SESSION 2

Setting the Scene II – Recent Developments

Old Wine in New Bottles:
Legal aid, lessons and the new Europe
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This paper considers the role of the European Union in developing legal aid, particularly in the countries of central and eastern Europe which have just acceded to the Union or who hope to do so in 2007. In doing so, it takes a journey that sets out from London; moves to Strasbourg as the home of the Council of Europe; shifts back to Brussels at the heart of the European Union; skips over the countries on the Union's eastern frontier; and finally returns to Killarney to discuss the lessons of the voyage.

The forgetfulness of the old

Let us begin in London with two contemporary illustrations of why countries as experienced as the UK in legal aid may yet have lessons to learn from such an exercise. First, government and its agencies for England and Wales remain remarkably coy about any link between legal aid and any justification for its funding in terms of human rights. Indeed, a post-election statement of purpose by the Department of Constitutional Affairs, *Making a Difference: taking forward our priorities*, makes no reference to human rights at all, stating somewhat menacingly: 'Legal aid will be reformed so that it responds to what the public wants and justice requires'.[i] The top strategic objective of the DCA has been to help the Home Office increase the number of offenders brought to justice – ie convicted or its equivalent. Within this context, the Legal

Services Commission, charged with day-to-day administration of the legal aid schemes, displays a consequent and predictable incoherence of focus. As an example, its Annual Report for 2003-4 contains the following:

> We aim to target available resources on highest priority clients and where legal aid interventions can add the greatest value and provide the most beneficial outcomes. An example of our work is the Reducing Offending Through Advice Scheme …[ii]

To understand this statement (only mildly taken out of context), you have to know that Reducing Offending is a major government target (legitimately enough); has its own action plan and political infrastructure (inevitably); that Reducing Offending Through Advice Scheme (Rotas) is a programme to help prisoners to keep in contact with family and other close connections outside their prisons (very reasonably); but that few people would agree that funding a relatively minor, if beneficial, communication facility for prisoners was the greatest value to be obtained from legal aid interventions. This would traditionally be advanced in terms of defending the civil or human rights of a suspect and might include at the absolute highest the overturning of the wrongful conviction of someone who has been the subject of a miscarriage of justice.

Second, the UK Legal Services Commission gives signs that it has lost its own clear focus as a separate, statutorily-created body. Its chief executive is a member of its sponsoring department's management board and has an office in its headquarters. The chairman is a former permanent secretary of another government

department. Its recently appointed head of the criminal defence service moved to the post from being head of public legal services at the Department. There is no lawyer of any kind on the Commission's management board. A recent critical analysis of the Commission's lack of independence noted that minutes of a recent meeting between the DCA and the Commission recorded fulsomely that the Commission has become 'more aligned with the DCA on policy matters (while maintaining its independence)'.[iii] That sounds a bit implausible and its perceived lack of independence is in danger of becoming a political issue.

The point of this discursive introduction is to indicate how an understanding of the fundamental purpose of legal aid can be forgotten in a jurisdiction where such aid is well established and where, understandably, the topical debates are all about detail: value-for-money, contracting with suppliers, competitive tendering, holding down the budget, restricting asylum claims, furthering social inclusion and, alas and all too often, cuts.

Legal aid and human rights

It is time to visit Strasbourg and Brussels to obtain a perspective on fundamentals. Those from non-European jurisdictions should bear with the necessary regionalism of this section. Their human rights obligations will be different but with the minimum of Article 14.3(d) of International Covenant on Civil and Political Rights (ICCPR) which provides, as 'a minimum guarantee', a right to 'legal assistance of his own choosing'; to be informed of that right 'and, to have legal assistance assigned to him, in any case where the interests of justice so require and without payment by him in any such case if he does not have sufficient means to pay for it'.

The European Convention on Human Rights (ECHR)

The ICCPR was adopted in 1966 and entered into force a decade later. But, the Council of Europe stole a march on the UN with its Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention) which opened for signature on 4th November 1950, with a clutch of countries (including the UK, France, Germany, the Netherlands and Turkey) signing on that very day. It entered into force for the UK on 3rd September 1953.

A crucial element in the Convention structure was the European Court of Human Rights, established to enforce the Convention. The UK allowed the right of individual petition in 1966. Two decades later, with the Human Rights Act 1998, the UK joined most of the rest of Europe and incorporated the Convention into domestic law - with effect from 2 October 2000. All the 15 members of the European Union prior to 2004 were, and are, members of the Council of Europe and signatories to the Convention. Such membership and signature became a badge of honour (along with membership of the UN and NATO) for the newly independent states of central and Eastern Europe in the aftermath of their separation from the former Soviet Union. Between 1992, when Bulgaria brought the Convention into force, and 1997, when Latvia got to the same position, all of the eight states of the former Soviet bloc who joined the EU in 2004 and the two waiting to join in 2007 signed, ratified and brought the Convention into force (Turkey, with whom accession talks have now begun, had already completed this task in 1954, and the two other countries to join in 2004, Cyprus and Malta had done so in 1962 and 1967 respectively).

Thus, 45 countries within a broad definition of Europe have signed the Convention and a traveller could progress from Lisbon in the west to Vladivostok in the East and, with the exception of any time spent in Monaco or Belarus, would be in a country that had brought its provisions into force – at least in theory.

So, in relation to legal aid, what did these 45 countries (comprising between them just under a quarter of all the countries who are members of the United Nations – 191) sign up for?

Article 6 bound them in the following terms:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …
2. Everyone charged with a criminal offence has the following rights: …

> c. to defend himself in person or through legal assistance of his own choosing or, **if he has not sufficient means to pay for legal assistance, to be given it free when the interest of justice so require.**

All these countries signed up to a surrounding penumbra of case law that said such rights were not to be 'theoretical or illusory' but 'practical and effective'.[iv] Furthermore, they accepted a wider obligation than in the ICCPR to provide access to justice not only in relation to criminal proceedings but also some civil proceedings, albeit in the words of one distinguished observer in relation to the latter: 'sparingly'.[v] This is a reasonable qualification both in the light of the leading case at the time that the author was writing[vi] and the subsequently 'McLibel' case (Steel and Morris v UK[vii]) where the court re-stated the principle that, in exceptional circumstances and where needed to give effective access to justice, legal aid should be available in civil proceedings. Thus,

> The question whether the provision of legal aid was necessary for a fair hearing had to be determined on the basis of the particular facts and circumstances of each case and depended *inter alia* upon the importance of what was at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.[viii]

The EU and human rights

The European Community was slow to pick up a concern with human rights, unsurprisingly as it began with such an economic focus. The Single European Act signed in 1986 contained the following reference in a preamble:

> DETERMINED to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice,

However, by 1997, the reference to the European Convention and its principles had migrated into the body of the text agreed in the Amsterdam Treaty and which came into force two years later:

> The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States.[ix]

This specifically tied the Union to the standards of the European Convention:

> The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950.[x]

'A serious and persistent breach' of the principles by any Member State could lead to suspension of rights under the treaty.[xi]

The proposed constitution on which referenda are occurring within Member States at the current time would give the Union a separate legal identity (hitherto

seen as a barrier to signing the Convention); requires it to accede to the European Convention directly; and sets out a whole new European Charter of Fundamental Rights and Freedoms.[xii]

1. The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II.
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms … The
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

By this means, the circle is intended to be complete. The Union and its Member States are all subject to the provisions of the Convention. Theoretically, the jurisprudence of the two European Courts in Strasbourg (Council of Europe) and Luxembourg (European Union) will happily converge with, for states in the Union, the additional, if legally limited, obligations of the European Charter of Fundamental Rights and Freedoms. It might be noted that this Charter, currently not legally binding, includes the most fulsome protection for legal aid in any human rights treaty in the sense that, though in one way is a reasonable summary of Convention jurisprudence, it gains from clarity and makes no distinction at all between criminal, civil or administrative proceedings:

> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.[xiii]

The accession process

Countries wishing to accede to the European Union were required to a process that required meeting a set of conditions published in some length in an *acquis communitaire*. The general principles for accession of the post-communist countries wishing to join the Union after the fall of the Soviet Union were agreed at a 1993 European Council meeting in Copenhagen and included, as one of three 'Copenhagen criteria':[xiv]

- stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.

acquis set no specific conditions in relation to legal aid and access to justice but monitoring reports produced on the candidate countries covered observations on these topics. For the new entrants in 2004, these culminated in a 'Comprehensive Monitoring Report' published in the previous year. Some of these were critical. For example, the comprehensive report on Poland stated that:

> The system of legal aid is still under-developed and organised in a non-transparent way, with the result that citizens are not informed as to their rights.[xv]

One of the legacies of the countries which were formerly part of the Soviet Union has been the *ex officio* system of legal aid which most incorporated into their new post-Soviet constitutions.[xvi] Some cases required the mandatory appointment of a defence lawyer – primarily where the minimum sentence was above a certain level. No account, however, was taken of maximum or likely lengths of sentence so a degree of arbitrariness was unavoidable. 'Other criteria for determining if legal representation is mandatory include the defendant's mental or physical condition, age and ability to speak the official language used in court, whether the defendant was subject to pre-trial detention and whether the trial was *in absentia*.'[xvii] Thus, there tended to be no general statement of the principle of 'equality of arms' that underlies Article 6 of the European Convention on Human Rights nor the principle that free legal aid should be supplied by the state

where 'the interests of justice' require and the defendant has insufficient means to pay.

The method of appointment of lawyers varied, as did provisions as to payment. A 2003 study reported 'In fact, virtually any lawyer can be appointed no matter what his or her field of specialisation, practice or experience is. The prosecuting authorities may either directly appoint a lawyer from a list provided by the local bar or refer the case to the local bar, leaving bar officials to designate the attorney. In either case, once the lawyer has been chosen, no mechanisms exist for initial or ongoing supervision of the attorney.'[xviii] A Hungarian study in 1996 revealed the consequence – a massive disparity in service between privately hired and *ex officio* lawyers. This was illustrated by statistics as to interview – 44 per cent of a sample of detainees had yet to meet their *ex officio* lawyer; only 8 per cent of the sample with privately hired lawyers had yet to meet them. Few or no statistics were kept in any country on the *ex officio* lawyers. There was every evidence that representation tended to be formal rather than real.

The scrutiny of the European Union caused the candidate states of central and eastern Europe to reconsider their legal aid arrangements. Other forces were working in the same direction. The Public Interest Law Initiative (PILI) of Columbia University has a base in Budapest and, now, Moscow. The Open Society Justice Initiative (OSJI) is also based in Budapest. Both have been active in encouraging legal aid in central and eastern Europe. Both have collaborated on two conferences – in 2002 and 2005 – that brought together people from countries in the region. PILI joined with three other human rights groups to produce a two volume study of access to justice in central and eastern Europe, published in 2003. OSJI has been extremely active and has funded two pilot public defender projects – one in Lithuania and the other in Bulgaria. It has facilitated the movement of officials between different European states to examine the operation of different legal aid systems – particularly, in Europe, the English and the Dutch.

The state of play of the 8 new <u>members and 2 accession states</u>

Papers produced for a conference in February 2005 allow a relatively up-to-date assessment of the state of play in relation to legal aid in the states from central and eastern Europe that have just joined the Union (8) and those hoping to join in 2007 (two – Bulgaria and Romania). The following are just sketches of events to indicate the degree of activity in this field: they do not purport to be anything like a full analysis. A short summary of the current situation is supplemented with the relevant assessment from the most recent or final comprehensive monitoring reports from the European Commission.

<u>Bulgaria</u>

The country was criticised in its 2003 monitoring report (see above) for the state of its legal aid. Bulgaria has a new law on attorneys, published on 25 June 2004. This requires that an attorney must act for a client if selected by the local Bar Council – a provision taken from earlier Acts. The Open Society Institute has set up a pilot Public Defender Office in Veliko Turnovo with five lawyers. A joint working party of the Ministry of Justice and the Open Society Justice Initiative developed a joint concept paper on legal aid and then a draft Bill in late 2004. This proposes the establishment of an independent Legal Aid Board; would extend legal aid to civil and administrative matters in addition to crime; requires registration and itemised billing by lawyers acting on legal aid. It is not yet in force.[xix] The EU considers that more should be done, stating in its 2004 report on progress to accession:

Regarding legal aid, studies show limited improvements in access to legal assistance during trial. A significant number of defendants are still being tried without a defence counsel. The situation regarding the pre-trial detention phase has not improved over the reporting period but the adoption of the

law on lawyers in June 2004 should guarantee some improvement in the access to justice for all citizens. A legal aid fund, separate to the budget of the judiciary, has not yet been established.[xx]

Czech Republic

A draft law on legal aid exists; was approved by the Legislative Council of the Czech Government in 2003; but only the part relating to cross-border legal aid has been submitted to Parliament. In the interim, legal aid is administered under a number of different provisions.[xxi]

The final monitoring report was rather favourable:

> Access to justice is satisfactory, however not all citizens may be fully aware of their entitlement. Legal aid is available both in criminal and civil cases, either by virtue of the code of criminal procedure (free legal representation for defendants and victims) or by request to the Chamber of Advocates under the Act on Attorneys.[xxii]

Estonia

A State Legal Aid Act entered into force on 1 March 2005. This considerably broadened the types of case in which legal aid can be granted – either to natural or legal persons. Only advocates can receive legal aid remuneration, a somewhat contentious limitation. Controversy has also arisen over the requirement that forms must be submitted in Estonian – the county has inherited a large Russian-speaking minority. Significantly, the rate of expenditure on legal aid is budgeted to rise: from €1.7m in 2004-5 to €2.8m in 2005-6.[xxiii]

The final monitoring report's comment was:

> Concerning legal aid, the draft Legal Services Act, which was submitted to Parliament at the end of 2001, has yet to be adopted and may not enter into force before 2005. It is possible to be granted free legal aid by submitting an application to the court for the appointment of a lawyer at the expense of the state. This is provided for in the codes of criminal, civil and administrative procedure and also in connection with administrative offences. However, while free legal aid is routinely granted in criminal cases, its availability in civil and administrative cases seems to remain rather limited.[xxiv]

Hungary

Hungary passed a Legal Aid Law in 2003 – coming into effect in a first phase from April 2004 and a second in January 2006. This introduces state-funded legal advice and services other than for criminal suspects and defendants; in contrast to Estonia, it welcomes in non-attorney providers such as NGOs. Hourly rates for advice remain somewhat unattractive – the equivalent of €9.93 an hour. A new Code of Criminal Procedure in 2003 at last required the state to provide the cost of legal aid if the defendant was exempted from payment by the court. No change has been made to the *ex officio* system for criminal proceedings.[xxv]

The final comprehensive monitoring report stated:

> Legal aid is currently rather restricted. In criminal cases, the state is obliged to provide defence counsel only in limited cases (e.g. if the offence is punishable with more than 5 years' imprisonment), and a defence counsel may be provided as a matter of discretion in other cases. In general, if the defendant is convicted, he must pay all costs. In civil cases, legal aid tends to be restricted to the very poor and to pensioners. Although there is a network of offices offering free legal information, these offices do not represent citizens in trials.

> The government has undertaken to submit a bill to Parliament to significantly improve the legal aid system before the end of 2003.[xxvi]

Latvia

Latvia has drawn up a very broad draft law on legal aid but it is not yet in force. The budget for mandatory legal aid in 2005 is only €648,535.[xxvii]

Latvia got an admonition from its final monitoring report:

> In the field of legal aid, planned legislative measures have been delayed. It is important to complete the legal framework to improve citizens' access to justice and to ensure adequate funding of legal aid.[xxviii]

Lithuania

In legal aid terms, Lithuania can claim to be the beacon of the Baltic. It passed a new law on legal aid in January 2005 covering legal advice ('primary legal aid') and aid ('secondary legal aid'). The budget for both is projected to rise steeply - in relation to legal aid, from €1.5m to €2.1m from 2004 to 2005 and advice, from €103,000 to €760,000.[xxix] It did not escape criticism in the final monitoring report:

> The situation regarding access to legal aid, particularly in civil and administrative cases, is still unsatisfactory, due to the complexity of the procedure. The new Law on Bailiffs, which entered into force in January 2003, is expected to significantly improve the effective enforcement of judgements.[xxx]

Poland

The Minister of Justice established a working group on a new draft legal aid law in October 2004 and it proposed a new draft law in February 2005.[xxxi] A comment of the final comprehensive pre-accession report is given above. Overall, the report was damning:

> The access of the public to the judicial system remains limited, especially access to general information on procedures, legal aid and the state of play of an individual's own pending case. In general, the level of public trust in the efficiency and fairness of the judicial system remains low and the perception of corruption by the public is high.[xxxii]

Romania

Legal aid in Romania remains pretty rudimentary. The Bucharest Bar Association runs a legal aid office with the help of fees from its members. State payment is late and somewhat low – ranging lump sums of between €5 and €15 from criminal *ex officio* matters.[xxxiii] The 2004 annual monitoring report called for more action on legal aid:

> There are shortcomings in the implementation of the legal aid system and effective defence for the accused is not systematically guaranteed. The lack of precise definitions of the criteria for receiving assistance may lead to arbitrary and non-uniform application of the rules. Better remuneration of lawyers providing legal aid should be ensured to encourage the lawyers to provide such assistance.[xxxiv]

Slovakia

The Government has committed itself to produce a Law on Free Legal Aid in April 2005.[xxxv]

The final monitoring report was critical of the legal system though seems not to have considered legal aid specifically:

> The level of public trust in the efficiency and fairness of the judicial system remains low.[xxxvi]

Slovenia

Slovenia introduced a new Legal Aid Act in 2001 which was amended in 2004. Expenditure rose from €371,006 in 2003 (itself well over budget) to a budgeted €521,000 in 2004 which was overspent 'by the end of the summer'.[xxxvii]

The result was a ticking of about court delays but a pass on legal aid, if a somewhat perfunctory one, if the final monitoring report:

> Free legal aid is available to socially vulnerable people. It covers both civil and criminal cases.[xxxviii]

Lessons from the EU's role in the accession process

Overall, the EU reports provide a sobering catalogue that illustrates just how ambitious was the undertaking of bringing the accession states from central and eastern Europe up to standards reasonably compatible with those of the 15 existing member states of the Union by March 2004. Realistically, legal aid is just one part of a justice system and, for a number of states, the observation above in relation to Slovakia on the point of its accession to the Union is likely to remain true: there is a lack of public trust in the integrity and competence of the court structure. Read these reports and you understand why. Decades of satellite status to a foreign power overwhelmingly depleted confidence in the institutions of government. From any realistic perspective, the European Union played a remarkable role in the transformation of societies where progress to full national independence only occurred in the aftermath of the dramatic events of 1989 of which the most celebrated image was the fall of the Berlin Wall. It has to be remembered that Russian troops completed their withdrawal from countries now in the European Union only on 31 August 1994 – and not without, as in Lithuania and Latvia, a degree of bloodshed in attempted Russian counter-coups as late as 1991.[xxxix] Within two years of the final Russian withdrawal, the three Baltic states, together with all the other accession states of central and eastern Europe, had signed, ratified and brought into force the European Convention of Human Rights.

There was no way in which accession to the Convention such a short time after effective independence could be more than a statement of aspiration. Practically, there was bound to be a distance between the theoretical position of adherence to Convention standards and the need for a reasonable transition time to bring standards up to scratch. However, this dissonance was also bound to cause a problem. The European Court of Human Rights has stressed that the Convention is more than an aspirational statement of values. Indeed, it has made this point quite specifically in relation to access to justice:

> The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right to access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.[xl]

In this context, the monitoring role of the European Commission in terms of the accession states has been extremely helpful. It has provided a framework within which legal aid, access to justice and, more widely, elements of the rule of law has been scrutinised; reported; and called forth responses, as can be seen above. It is, however, manifestly clear from the cautious observations of the monitors that it is highly likely that questions still arise as to the state of equality of arms within the legal systems of these accession countries. Indeed, it would be quite remarkable if they did not; they are likely to be different sources and levels of concern in different countries; but expenditure and organisation of legal aid provides a potential indicator (crude but probably accurate) of the extent to which states

have brought their legal systems up to an acceptable level.

There is more: the EU raises the net (sort of)

The EU's engagement in legal aid standards has gone farther than the harmonisation of its human rights' commitment with that of the European Convention. From the Maastricht Treaty (agreed in 1992), the Union conceived itself as based on three pillars – the third of which was co-operation in judicial and home affairs. Reflecting the political sensitivity of decisions in this area, they were to be taken unanimously and movement has been cautious. Underpinning this movement were provisions that, as expressed in the Amsterdam Treaty (agreed in 1997 and coming into force in 1999) to the effect that:

> The council shall, acting unanimously …, issue directives for the approximation of such laws, regulations and administrative provisions of the Member States as directly effect the establishment or functioning of the common market.[xli]

Two forces – one internal and one external – took the processes of approximation, mutual recognition and co-operation further and faster than might have been expected: the EU itself through decisions taken at the Tampere European Council in October 1999 and the consequences of the events of 11 September 2001.Tampere advanced the idea of a 'union of freedom, security and justice' and, in a phrase that probably sounds better in the French 'A European judicial space'. Tampere set out an ambitious programme which specifically included a section on access to justice. This, in turn, contained a commitment for 'user' guides on judicial co-operation and the legal systems of Member States and stated that:

> The European Council invites the Council, on the basis of proposals by the Commission, to establish minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union as well as special common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims, as well as maintenance claims, and on uncontested claims. Alternative, extra-judicial procedures should be created by Member States.[xlii]

Tampere led to a number of uncontroversial developments. For example, the Commission is co-operating with the Council of Europe to produce legal aid information sheets on the countries of Europe and appropriate websites are under construction.[xliii] A directive was agreed on cross-border legal aid in civil cases – basically giving non-nationals the same rights to legal aid as nationals in such cases.[xliv]

9/11 intruded on the future of legal aid in the European Union through a side wind. Tampere had called for the replacement of extradition proceedings with 'simple transfer'.[xlv] By 20 September 2001, the Council of Members, keen to display solidarity with the US, had agreed a 'Road Map on Terrorism' in response to include a fast-track extradition procedure, the European Arrest Warrant. Such was the political drive for agreement that this was forthcoming in record time at a Justice and Home Affairs Meeting in early December. A Framework Decision approved by the Council on 13 June 2002.[xlvi] To move with such speed, full safeguards for suspects and defendants were left to a separate process. Crucial to these is, of course, legal aid. A suspect facing transfer has relatively few rights but the whole process is subject to the principles of the European Convention (and, thereby, in the UK expressly the provisions of the Human Rights Act 1998)[xlvii]. This allows a judge to consider whether a person subject to a request for transfer would receive a fair trial in the requesting country. The UK implemented the warrant relatively unproblematically. Other countries had more difficulty and some had to amend

their constitutions, generally in relation to the removal of any distinction between nationals and non-nationals.

The existence of the warrant makes more urgent the need for the implementation of agreed minimum standards throughout the Union. Interestingly, the effect may be even more global. The warrant was implemented in the UK by the Extradition Act 2003 which took the opportunity of acknowledging agreements with some third countries that were not members of the European Union and not subject to the European Convention – notably the United States – to which it applied the same procedures. This has raised in the UK a whole raft of issues about US standards of justice, particularly in relation to three current cases relating, on the one hand, to an alleged terrorist (Babar Ahmed)[xlviii] and, on the other, Ian Norris and the 'Enron Three', accused of major fraud and leading the *Daily Telegraph* to describe their situation as an 'existential nightmare'.[xlix] Standards of US legal aid have not been raised to date but they might be in the future: controversy has arisen over US expansive assertions of jurisdiction; lack of reciprocity by the US in maintaining a requirement of 'just cause' before an extradition is allowed; its maintenance of the death penalty and assertion of a right to jurisdictional 'black holes'. The UK judge only agreed to extradition with reluctance and on US government assurances that Mr Ahmed would neither be subject to the death penalty nor, more than somewhat humiliatingly, 'disappeared' from US jurisdiction.[l]

Within the European Union, the Commission has pressed on with plans for minimum standards to cover five specific areas:

- legal advice;
- interpretation and translation;
- vulnerable suspects and defendants;
- consular access;
- a letter of rights.

The process has now reached the stage of a Proposal for a Framework Decision.[li] A framework decision requires implementation by Member States within a specified time- in this case, it is hoped, by 1 January 2006.

In this context, let us look only at the provisions relating to legal advice – governed by articles 2-5. These propose that:

> A person has the right to legal advice as soon as possible and throughout the criminal proceedings if he wishes to receive it.[lii]
>
> Member States shall ensure that legal advice is available to any suspected person who:
>
> - is remanded in custody prior to trial;
> - is formally accused of having committed a criminal offence which involves a complex factual or legal situation, or which is subject to severe punishment, in particular where in a Member State, there is a mandatory sentence of more than one year's imprisonment …;
> - is the subject of a European Arrest Warrant or extradition request or other surrender procedure;
> - is a minor; or
> - appears not to be able to understand or follow the content or meaning of the proceedings owing to his age, mental, physical or emotional condition.[liii]
>
> Member States shall ensure that only lawyers … are entitled to give legal advice …[liv]
>
> … the costs of legal advice shall be borne in whole or in part by the Member States if those costs would cause undue financial hardship to the suspected person or his dependents.[lv]

These provisions raise the issue of compatibility with the wording of the European Convention – quoted earlier. In the accompanying explanatory memorandum, the Commission makes the following assertion – the truth of the first sentence surely being somewhat questionable in the light of the pre-accession monitoring noted above:

> All the Member States have criminal justice systems that meet the requirements of Articles 5 … and 6 … of the ECHR. The intention here is not to duplicate what is in the ECHR, but rather to promote compliance at a consistent standard. This can be done by orchestrating agreement between the Member States on a Union wide approach to a 'fair trial'.[lvi]

The problem with the Commission's proposed wording is that, in two material ways, it does not duplicate the ECHR because it sets a lower standard. The Commission's provisions all refer to 'legal advice' not 'assistance'. And the obligation to provide free legal advice occurs neither on the general grounds of 'the interests of justice' but only in specified circumstances, removing any individual discretion, nor on a test of insufficient means but 'undue financial hardship'. The issue of the definition was taken up by the UK House of Lords European Union Committee which called for clarification.[lvii] Assurances exist in written correspondence from UK ministers that 'The reference to "legal advice" would implicitly include legal representation'[lviii]. However, domestic English legal aid legislation has traditionally characterised advice, assistance and representation as three separate functions. It is not clear that a broad interpretation would, in fact, be taken either domestically in the UK or elsewhere.

The proposed framework decision contains a non-regression clause, prohibiting Member States from lowering their standards in consequence.[lix] This should not be a problem in relation to the UK which is largely compliant with Article 6, albeit that existing duty solicitor arrangements would need – as the House of Lords committee accepted – additional provisions so that services could be delivered by lawyers and accredited non-lawyer representatives. The problem will arise in relation to standards within other countries of the European Union because, *prima facie*, it looks as if the Member States have watered down the proposals of the Commission, which were originally stronger, to an extent that they are now at a lower level than those of the Convention. This may represent a level of political reality among governments and officials but it carries the danger that there will be a public explosion of feeling against the Union when a Barbar Ahmed or Enron 3 case takes place with another country of the European Union taking the place of the US. We have only to look at the storm of controversy that arose when the Greek authorities had the temerity to charge a group of plane-spotters photographing a military base – on at least one reputable account being fully aware of the risks[lx]. This called forth a torrent of abuse, in the context of which the organisation Fair Trials Abroad was but mild:

> 'The continuing plight of the innocent Dutch and British tourists held in Greece in defiance of the European Convention of Human Rights demonstrates that the time is not yet right for a European Warrant based on mutual respect for all the justice systems of Europe,' Stephen Jakobi, Director of Fair Trials Abroad, said today. 'No European citizen outside Greece has any respect for Greek justice at the present time and much practical work on raising the judicial standards of Greece and other countries must be done before the mutual confidence upon which all else depends can be established. Greece appears at present to be the weakest link'.[lxi]

For entirely understandable reasons, the European Union, having played a very

creditable role in raising the quality of justice and legal aid in the accession countries, has had practically to accept that standards are not unified over the Union; that some states (and they may include long established members of the Union) do not meet the fair trial rights of Article 6 ECHR and do not have adequate legal aid. There are many other demands on money and time, however, and there are effective limits to what can be done in so short a time. The problem is that the Union has also progressed measures that are based precisely upon uniform standards. Thus, the European Arrest Warrant, in essence a desirable development, may well prove to be based on sand if it ever attracted the same level of media and political concern as has been manifest in the cases related to the United States.

A final assessment

So, to return to Killarney, what assessment do we make from the experience of the engagement of the EU in legal aid as set out above?

First, there are obviously issues that are particular to the European Union: the price of membership should clearly include eternal vigilance against the *realpolitik* of the Commission and Member States. High-sounding measures against crime can turn out to have complications which, if they arise as hot media issues, will be dumped somewhat unfairly on the European Union as a project.

Second, now that all EU countries should have operational legal aid schemes, there should be more scope for European initiatives in the field. The success of the NGO-organised 2nd European Forum on Access to Justice in February, which was attended by a wide range both of NGOs and officials, is a testament to the possibilities.

Third, there has to be a serious assertion of the human rights' standards that underlie a state's obligation to provide effective access to justice, including legal aid where it is required. That baseline is very clear in countries gearing up their schemes and, as was highlighted at the beginning of this paper, it can be obscured by the detail in those countries that may have grown complacent about their understanding of principle.

Fourth, countries developing legal aid schemes in response to pressure from the EU have been, in a number of cases, reluctant to establish intermediate organisations to deliver legal aid. This would seem necessary at a minimum to provide a third party responsible for decisions to grant or refuse legal aid where the state may be another party – as it will in criminal cases. In such countries, merit can also be seen in providing a body with an interest in legal aid which is not part of the government. The principle is much the same in any jurisdiction.

Fifth, and interestingly, the issue of quality is alive and abroad – not only among administrators of older schemes as a way of cracking down on practitioners - but also among a wider range of countries and people concerned with legal aid. The practical work of the Open Society Justice Initiative projects has thrown up the question of ensuring adequate quality and it emerged very much as a theme at the 2nd European Forum in a way in which it had not in the first that took place in 2002. There is a real scope here for a dialogue between those in countries like England and Wales that have sought to grapple with this issue and others in order to find transferable techniques.

Finally, there is the intriguing possibility that the language and concepts of human rights may re-ignite some of the same energy and attention to legal services and access to justice that drove the expansion of legal aid programmes around the world in the 1960s and 1970s. Or, more confusingly, might do so in a rather different range of countries. Certainly, developments in Europe underline the very practical importance of seeing the core of legal aid provision – in criminal cases and in some civil cases - as part of a range of

measures required of a state to provide the necessary equality of arms between citizen, even when suspect or defendant, and state.

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[i] May 2005, p6.
[ii] P17.
[iii] P10, F Bawdon, 'Too close for comfort', *Independent Lawyer, April 2005*.
[iv] *Airey v Ireland* ECHR (1979), Series A no 32; 2EHRR 305, para 24.
[v] C Harlow 'Access to Justice as a Human Right' at p203 *The EU and Human Rights* ed P Alston et al, OUP, 1999.
[vi] *Airey v Ireland* 1979.
[vii] Chamber judgement, 15 February 2005, application no 68416/01.
[viii] As above
[ix] Article 6.1
[x] Article 6.2
[xi] Article 7
[xii] Article 1-9
[xiii] Article 47
[xiv] http://europa.eu.int/comm/enlargement/intro/criteria.htm
[xv] Public Interest Law Initiative 'EU Access Reports Highlight Legal Aid Deficiencies', http://pili.org/features/PublicationLaunch/
[xvi] The following description is largely taken from E Rekosh, K Buchko, D Manning and V Terzieva 'Access to Justice: legal aid for the unrepresented' in *Access to Justice in central and eastern Europe: source book*, 2003, Public Interest Law Initiative, Bulgarian Helsinki Committee, Polish Helsinki Foundation for Human Rights and Interights.
[xvii] P6 as above.
[xviii] P9.
[xix] From M Gramatikov 'Legal aid developments: country update on Bulgaria' in Public Interest Law Initiative and Open Society Justice Initiative *2nd European Forum on Access to Justice: background materials.*
[xx] P22, European Commission *2004 Regular Report on Bulgaria's Progress to Accession*, Com (2004) 657 final. All the monitoring reports can be accessed through the European Union's website: http://europa.eu.int/comm/enlargement/report_2003/.
[xxi] B Bukovska 'Legal aid developments: country update on the Czech Republic' in the above
[xxii] P13, European Commission *Comprehensive Monitoring Report on the Czech Republic's preparations for Membership*, 2003.
[xxiii] T Evas 'Legal aid developments: country update on Estonia' in the above
[xxiv] P13.
[xxv] M Pardavi 'Legal aid developments; country update on Hungary' in the above
[xxvi] P12, European Commission *Comprehensive Monitoring report on Hungary's preparations for membership,* 2003
[xxvii] K Jarinovska 'Legal aid developments: country update on Latvia' in the above
[xxviii] P13.
[xxix] P Koverovas 'The goals and process of the institutional legal aid reform in Lithuania' for the above
[xxx] P13, European Commission *Comprehensive monitoring report on Lithuania's preparations for membership*, 2003
[xxxi] L Bojarski 'Legal aid developments: country update on Poland' in the above
[xxxii] P14 European Commission *Comprehensive Monitoring Report on Poland's preparations for membership,* 2003
[xxxiii] G Iorgulescu and N Popescu 'Legal aid developments: country update on Romania'
[xxxiv] P25, European Commission *2004 Regular Report on Romania's Progress to Accession*, Com (2204) 657 final
[xxxv] J Hrubula 'Legal aid developments: country update on Slovakia'
[xxxvi] P12 European Commission *Comprehensive Monitoring Report on Slovakia's Preparations for membership*, 2003
[xxxvii] M Anclin 'Legal aid developments: country update on Slovenia'
[xxxviii] p13, European Commission *Comprehensive Monitoring Report on Slovenia's Preparations for Membership*, 2003.
[xxxix] http://www.balticsww.com/timeline.htm
[xl] *Airey v Ireland* ECHR (1979), Series A, No 32, 2 EHRR 305, para 24.
[xli] Article 94.
[xlii] Para 30.
[xliii] See http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Access_to_justice_and_legal_aid/
[xliv] Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes
[xlv] Para 35.
[xlvi] See S Alegre and M Leaf *European Arrest Warrant: a solution ahead of its time?* JUSTICE, 2003.

[xlvii] S21 Extradition Act 2003.
[xlviii] See, eg http://www.freebabarahmad.com/messageskey.php
[xlix] City Comment, N Collins, 13 May 2005
[l] *New York Times* 18 May 2005, http://www.iht.com/articles/2005/05/18/news/extra.php
[li] COM (2204) 328 final (28 April 2004).
[lii] Article 2
[liii] Article 3
[liv] Article 4
[lv] Article 5
[lvi] Para 9
[lvii] House of Lords European Committee *Procedural Rights in Criminal Proceedings* HL Paper 28, 2004-5
[lviii] Lord Bassam of Brighton to Roger Smith, JUSTICE, 22 February 2005
[lix] Article 17
[lx] http://news.bbc.co.uk/1/hi/world/europe/1685453.stm
[lxi] Press Release 19 November 2001, Fair Trials Abroad.