ILPA's RESPONSE TO THE HOME OFFICE CONSULTATION ON THE IMPLEMENTATION OF THE REFUGEE DEFINITION DIRECTIVE

PART 1: DOES CURRENT UK PRACTICE BROADLY REFLECT THE DIRECTIVE?

Article 1: Subject matter and scope

1. This article refers to "third country nationals or stateless persons", whereas the Refugee Convention applies to *any* person, which is clearly wider. There is no reference to EU nationals in the Directive. The Consultation Paper asks for responses to whether the Directive should apply to claims from EU nationals. It also states at paragraph 4.2 that the Directive will be applied to all asylum applicants. . ILPA is firmly of the view that the Directive should apply to all asylum applicants including EU nationals and supports the stated intention to give the Directive this wider and consistent application to all. (see para. 59 below).

Article 2: Definitions

2. The definitions broadly reflect UK practice other than the introduction of the new category of subsidiary protection which will be dealt with below under Article 15.

3. The inclusion of unmarried partners in the definition of family members is broader than current UK practice on refugees but is in line with other UK legislation, including elsewhere in the Immigration Rules, and is consistent with other recent changes as reflected by the introduction of civil partnerships. In relation to children, the specific references to children born out of wedlock and those adopted is arguably broader than the Rules on minor dependents of refugees but again is consistent with broader UK immigration practice. The API on Dependents is currently being revised and ILPA urges that the new version reflects this provision of the Directive. **ILPA is very concerned that there is not family reunion currently provided for minor children who are recognised as refugees. This omission is discriminatory and the deprivation affects particularly vulnerable refugees.**

Article 3: More favourable standards

4. ILPA would encourage the UK to retain any more favourable standards that are already in place, to raise standards where UK approach is not in line with the

Refugee Convention and to interpret the provisions of the Directive as setting minimum standards only.

Article 4: Assessment of facts and circumstances

5. Article 4 broadly reflects UK practice in assessing asylum claims. For example the approach to past persecution set out in Article 4 (4) is directly in line with UK case law such as *Demirkaya* [1999] Imm AR 498.

6. Article 4 (5) is much more generous than current UK approach to credibility in that it provides for the possibility of a presumption in favour of credibility in contrast to Section 8 of the 2004 Act which provides that certain factors must have an adverse effect on credibility. **ILPA submits that Section 8 needs revision in the light of the Directive and is unsustainable in light of the Directive**.

Article 5: International needs arising *sur place*

7. Article 5 is consistent with UK practice on *sur place* refugees with the exception of Article 5 (3), which provides that an applicant who files a subsequent application shall normally not be granted refugee status, if the risk of persecution is based on circumstances which the applicant has created by his own decision/actions since leaving the country of origin. This is inconsistent with UK case law and practice since *Danian* [2000] Imm AR 96. Currently there is no reason why the fear should not arise from the refugee's activities abroad, even if carried out in bad faith. The current approach provides that where a claim is based exclusively on such acts it will be scrutinised with some scepticism as self-serving and lacking in credibility, which is consistent with Article 4 (3) (d).

8. Article 5 (3) is a discretionary provision which according to the Consultation Paper (and to John Ponsford (APU) at the Home Office meeting on 31 July 2006) the UK does not intend to implement. In line with this the UK does not plan to implement Articles 20 (6) and 20 (7) which allow for the reductions in benefits to those who have created the necessary conditions for being recognised as refugees (Consultation Paper at paragraph 8.4). ILPA welcomes this. ILPA considers that the current approach in the UK is properly reflective of obligations under the Refugee Convention.

Article 6: Actors of persecution or serious harm

9. Article 6 is consistent with UK case law. We share the view of UNHCR[1] that "whether or not a *State* actor exists that is unable to provide protection is of no consequence. Such a situation may arise with failed States, where there is no State actor that could be held accountable for not offering protection" (emphasis added) and urge the UK to follow the UNHCR recommendation that express reference is made to the situation of failed States.

Article 7: Actors of protection

10. The provisions in Article 7(1) of the Directive that international organisations and parties may be considered as actors of protection for the purposes of the Directive is not found in any UNHCR document or guidance. We do not accept that, as a matter of international law, non-State or quasi-State bodies can provide protection that is equivalent to that provided by a State: they are not parties to international law human rights instruments and are therefore do not have the same accountability in international law[2]. The European Court of Human Rights has set standards for protection that it would be difficult for a non-State to meet[3] and there will be grave practical problems in implementation if an actor of protection is deemed inadequate for ECHR purposes but adequate for claims under the Refugee Convention. **We suggest that, in line with the reference in Article 3 of the Directive to "minimum standards" the UK should take this opportunity to require in regulations that protection must be provided by a State**.

11. We recognise that our submission is unlikely to be accepted given that, in asylum cases, UK caselaw has already recognised that protection may be provided other than by a State. This caselaw has required that protection be afforded by a body having the powers and functions of a State[4]. This is in line with Article 7's use of

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[1] *UNHCR Annotated Comments on the EC Council Directive...on Minimum Standards for the Qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*

[2] See Goodwin Gill, G and A Hurwitz, *Submission to the House of Lords on the Draft Council Directive on minimum standards for the qualification and status of* Ruffert, M. *The Administration of Kosovo and East Timor by the International Community* ICLQ vol. 50 [2001] 613 and Hathway J, & M Foster *Internal Protection/Relocation/Flight Alternative as an aspect of Refugee Status Determination* Paper for the San Remo expert round table (UNHCR Global Cvonsultation 8-10 September 2001)

[3] E.g. *Edwards v UK* , 14 March 2002, *Z & ors v UK* 10 May 2001, [2002] 34 EHRR 3

[4] (*R (Vallaj) v IAT* [2001] INLR 655 (placing important limitations on the application of *Dyli* 00/TH/02186 - and see *Canaj v SSHD, Vallaj v A special Adjudicator* [2001] EWCA Civ 782, [2001]

the word "controlling" and further support for a correlation with State powers and functions is provided by the reference to "a substantial part" of a State[5]. Articles 12 to 34 of the 1951 Refugee Convention provide a useful gloss on the scope of such powers and functions. In the event that our primary submission is not accepted, ILPA recommends that the extent to which an organisation or party including an international agency enjoys this range of State powers and functions can be used to determine whether it fulfils the conditions of Article 7 of the Directive in that it "controls" the State or a "substantial part" of the State. **The requirement for the party, organisation or international organisation to have the powers and functions of a State should be reflected in the API.**

12. We find no support in the text of Article 7 for the contention put forward in the existing API on *Assessing the Claim* that a State that relied on drug barons or armed militias to provide protection could ever be found to provide effective protection (glossing *SSHD v DM (Somalia)* [2005] UKAIT 00150, a decision we do not consider compatible with the higher authorities cited above) and consider that **this part of the APIs must be withdrawn and rewritten if the guidance is to be in line with Article 7 and with draft Regulation 8[6].**

Article 8 : Internal Protection

13. We understand from the meeting held at the Home Office on 31 July 2006 as part of this consultation that the final sentence of paragraph 5.13 "We do not consider that these changes will impact significantly on existing caselaw and practice" can

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INLR 342, CA. See also the discussion of the cases of *Gardi* and *Saber* in Macdonald's *Immigration Law and Practice* (6th edition) at 12.41

[5] We find it difficult to envisage circumstances in which Article 7's require of "controlling" could be met as "party" as that Article envisages.

[6] API on Assessing the Claim downloaded 3 August 2006:

> **"v) Protection provided by dominant clans/militias in countries where central government has broken down**
>
> In countries where there is no effective central government an individual is unlikely to be able to go to his own national authorities for protection.

However, if it is possible for the claimant to obtain the protection of a dominant militia/tribe/clan so that there is no reasonable chance of ill-treatment occurring, the asylum application is unlikely to succeed. In the case of *SSHD v DM (Somalia)* [2005] UKAIT 00150 the Tribunal held that: "All that is essential for Refugee Convention and Human Rights Convention purposes... is that as a matter of fact an entity within a country or state affords effective protection. Plainly, an entity which relies for its law and order functions on drug barons or armed militias may be less able to provide effective protection than one which can rely on those functions being performed by properly trained, properly resourced and accountable police or army personnel whose standards of human conduct are exemplary. But variations of this type simply go to the factual question, "Is protection afforded?"..."

be read as saying "We do not consider that these changes will impact on caselaw and practice" and is the explanation for there being no draft regulation to implement this article. Our response takes that view of the Home Office position as our starting point.

14. The leading UK case is *Januzi (FC) et ors v SSHD* [2006] UKHL 5, in which the House of Lords considered the Article 8(1) and (2) of the Directive (see paragraph 17 of the judgment), on the basis of which we concur that the changes will not impact upon caselaw. The judges advised that the approach to internal protection should have regard to the UNHCR Guidelines on Internal Protection of 21 July 2003 (paragraphs 20 & 67) and **we trust that this will be reflected in the APIs**.

15. We share UNHCR's view[7] that Article 8(c) should not be implemented in national law or practice because the effect of this provision is to deny international protection to persons who have no accessible protection alternative and it is not consistent with Article 1 of the 1951 Convention. It behoves the UK, so that it can respect its international treaty obligations, not to give effect to this provision in national law and, in line with the reference in Article 3 to the Directive's setting "minimum standards" urge the UK not to implement Article 8(c).

16. As to whether Article 8(c) is compatible with UK caselaw[8], cases such as *GH*[9] turn on the Secretary of State's undertaking not to use the unsafe route of return and leave open what would happen if he proposed to do so.

Article 9: Acts of persecution

17. The provisions in Article 9 are broadly reflective of UK caselaw. The words *inter alia* used in the Directive would not find favour in UK law, the words "in particular" are the current preferred statutory construction to capture this content (see e.g. s. 4 of the Immigration and Asylum Act 2006) and **we suggest that the phrase 'in particular' be inserted into draft regulation 5(2).**

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[7] In their Annotated Comments, op.cit. See footnotes referencing UNHCR documents on the point

[8] See the *Vallaj*[8]*, Gardi* and *Dyli* cases cited in our comments on Article 7, and see *GH v SSHD* [2005] EWCA Civ 1182

[9] See paragraphs 12 and 47 of the judgement

Article 10: Reasons for Persecution

18. We understand from the meeting at the Home Office that it is intended to set out in the API that societal recognition may help establish the group but is not a pre-requisite, so that the UK continues to apply *Shah and Islam* [1999] INLR 144, HL*(see below paras 69-72 below).*

Article 11: Cessation

19. This provision concurs with Article 1C of the Refugee Convention and broadly reflects UK practice. However the proviso to Article 1 C paragraph 5 of the Refugee Convention, which exceptionally allows for the continuation of refugee protection after a fundamental change of circumstances for persons able to invoke compelling reasons arising out of a previous persecution, has unfortunately not been incorporated into the Directive. **In ILPA's view this remains a Refugee Convention obligation which must continue to be honoured and the IC proviso should be reflected in the draft Regulations or Immigration Rules**

Article 12: Exclusion

20. This Article concurs with Articles 1 D and 1 E of the Refugee Convention and reflects UK practice. Article 1F is reproduced except for the addition of interpretative guidance on Article 1F (b) in the second part of Article 2 (b) of the Directive. It includes "particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes" which broadly reflected the UK approach since cases such as *T v SSHD* [1996] Imm AR 443. Currently the UK has a much broader definition than that in the Directive of serious crime which would result in the revocation of refugee status at Section 72 of the *Nationality, Asylum and Immigration Act* 2002. ILPA considers that Section 72 is far too broad and is not consistent with the Directive or the Refugee Convention. **Section 72 should be amended to conform with the Directive.**

21. The addition in Article 12 (2) (b) of the phrase "which means the time of issuing a residence permit" changes the scope of Article 1F (b) of the Refugee Convention which specifies that serious non-political crimes must have been committed outside the country of refuge and prior to admission there. However the UK

already applies this interpretation. The definition of serious crime in the 2002 Act includes offences for which a period of imprisonment of at least two years is imposed where the crime has been committed either inside or outside the UK. Again ILPA considers the definition of serious crime in the 2002 Act is far too broad and inconsistent with the Directive and the Refugee Convention and should be amended.

22. A further concern regarding exclusion is that the Directive, in making no reference to the ECHR, overlooks that the exclusion from refugee status will not necessarily make a person removable, particularly where to remove the person would breach Article 3 ECHR. ILPA considers it unacceptable to deny a person some form of immigration status (ie: leave to remain) if the person is irremovable.

Articles 13 & 18: Granting of refugee status and subsidiary protection

23. It has already been pointed out that as asylum and subsidiary protection under the Directive can only be granted to "a third country national or a stateless person" this means that an EU national cannot be granted refugee status. This is incompatible with the Refugee Convention.

Article 14: Revocation etc

24. The provisions on revocation broadly reflect law and practice in the UK. For example Article 14 (2) is similar to paragraph 340 of the Immigration Rules; Article 14 (3) (b) is similar to paragraph 322 (2) of the Immigration Rules and Article 14 (4) (a) is similar to paragraph 322 (5) of the Immigration Rules. "Serious crime" (referred to in Article 14 (4) (b)) is given a very broad definition in Section 72 of the *Nationality, Asylum and Immigration Act* 2002, as discussed above under exclusion provisions. The UK definition is not in line with either the Refugee Convention or the Directive.

Article 15: Subsidiary protection

25. This Article of the Directive departs most significantly from the 1951 Convention. Bearing in mind the UK's obligations under the ECHR, and in particular Article 3, this provision does largely reflect UK practice. But there are also significant differences. The Directive does not include unlawful killing whereas UK policy does. The stated intention is to retain this in the Immigration Rules and ILPA welcomes this retention of UK practice.

26. Further although the Directive borrows directly from Article 3 of the ECHR at Article 15(b) insofar as the reference is to "torture or inhuman or degrading treatment or punishment," this is then limited by the addition "of an applicant in the country of origin" which does not appear in the ECHR. It is unclear whether this limitation means that only so-called "domestic cases" are covered and that "foreign cases", such as medical cases, are not. According to John Ponsford (APU) at the Home Office Meeting on 31 July 2006 the UK signed up to the Directive on the basis that non-deliberate harm contrary to Article 3 was not within the scope of Article 15(b). But this would be in contrast to the current UK approach where medical cases can fall within Article 3, although the threshold is very high (e.g. *N v Secretary of State for the Home Department* [2005] 2 WLR 1124). ILPA considers that it is appropriate for "medical cases" to be treated consistently with subsidiary protection provisions and for successful applicants to be granted humanitarian protection.

27. There is a further category of serious harm in Article 15 (c) that covers "situations of international or internal armed conflict". On the face of it this is certainly wider than current UK case law which does not cover civil war and situations of armed conflict under Article 3 (e.g. *Adan* [1999] 4 All ER 774). For this Article in the Directive to cover the situation of internal armed conflict in a failed state such as Somalia would be a significant change. The wording of Article 15 is unclear. This provision also refers to an "individual threat" and it may be argued by the UK that it only applies where the applicant has been singled out. But this interpretation would then conflict with the concept of the threat being of "indiscriminate violence". It is clear that the development of this new category of Subsidiary Protection is likely to be a controversial aspect of the Directive. However ILPA welcomes this inclusion in the Subsidiary Protection category as it reflects the real humanitarian needs of persons facing such conflict situations.

Article 16: Cessation

28. The cessation provision applies where the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required but this does not take account of Article 8 rights to family and private live or of the strength of ties to the UK accrued during the period of residence. It is clear that UK law and practice must take account of these in line with its ECHR obligations. ILPA notes that although

the Directive seems not to require the giving of another status to those excluded from Convention protection and subsidiary protection, it certainly does not deny it. ILPA submits that applicants whose removal would be in breach of Article 8 ECHR for instance or other ECHR obligations not covered by the Directive should be treated consistently with those granted subsidiary protection under the Directive.

Article 17: Exclusion

29. The grounds of exclusion from subsidiary protection at Article 17 (1) (a) – (c) are the same as those set out at paragraph 2.5 of the API on Humanitarian Protection, save for the reference to the Charter of the United Nations at Article 17 (1) (c) which is not mentioned in the API. The ground of constituting a danger to the community or the security of the Member State covered by Article 17 (1) (d) could amount to the same thing as exclusion on the ground of not being conducive to the public good However UK practice then goes further than the Directive as exclusion from Humanitarian Protection can be based on engagement "in one or more unacceptable behaviours" which are listed in the API and broadly relate to terrorist activities. There is no mention of such activities in the Directive and the UK practice is out of line with the Article 17(2) of the Directive.

30. As discussed above "serious crime" is not defined in the Directive but in UK law it is defined in Section 72 of the Nationality, Immigration and Asylum Act 2002 for the purposes of the construction and application of Article 33 (2) of the Refugee Convention. According to that section it applies to sentences of two years or more imposed for offences committed both inside and outside the UK. The API states that this definition also applies to exclusion from Humanitarian Protection. ILPA considers that this application is inconsistent with the Refugee Convention and the ECHR.

31. The Directive at Article 17 (3) also covers crimes outside the scope of paragraph 1, which would be punishable by imprisonment, where the applicant left his or her country of origin solely in order to avoid sanctions resulting from these crimes.

Article 19: Revocation

32. This provision is largely the equivalent for subsidiary protection that discussed above for the revocation of refugee status under Article 14 of the Directive.

Article 20: General rules

33. UK law and practice are not consistent with the requirement at Article 20(5) that the best interest of the child shall be a primary consideration for Member States. A review of the UK approach is required. Although there is a requirement in the Children Act 1989 that the best interests of the child are of paramount importance this is not applied in the immigration and asylum context in practice. **This requirement of the Directive should be included in the Immigration Rules and implemented in practice. In ILPA's view the implementation of the best interests requirement as a primary consideration will require redrafting of the family reunion provisions for child refugees and will also require that there is explicit consideration given to the circumstances of children included as dependants in any asylum application. This last will require changes to decision-making practices.**

Article 22: Information

34. Current UK practice is not consistent with this requirement of the Directive as at present this information is only provided in English.

Article 23: Maintaining family unity

35. UK law and practice in relation to maintaining family unity, as provided for at paragraph 352 of the Immigration Rules, is consistent with the Directive as far as the spouse and minor children are concerned. However as already discussed above the definition of family members in the Directive includes unmarried partners, which are not currently provided for in the Rules. **As stated ILPA is further concerned that there is no provision currently for the family reunion of unaccompanied minors recognised as refugees and this needs urgent revision.**

36. Dependents are currently entitled to benefits in the UK without restriction.

37. Article 23 (5) provides for "other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary". This is not a mandatory provision. However it is similar to the Refugee Family Reunion Policy that had been in place in the UK for some time until it was withdrawn earlier this year and continues "under review". The Directive is broader than policy in that the policy required there to be

"compelling compassionate circumstances" for the discretion to be exercised. **In reviewing the wording of the policy the more inclusive category at Article 23 (5) should be adopted. ILPA requests to see any draft API in relation to this issue.**

Article 24: Residence permits

38. Those granted status in the UK are provided with residence permits but this is unfortunately often not done *as soon as possible* after their status has been granted as provided for in the Directive. **ILPA submits that urgent consideration needs to be given to speeding up procedures for the issuing of residence permits following refugee recognition.**

Article 25: Travel documents

39. The provision of travel documents to refugees in the Directive at Article 25 (1) is on the same basis as that in the Refugee Convention and reflects UK practice.

40. In relation to those granted subsidiary protection there is no longer a requirement in the UK that they provide a compelling reason for travelling. This is consistent with the Directive at Article 25 (2) which provides that they must *at least* be given a travel document *when serious humanitarian reasons arise that require their presence in another state*. In the UK they must normally demonstrate that they have been formally and unreasonably refused a national passport which is more restrictive in that it appears to require evidence of a formal refusal whereas the Directive provides that they must be *unable to obtain a national passport.*

Article 26: Access to employment

41. Those granted refugee status and those granted humanitarian protection in the UK already have the same access to employment, including employment related education opportunities, as UK nationals. The Directive appears to require less for those granted subsidiary protection. At Article 26 (3) it provides that *the situation of the labour market in the Member States may be taken into account, including for possible prioritisation of access to employment for a limited period of time*. Article 26 (4) provides for access to employment-related education opportunities but *under conditions to be decided by the Member States.* This appears to allow for differential treatment between the two categories of beneficiaries, which is not the case at present in relation to access to

employment. We note that the UK does not intend to implement a difference in treatment. This is welcomed by ILPA.

Article 27: Access to education

42. UK practice broadly reflects the Directive. All minors, with either status, as well as refugees have full access to education in the UK under the same conditions as nationals

Article 28: Social welfare

43. The Directive broadly reflects UK practice where refugees and those granted humanitarian protection are entitled to claim social welfare benefits in the same way as UK nationals.

Article 29: Health care

44. UK practice in relation to the provision of health care is consistent with Article 29 (1). According to National Health Service (Charges to Overseas Visitors) Regulations 1989, SI 1989/306, as amended by National Health Services (Treatment of Overseas Visitors) (Amendment) Regulations 2004, SI 2004/614, regulation 4 (1) (c) since 1 April 2004 persons granted refugee status enjoy the same entitlement to free non-emergency NHS hospital treatment as British citizens. The same applies to those with Humanitarian Protection and Discretionary Leave according to Department of Health *Entitlement to NHS Treatment*.

45. The specific inclusion in Article 29 (3) of "adequate health care" not only for pregnant women and disabled people but also for those who have undergone psychological, physical or sexual violence as well as for minors is arguably more generous than current UK practice where the availability of such specialist treatment is likely to depend on the approach of the particular health authority or even an individual doctor, rather than any generally applicable policy.

Article 30: Unaccompanied minors

46. The current UK practice offers less to unaccompanied minors than provided for in the Directive despite the assertions made in the consultation paper. For example in practice minors are often not provided with anyone who acts in *loco parentis* for them (Article 30 (1)). Further although they will be accommodated they are often not fostered or placed in suitable accommodation. Also although regular

assessments by the appropriate authorities may be intended they are not made (Article 30 (2)).

47. Although the Home Office does inform minors of the Red Cross' tracing facilities it does not play the more active role that could be read into Article 30 (5). However a more active role would need to consider issues of consent and confidentiality. The role is most appropriately undertaken by the child's lawyer or social worker and guidelines should recommend these professionals undertake the responsibilities of counselling and assisting in tracing if this last is desired by the child.

48. In the context of unaccompanied minors see also comment on the reference to the best interest of the child being a primary consideration in the general rules at Article 20 (5). As already noted this sets new standards for the UK which need to be reflected in the Immigration Rules and in practice.

Article 31: Access to accommodation

49. Those recognised as refugees or granted humanitarian protection in the UK have largely the same rights of access to accommodation not only as third country nationals legally resident as provided for in the Directive but also as UK nationals.

Article 32: Freedom of movement within the Member State

50. Those granted either refugee status or humanitarian protection in the UK have the same freedom of movement as everyone lawfully resident in the UK, including UK nationals. However they do not have the freedom to choose where they live if they are reliant on social housing.

Article 33: Access to integration facilities

51. The UK is making provision for integration programmes although this is relatively recent.

Article 34: Repatriation

52. The UK's current practice is already to provide assistance to those who wish to repatriate.

PART 2: WHETHER THE PROPOSED CHANGES TO THE IMMIGRATION RULES AND CONTENTS OF THE DRAFT REGULATIONS SATISFACTORILY IMPLEMENT THE DIRECTIVE?

General Comments

53. In ILPA's view it is extremely important that a clause is inserted into the Draft Regulations and/or the Immigration Rules stating that the application of the Directive is without prejudice to the meaning of the Refugee Convention where it would result in recognition of a claimant as a refugee.

54. ILPA's position is that the nature of the Directive as laying down minimum standards for recognition, means:-
    i. it sets broad parameters where the state must recognise a claimant as a refugee;
    ii. beyond those parameters it continues to leave the question of recognition to state legislatures or courts applying the proper international meaning.

55. The Directive cannot be interpreted as meaning that it lays down minimum conditions that a claimant must meet in order to be recognised as a refugee. This would undermine the whole nature of the project as a political agreement on minimum common approaches between states.

56. That states are agreed on minimum standards in no way prevents a claimant who does not meet all these standards in a relevant case from being recognised as a refugee.

57. The intention of the Directive and the obligation in internal law is that the Convention predominates as a legal duty and the Directive must be without prejudice to these obligations.

58. States may have agreed to a "margin of appreciation" in the application of the Refugee Convention as far it affects international relations and transfers under the Dublin Convention, but they have not, and could not, substitute the task of interpreting the Refugee Convention by the conventional approach set out in

Adan and Aitsegur with an approach that substitutes the language of the Directive for the proper international meaning of the Convention.

Specific Provisions in the Draft Regulations and the Immigration Rules

It is not necessary to comment on the entirety of the Draft Regulations and Immigration Rules and we therefore confine our comments to areas of concern for ILPA.

Definitions

59. We note that the Regulations apply to all third country nationals and stateless persons where third country nationals are defined as non-UK nationals. ILPA agrees that the Directive and the Regulations should be applied to all non-UK nationals. We do not accept that it is correct as a matter of international law to attempt to exclude from the scope of the Directive other EU nationals. Whilst in practice numbers are not likely to be large, as a matter of principle the same regime should apply to EU nationals who claim asylum as applies to non-EU nationals.

Actors of persecution or serious harm

60. We understand the consultation paper to assert that the regulations are not intended to change the current law in the UK as established by the caselaw. It is our understanding that the use of the word "demonstrated" in draft Regulation 3(1)(c) is not intended to alter the existing standard of proof under UK law. This should be made clear and explicit.

61. As stated above ILPA shares the view of UNHCR that "whether or not a *State* actor exists that is unable to provide protection is of no consequence. Such a situation may arise with failed States, where there is no State actor that could be held accountable for not offering protection" (emphasis added) and ILPA urges the UK to follow the UNHCR recommendation that express reference be made to

situations of failed States. With this important qualification, we consider that the text of the draft regulations is in line with existing UK caselaw and is also in line with the Directive.

Proposed amendment to draft regulation 3(c): insert reference to failed States:

Actors of protection

62. We comment above on ILPA's position actors of protection. We suggest that, in line with the reference in Article 3 of the Directive to "minimum standards" the UK should take this opportunity to require in regulations that protection must be provided by a State.

Proposed amendment to draft regulation 4: omit from "; or in 4(1) to end of 4(b). Consequential amendments to draft regulation 3((1)(c).

63. In the event that our primary submission is not accepted, the extent to which an organisation or party or an international agency enjoys the range of State powers and functions can be used to determine whether it fulfils the conditions of Article 7 of the Directive that it "controls" the State or a "substantial part" of the State. This interpretation should be reflected in the APIs.

64. Article 7(2) of the Directive also addresses the question of sufficiency of protection. In so doing it sets out to establish a common test in both asylum and human rights cases. We detect a possible inconsistency in the consultation paper – if this Article is felt to be in line with UK caselaw why it is it made the subject of a draft regulation when Article 8, internal protection, is not? We note that the ECHR jurisprudence requires that the protection afforded obviates the risk (see *HLR v France* 26 EHRR 29, *D v UK (1997) 24 EHRR 423*) and recognises a positive obligation to protect (*Osman v UK (1998) 29 EHRR 245).* We would concur that the definition in the draft regulation does not propose a lower test than the House of Lords judgment in *R v Bagdanavicius* [2005] UKHL 38 – the

question must be whether the decision in *Bagdanavicius* accurately reflects the jurisprudence of the European Court of Human Rights.

Internal Protection

65. The leading UK case is *Januzi (FC) et ors v SSHD* [2006] UKHL 5, in which the House of Lords considered Article 8(1) and (2) of the Directive (see paragraph 17 of the judgment). On this basis we concur that the changes will not impact upon caselaw. The judges advised that the approach to internal protection should have regard to the UNHCR Guidelines on Internal Protection of 21 July 2003 (paragraphs 20 & 67) and we trust that this will be reflected in the APIs.

66. We share UNHCR's view[10] that Article 8(3) should not be implemented in national law or practice because the effect of this provision is to deny international protection to persons who have no accessible protection alternative and it is not consistent with Article 1 of the Refugee Convention. It behoves the UK, so that it can respect its international treaty obligations, not to give effect to this provision in national law and, in line with the reference in Article 3 to the Directive's setting "minimum standards" urge the UK not to implement Article 8(3).

67. As to whether Article 8(3) is compatible with UK caselaw[11], cases such as *GH*[12] turn on the Secretary of State's undertaking not to use the unsafe route of return and leave open what would happen if he proposed to do so. Whatever the decision on our primary submission, we consider that proposed rule 339O(iii) should be amended, with the insertion of the words "where these mean that removal is not to be enforced" at the end.

Proposed amendment
Rule 3390(iii) Insert "where these mean that removal is not to be enforced" at the end.

[10] In their Annotated Comments, op.cit. See footnotes referencing UNHCR documents on the point
[11] See the *Vallaj*[11], *Gardi* and *Dyli* cases cited in our comments on Article 7, and see *GH v SSHD* [2005] EWCA Civ 1182
[12] See paragraphs 12 and 47 of the judgement

Acts of persecution

68. Regulation 5(1) of the draft regulations fails accurately to transpose the Directive. The Directive makes reference to "a severe violation of human rights, in particular the rights from which derogation cannot be made under Article 15(2)". Draft regulation 5(1) is confined to violations of rights from which derogation cannot be made. Not only does this fail to implement the minimum standards required by the Directive, it is also out of line with UK caselaw (see in particular the case of *R (Ullah) v Special Adjudicator* [2004] UKHL 26) and the case law of the European Court of Human Rights (see e.g. *MAR v United Kingdom* (1996) 23 EHRR CD 120)[13]. The regulation should be amended with the words "a right in the Convention" in draft regulation 5(1) replaced by the words "of basic human rights, in particular rights in the Convention…".

Proposed amendment to draft regulation 5(1) remove "a right in the Convention" and replace with "basic human rights, in particular rights in the Convention"

69. We consider it necessary expressly to capture in proposed regulation 5(2) that the list of acts of persecution is illustrative. While the words *inter alia* used in the Directive would not find favour in UK law, the words "in particular" are the current preferred statutory construction to capture this content (see e.g. s. 4 of the Immigration and Asylum Act 2006) and we recommend that they be inserted into draft regulation 5(2).

Proposed amendment to draft regulation 5(2), after "form of" insert the words "in particular"

70. We observe that the UK has not included express reference to Article 9(2)(f) of the Directive – it was suggested at the 31 July meeting that this was because the UK was not clear on what these words meant. ILPA submits that the phrase in sub-paragraph (f) is clearly directed to gender and child persecution. The meaning is plain enough and the intention is to give particular emphasis is to

[13] See also the UNHCR *Handbook* paragraph 51.

these wholly unacceptable forms of persecution (child conscription, gender violence). ILPA submits that Article 9(2)(f) should be included in the draft Regulations. The deletion of the clause is likely to cause uncertainty and litigation in respect of vulnerable applicants.

Proposed amendment to draft regulation 5, after 5(2) insert the wording of Article 9(2)(f).

71. We do not consider that Regulation 5(3) accurately reflects Article 9(3) of the Directive or current UK case law. It should be sufficient that there is some connection between the persecution and a Convention reason.

Proposed amendment to draft regulation 5(3) "there must be a connection between the reasons mentioned in Regulation 6 and the acts of persecution as qualified in paragraph 1.

72. We consider that regulation 6(1) should be amended by the insertion of the words "in particular" after include in subsections (a), (b) and (c) and (f). This would accurately transpose the wording of the directive and would make clear that the examples given are illustrative, not exhaustive. The omission of the phrase 'in particular' alters the meaning and does not properly transpose the Directive

Proposed amendment to regulation 6(1)(a)(b)(c) & (f): after "include" insert "in particular"

73. As to social group (draft regulation 6(d) and 6(e), we understand from the 31 July 2006 meeting as part of this consultation that it is intended to replace the words "Member States" in draft regulation 6(2)(e)(ii) and commend that change.

Proposed amendment to regulation 6(2)(e)(ii: remove "Member States" and replace with "UK"

74. Whereas the draft regulations do not transpose Article 8, on the basis that it is adequately covered by UK caselaw, it is proposed to introduce a regulation to cover Article 10. This suggests to us that it is anticipated that the regulations will change UK caselaw on social group, as further evidenced by the note in the consultation paper that the definition is "similar rather than identical" to that used in the UK. We understand from the meeting at the Home Office on 31 July that it is intended to set out in the API that societal recognition may help establish the group but is not a pre-requisite, so that the UK continues to apply *Shah and Islam* [1999] INLR 144, HL. We consider that an attempt to deal with this in APIs is clumsy and does not properly endorse or maintain existing case authority. A better approach, sanctioned by Article 3 of the Directive, would be to replace "and" in draft regulation 6(1)(d)(i) with "or" so that the a particular social group can be identified where either 6(1)(d)(i) or (ii) is made out. This would also be in line with the UNHCR *Guidelines on international protection*[14]. ILPA endorses the UNHCR comment on the Directive that the protected characteristics and social perception tests for particular social groups which are summarised in 6(1)(d(i) and (ii) should be alternative rather than cumulative requirements for the social group ground.

Proposed amendment to draft regulation 6(1)(d)(i) delete "and" and replace with "or".

We should be grateful to be consulted on any proposed changes to the APIs on Membership of a Particular Social Group and on Assessing the Claim

Exclusion

75. ILPA has the gravest doubts about the drafting of Regulation 7(2)(a). We are concerned that the phrase "particularly cruel" is inappropriately subjective. The accepted approach is set out in para 152 of the UNHCR handbook. It is possible

[14] See"Membership of a particular social group" within the context of Art. 1 A para. 2 of the Refugee Convention and/or its 1967 Protocol HCR/GIP/02/02 7 May 2002

to have a non-atrocious allegedly political act that was nonetheless not truly political. If the act is atrocious, the approach of the Handbook is that it would be difficult to accept it as political, or that the action as whole could all be ascribed to the political motivation. Regulation 7(2)(a) appears to legislate a level of cruelty at which the act cannot possibly be political. This shifts the focus of inquiry and ILPA considers the change leaves too much room for subjectivity and is unclear.

Proposed amendment to Regulation 7(2) leave out sub-paragraph (a).

76. In relation to Regulation 7(4) ILPA is opposed to the inclusion of a reference to Section 54 of the 2006 Act. This provides a statutory construction of the reference to "acts contrary to the purposes and principles of the United Nations" in Article 1(F)(c) of the Refugee Convention, part of the Article setting out the grounds on which a person can be excluded from recognition as a refugee. The Refugee Convention is an international convention. UNHCR statements and international jurisprudence are relevant. To purport to interpret it in statute is to fail to respect this jurisprudence and to usurp the role of judges in interpreting it. UNHCR has provided detailed criticism of the way the Government has interpreted Article 1F(c) in the section 54. They note *inter alia:*

- "*the assertion in Security Council resolutions that an act is "terrorist" in nature would not by itself suffice to warrant the application of Article 1F (c), especially, as there remains no universally accepted legal definition of terrorism at the international level.*"
- In UNHCR's view only *"persons who are in positions of power in their countries or in State-like entities",* and *"in exceptional circumstances, the leaders of organisations carrying out particularly heinous acts of international terrorism which involve serious threats to international peace and security"* are persons who could act contrary to the principles and purpose of the United Nations and fall within 1F(c)
- 1F(c) envisages acts of such a nature as to impinge on the international plane in terms of their gravity, international impact and implications for international peace and security.

77. During the passing of the 2006 Act officials suggested to ILPA that there is a precedent for defining Article 1F in primary legislation in the Refugee Qualification Directive. This argument is plainly weak. Article 12 says:

"12(2) A third country national or stateless person is excluded from being a refugee where there are serious reasons for considering that:

(a) he or she has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.

(b) He or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;

(c) He or she has been guilty of acts contrary to the purposes and principle of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

(12)(3) Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein."

78. Subsection 12(2)(c) repeats the words of Article 1(F)(c); it says where the principles and purposes of the UN are found (and makes no reference to security council resolutions in doing so). It does not seek to substitute a home-grown definition of terrorism for an international convention.

79. Section 54 appears to suggest that a person could be excluded from recognition as refugee for actions that are not a crime under UK law. This is contrary to UNHCR's *Handbook*, which states of Article 1F(c) that *"Article 1F(c)…is intended to cover in a general way such acts against the purposes and principles of the United Nations that might not be fully covered by the two preceding exclusion clauses. Taken with the latter, it has to be assumed, although this is not specifically stated, that the acts covered...must also be of a criminal nature"*[15].

80. ILPA submits that Regulation 7(4) should be deleted for these reasons.

Proposed amendment: delete Regulation 7(4).

[15] *UNHCR* Handbook on Procedures and Criteria for Determining Refugee Status, Paragraph 162.

Revocation or refusal

81. ILPA is very concerned to see the draft Immigration Rule at para 339A does not properly distinguish and separate cases where a person does not need international protection and cases where a person does not deserve international protection.

82. ILPA is very troubled by the mandatory wording applied to those people who fall within para 339A(v) and (vi) in particular. There should be a discretion to revoke in such circumstances but not an obligation to do so. Note the comments concerning the proviso to 1C above. We observe considerable difference between the wording of paragraph 6.13 of the consultation paper with the wording of 339A.

Proposed amendment to last line of para 339A change to "is satisfied that at least one of the provisions in sub-paragraph (i) to (iv) apply.

83. We are very concerned at the provision in para 339C. ILPA objects to persons who are non-removable being denied any form of immigration status and leave to remain. It is fundamentally at odds with the UK's obligations under the ECHR for persons who cannot be removed, regardless of their behaviour or actions to be left without any status in the UK. As the government has made the fundamental rights to work, attain benefits and to marry all depend upon immigration status, the denial of such status is a denial of these associated fundamental rights. **It should be made clear in the APIs that the person excluded under paragraph 339C of the Immigration Rules should be granted at least discretionary leave**.

84. ILPA objects to the cross referencing to Regulation 7(4) in paragraph 339C for the reasons set out above. ILPA does not accept that Section 54 of the 2006 Act is consistent with international obligations.

85. ILPA is concerned at the use of the phrase “danger to the community” in paragraph 339C(vi). This is not used elsewhere and ILPA does not consider it necessary or useful to introduce yet more phrases or terminology in this area. It will only lead to confusion and inconsistency in decision making.

PART THREE: Whether the UK should apply the provisions of the Directive to all

asylum claims in the system (including at appeal) on 10th October 2006

or limit its application only to new asylum claims lodged on or after 10th

October 2006.

86. ILPA suggests the adoption of a "no less favourable principle" namely that the Directive is applied to all claims in the system on 10 October 2006 when this will result in treatment no less favourable than that which the applicant would have received under the former regime. Where the result under the Directive would be more favourable than under existing UK law or practice, the applicant should get the benefit of the Directive.

87. As regards appeals in the system, ILPA suggests that IND undertakes a review of any cases pending appeal to ensure that its decisions are consistent with the Directive and meet the minimum standards laid down in the Directive.