements of Article 1(A) of the Geneva Convention". This form of words prevents a citizen of the European Union from availing themselves of protection from persecution arising in a Member State within the boundaries of EU itself, and is therefore contrary to the international interpretation of the 1951 Refugee Convention (read with the 1967 Protocol), which has no such geographical limitation. The democratic states of the European Union doubtless provide protection to their nationals against the threat of persecution, so on the natural reading of the Convention they will not be able to establish a claim to refugee status, within the EU or outside it. Hence the limitation of potential claimants to "third country nationals" is unnecessary in the European context, and might be used as a precedent elsewhere to justify the avoidance of obligations where protection is not available.

2.2 RLC accordingly recommends that the wording of this Article is altered such that the term "third country national or stateless person" is replaced by the term "any person". Articles 3 and 5 should be amended consequently.

2.3 Further, RLC echoes the concern raised by ECRE as to the choice of term "subsidiary protection" in the draft directive. Like that agency, we would prefer "complementary protection"; a term that demonstrates the supporting nature such a status plays to the Refugee Convention and permits no suggestion that non-Refugee Convention refugees are in any less need of international protection.

Article 8 (International protection needs arising sur place)

3.1 Article 8 states that refugee status should be denied to an applicant who engages in activities for the sole purpose of creating the necessary conditions for making an application for international protection. There is no internationally accepted principle which would found such a notion. The proposal is dangerous, concentrating the enquiry as to the determination of refugee status on the subjective state of mind of the individual, which is notoriously difficult to establish, rather than upon the single factor which the common

international interpretation of refugee law recognises as determinative of an entitlement to protection: the objective risk to the individual.

3.2 Accordingly the passage “save where . . . international protection” should be omitted from Article 8.

Article 9 (Sources of harm and protection)

4.1 Article 9 paragraph 2 provides that “effective State protection” will be available where there is in a country of origin a “system of domestic protection and machinery for the detection, prosecution and punishment of actions which constitute persecution or other serious and unjustified harm.” A simpler definition would be one which recognises that there can be no true protection against human rights abuses unless that protection prevents there from being a well-founded fear of persecution or other serious unjustified harm. This would prevent the return of persons who have genuine protection needs, in that the system of domestic protection available to them did not alleviate their objectively well-founded fears.

4.2 Article 9 paragraph 3 deems protection from persecution or serious unjustified harm to be capable of being provided by international organisations and stable State like authorities who control a clearly defined territory. This is dangerous: such bodies are not accountable in international law for the protection of human rights. As Professor Hathaway has written, “The protective obligations of the Convention in Arts 2-33 are specifically addressed to “States”. The very structure of the Convention requires that protection will be provided not by some legally unaccountable entity with *de facto* control, but rather by a government capable of assuming and being held responsible under international law for its actions” (paper commissioned by UNHCR for Global Consultation on International Protection).

Article 10: Persecution

5.1 The dominant trend in refugee law is to interpret persecution as constituting the sustained or systematic denial of core human rights. The relevant human rights are those laid out in the International Bill of Rights which constitutes the most universal measure of appropriate standards. This objective approach offers the dual advantages of minimising the intrusion of ideology which might otherwise result from a reliance upon subjective criteria relevant in the country of asylum application that may not be universally recognised; and also avoids the implication of censure of the state of origin. Accordingly the phrase “significant risk to the applicant’s life, freedom or security” should be replaced by “significant risk of the sustained or systematic denial to the applicant of their rights as set out in the International Bill of Rights.”

CHAPTER V: REFUGEE STATUS AND SUBSIDIARY PROTECTION STATUS

Articles 21, 24 and 31: Subsidiary Protection

6.1 It is the experience of RLC that the grant of leave to remain in the United Kingdom on European Convention on Human Rights grounds rather than under the Refugee Convention often leads to appeals by those wishing to establish an entitlement to the latter status. These appeals are brought by persons dissatisfied with their lack of access to rights accruing to Convention refugees. Accordingly the rights granted to the two classes of protected person should be brought into line, so that the right to a residence permit, the right to employment and self-employment without any restrictions, and the right of access to integration programmes once status has been determined are available to persons granted subsidiary protection on the same terms as Convention refugees.

12 April 2002

Distributed by The Stationery Office Limited and available from:

The Stationery Office

(mail, telephone and fax orders only)

PO Box 29, Norwich NR3 1GN

General enquiries 0870 600 5522

Order through the Parliamentary Hotline *Lo-call* 0845 7 023474

Fax orders 0870 600 5533

You can now order books online at www.tso.co.uk

The Stationery Office Bookshops

123 Kingsway, London WC2B 6PQ

020 7242 6393 Fax 020 7242 6394

68–69 Bull Street, Birmingham B4 6AD

0121 236 9696 Fax 0121 236 9699

9–21 Princess Street, Manchester M60 8AS

0161 834 7201 Fax 0161 833 0634

16 Arthur Street, Belfast BT1 4GD

028 9023 8451 Fax 028 9023 5401

The Stationery Office Oriel Bookshop

18–19 High Street, Cardiff CF1 2BZ

029 2039 5548 Fax 029 2038 4347

71 Lothian Road, Edinburgh EH3 9AZ

0870 606 5566 Fax 0870 606 5588

The Parliamentary Bookshop

12 Bridge Street, Parliament Square

London SW1A 2JX

Telephone orders 020 7219 3890

General enquiries 020 7219 3890

Fax orders 020 7219 3866

The Stationery Office's Accredited Agents

(see Yellow Pages)

and through good booksellers

© Parliamentary Copyright House of Lords 2002

Applications for reproduction should be made in writing to the Copyright Unit,

Her Majesty's Stationery Office, St Clements House, 2–16 Colegate, Norwich NR3 1BQ

– Fax 01603 723000

ISBN 0-10-412302-8



9 780104 123027