HUMAN RIGHTS NEXUS WORKING PARTY BACKGROUND PAPER FOR THE WELLINGTON CONFERENCE ON SUBSIDIARY/ COMPLEMENTARY PROTECTION

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This background paper examines the application of subsidiary/complementary protection, in a number of jurisdictions, to those who would face serious harm should they return to their country of nationality or former habitual residence. It focuses, in particular, on the European Union (EU) Council Directive on International Protection and subsidiary/complementary protection in the United States, United Kingdom, Canada and Sweden. The background paper notes a number of perceived disadvantages in the application of subsidiary/

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complementary protection among States in the world today and suggests four areas that need to be resolved and explored in order to address these perceived disadvantages. The background paper concludes with a brief analytical summary that suggests that although there are distinct trends toward the harmonization of international protection standards there are still, presently, considerable and significant variations among States in the application subsidiary/complementary protection.

I TOWARD A COMMON EUROPEAN ASYLUM SYSTEM

It has been noted that most States extend some form of protection to persons who are not covered by the 1951 Geneva Convention. These persons are protected against refoulement because there are valid and compelling reasons for not returning them to their countries of origin, even though they do not fall strictly within the definition of Article 1A(2) of the 1951 Geneva Convention.[1]

In his closing remarks, at the seminar held in Norrkoping, Sweden, in April 2001, on "International Protection Within One Single Asylum Procedure," Guus Borchardt, Director, Directorate-General Justice and Home Affairs, European Commission, stated:[2]

> In assessing claims for international protection, it should first and foremost be assessed whether or not the person in question is covered by the Convention, before assessing if any other protection system is appropriate in that particular case. This approach reflects well the primacy of the Convention. In that sense the term "subsidiary protection" clearly and accurately reflects that any such regime is subsidiary to the protection regime offered by the Geneva Convention.
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> This Seminar used another term indicating the regime of subsidiary protection, namely "complementary protection". It is not worthwhile fighting too long over the use of the exact terminology. This particular term, we feel, reflects equally clearly and accurately the relationship between the Refugee Convention and other

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1 Dr Hugo Storey, "Symposium Outline Paper: Complementary Protection: Should there be a common approach to providing protection to persons who are not covered by the 1951 Geneva Convention?" A paper prepared for the Joint ILPA/IARLJ Symposium, December 1999, p. 1.

2 Guus Borchardt, Director, Directorate-General Justice & Home Affairs, European Commission, *Report from the Seminar, "International Protection within One Single Asylum Procedure."* 23-24 April 2001, in Norrkoping, Sweden, Migrationsverket, 2001-06-15.

> protection regimes, in that any other regime offering international protection to those in need of it and not covered by the Refugee Convention, should be seen as complementary to the regime offered by the Convention.

This seminar, organized during the Swedish Presidency of the EU, was part of the ongoing negotiations leading to the harmonization of asylum policy within the EU.

In October 1999, the Tampere European Council reaffirmed the importance that the EU and member States absolutely respect the right to seek asylum.[3] The Tampere European Council further agreed to work towards establishing a Common European Asylum System based on the "full and inclusive application of the Geneva Convention".[4] It is worth noting that in 1994 the EU Committee on Civil Liberties and Internal Affairs of the European Parliament proposed a draft resolution calling on member states to "adopt a common approach to providing protection to the many refugees who are not covered by the 1951 Geneva Convention".[5] This is recognized in some EU member states by distinguishing between 'A status' and 'B status'. The 'A status' constitutes Convention refugee status, while the 'B status' includes victims of war, violence, and violations of human rights.[6] Those who fall under the 'B status' have been referred to as "de facto refugees" or "refugees for humanitarian reasons."

In an effort to move to a Common European Asylum System the Council of the European Union has issued a proposed Council Directive, (2001) 510 final,[7]

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3 Jens Vedsted-Hansen, University of Aarhus Law School, Denmark, "Complementary or Subsidiary Protection? Offering an Appropriate Status without Undermining Refugee Protection" Report from the Seminar, "International Protection within One Single Asylum Procedure" 23-24 April 2001, in Norrkoping, Sweden, Migrationsverket, 2001-06-15, (p 2).

4 Above n 3.

5 Dr Hugo Storey, "Symposium Outline Paper: Complementary Protection: Should there be a common approach to providing protection to persons who are not covered by the 1951 Geneva Convention?" A paper prepared for the Joint ILPA/IARLJ Symposium, December 1999, p 1, n 2.

6 Above n 5.

7 It is important to note that this proposed EU Council Directive is still in draft form. There have been a number of "readings" by the EU Council working group and proposed amendments to the draft examined here. For the complete text see http://www.ecre.org/eu_developments/qual.shtml.

that seeks to establish minimum standards on the qualification and status of applicants for international protection as refugees or beneficiaries of subsidiary protection. This effort is a constituent part of the EU's objective of progressively establishing an area of freedom, security and justice open to all.

II THE PROPOSED EU COUNCIL DIRECTIVE FOR INTERNATIONAL PROTECTION

The proposed EU Council Directive attempts to ensure that a minimum level of protection is available in all EU member States for those genuinely in need of international protection. The proposal is intended to respect fundamental rights and observe the principles recognized by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The EU Council proposal seeks to ensure the applicant's right to asylum and protection in the event of removal, expulsion, or extradition. The proposed EU Council Directive also is intended to ensure that member States fully respect the human dignity of all asylum applicants.

The proposed EU Council Directive seeks to introduce common concepts for terms such as persecution, including the reasons for persecution, the sources of harm and the availability of protection; internal protection/relocation/flight alternative; and, *sur place* claims. In addition, it seeks to introduce a common concept for the persecution ground of "membership in a particular social group". For example, EU member states are expected to be sensitive to child-specific forms of persecution, such as the recruitment of children into armies, trafficking for sex work, and forced labour.

Minimum standards for the definition and content of subsidiary protection status are outlined. For instance, criteria will be introduced for determining which applicants for international protection will be recognized as eligible for subsidiary protection status. The criteria will be drawn from international obligations under human rights instruments and practices existing in EU member states.

Subsidiary protection is defined, in the proposed EU Council Directive, as "any third country national or stateless person who does not qualify as a refugee, according to the criteria set out in Chapter III of this directive, or whose application for international protection was explicitly made on grounds that did not include the Geneva Convention, and who, owing to a well-founded fear of suffering serious and unjustified harm as described in Article 15, has been forced to flee or to remain outside his or her country of origin and is unable or, owing to

such fear, is unwilling to avail himself of the protection of that country." (Chapter II, Article 5, Paragraph 2).

Chapter IV, Qualification for subsidiary protection status, Article 15, the grounds of subsidiary protection, states that EU member States shall "grant subsidiary protection status 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:

(1) torture or inhuman or degrading treatment or punishment; or

(2) violation of a human right, sufficiently severe to engage the Member State's international obligations or;

(3) a threat to his or her 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. (Chapter IV, Article 15)

III ASSESSING THE EU COUNCIL DIRECTIVE ON INTERNATIONAL PROTECTION

Dr Hugo Storey's detailed commentary on this proposed EU Council Directive is instructive.[8] He notes that this proposed EU Council Directive is the last of a set of four proposed directives that are currently under discussion. The others are:

- the proposed directive on minimum standards for giving temporary protection in the event of a 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 (2000/C/311/E18);
- the proposed directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (COM (2002) 326 final);
- the proposed directive on minimum standards on the reception of applicants for asylum in Member States.[9]

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8 Dr Hugo Storey, "The New EU Directive – An Evaluation," May 2002, A paper presented at the IARLJ European Chapter Conference, Dublin, Ireland, May 2002.

9 Above n 8, 2. The proposed directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on a balanced effort

He further notes that there is a proposed EU Council Regulation that would establish the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national.[10] He argues that the instant proposed EU Council Directive should have been debated and finalised first, since agreement on who is a refugee and who qualifies for subsidiary protection precedes addressing issues dealing with procedures and reception conditions.[11]

He also notes that the "minimum level of protection" standards offered by the proposed EU Council Directive are neither the lowest nor the highest "common denominator amalgam"[12] in Europe.

With respect to positive comments, he asserts: [13]

> Overall the proposed directive represents a major advance in the legal protection of persons in need of international protection.

He further notes that the proposed EU Council Directive is the "first major attempt to furnish a clear set of criteria governing both protection under the Refugee Convention and other forms of protection due under international human rights law."[14] It also establishes a single concept of "international protection" comprised of both refugee protection and subsidiary protection.[15]

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among member states in receiving such persons has been adopted and shall be implemented by the member states no later than December 31, 2002. (Council Directive 2001/55/EC) This is the second proposed directive on minimum standards on procedures in member states for granting and withdrawing refugee status. The proposed directive on the minimum standards for the reception of applicants for asylum in member states has been adopted informally and is pending the opinion of the European Parliament and the withdrawal of reservations for decisions by national parliaments.

10 Above n 8. See the EU Council Regulation on Criteria and Mechanisms COM (2001) 447 final.

11 Above n 8.

12 Above n 8.

13 Above n 8, 3.

14 Above n 8, 4.

15 Above n 8.

With respect to negative comments, he makes the point that the proposed EU Council Directive lacks integration with the other proposed Council Directives and Regulation noted above. He states that it is imperative that each of the proposed Council Directives and Regulation should cross-reference each other.[16] It is further noted that there is a risk that this proposed EU Council Directive on international protection will "replace an international with a regional European jurisprudence".[17]

The argument has also been made that the proposed EU Council Directive's refugee definition diverges from the Geneva Convention definition of refugee in a number of limited respects. For instance, in the use of the phrase "unjustified harm" that is not found in either the Refugee Convention or the ECHR. Furthermore, it is argued, that "the language of justifiability, insofar as it should come into play at all, should be left to be determined, as now, in accordance with international human rights law principles. To insert it into the very definition of persecution and serious harm only confuses matters".[18] The use of the phrase "unjustified harm" could lead to an "unduly restrictive interpretation and application of the directive".[19]

The proposed EU Council Directive provides a coherent definition of subsidiary protection.[20] It is reasonable to assume that once the proposed Council Directive comes into force, member states will review their own criteria for subsidiary protection to ensure that they are consistent with the definition and requirements for subsidiary protection under the terms of this Council Directive.

It is also important to note that those applicants who are excluded under the terms of this proposed EU Council Directive but are, nevertheless, found to have a risk of a danger of torture and inhuman and degrading treatment or punishment in their countries of nationality or former habitual residences and, therefore, are not removable, will not have the same rights as those who are found to be in need of international protection. Hence, the proposed EU Council Directive provides a

16 Above n 8, 7.

17 Above n 8.

18 Above n 8, 8.

19 Above n 8.

20 Proposed EU Council Directive, COM(2001) 510 final, 2001/0207 (CNS), Chap II, Art 5, Para 2.

rational basis on which to deny those applicants who are excluded under the terms of this proposed EU Council Directive from gaining equivalent status from those who are not excluded and deemed to be need of international protection.

He further notes that there is a glaring omission that there is no subparagraph in the proposed EU Council Directive that identifies "serious harm arising from exposure to the death penalty."[21] He points out that the Sixth Protocol of the ECHR prohibits this in absolute terms, with the exception in times of war, and that Strasbourg jurisprudence has established that exposing a person to the death penalty is a violation of this protocol of the ECHR.[22] Indeed, a thirteenth protocol of the ECHR has been decided, although it is not yet in force, that prohibits the death penalty, even in times of war.

While the proposed EU Council Directive gives the first legal expression at the EU level of the principle of family unity, it does not extend to the refugee's dependants. It is argued that there is a wide divergence of practice on this among the member states of the EU. He further notes that the proposed EU Council Directive's definition of family member in Article 2 (j) fails to identify lesbian, gay and transgender persons.[23]

It is also noted that Article 13 of the proposed EU Council Directive states that in considering cessation, member States "shall have regard to whether the change of circumstances is of such a profound and durable nature that the refugee's fear of persecution can no longer be regarded as well-founded".[24] He further argues that the "profound and durable" test is too demanding. He notes that "'profound' is a very strong word, for judges and goes well beyond the language found in the Refugee Convention and paragraph 112 of the 1979 *UNHCR Handbook* that refers, rather, to a "fundamental change of circumstances".[25]

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21 Above n 8.

22 Above n 8.

23 Above n 8, 9.

24 Above n 8.

25 Above n 8.

IV SUBSIDIARY/COMPLEMENTARY PROTECTION IN THE US, UK, CANADA, AND SWEDEN

The proposed EU Council Directive is only one example of a number of significant efforts, in recent years, by states and supranational bodies to integrate the 1951 Geneva Convention with subsidiary/complementary protection measures. Asylum judges in the United States, for instance, have acquired jurisdiction in relation to claims based on Article 3 of the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[26] In the United Kingdom, Adjudicators decide claims based on the argument that refoulement would be contrary to the Article 3 of the ECHR. In Canada, Immigration and Refugee Board (IRB) decision-makers, are now required to assess whether a claimant would be subjected to a danger of torture, within the meaning of Article 1 of CAT, and/or a risk to their life or to a risk of cruel and unusual treatment or punishment.[27] The Swedish Migration Board (SMB), previously known as Swedish Immigration Board (SIB), determines applications for asylum, residence permits, and Swedish citizenship. The decisions of the SMB can be appealed to the Aliens Appeals Board (AAB). The decisions of the AAB cannot be appealed.[28] Both Boards examine all grounds for residence permits, including, Convention grounds, affiliation and humanitarian grounds.[29]

As noted, United States Immigration Judges now have jurisdiction over non-refoulement claims based on Article 3 of the CAT. In a recent decision of the Board of Immigration Appeals (BIA) in *J-E, Respondent*, decided on March 22, 2002, the majority upheld an Immigration Judge's ruling that denied the respondent's application for asylum, withholding of a removal order, and protection under Article 3 of the CAT.[30] The issue before the BIA was whether

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26 Deborah E Anker *The Law of Asylum in the United States* 465-552.

27 An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced or in danger. SC 2001, c 27. Immigration and Refugee Protection Act (IRPA), s 97 (1)(a)(b).

28 Aliens Appeals Board – a presentation, 1998, Background, 1.

29 Goran Hakansson, Aliens Appeal Board, Sweden, "Complementary Protection".

30 *In re J-E-, Respondent*, Decided March 22, 2002, U.S. Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals. See the United States Department of Justice website for the complete decision at http://www.usdoj.gov/eoir/vll/intdec/lib_vol23idxnet.html.

the respondent was eligible for protection under Article 3 of the CAT. The respondent was a citizen of Haiti who was convicted of selling cocaine, a second degree felony under Florida law. The majority ruling in this decision saw two pertinent questions: "first, whether any actions by the Haitian authorities – indefinite detention, inhuman prison conditions, and police mistreatment – constitute torturous acts within the definition of torture at 8 C.F.R. 208.18(a) (2001); and, if so, whether the respondent has established that it is more likely than not that he will be tortured if removed to Haiti".[31] On the first question, the majority found that Haiti's detention policy is a lawful enforcement sanction and, therefore, does not constitute torture. The majority also did not find any evidence that the Haitian authorities were detaining criminal deportees with the specific intent to inflict severe physical or mental pain or suffering.[32] Rather, the appalling prison conditions in Haiti were due to the country's budgetary and management problems as well as its severe economic difficulties.[33] The majority did acknowledge, however, that "isolated acts of torture occur in Haitian detention facilities".[34] Nonetheless, this evidence was insufficient for the majority to accept that "it is more likely than not" that the respondent would be subject to torture if he were removed to Haiti. The majority, thus, concluded that although the Haitian prison conditions fall squarely within Article 16 of the CAT, that the treatment of prisoners in Haiti amounted to cruel, inhuman, or degrading punishment or treatment, it did not amount to torture.[35] The majority state that, "although these prison conditions do not rise to the level of torture, every effort must be made to improve such conditions."[36] It is important to note that the obligations undertaken by a State Party regarding acts of torture, Article 1 of the Convention, are far more comprehensive than those for "other acts of cruel, inhuman or degrading treatment or punishment, Article 16 of the Convention. Moreover, the obligation of non-refoulement applies to Article 3 of the CAT, where the basis of the fear is torture, and not Article 16, when the fear is of cruel, inhuman, or degrading punishment or treatment.

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31 Above n 30, 292.

32 Above n 30, 300.

33 Above n 30, 301.

34 Above n 30, 303.

35 Above n 30, 304.

36 Above n 35.

V THE US BOARD OF IMMIGRATION APPEAL DECISION IN J-E, RESPONDENT

The minority, in the *J-E-, Respondent* judgement, take the position that the "majority errs in concluding that because the Haitian authorities do not have a specific intent to subject returnees to severe physical or mental pain or suffering, the treatment does not rise to the level of torture".[37] The minority further takes the position that this is not an instance of the Haitian authorities merely being negligent but rather "a government deliberately continuing a policy that leads directly to torturous acts".[38] Furthermore, the documentary evidence presented, in the opinion of the minority, indicates "the torture of detainees in Haiti is routine, widespread, horrific, and officially tolerated"[39] that "satisfies a reasonable, common-sense application of the 'more likely than not' standard of protection under the Convention".[40]

The minority opinion, as expressed by Madame Justice Rosenberg, notes that the majority's restrictive definition of torture "is contrary to both international and domestic interpretations of the term".[41] She also disagrees with the majority's interpretation of the specific intent requirements as "proof of an intent to accomplish a precise criminal act".[42] A plain language reading of the text, she opines, "reflects only that something more than an accidental consequence is necessary to establish the probability of torture".[43] She further notes that the regulations point out that "all evidence relevant to the possibility of future torture shall be considered".[44] This clearly denotes that evidence should not be limited to past torture that may have been inflicted on an applicant. She makes the point that even though "past circumstances may be considered, the determination is a prospective one".[45] Accordingly, she concludes that even though it may be that

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37 Above n 30, 307.

38 Above n 37.

39 Above n 30, 308.

40 Above n 39.

41 Above n 30, 315.

42 Above n 30, 316.

43 Above n 42.

44 Above n 30, 317.

45 Above n 30, 318.

"prison conditions alone will not meet the definition of torture", the totality of the relevant evidence, including, "reports of other forms of torture, all committed by Haitian Government officials with impunity, establish that it is more likely than not the respondent will be tortured if returned to Haiti".[46]

The standard of proof for the application of the CAT in the United States is a "balance of probabilities." This test is not found in the CAT case law, where the standard of proof is "substantial grounds for believing". In the United Kingdom the standard of proof in the application of the CAT is equivalent to the lower standard of proof used in asylum cases of a "reasonable degree of likelihood". In Canada, the standard of proof for conferral of refugee protection whether under Sections 96 or 97 of the Immigration and Refugee Protection Act (IRPA) is "serious possibility", "reasonable chance", "good grounds" or "more than a mere possibility". It would appear then that the standard of proof applied in the United States is higher than in either the United Kingdom or Canada.

VI TEMPORARY PROTECTED STATUS IN THE US

The most prominent form of complementary protection in the United States is Temporary Protected Status (TPS).[47] Section 302(a) of the Immigration Act of 1990 allows the United States Attorney General to designate the nationals of a foreign state, already present in the United States, as eligible for TPS, if in the foreign state: there is an ongoing armed conflict that would pose a serious threat of safety to returnees; if there has been an earthquake, flood, drought, or environmental disaster in the state; if the state is unable temporarily to handle the return of its nationals; or if the State has requested such protection. TPS is purely an executive matter and has been based on country-specific concessions introduced over a number of years. Edward Grant has listed the nationals of the countries that are eligible to apply for TPS, if present in the United States as of the date of the designation, as follows: Bosnia/Hercegovina; Burundi; Guinea-Bissau; Honduras and Nicaragua; Montserrat; Kosovo; Sierra Leone; Somalia; Sudan; El Salvador; Liberia; Rwanda; Haiti; Cuba; Ethiopia/Eritrea.[48] The United States

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46 Above n 30, 318.

47 As enacted by Congress under s 302(a) of the Immigration Act of 1990 (s 244A of the Immigration and Nationality Act).

48 Edward Grant, Research Paper Presented at the "Perspectives on Complementary Protection: Colloquy," International Association of Refugee Law Judges & Immigration Law Practitioners Association," London, December 6, 1999, 15-19.

Immigration and Naturalization Service (INS) website lists the following countries as currently designated for TPS: Angola, Burundi, El Salvador, Honduras, Nicaragua, Sierra Leone, Somalia, Sudan, Montserrat.[49]

VII EXCEPTIONAL LEAVE TO REMAIN IN THE UK

The United Kingdom has Exceptional Leave to Remain (ELR) status that allows a claimant to stay in the UK when there are "substantial grounds for believing that a person would be tortured or otherwise subjected to inhuman or degrading treatment, even though this would not amount to persecution within the terms of the 1951 Convention".[50] The persecution, in these instances, would not be for a Convention ground. ELR is also granted when there are substantial grounds to believing that someone will suffer a serious and disproportionate punishment for a criminal offence, such as execution for draft evasion, or when there is medical evidence that the claimant's return would result in substantial damage to the physical or psychological health of the applicant or his dependants. Applications for family reunion are only retained after the applicant has been in the UK for four years.

VIII THE IMMIGRATION AND REFUGEE PROTECTION ACT (IRPA) IN CANADA

The IRPA came into force in Canada June 28, 2002. This new Act expands the jurisdiction of the IRB beyond the determination of Convention refugee status to include conferral of refugee protection based on two additional grounds. Those claimants who fall outside the 1951 Geneva Convention and face a personal danger of being tortured, as defined by Article 1 of the CAT, will be granted refugee protection. The definition of torture does not include, of course, pain or suffering arising only from, inherent in or incidental to lawful sanctions. Further, the harm must be inflicted or instigated, or consented or acquiesced to, by a public official or a person acting in an official capacity. Hence, if the state is not involved, the harm does not fall within the definition of torture.[51] Likewise, those claimants who fall outside the 1951 Geneva Convention and face a personal risk to life or a risk of cruel and unusual treatment or punishment, that is not inherent

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49 See <http://www.ins.usdoj.gov/graphics/howdoi/tps.htm>.

50 Asylum Directorate Instructions (March 1998) Exceptional Leave to Remain.

51 Legal Services, "Consolidated Grounds in the Immigration and Refugee Protection Act, Persons in Need of Protection, Danger of Torture" Immigration and Refugee Board, January 23, 2002.

or incidental to lawful sanctions, will be granted refugee protection. The death row phenomenon is an example frequently cited of torture inherent or incidental to lawful sanctions. If the risk to life and cruel and unusual treatment or punishment is caused by the claimant's country of reference's inability to provide adequate health or medical care then the claimant will not be granted refugee protection. Thus, persons seeking refugee protection in Canada will not only include Convention refugees but those who fall outside the 1951 Geneva Convention and face a personal risk of torture, or a risk to their life or of cruel and unusual treatment or punishment. In all instances, the protection conferred will be "refugee protection". In Canada, the conferral of refugee protection on these additional grounds is referred to as the "consolidated grounds".

IX THE SUPREME COURT OF CANADA DECISION IN SURESH

The Supreme Court of Canada (SCC), in its recent ruling in *Suresh*,[52] addressed a series of questions on the constitutional permissibility of deporting a person to torture and whether the terms "danger to the security of Canada" and "terrorism" were unconstitutionally vague. Section 53 of the former Immigration Act, in Canada, permitted deportation "to a country where the person's life or freedom would be threatened". The question that the SCC had to address was whether such deportation violates Section 7 of the Canadian Charter of Rights and Freedoms. Section 7 of the Charter guarantees "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The SCC ruled that section 53, as such, did not violate section 7 of the Charter. On this point, the SCC states, at paragraph 78:

> We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the Charter or under s. 1 [Section 1 states: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."] (A violation of s. 7 will be saved by s. 1 "only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like": see Re BC Motor Vehicle Act, supra, at p 518; and New Brunswick (Minister of Health and Community Services) v G (J),

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52 *Suresh v Canada (Minister of Citizenship and Immigration)* 2002 SCC, January 11, 2002 <http://www.lexum.unmontreal.ca/csc-scc/en/rec/html/suresh.en.html>.

> [1999] 3 SCR 46, para. 9). Insofar as Canada is unable to deport a person where there are substantial grounds to believe that he or she would be tortured on return, this is not because Article 3 of the CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under s. 7 of the Charter generally precludes deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive. The ambit of an exceptional discretion to deport to torture, if a possibility, must await future cases.

On the question, "Is the term 'danger to the security of Canada' found in section 53(1)(b) of the Immigration Act and/or the term 'terrorism' found in section 19(1)(e) and (f) of the Immigration Act void for vagueness and therefore contrary to the principles of fundamental justice under section 7 of the Charter?" the SCC answered "No". At paragraph 99, the SCC ruled:

> We conclude that the terms "danger to the security of Canada" and "terrorism" are not unconstitutionally vague. Applying them to the facts found in this case, they would prima facie permit deportation of Suresh provided the Minister certifies him to be a substantial danger to Canada or provided he is found to be engaged in terrorism or a member of a terrorist organization as set out in section 19(1)(e) and (f) of the Immigration Act.

X THE ALIENS ACT IN GERMANY

In Germany, section 51 of the Aliens Act recognizes recipients of protection against refoulement as refugees within the meaning of the Geneva Convention, but their status is less secure and the benefits they receive less generous than for persons granted asylum. Those granted refugee status under section 16(A) of the Constitution received unlimited residence permits. Temporary residence permits are granted to failed refugee claimants whose lives would be endangered if they were to return to their home country, such as those fleeing civil war.

XI SUBSIDIARY/COMPLEMENTARY PROTECTION IN SWEDEN

In Sweden, residence permits are granted to those recognized as Convention refugees or who fall in one of the following three other categories: those who have a well-founded fear of being sentenced to death or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment; those who cannot return to their country of origin because of external or internal armed conflict or environmental disaster; and, those who because of their sex or

homosexuality have a well-founded fear of persecution. The agents of persecution need not be the state for either the Convention refugee grounds or subsidiary protection. Residence permits may also be granted on purely humanitarian grounds, such as family reunion, but only in exceptional situations.[53]

Temporary residence permits are issued to persons who are excluded from being considered refugees but cannot be returned to their country of nationality or former habitual residence because of a genuine fear of torture. EU member states adhere to the principle of the absolute right to protection against torture.[54]

The jurisprudence in Sweden makes a distinction between protection, on the basis of the 1951 Geneva Convention, and other grounds for the issuance of a residence permit, such as affiliation and humanitarian grounds. Family reunion is, in most cases, dealt with as an affiliation ground and not as a humanitarian ground. For persons who face life threatening illnesses and where there is no cure available in the country of origin or in claims involving minor claimants, where the principle of "the best interest of the child" weighs heavily, are examples of applications made under humanitarian grounds in Sweden.

XII THE CURRENT SITUATION OF SUBSIDIARY/ COMPLEMENTARY PROTECTION

There are a number of inherent disadvantages in the current status quo pertaining to subsidiary/complementary protection in the world today. Dr Hugo Storey outlines a number of these perceived disadvantages below.[55]

(1) The significant variation in the forms of complementary protection from country to country makes it appear that each state is "doing its own thing" rather than responding to international standards.

(2) More asylum seekers may choose their countries of asylum by reference to which one affords the widest overall system of protection. Economic

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53 Goran Hakansson, Aliens Appeal Board, Sweden, "Complementary Protection," p 2.

54 Article 3, Prohibition of Torture, in the ECHR states, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

55 Dr Hugo Storey, "Symposium Outline Paper: Complementary Protection: Should there be a common approach to providing protection to persons who are not covered by the 1951 Geneva Convention?" A paper prepared for the Joint ILPA/IARLJ Symposium, December 1999, C Disadvantages of the Present Situation. 1999.

migrants seeking only a better life in countries less torn by poverty, instability or inequality may be tempted more than previously to join the ranks of asylum-seekers.

(3) Officials in countries experiencing a high level of asylum-seekers may face pressures to divert asylum-seekers to other countries where the complementary protection system is more liberal.

(4) Because the scope and substance of each other's complementary protection is not always clearly known, states are less able to assess each other's capability and commitment to deliver effective burden-sharing and fair allocation of responsibilities according to the principle of international solidarity. This threatens to undermine the vital objective of international refugee law itself – the prevention of refugee problems from becoming a cause of tension between states.

It is important to note that some form of subsidiary/complementary protection is, in fact, necessary for states to fulfil their international obligations, whether it is a consequence of international human rights treaty obligations or customary international law. For instance, returning a person to their country of reference where there is a real risk of torture, cruel and inhuman and degrading treatment or punishment is contrary to the International Bill of Rights, Article 7 of the ICCPR (International Covenant on Civil and Political Rights) and Article 3 of the CAT.[56] This also applies to persons whose lives are placed at risk if they are sent back to their countries of reference because of internal or external wars whose conduct violates basic rules of human conduct.[57]

The foregoing suggests that a number of questions need to be resolved and explored from a comparative refugee law perspective:

(1) What should be included in subsidiary/complementary protection?

(2) Should there be a single asylum procedure, and, if so, how should the protection grounds be sequenced?

Clearly, it would appear that the first determination would pertain to whether the claimant is a Convention refugee. This would be followed by

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56 For EU member states, this also includes Art 3 of the European Convention on Human Rights.

57 Above n 1, D Underlying Principles and some Tentative Suggestions.

whether the claimant is determined to be in need of protection because he/she faced a personal risk of torture, as defined under the CAT, or a risk to life or inhuman and degrading treatment or punishment.

(3) What should the international meaning be for such key terms as: (1) torture; (2) inhuman and degrading treatment or punishment, and so on?

(4) What should the standard of proof be in a single international protection claim?

It is suggested that as the Human Rights Nexus Working Party continues its research on subsidiary/complementary protection, it may wish to concentrate its examination of this area of comparative refugee law by concentrating on the above list of questions.

XIII PRELIMINARY ANALYSIS AND CONCLUSIONS

A preliminary analysis of the brief summary of developments in subsidiary/ complementary protection in the various jurisdictions indicates that Sweden and the proposed EU Council Directive would appear to have the most comprehensive coverage in terms of subsidiary/complementary protection. As noted above, in Sweden, residence permits are issued not only to Convention refugees but those who fall in three categories: (1) those who have a well-founded fear of being sentenced to death or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment; (2) those who cannot return to their country of origin because of external or internal armed conflict or environmental disaster; (3) those who have a well-founded fear of persecution because of their sex or homosexuality. The proposed EU Council Direct explicitly defines subsidiary protection in the following terms: applicants for international protection who have a well-founded fear of being subjected to the following serious and unjustified harm: (a) torture or inhuman or degrading treatment or punishment; (b) violation of a human right, sufficiently severe to engage the member state's international obligations; (c) 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 generalized violations of their human rights. The United Kingdom perhaps comes next with its ELR status that is granted to applicants for international protection when there are substantial grounds for believing that a person would be tortured or otherwise subjected to inhuman or degrading treatment; that a person will suffer a serious and disproportionate punishment for a criminal offence; when there is medical evidence that the applicant's return would result in substantial damages to the

physical or psychological health of the applicant or his dependents. In the United States, Immigration Judges have jurisdiction over non-refoulement claims based on Article 3 of the CAT. In addition, the United States has TPS, although this is entirely a matter for the US Attorney General to grant. In Canada, applicants for international protection who are found to face a personal danger of being tortured, as defined by Article 1 of the CAT, and those applicants who face a personal risk to life or a risk of cruel and unusual treatment or punishment will be granted refugee protection. As previously noted, EU member states adhere to the principle of the absolute right to protection against torture. In Canada, the Supreme Court has ruled, in its recent decision in *Suresh*,[58] that this is not an absolute right but a matter of balance under section 7 of the Charter.

It is worth reiterating that some analysts perceive the proposed EU Council Directive as "a major advance in the legal protection of persons in need of international protection."[59] In addition, the salient point has been made that the proposed EU Council Directive is the "first major attempt to furnish a clear set of criteria governing both protection under the Refugee Convention and other forms of protection due under international human rights law".[60]

Sweden appears to follow more closely the "single asylum procedure" approach to conferring international protection than other jurisdictions. The SMB not only determines applications for asylum but also residence permits and Swedish citizenship. SMB decisions can be appealed to the AAB. But the decisions of the AAB cannot be appealed. In the United States, Immigration Judges and members of the BIA deal with asylum claims and claims based on Article 3 of the CAT. However, TPS is entirely an Executive Branch matter. In Canada, IRPA has given the IRB the additional responsibility to decide claims involving a personal danger of being tortured, as defined by Article 1 of the CAT, and claims involving a personal risk to life or a risk of cruel and unusual treatment or punishment. The Canadian "consolidated grounds" approach moves Canada closer to a single asylum procedure but not to the degree extant in either Sweden or what is contemplated in the proposed EU Council Directives.

It is also worth pointing out that the standard of proof for the application of the CAT varies from jurisdiction to jurisdiction. As noted previously, the

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58 Above n 50.

59 Above n 12.

60 Above n 14.

standard of proof applied in the United States is higher than in either that of the United Kingdom or Canada.

This brief analytical summary suggests that although there appears to be a distinct trend toward the harmonization of international protection standards, as perhaps best exemplified by the proposed EU Council Directive, there is still a significant and considerable way to go toward harmonization of standards among states in the area of subsidiary/complementary protection.