Comment of the Standing Committee of experts on international immigration, refugee and criminal law in response to the Discussion paper regarding the concept of refugee and subsidiary protection, for the meeting with officers of the European Commission, Brussels, 29th of May 2001

CM01-012

The Refugee Definition

1. The Standing Committee has written a separate set of Comments on the EU Joint Position of 1996 on the issue, in light of the reference in the Discussion paper to the Joint Position. This comment is a response to the Discussion paper in general.

2. The Directive should contain a precedence clause for the Refugee Convention in such a form that the Court of Justice is competent to give rulings on the compatibility of (measures taken on the basis of) the Directive with the Refugee Convention. In the long run, only supranational judicial review will lead to a harmonised interpretation of the refugee definition; also, this is a crucial tool in preventing subsidiary protection from undermining the Refugee Convention.

3. Article 63-1-c ECT requires that minimum norms are established, not that minimum norms are approximated (par. 10 of the Discussion Paper). As the Adan & Aitsegur decision of the House of Lords argues explicitly, it is insufficient that the Member States all use a *reasonable* interpretation of the definition. Hence, even minimum norms may well be insufficient; watering down the standard set by art. 63 ECT to approximation of minimum norms exacerbates the problem.

4. On the issue of Agents of Persecution, Option 2 (par. 27-28 of the Discussion Paper) is insufficient for two reasons. The first, legal reason is that it leaves the situation as it is (Member States are free to do as they please), and it is precisely this situation which has led to the case law referred to in par. 7 of the Discussion Paper, which illustrates the necessity of harmonisation. The second, more practical reason is that the idea underlying par. 28 of the Discussion Paper does not work; Germany applies the same restrictive doctrine to Article 3 ECHR as it does to the refugee definition; the T.I. case shows that German domestic law does not guarantee other protection in such cases either.

Complementary Protection

5. It is clear that in practice, refugee protection and complementary protection interact. The scope of refugee protection and of complementary protection is shifting, both in domestic case law and practice and in the case law of the European Court of Human Rights. Because at the political level in the EC the police/crime control approach to asylum is dominant, it is crucial that a Directive does not fixate the scope of refugee and complementary protection, but to the contrary leaves as much space as possible for future legal developments. The present dynamics of refugee protection and complementary protection should not be interrupted. In respect to the Refugee Convention, this can be done by a precedence clause for the Refugee Convention (par. 1 above). In respect to complementary protection, this can be done by referring to Article 3 ECHR; if the scope of complementary protection is to be broader than Article 3 ECHR alone, the wording should be as vague as possible. Competence as to who will benefit from the vague category should not be with the Council, as the

prospects of a meaningful application would be dim. Competence should be with the Commission, and as long as this is not feasible with the Member States.

6. Regardless of the harmonisation of refugee and complementary protection, Member States will grant a national status to asylum related migrants whom they admit for historical or cultural reasons, or for reasons of domestic politics. Member States should keep the competence to give residence rights to more people than required under European law; it is unrealistic to expect they will do otherwise. This conclusion has consequences for the structure of protection: if one national asylum related status is a given, this is an extra incentive to keep the number of European statuses to a minimum.

7. It is crucial that the grant of complementary protection does not block access to full asylum procedures, as this would hinder the dynamics referred to in par. 4 above. A Directive on complementary protection should make this explicit.

8. It is crucial that a complementary protection system does not create the idea that complementary protection is more temporary than refugee protection (as happens in par. 60 of the Discussion Paper). Protection against inhuman treatment is not more limited or temporary in nature than protection against persecution. For temporary protection, other instruments are available.

<u>The four options from the Discussion Paper</u>

9. One or two Directives? This seems not to be a matter of principle. A matter of principle is, however, that the dynamics of refugee and complementary protection is not interrupted (par. 4 above). This may be achieved by both options, and depends not on the form but on the substance of the Directive(s).

10. Agents of persecution: upward harmonisation or allow for diverging interpretations? The text of Article 63-1-c ECT suggests option 2, but this would imply a continuation of a non-harmonised situation - see par. 3 above.

11. Definition of beneficiaries: a reference to Article 3 ECHR should be included. Any other definition which might suggest a restrictive interpretation of the refugee definition should be avoided. A third option might be considered, such as "persons whose return would be contrary to Article 3 ECHR and others in need of international protection". This formulation is vague yet contains no reference to discretion of Member States or the Council. Such reference ("*recognised/considered as being* in need of international protection") is to be avoided in order to keep the instrument open.

12. Content of complementary protection status: the mixed system (option 4) is highly impractical. Who defines the different categories, how to prevent that applicants start litigation about the precise category they have been relegated to? Option 2 (subsidiary system) seems hard to justify: why would someone whose return would violate Article 3 ECHR have substantially lower entitlements than someone whose return would violate article 33 Refugee Convention? Based on the Dutch experience with the incremental system, option 1 seems preferable over option 3.

23.05.01