

**IN THE COURT OF APPEAL  
ON APPEAL FROM THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
DIVISIONAL COURT**

**C1/2006/1064**

**BETWEEN**

**THE QUEEN  
On the application of  
(1) BISHAR AL RAWI  
(2) JAMIL EL BANNA  
(3) OMAR DEGHAYES  
(4) WAHAB AL RAWI  
(5) JAHIDA SAYYADI  
(6) SABAH SUNNOQROT  
(7) ABUBAKER DEGHAYES**

**Appellants**

**- and -**

**(1) THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH  
AFFAIRS  
(2) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondents**

**- and -**

**THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR  
REFUGEES**

**Intervener**

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**WRITTEN SUBMISSIONS ON BEHALF OF  
THE INTERVENER (UNHCR)**

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1 The Office of the United Nations High Commissioner for Refugees ('UNHCR') has been entrusted by the United Nations General Assembly with the responsibility of providing international protection, under the auspices of the United Nations, to refugees within its mandate and of seeking permanent solutions to the problem of refugees.

- 2 The Statute of the Office is annexed to General Assembly Resolution 428 (V) of 14 December 1950. In that same resolution, the General Assembly,

‘2. Calls upon Governments to co-operate with the United Nations High Commissioner for Refugees in the performance of his functions concerning refugees falling under the competence of his office, especially by:

(a) Becoming parties to international conventions providing for the protection of refugees, and taking the necessary steps of implementation under such conventions...’

**[UNHCR Authorities, Tab 1]**

- 3 The Statute of the Office of the High Commissioner specifies that the High Commissioner shall provide for the protection of refugees falling under the competence of the Office by, among others:

‘Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto...’

Statute of the Office of the United Nations High Commissioner for Refugees, UNGA Res. 428(V), 14 December 1950, Annex, paragraph 8.

- 4 This supervisory responsibility of the UNHCR is recognized in Article 35 of the 1951 Convention relating to the Status of Refugees, to which the United Kingdom became a party on 11 March 1954.

*‘Article 35 – Co-operation of the national authorities with the United Nations*

1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.<sup>1</sup>

**[UNHCR Authorities, Tab 2]**

- 5 The legal and political context within which the High Commissioner must fulfil his responsibilities has been described as follows:

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<sup>1</sup> See also Article II, 1967 Protocol relating to the Status of Refugees.

'32. The international refugee protection regime is a dynamic body of universal and regional refugee law and standards, founded on the 1951 Convention and the 1967 Protocol, and complemented by international human rights and humanitarian law instruments, as well as national legislation and jurisprudence...

'33. The 1951 Convention, complemented by the 1967 Protocol, forms a central part of the international protection regime. The 1951 Convention is a multilateral instrument of general and universal application, creating a special international legal regime for persons in need of international protection...

UNHCR, 'Note on International Protection', UN doc. A/AC.96/930, 7 July 2000. [UNHCR Authorities, Tab 6]

6 In their 2001 Declaration, the States Parties to the 1951 Convention recognized,

'... the enduring importance of the 1951 Convention, as the primary refugee protection instrument which, as amended by its 1967 Protocol, sets out rights, including human rights, and minimum standards of treatment that apply to persons falling within its scope...'

Declaration of States Parties to the 1951 Convention and or its 1967 Protocol Relating to the Status of Refugees, adopted on 13 December 2001 in Geneva at the Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UN doc. HCR/MMSP/2001/09, 16 January 2002, Preamble, para. 2. [UNHCR Authorities, Tab 7]

7 The States Parties thereafter solemnly reaffirmed their commitment to implement their obligations under the 1951 Convention/1967 Protocol, 'fully and effectively in accordance with the object and purpose of these instruments'. Ibid., operative para. 1.

8 The present case raises important questions concerning the implementation of the 1951 Convention/1967 Protocol relating to the Status of Refugees, including the obligations, rights and responsibilities of the States Parties, both towards refugees and between themselves. It involves the essential interests of refugees recognized under the Convention and within the mandate of the High Commissioner, and the international protection function of the Office.

The decision in this case may also influence the manner in which the authorities of other countries interpret the scope and extent of their international obligations.

- 9 Given the supervisory responsibilities with which it has been entrusted by the international community of States, UNHCR welcomes this opportunity to place its written views before the Court and to provide any additional assistance to the Court by way of oral submissions, should it be so called upon. UNHCR will limit its submissions to the issues of international law and the protection responsibilities of States.

### Relevant facts and legal issues summarised

- 10 The UNHCR mandate, endorsed by the UNHCR Executive Committee and the UN General Assembly, includes the supervision and oversight of the international refugee protection regime at large.
- 11 The facts underlying this appeal are set out in the Judgment of the Divisional Court at paragraphs 1-15. So far as they concern UNHCR, the relevant facts concern two of the Appellants, Jamil El Banna and Omar Deghayes, who have been recognized as refugees and granted asylum in the United Kingdom.
- 12 Jamil El Banna is a Jordanian citizen. He was advised by letter from the Immigration and Nationality Directorate dated 17 February 1997 that he had been recognized as a refugee in the United Kingdom under the 1951 Convention/1967 Protocol. He was issued with a (United Kingdom) Convention Travel Document ('CTD') number RP0156168 on 14 October 2000, valid to 14 October 2010. The CTD indicated that as of 19 October 2000, there was not time limit on the holder's stay in the United Kingdom, and confirmed that he is authorised to return to the United Kingdom without a visa within the validity of the CTD. Aspects of the Convention Travel Document are dealt with further below in paragraphs 75-84.
- 13 Omar Amer Deghayes is of Libyan origin. He came to the United Kingdom as a child in 1986 and was recognized as a refugee in 1987. He was advised by

letter from the Home Office dated 20 August 1992 that he had been granted indefinite leave to remain in the United Kingdom as a refugee under the 1951 Convention/1967 Protocol. He was further advised to apply for a 'Home Office travel document' if he wished to travel outside the UK. UNHCR understands that he holds a United Kingdom travel document issued under the 1951 Convention, but has not been informed of its date of issue, number, or period of validity.

14 According to the facts as set out in the Judgment of the Divisional Court, Jamil El Banna was detained in The Gambia in November 2002, and Omar Amer Deghayes is reported to have been arrested in Pakistan in April 2002. Both Appellants were first transferred to Baghram Air Base in Afghanistan, and are presently held by the United States authorities in 'Guantanamo Bay'.

15 Both Appellants have requested the intervention of Her Majesty's Government to secure their release and return to the United Kingdom, analogously with that exercised on behalf of certain British citizens. The Government has declined to intervene, firstly, on the ground that it is not entitled to exercise 'diplomatic protection' with regard to individuals who do not themselves hold British citizenship; secondly, on the ground that the primary responsibility for the Appellants' detention and welfare lies with the country holding them and the country of their nationality; thirdly, on the ground that refugee status does not give the country of residence (sic) the right to provide consular or diplomatic assistance; and fourthly, because UNHCR is entitled to provide assistance or, if the individual was travelling on refugee documents, 'may be able to help'.

See letter dated 28 February 2003 from Baroness Amos, Foreign and Commonwealth Office, to Birnberg Peirce and Partners, Solicitors; cited in the Judgment of the Divisional Court, §30. [**Appeal Bundle, Tab 33, 397-8**]

See also letter dated 14 October 2002 from Baroness Amos to Solicitors acting from Mr Deghayes, in which the UK's recognition of his refugee status is not mentioned and it is advised that contact be made with the US and Libyan Embassies; cited in the Judgment of the Divisional Court, §29. [**Appeal Bundle, Tab 31, 391**]

- 16 In the view of UNHCR and for the reasons set out below in paragraphs 50-67, the international law of 'diplomatic protection' recognizes a sufficient number of exceptions so as to offer no bar to the United Kingdom, should it so wish, to take up the case of the Appellants vis-à-vis the United States of America.
- 17 However, it appears to UNHCR that the international status of these two individuals as recognized refugees may not have been sufficiently appreciated. In UNHCR's submission, the right and responsibility of the United Kingdom to intervene on behalf of Convention refugees recognized in the UK and detained under the authority of the United States have a solid and effective legal basis in the treaty relations of the two parties and are not dependent on the law of diplomatic protection.
- 18 In so far as the decision not to intervene on behalf of British recognized refugees detained in Guantanamo is based on the lack of legal standing (or 'lack of any recognised right to make Formal Requests in relation to the Detainee Appellants', in the words of the Respondent's Skeleton Argument, 14 June 2006, §46), UNHCR submits that this is incorrect.
- 19 UNHCR respectfully submits that the United Kingdom has the right under the 1951 Convention and the 1967 Protocol, to the latter of which the United States of America is also a party, to invoke the responsibility of the United States generally under the treaty, and specifically, with regard to the 'injury' caused to itself and to the Appellants, Jamil El Banna and Omar Deghayes.
- 20 UNHCR further submits that, so far as the international refugee protection regime combines undertakings by States both towards refugees and between themselves, and given the United Kingdom's general obligation in good faith to ensure the implementation of the 1951 Convention/1967 Protocol and the protection of the rights of refugees, it *ought* to invoke the responsibility of the United States in the present case with a view to achieving a solution compatible with international law. In that respect, UNHCR stands ready and willing to fulfil its own responsibility to supervise the application of the provisions of the 1951 Convention/1967 Protocol and to act jointly with and support the United Kingdom in the protection of these refugees.

21 In failing to provide the Appellants, Jamil El Banna and Omar Deghayes, with access to a court under Article 16 of the 1951 Convention relating to the Status of Refugees, the United States is not only in breach of its treaty obligations to the United Kingdom in its own right, but has also injured the United Kingdom indirectly through its failure to accord to refugees recognized by the United Kingdom under the Convention the treatment to which they are entitled under international law.

22 Each of these heads of claim, however, is separate and independent of the other. As is shown below in paragraphs 27-29 and 40-49, this separate cause of action available to Her Majesty's Government, is independent of the nationality of the Appellants, and does not depend on the international law of diplomatic protection.

### 1. The United Kingdom and the United States of America: Parties to the 1951 Convention/1967 Protocol relating to the Status of Refugees

23 The legal relationship between the United Kingdom and the United States of America is simple and straightforward. The United Kingdom ratified the 1951 Convention relating to the Status of Refugees on 11 March 1954 and the 1967 Protocol relating to the Status of Refugees on 4 September 1968. The United States of America ratified the 1967 Protocol on 1 November 1968, as the Protocol permits, without ratifying the Convention.

24 Both States are therefore party to one and the same treaty – the 1967 Protocol – and both have agreed to apply the provisions of the 1951 Convention (specifically, Articles 2-34) to refugees, as if the original dateline in the Convention were omitted. Article 16 of the 1951 Convention is used illustratively, for it is evidently the one right which British recognized refugees detained in Guantanamo have been unable to exercise. The right to access the courts reflects an obligation which is due to every

State party to the 1951 Convention by every other State party; it is also an individual right of every refugee, both in the State party which has recognized his or her status, and internationally, vis-à-vis every other State party, whenever he or she is in its territory or subject to its jurisdiction or control. Article 16 is illustrative of a benefit which applies to *all* refugees and to *all* Contracting States, irrespective of the place of residence of the refugees.

25 Moreover, the ability to access the courts in order to challenge the legality of their detention in another Contracting State is clearly also essential if British recognized refugees are to be able to exercise their other rights under the 1951 Convention, including the right to return to the United Kingdom.

26 In the present case, two British recognized refugees having asylum in the United Kingdom are detained within the jurisdiction and control of the United States. They have not been charged, their release has been refused, and they and others similarly situated have been denied access to the courts. With regard to these two refugees, there is thus a clear breach of the terms of Article 16 (and also, in consequence, a denial of the refugees' right of return); by reason of this breach, the United Kingdom is an 'injured State' with a right to claim – it has a cause of action.

### 1.1 The nature of the obligations

27 The legal effects of participating in a multilateral treaty can be set out in a simple and straightforward manner. First, each State party undertakes an obligation towards every other State party to implement the treaty in good faith:

*Article 26 Pacta sunt servanda*

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.



28 In addition, the responsibility of each State party is engaged at the *bilateral* level, in the following sense: The United States of America has undertaken toward the United Kingdom not only a general obligation to implement the treaty in good faith, but also a series of specific obligations in the form of the particular articles of the treaty. In the present case, therefore, the United States is not only obliged to ensure that refugees generally have access to the courts, but it is also specifically obligated towards the United Kingdom with regard to refugees recognized by the United Kingdom who are within US territory or jurisdiction.

29 From another perspective, the United Kingdom has the right to take up the breach of Article 16 and any other violations of the 1967 Protocol/1951 Convention by the United States, both generally and in respect of the treatment accorded to individual refugees whom it has recognized and to whom it owes a special duty of protection.

## 1.2 Article 16 of the 1951 Convention: Access to a court

30 Article 16 of the 1951 Convention relating to the Status of Refugees provides as follows:

### *Article 16 – Access to courts*

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*.

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

**[UNHCR Authorities, Tab 2]**

31 It will be noted that paragraph 1 lays down the basic rule of access, while paragraph 3 requires that in other States parties, the refugee shall be treated

for the purposes of access to the courts *as if he or she were a national of their State of habitual residence*.

- 32 Article 16 is the direct descendant of a process that began with the 30 June 1928 Arrangement relating to the legal status of Russian and Armenian refugees, paragraph 5 of which recommended that, 'the benefit of legal assistance and if possible exemption from the *cautio iudicatum solvi*<sup>2</sup> shall be granted to Russian and Armenian refugees irrespective of reciprocity': 89 *LNTS* No. 2005.
- 33 Article 6 of the 1933 Convention relating to the International Status of Refugees provided that, 'Refugees shall have, in the territories of the Contracting Parties, free and ready access to the courts of law...'. and also the benefit of legal assistance and exemption from the *cautio*: 159 *LNTS* 3663. Article 7 of the 1936 Provisional Arrangement concerning the Status of Refugees coming from Germany: 171 *LNTS* No. 3952 and Article 8 of the 1938 Convention concerning the Status of Refugees coming from Germany provided similarly: 192 *LNTS* 4461.

See *Ad hoc* Committee on Statelessness and Related Problems, Memorandum by the Secretary-General, UN doc. E/AC.32/2, 3 January 1950, 16-17. [UNHCR Authorities, Tab 9]<sup>3</sup>

See also the discussion in the *Ad hoc* Committee: UN doc. E/AC/32/SR.11, 3 February 1950, 4-6-8; *Report of the Ad hoc* Committee on Statelessness and Related Problems, UN doc. E/1618, 17 February 1950, Annex II, Comments, 31, and note 6 at 42-3. [UNHCR Authorities, Tabs 10, 17]

- 34 According to Article 42 of the 1951 Convention, no reservation may be made to paragraph 1 of Article 16. The reservations clause was discussed earlier in the second session of the *Ad hoc* Committee, where the delegate for Israel proposed that, 'in view of the extra-territorial effects of its provisions,

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<sup>2</sup> That is, the requirement to give security to the Court for the defendant's costs.

<sup>3</sup> The page numbers for the *travaux préparatoires* correspond to the version of the relevant document reproduced from the UNHCR CD-ROM *RefWorld*, a copy of which is included in the UNHCR Authorities. This pagination differs from that of the original UN documents.

paragraph 3 of article 11 should not be subject to reservation'. The Chair queried whether this would in fact best serve the interests of refugees and the French delegate, supported by the delegate for the United States of America, suggested as a compromise that reservations concerning *paragraph 1* not be permitted. This proposal was duly adopted, and Article 16(1) was later adopted unanimously at the 1951 Conference.

*Ad hoc* Committee on Refugees and Stateless Persons, Summary Record of the 43<sup>rd</sup> Meeting, UN doc. E/AC.32/SR.43, 28 September 1950, 6; 1951 Conference of Plenipotentiaries, Summary Record of the 8<sup>th</sup> Meeting, UN doc. A/CONF.2/SR.8, 6-7. [UNHCR Authorities, Tabs 16, 18]

- 35 At the 1951 Conference, Yugoslavia proposed to add in paragraph 3, after the words, 'habitual residence', the phrase, 'and if he is considered by such countries as being a refugee under the terms of this Convention...' It was withdrawn.

Conference of Plenipotentiaries, Summary Record of the 8<sup>th</sup> Meeting, UN doc. A/CONF.2/SR.8, 6. [UNHCR Authorities, Tab 18]

### 1.3 Extraterritorial effect and the 'opposability' of decisions on refugee status

- 36 At its 29<sup>th</sup> Session in October 1978, the UNHCR Executive Committee examined the extra-territorial effect of the determination of refugee status, on the basis of a paper which it had requested the previous year from UNHCR. The Executive Committee, 'considered that one of the essential aspects of refugee status, as defined by the 1951 Convention and the 1967 Protocol, is its international character.' It noted further,

(c) ... that several provisions of the 1951 Convention enable a refugee residing in one Contracting State to exercise certain rights – as a refugee – in another Contracting State and that the exercise of such rights is not subject to a new determination of... refugee status...

(f) *Considered* that the very purpose of the 1951 Convention and the 1967 Protocol implies that refugee

status determined by one Contracting State will be recognized also by the other Contracting States;

(g) *Recognized*, therefore, that refugee status as determined in one Contracting State should only be called into question by another Contracting State when it appears that the person manifestly does not fulfil the requirements of the Convention, e.g. if facts become known indicating that the statements initially made were fraudulent or showing that the person concerned falls within the terms of a cessation or exclusion provision of the 1951 Convention...'

UNHCR Executive Committee, Conclusion No. 12 (XXIX), 1978. [UNHCR Authorities, Tab 4]

- 37 UNHCR's background note cited Articles 12, 14, and 16 among those, the exercise of which is *not* necessarily related to the refugee's 'lawfully staying' in the territory of a Contracting State. It also referred to Article 28, which provides for the issue of 'Convention travel documents', and to paragraph 7 of the Schedule, to the effect that, 'The Contracting States shall recognize the validity of travel documents...', issued in accordance with this article.

'Recognition of the validity of a Convention travel document can normally be taken also to imply acceptance of the previous determination of refugee status, which formed the basis of the issue of the Convention travel document by the other Contracting State. Just as a national passport is prima facie evidence of the holder's nationality, a Convention travel document should be (and in fact is), in the absence of proof to the contrary, accepted as evidence of the holder's refugee status.'

UNHCR, 'Note on the Extraterritorial Effect of the Determination of Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees': UN doc. EC/SCP/9, 24 August 1978, para. 18. [UNHCR Authorities, Tab 3]

- 38 Whereas paragraph 16 of the Schedule to the Convention provides that 'The issue of the [Convention travel document] does not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue, and does not confer on these authorities a right of protection',

it has been pointed out that it is 'the issue...' which is the subject of the whole sentence. In the words of one commentator,

'As paragraph 16 clearly refers to the "issue" of the document, it can in no way negate the right of protection originating from *another* legal relationship, such as a State's interest in seeing the grant of asylum respected or its interest in seeing another Contracting Party comply in good faith with the provisions of the 1951 Convention.'

Reiterer, M., *The Protection of Refugees by their State of Asylum*, Abhandlungen zu Flüchtlingsfragen, Band-Volume XVI, Vienna: Braumüller, 1984, 63-4.  
**[Claimants'/Appellants' Authorities, Tab 23]**

- 39 Paragraph 16 appears to have been included in the Schedule simply because it had appeared in the 1946 London Agreement on the Adoption of a Travel Document for Refugees. The *Ad hoc* Committee debated its deletion, but participants also mentioned both the possibility of exceptions to the general rule (for example, where the country of 'transit' accepted the exercise of protection by the country of issue), and the need for such protection. The United States representative, Mr Henkin, suggested that the Committee, 'might quite well examine the question of the right of protection from the viewpoint, not of stateless persons, but of refugees, stateless or not, who did not enjoy any diplomatic protection.'

*Ad hoc* Committee on Statelessness and Related Problems, Summary Records, 18<sup>th</sup> Meeting, UN doc. E/AC.32/SR.18, 8 February 1950, 8-9. **[UNHCR Authorities, Tab 11]**

## 2. The United Kingdom's right to claim

- 40 The United Kingdom, as an injured State, is entitled to invoke the responsibility of the United States. The United Kingdom incurred injury, first, at the direct inter-State level, through the violation of, among others, Article 16 of the 1951 Convention. It has also been argued that the obligations to implement the provisions of the 1951 Convention/1967 Protocol are,

'obligations *erga omnes partes*, that is, obligations towards the other States parties as a whole. This is clearly evidenced by Article 38 of the 1951 Convention and Article IV of the 1967 Protocol, entitling each State Party to the Convention or the Protocol to refer a dispute with another State "relating to its interpretation or application" to the International Court of Justice even if it has not suffered material damage.'

Kälin, W., 'Supervising the 1951 Convention Relating to the Status of Refugees', in Feller, E., Türk, V. & Nicholson, F., *Refugee Protection in International Law*, Cambridge: Cambridge University Press, 2002, 613-66, at 632; see also at 636. [UNHCR Authorities, Tab 25]

- 41 As an 'injured State', the United Kingdom does not need to rely on any 'interest of the law' or 'interest of the international community at large' in order to justify its claim. Though an issue of fundamental human rights – access to a court – and notions of obligations *erga omnes* may be involved,<sup>4</sup> there is in fact no need to go wider than the confines of this one article, Article 16, which is illustrative of the claim under the 1951 Convention/1967 Protocol: There is a clear and unencumbered statement of what is required – a right on the part of the refugee, a duty on the part of the Contracting States: 'A refugee shall have free access to the courts of law on the territory of all Contracting States' – a clear breach of the duty, and a clear cause of action.
- 42 The International Law Commission's Articles on the Responsibility States for Internationally Wrongful Acts confirm that an internationally wrongful act comprises, first, an action or omission that is attributable to the State under international law; and secondly, which constitutes a breach of an international obligation of the State.

International Law Commission, Articles on the Responsibility States for Internationally Wrongful Acts, Article 2; text annexed to UN General Assembly Resolution 56/83, 'Responsibility of States for

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<sup>4</sup> Cf Oppenheim, *International Law*, 8<sup>th</sup> edn., Jennings, R. Y. & Watts, A., eds., London: Longman, 1992, Vol. 1, 1503: '... the legal proceedings available to states still relate essentially to the traditional measures appropriate to action by a particular state in response to the violation of an international obligation owed to it by some other state, and do not yet extend to measures to protect the more general public interest of the international community.'

internationally wrongful acts', 12 December 2001.  
**[UNHCR Authorities, Tab 23]**

- 43 The ILC Articles also help to clarify the nature of the obligations and the legal consequences in case of breach. Thus, Article 42, which deals with invocation of responsibility by an injured State:

'A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) That State individually; or
- (b) A group of States including that State, or the international community as a whole, and the breach of the obligation:
  - (i) Specifically affects that State; or
  - (ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.'

Crawford, J., *The International Law Commission's Articles on State Responsibility*, Cambridge: Cambridge University Press, 2002, Introduction, 38-42; ILC Commentary, *ibid.*, 254-60: 'Central to the invocation of responsibility is the concept of the injured State. This is the State whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act': *ibid.*, 254. **[UNHCR Authorities, Tab 24]**

- 44 The ILC has further observed that Article 42(a), 'is intended to cover cases where the performance of an obligation under a multilateral treaty... is owed to one particular State... [A]lthough a multilateral treaty will characteristically establish a framework of rules applicable to all the States parties, in certain cases its performance in a given situation involves a relationship of a bilateral character between the two parties. Multilateral treaties of this kind have often been referred to as giving rise to "bundles of bilateral relations".'

Crawford, J., *The International Law Commission's Articles on State Responsibility*, Cambridge: Cambridge University Press, 2002, Commentary, para. 8, *ibid.*, at 258; see also para. 11, *ibid.*, at 259 on injury arising from violations of collective obligations.

45 Even if Article 16 of the 1951 Convention were characterised as a collective obligation, that is, as one that applies, ‘between more than two States and whose performance in the given case is not owed to one State individually, but to a group of States or even the international community as a whole’ (ILC Commentary on Article 42, para. 11, *ibid.*, at 259), the United Kingdom is nevertheless ‘specially affected’ within the meaning of Article 42(b)(i) in that the violation directly affects British recognized refugees; this fact ‘distinguishes it from the generality of other States to which the obligation is owed’: *ibid.*, para. 12, *ibid.*, at 259.

46 This may be compared with Article 48, which deals with the invocation of responsibility by a State other than the injured State:

‘1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(b) The obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached...’ [UNHCR Authorities, Tab 23]

47 This provision addresses the category of obligations *erga omnes partes*<sup>5</sup> referred to above in paragraphs 44-45, that is, obligations binding on a group of States

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<sup>5</sup> The phrase ‘*erga omnes partes*’ describes obligations owed, for example, to all the States party to a specific legal regime, such as regional human rights convention; the phrase ‘*erga omnes*’ is most commonly used to describe obligations with a broader reach, to the international community of States as a whole. Of course, there is likely overlap between the two, especially in the human rights field. See Sicilianos, Linos-Alexander, ‘The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility’, 13 *European Journal of International Law* 1125-45, 1136 (2002).



and established in the common interest, thereby transcending the 'sphere of the bilateral relations of the States parties'.

Crawford, J., *The International Law Commission's Articles on State Responsibility*, Cambridge: Cambridge University Press, 2002, Introduction, 42-3; ; ILC Commentary, *ibid.*, 276-80: 'A State which is entitled to invoke responsibility under article 48 is acting not in its individual capacity by reason of having suffered injury but in its capacity as a member of a group of States to which the obligation is owed, or indeed as a member of the international community as a whole.' Articles 42 and 48 are not mutually exclusive: *ibid.*, 255. **[UNHCR Authorities, Tab 24]**

48 Arguably, the obligations laid down in the 1951 Convention are also of this nature. A violation of its terms may affect all States parties, but not necessarily in the same way. The State whose subjective right has been violated is the injured State competent to claim; in the present context, it is the United Kingdom which, through the denial of access to the courts to its own refugees, is directly or individually affected, rather than the 144 other States parties to the Convention/Protocol, which are not directly or not individually affected, but nonetheless potentially competent to claim if able to bring themselves within the terms of Article 48 above.

49 The United Kingdom thus enjoys 'the full range of rights and powers consequent on the wrongful act'; it may therefore call for cessation, assurances and guarantees of non-repetition where appropriate (see the *LaGrand case*, below, paragraphs 62-67), reparation, and so forth.

### 3. Diplomatic protection

50 In the normal situation, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection. The International Court of Justice has stated that the rules of diplomatic protection rest on a double foundation:

'The first is that the defendant State has broken an obligation towards the national State in respect of its

nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach.'

*Reparation for Injuries, Advisory Opinion, ICJ Reports, 1949, pp. 181f., confirmed in Barcelona Traction Case, ICJ Reports, 1970, p. 32. [UNHCR Authorities, Tab 21]*

51 The United Kingdom's formal position on the exercise of diplomatic protection is set out in the Judgment of the Divisional Court, at paragraphs 38-42.

52 UNHCR recognizes that the United Kingdom has also maintained its position on the effective link of nationality as the necessary prerequisite to the exercise of diplomatic protection in various recent communications to the International Law Commission. Specifically with regard to refugees and stateless persons, the United Kingdom has observed:

'The protection of stateless persons and refugees is not a matter which Her Majesty's Government regard as falling within the scope of the concept of diplomatic protection as that is understood in current international law. Whether the Government would, exceptionally be prepared to make representations or take other action on behalf of stateless persons or refugees would depend on the circumstances of the case.'

Communication of 28 February 2001 to the United Nations; see Marston, G., ed., *United Kingdom Materials on International Law*, Oxford: Oxford University Press, 2003, Part Thirteen.II.A.1.(d).item 30 **[UNHCR Authorities, Tab 26]**; cf. Warbrick, Colin, 'Diplomatic representations and diplomatic protection', 51 *ICLQ* 723-33 (2002) **[UNHCR Authorities, Tab 27]**.

See also the Divisional Court's review of the discussion of diplomatic protection in the *Abbasi* case: Judgment of the Divisional Court, at paragraphs 47-55.

53 However, there are a number of recognized exceptions to the nationality rule, as well as a number of circumstances in which 'diplomatic protection' might in fact overlap with or complement causes of action with a different legal base.

54 In practice, the law of diplomatic protection serves to circumscribe one particular set of potential claims, that is, those that might be made by foreign

nationals against a State not their own. The underlying basis for claim, however, is not the linkage of nationality, but what the International Court of Justice described in the *Reparations for Injuries Case* as the international obligation owed to the protecting or claiming State; see above, paragraph 50.

### **3.1 Exceptions to the nationality requirement: Breach of obligation or direct injury to the State itself**

55 The orthodox approach to diplomatic protection is consistent with exceptions in appropriate cases. Diplomatic protection does not exhaust the category of circumstances in which one State may take up the case of individuals and their treatment by another State; the legal interest and standing of a State in any situation in which it has suffered direct injury is a case in point, and may or may not overlap with a conventional instance of diplomatic protection.

56 In the *Reparations for Injuries* advisory opinion, for example, the International Court of Justice recognized that, ‘even in State relations, there are important exceptions to the rule, for there are cases in which protection may be exercised by a State on behalf of persons not having its nationality.’ (p. 181). The Court noted further:

‘... the [United Nations] Organization, in bringing a claim for damage suffered by its agent, does so by invoking the breach of an obligation towards itself. Thus, the rule of nationality of claims affords no reason against recognizing that the Organization has the right to bring a claim... On the contrary, the principle underlying this rule leads to the recognition of this capacity as belonging to the Organization, when the Organization invokes, as the ground for its claim, a breach of an obligation towards itself.’ (*Reparation for Injuries, Advisory Opinion, ICJ Reports, 1949, p. 182*)

57 It is submitted that this reasoning is equally applicable to the situation now before the Court. The United Kingdom is in an equivalent position to the United Nations. In virtue of the treaty relationship between itself and the United States, it has standing to invoke the breach of a formal obligation owed

to itself, and the nationality of the individual refugees affected by the breach is no bar to the claim.

‘When it claims redress for a breach of these obligations, [it] is invoking its own right, the right that the obligations due to it should be respected. On this ground, it asks for reparation of the injury suffered, for “it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form”...’ (*Reparation for Injuries, Advisory Opinion, ICJ Reports, 1949, p. 184*)

### 3.2 Exceptions to the nationality requirement: Protection of refugees

58 There is also some support in principle and practice for the exercise of diplomatic protection on behalf of refugee non-nationals.

See Grahl-Madsen, A., ‘Protection of Refugees by their Country of Origin’, 11 *Yale J.I.L.* 362 (1986), arguing for a rule under which the State of origin of refugees, ‘by breaking its ties with a refugee’, loses any right to exercise protection until such time as the refugee willingly returns.

Reiterer, M., *The Protection of Refugees by their State of Asylum*, Abhandlungen zu Flüchtlingsfragen, Band-Volume XVI, Vienna: Braumüller, 1984. **[Claimants’/Appellants’ Authorities, Tab 23]**

See also Brownlie, I., *Principles of Public International Law*, Oxford: Oxford University Press, 6<sup>th</sup> edn., 2003, 395, on ‘the functional approach to nationality’, in reference to Article 16(3) of the 1951 Convention; see also at 406. **[Claimants’/Appellants’ Authorities, Tab 21]**

59 In its own practice, the United States has also exercised ‘diplomatic protection’ with regard to individuals who were not US citizens. Reiterer cites the case of *Martin Koszta*, a political refugee from the Austro-Hungarian Empire, on behalf of whom the United States exercised protection, even though he was not a US citizen. To objections that he had never ceased to be an Austrian subject, the US Secretary of State defended intervention on the grounds of the individual’s domicile in the United States.

Reiterer, M., *The Protection of Refugees by their State of Asylum*, Abhandlungen zu Flüchtlingsfragen, Band-

Volume XVI, Vienna: Braumüller, 1984, 27, citing Moore, J. B., *A Digest of International Law*, Vol. III, 1906, 820-30. **[Claimants'/Appellants' Authorities, Tab 23]**

60 The Witness Statement of Bernhard Docke dated 5 June 2006 indicates that the United States authorities are also open to protection interventions by States other than the State of nationality. **[Application Bundle, pp. 11-12]**

61 The United States is also on record as considering 'unobjectionable' proposals to assimilate refugees to nationals for the purposes of diplomatic protection, which it characterizes as a progressive development of the law. **[Appeal Bundle, Tab 52].**

### 3.3 Diplomatic protection complementary to direct injury

62 In the *La Grand* case, Germany argued before the International Court of Justice, among other issues, that the United States, by not informing the LaGrand brothers without delay following their arrest of their rights under Article 36(1)(b) of the Vienna Convention on Consular Relations, and by depriving Germany of the possibility of rendering consular assistance, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, under Articles 5 and 36(1) of the Vienna Convention.

*LaGrand Case (Germany v United States of America)*, ICJ Reports 2001, paras. 11, 12, 38 **[UNHCR Authorities, Tab 22].**

Article 36 of the Vienna Convention on Diplomatic Relations provides:

'With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district,

a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.' Cited *ibid.*, para. 37.

- 63 The United States did not deny the breach of obligation under Article 36(1)(b), 'promptly to inform the LaGrand brothers that they could ask that a German consular post be notified of their arrest and detention', but disputed any other claim under Article 36(1)(a) or (c) and, in particular, the additional claim of diplomatic protection, in principal on the ground of jurisdiction. *Ibid.*, paras. 40-42, 65-7.
- 64 Germany further argued that 'the breach of Article 36 by the United States did not only infringe upon the rights of Germany as a State party to the [Vienna] Convention but also entailed a violation of the individual rights of the LaGrand brothers'. It invoked its right of diplomatic protection to seek relief also on this ground. The Court agreed that individual rights were at issue, by reason of the clarity of the provisions, viewed in context, and agreed further that the rights had been violated. *Ibid.*, paras. 75-8.
- 65 It is submitted that the language of Article 16 of the 1951 Convention is equally consistent with the 'individual rights' interpretation. In the *LaGrand Case*, the International Court of Justice did not find it necessary to consider the further submission by Germany that the right of the individual to be informed under Article 36(1) of the Vienna Convention was not only an individual right, but also a human right. *Ibid.*, para. 78.

66 The human rights aspect to the right of access to a court today is beyond dispute; see Clayton, R. & Tomlinson, H., *The Law of Human Rights*, Oxford: Oxford University Press, 2000, 637-43. In the present case, this adds weight to the argument that Article 16 of the 1951 Convention is particularly a matter of individual rights, the denial of which directly affects the refugees concerned and the State linked to them by recognition of status and asylum.

67 The International Court of Justice found (by fourteen votes to one) that the failure of the United States authorities to notify the LaGrands of their rights under the consular convention had violated both Germany's rights under this treaty, and also the LaGrands' individual rights: *ibid.*, para. 128(3). It found further that Germany could take up these latter rights by way of diplomatic protection (paras. 65-78). The Court also agreed that Article 36 of the Consular Convention indicated the existence of an individual right, which Germany could invoke through diplomatic protection; see paragraphs 77, 89.

#### 4. Article 25 of the 1951 Convention and the present Appeal

68 Although it may be argued that Article 25 of the 1951 Convention, which deals with the provision of administrative assistance to refugees, is capable of extending also to the provision of consular or consular-equivalent assistance to refugees outside the recognizing State's territory, strictly speaking it is irrelevant to the present case. This is clear from the terms of the article and from a review of the nature of reservations to this provision. The *travaux préparatoires* also offer a particularly clear statement of the United Kingdom's position, and show that the only concern, both during the *Ad hoc* Committee sessions in 1950 and at the 1951 Conference, was that the UK should not have to enact implementing legislation in a field amply and sufficiently covered by the common law through the simple instrumentality of the sworn affidavit.

69 For example, in the *Ad hoc* Committee, Sir Leslie Brass stated that the question of 'administrative assistance' did not arise in the UK, and was not a problem, while Mr Weis, for the International Refugee Organization, added that in

common law counties, no new legislation or administrative procedures were required to protect refugees.

*Ad hoc* Committee on Statelessness and Related Problems, Summary Record of the 19<sup>th</sup> Meeting, UN doc. E/AC.32/SR.19, 8 February 1950, 2-6. [UNHCR Authorities, Tab 12]

- 70 The Report of the *Ad hoc* Committee further clarified the object and purpose of the draft article on administrative assistance.

‘Refugees do not enjoy the protection and assistance of the authorities of their country of origin. Consequently, even if the government of the country of asylum grants the refugee a status which ensures him treatment equivalent to or better than that enjoyed by aliens, he may not in some countries be in a position to enjoy the rights granted him. Often he will require the assistance of an authority which will perform for him the services performed by national authorities in the case of persons with a nationality.’

- 71 In its comment on paragraph 2 of the draft article, the *Ad hoc* Committee noted that it required the authorities to deliver to refugees the documents and certifications which are normally delivered to aliens who possess a nationality either by the judicial or administrative authorities of their country of nationality or by its consular activities. A footnote provides an indication of the types of documents involved, such as those certifying the identity and the position of the refugees, their family position and civil status, the regularity, validity and conformity with the previous law of their country of origin of documents issued in that country, certifying the signature of refugees and copies and translations of documents drawn up in their own language, the refugee’s previous record, professional qualifications, university degrees, diplomas, etc.

Report of the *Ad hoc* Committee on Statelessness and Related Problems, UN doc. E/1618 and Corr.1, 17 February 1950, Comment on draft Article 20. [UNHCR Authorities, Tab 17]



72 At the 1951 Conference of Plenipotentiaries, Mr Hoare for the United Kingdom said that he had taken no part in the discussion,

‘... for the reason that common law applied in the United Kingdom, and that, as a consequence, the documents referred to in article 20 would not be required to enable refugees to exercise rights in that country. Affidavits would be sufficient. The United Kingdom delegation might have to enter a reservation on article 20 in order to make its position clear, especially since paragraph 2, as at present drafted, would make it mandatory on the United Kingdom authorities to supply the documents which would under Continental systems of law be issued by national authorities. Such an obligation would be unacceptable to the United Kingdom Government. But he wished to emphasize that he was in no way opposed to the general tenor of the article...’

1951 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the 11<sup>th</sup> Meeting, UN doc. A/CONF.2/SR.11, 22 November 1951, 8; see also the comments of the representative for Belgium at 6-7 and 8, and the comment by the High Commissioner at 8, that ‘No difficulties arose in countries of common law, where the affidavit system was applied...’ **[UNHCR Authorities, Tab 19]**

73 The United Kingdom’s reservation to what is now Article 25 states that it cannot undertake to give effect to the obligations contained in paragraphs 1 and 2 and can only undertake to apply the provisions of paragraph 3 so far as the law allows. Its own comment on this reservation states:

‘No arrangements exist in the United Kingdom for the administrative assistance for which provision is made in article 25 nor have any such arrangements been found necessary in the case of refugees. Any need for the documents or certifications mentioned in paragraph 2 of that article would be met by affidavits.’

UNHCR, ‘Declarations and Reservations to the 1951 Convention relating to the Status of Refugees’, Geneva, 1 March 2006, 21-2. **[UNHCR Authorities, Tab 8]**

74 From the information available to it, UNHCR submits that no issue of administrative assistance arises, which falls within the ordinary meaning of Article 25.

## 5 Protection and the right to return

75 A central issue in the present Appeal is necessarily the future of the two refugee Appellants, should the United Kingdom successfully intervene on their behalf. On the one hand, it is common knowledge that the 1951 Convention does not deal with ‘admission’ or ‘asylum’; on the other hand, it is clear that the Appellants have ‘enjoyed asylum’ and the benefits of the 1951 Convention in the United Kingdom over many years, and that they have established very close family, personal and business links with this country.

76 The refugee Appellants (or at least one of them) have benefited, as is their right, from the issue of travel documents under Article 28 and in accordance with the Schedule to the Convention. In recognition of the linkage between the State and the refugee lawfully staying in its territory, Article 28 provides as follows:

‘1. The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule shall apply with respect to such documents...’ **[UNHCR Authorities, Tab 2]**

77 The documents – ‘Convention Travel Documents’ or ‘CTDs’ – are issued by Contracting States, and not by UNHCR as would seem to be implied in the letter from Baroness Amos referred to in paragraph 15 above. Moreover, the issue of travel documents to refugees brings into operation a set of obligations vis-à-vis other Contracting parties. In particular, as paragraph 13 of the Schedule to the Convention provides in part:

‘1. Each Contracting State undertakes that the holder of a travel document issued by it in accordance with Article 28 of this Convention shall be re-admitted to its territory at any time during the period of its validity...’

78 Freedom of movement was considered to be as valuable a human right for the refugee as for the citizen; see also Articles 26 and 30 of the 1951 Convention.

The exercise of this right has no prejudicial effect on the status of the individual as a refugee, which ceases only in the circumstances set out in Article 1C of the 1951 Convention, and in accordance with due process and an appropriate procedure. As the terms of the Convention make clear (see above, paragraphs 36-37), refugee status has an international character and many 'refugee rights' are not limited to the territory of the State which has recognized status.

- 79 The right of the refugee to return to the country which had issued him or her with a travel document was extensively discussed in the *Ad hoc* Committee. It was agreed that without a right of return, a travel document was practically worthless. The IRO representative, Mr Weis, noted that agreement on the 'return clause' was important because 'not only did it provide for rights for refugees of the greatest value but it also created relations between States'.

*Ad hoc* Committee on Statelessness and Related Problems, Summary Records, 39<sup>th</sup> Meeting, UN doc. E/AC.32/SR.39, 27 September 1950, 6-10; 41<sup>st</sup> Meeting, UN doc. E/AC.32/SR.41, 28 September 1950, 12-13; 42<sup>nd</sup> Meeting, UN doc. E/AC.32/SR.42, 28 September 1950, 3-6. [UNHCR Authorities, Tabs 13, 14, 15]

- 80 Although there were some differences among participating States regarding the formalities attaching to departure and return, the basic question of return was not disputed. The representative of Denmark, for example, considered that a travel document was implicitly understood to confer on the holder the right of re-entry; what he was concerned to ensure was that issuing States, 'should assume an *unconditional* commitment to re-admit holders of their own travel documents.'

1951 Conference of Plenipotentiaries, Summary Record of the 18<sup>th</sup> Meeting, UN doc. A/CONF.2/SR.18. 23 November 1951, 5, 8 (emphasis supplied). [UNHCR Authorities, Tab 20]

- 81 The representative of France reiterated that without a return clause a travel document was completely meaningless, while the United Kingdom representative, Mr Hoare, was of the view that,

‘The basic principle underlying the provisions of paragraph 13 was that States issuing travel documents to refugees resident within their territory would bind themselves to allow such refugees re-entry during the period of validity of the document. He was anxious that the principle should not be tampered with.’

Ibid., 7.

82 The United Kingdom practice with respect to CTDs fully conforms with the requirements of Article 28 and the Schedule; indeed, in many respects it follows the liberal practice recommended in Executive Committee Conclusion No. 13 (XXIX), 1978, and exceeds what is formally required. **[UNHCR Authorities, Tab 5]**

83 The CTD issued to Jamil El Banna, for example, is valid for 10 years, whereas paragraph 5 of the Schedule suggests either one or two years. In addition, it confirms that the holder has the right of return during the whole of this period. In that respect, the Divisional Court appear to have erred in remarking (at §98 of the Judgment), that their CTDs only gave the second and third claimants a right to return within two years.

84 In any event, UNHCR submits that where the travel document expires and cannot be renewed by the refugee through no want of diligence on his or her part, for example, because of the denial of access to the issuing State’s consular officers or of contact with UNHCR, then the right of return continues, particularly where the refugee can show long residence and established ties.

## 6. UNHCR’s complementary protection role

85 As has been shown by reference to a limited number of provisions, States parties to the 1951 Convention have accepted a significant range of protection obligations towards refugees, and particularly towards refugees whom they themselves have recognized under the Convention.

86 This protection role of States parties to the 1951 Convention/1967 Protocol can be usefully compared and contrasted with that of the Office of the United Nations High Commissioner for Refugees, which has been charged by the UN

General Assembly with providing ‘international protection’ to refugees; see UNHCR Statute, annexed to UNGA Resolution 428(V), 14 December 1950, paragraph 1.

87 The Statute includes among UNHCR’s protection activities supervising the application of conventions (see above, paragraph 3), and under Article 35 of the 1951 Convention/ Article II of the 1967 Protocol, States have undertaken to co-operate with UNHCR in the exercise of its functions, and ‘shall in particular facilitate its duty of supervising the application of the provisions’ of the Convention/Protocol.

88 The initial draft of this article focused particularly on co-operation and for States to maintain ‘constant relations’ with UNHCR.

See Article 26, Preliminary Draft Convention relating to the Status of Refugees (and Stateless Persons), annexed to the Memorandum by the Secretary-General, UN doc. E/AC.32/2, 3 January 1950, 13, 49.

89 It was the United States which proposed a revision, specifically to recognize not only the need for co-operation, but also the international protection function of UNHCR and its responsibility to supervise the application of the provisions of the Convention. The proposal was duly agreed and referred to the drafting committee, which produced the final text of Article 35.

‘Compilation of the Comments of Governments and Specialized Agencies on the Report of the *Ad hoc* Committee on Statelessness and Related Problems (Doc. E/1618)’, UN doc. E/AC.32/L.40, 10 August 1950, 59-60; Summary Record of the 40<sup>th</sup> Meeting, UN doc. E/AC.32/SR.40, 27 September 1950, 34-6.

90 Article 35, however, remains an obligation entered into between States,<sup>6</sup> and UNHCR is not a party to the Convention or the Protocol. This does not mean that UNHCR is without legal standing, for States members of the United Nations have also recognized their ‘obligation’ to co-operate, in the resolutions setting up UNHCR and in successive resolutions adopted by the General

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<sup>6</sup> At the 1951 Conference, the French representative suggested that Article 35(1) was ‘only a recommendation’: Summary Record of the 25<sup>th</sup> Meeting, UN doc. A/CONF.2/SR.25, 27 November 1951, 16.

Assembly on the work of the Office. UNHCR therefore has the legal authority to intervene with a State party which is perceived to be failing in its implementation of the Convention.

91 UNHCR's legal position is consequently and correspondingly different from that of a Contracting State. Although UNHCR may not be able to claim the breach of Convention obligations owed to itself, or to invoke the dispute settlement provisions of the Convention and the Protocol, which are reserved to States parties, it nevertheless possesses the necessary legal standing to exercise a 'supervisory jurisdiction'.

See Article 38 of the 1951 Convention, and Article IV of the 1967 Protocol [**UNHCR Authorities, Tab 2**].

92 Its protection role in the present context is therefore complementary to the specific legal claims which can be raised by reason of the participation of the United Kingdom and the United States in a common treaty regime.

## 7. Concluding submissions

93 UNHCR respectfully submits that the above matters of international law are appropriate for consideration by the Court in this appeal, and in determining the question of legal standing and the grounds upon which the United Kingdom might lawfully intervene on behalf of the two Claimant refugees.

94 As this Court will be aware, the international protection regime is built upon the principles of solidarity and co-operation, on shared responsibility, and on the commitment by States to a set of common obligations.

95 On the one hand, the 1951 Convention regulates the relationship between the individual State party and the refugee; on the other, it regulates the conduct of States between themselves, each having contracted with every other State party to implement the Convention provisions in good faith and, among others, to co-operate with UNHCR.

96 UNHCR further submits that the United Kingdom's legal standing under the 1951 Convention is established by the fact of its common participation, with

the United States of America and others, in the same multilateral treaty; and it is strengthened by reason in particular of the direct effect of United States action on refugees recognized by the United Kingdom.

97 In fulfilling its own responsibility to provide international protection to refugees, UNHCR looks to States parties to the Convention, not only to fulfil their own undertakings, but also to use their legal standing under the Convention to ensure compliance among the other parties.

98 In this regard, UNHCR stands ready and willing to act jointly with the United Kingdom in making the necessary démarches and intervening with the US authorities in order to ensure the two refugees recognized and documented by the United Kingdom are able to exercise their Convention rights vis-à-vis the United States of America and, in particular and as appropriate, to exercise their right to return to the United Kingdom in accordance with the Convention and the terms of the travel documents issued to them.

A handwritten signature in black ink, appearing to read 'Guy S. Goodwin-Gill', with a horizontal line underneath.

**GUY S. GOODWIN-GILL  
BLACKSTONE CHAMBERS  
BLACKSTONE HOUSE  
TEMPLE  
LONDON EC4Y 9BW  
12 July 2006**

**IN THE COURT OF APPEAL C1/2006/1064  
ON APPEAL FROM THE HIGH COURT OF  
JUSTICE  
QUEEN'S BENCH DIVISION  
DIVISIONAL COURT**

**THE QUEEN**

**On the application of**

- (1) BISHAR AL RAWI**
- (2) JAMIL EL BANNA**
- (3) OMAR DEGHAYES**
- (4) WAHAB AL RAWI**
- (5) JAHIDA SAYYADI**
- (6) SABAH SUNNOQROT**
- (7) ABUBAKER DEGHAYES**

**Appellants**

**- and -**

- (1) THE SECRETARY OF STATE FOR  
FOREIGN AND COMMONWEALTH  
AFFAIRS**
- (2) THE SECRETARY OF STATE FOR THE  
HOME DEPARTMENT**

**Respondents**

**- and -**

**THE OFFICE OF THE UNITED NATIONS  
HIGH COMMISSIONER FOR REFUGEES**

**Intervener**

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**WRITTEN SUBMISSIONS ON BEHALF OF  
THE INTERVENER (UNHCR)**

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