UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009)

1. Introduction

On 21 October 2009, the European Commission adopted a proposal to recast the Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, (COM (2009) 551), hereinafter the "Qualification Directive".[1]

The proposed amendments have direct consequences for persons of concern to UNHCR. UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to refugee problems.[2] Paragraph 8 of UNHCR's Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,[3] whereas Article 35 of the 1951 Refugee Convention[4] and Article II of the 1967 Protocol relating to the Status of Refugees[5] oblige States Parties to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR's duty of supervising the application of the provisions of the 1951 Convention and 1967 Protocol. UNHCR's supervisory responsibility extends to each EU Member State, all of whom are States Parties to these instruments. UNHCR's supervisory responsibility is reflected in European Union law, including pursuant to Article 78 (1)

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[1] European Commission, *Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted*, 21 October 2009, COM(2009) 551 final; 2009/0164 (COD), at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0551:FIN:EN:PDF ["the Proposal"].

[2] UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), at: http://www.unhcr.org/refworld/docid/3ae6b3628.html.

[3] UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), paragraph 8(a), at: http://www.unhcr.org/refworld/docid/3ae6b3628.html.

[4] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series No. 2545, vol. 189, p. 137, at: http://www.unhcr.org/refworld/docid/3be01b964.html. According to Article 35(1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of this Convention" ["Geneva Convention" or "1951 Convention".].

[5] UN General Assembly, *Protocol Relating to the Status of Refugees*, 30 January 1967, United Nations Treaty Series No. 8791, vol. 606, p. 267, at: http://www.unhcr.org/refworld/docid/3ae6b3ae4.html ["1967 Protocol"].

of the Treaty of the Functioning of the European Union[6], which stipulates that a common policy on asylum, subsidiary protection and temporary protection must be in accordance with the 1951 Convention. This role is reaffirmed in Declaration 17 to the Treaty of Amsterdam, providing that "consultations shall be established with the United Nations High Commissioner for Refugees … on matters relating to asylum policy."[7] UNHCR therefore has a direct interest in and competence to advise Member States and EU institutions in relation to EU proposals concerning refugee law.

UNHCR welcomes the Commission's initiative in proposing amendments to the Qualification Directive. There is a significant need to spell out in greater detail the legal concepts in the existing provisions, recognize existing state practice, and strive to streamline the application of the protection criteria. The proposal also has the potential further to harmonize protection standards, incorporating relevant case law from the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR).

As stated in its Explanatory Memorandum, the Commission's proposal is put forward in part on the basis of available information on the implementation of the existing Directive. UNHCR welcomes the fact that in drafting this new proposal, the Commission has taken into account, in addition to feedback from Member States and experts, several studies produced by UNHCR, the academic network Odysseus[8], ECRE and other NGOs.[9] These studies conclude that there are problems with the current provisions, including their failure to secure full compatibility with evolving human rights and refugee law standards, to achieve a sufficient level of harmonization, as well as their impact on the quality and efficiency of decision-making.[10]

The UNHCR and ECRE studies in particular have highlighted the divergent practices among states, reflected for instance by vastly different recognition rates for the same profile of asylum-seeker:

> …[S]triking disparities appeared in the research. For example, with regard to Iraqi applicants, during the first quarter of 2007, the

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[6] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF.

[7] European Union, Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, 2 September 1997, *Declaration on Article 73k of the Treaty establishing the European Community* [OJ C 340, 10.11.1997] at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX :11997D/AFI/DCL/17:EN:HTML.

[8] Odysseus - Academic Network for Legal Studies on Immigration, *Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in the EU Member States*, 2007, p. 7, at: http://www.unhcr.org/refworld/docid/484009fc2.html.

[9] UNHCR, *Asylum in the European Union, A study on the implementation of the Qualification Directive*, November 2007; ["UNHCR QD Study"], at: http://www.unhcr.org/refworld/docid/473050632.html; ELENA/ECRE, *The impact of the EU Qualification Directive on International Protection*, October 2008 at www.ecre.org/files/ECRE_QD_study_full.pdf; France Terre d'Asile, *Asile et la protection subsidiaire en Europe: Une mosaïque de droits*", Les cahiers du social no 18, Septembre 2008; Dutch Refugee Council/ECRE, *Networking on the Transposition of the Qualification Directive*, December 2008, Nijmegen University; Karin Zwaan (ed), *The Qualification Directive: Central themes, Problem issues, and Implementation in selected Member States*", 2007.

[10] The Proposal, p. 3. op. cit. Note 1.

> percentage recognized as refugees in Germany at first instance was 16.3 %, and those qualifying for subsidiary protection 1.1 %. In Sweden, 73.2 % of Iraqi applicants were granted subsidiary protection at first instance in the first quarter of 2007 and 1.7 % were recognized as refugees. This contrasts sharply with the recognition rate for Iraqis of 0 % in Greece and 0 % in the Slovak Republic at first instance. It must be a matter of deep concern to the European Union that the practice with regard to one group varies so greatly across just the five Member States studied.[11]

These disparities are also referred to in the European Pact on Immigration and Asylum:

> The European Council welcomes the progress achieved in recent years as a result of the implementation of common minimum standards with a view to introducing the Common European Asylum System. It observes, however, that considerable disparities remain between one Member State and another concerning the grant of protection and the forms that protection takes. While reiterating that the grant of protection and refugee status is the responsibility of each Member State, the European Council considers that the time has come to take new initiatives to complete the establishment of a Common European Asylum System, provided for in the Hague Programme, and thus to offer a higher degree of protection, as proposed by the Commission in its asylum action plan. A sustained dialogue should be conducted with the Office of the United Nations High Commissioner for Refugees in this new phase. [12]

The following observations address the recast proposals relating to the Qualification Directive. References to articles refer to those in the relevant EU communication, unless stated otherwise.

2. Scope of the Directive

UNHCR welcomes the stated goal of ensuring the "full and inclusive application of the Geneva Convention… and full respect for the ECHR and the EU Charter of Fundamental Rights." Through greater harmonization of protection standards, the proposal aims to reduce secondary movements due, at least in part, to diverse national legal frameworks and practice and attempts to address the different levels of rights afforded in different Member States, including as have been detailed in the UNHCR, Odysseus and ECRE studies. The proposal should bring the EU closer to an approach that reflects international standards and good practice, rather than the lowest common denominators, among Member States.

A change in scope is reflected in the proposed amendment to the Directive's title, which merges applications for recognition as "refugees" and "persons otherwise in need of international protection" into "beneficiaries of international protection". Using one

[11] UNHCR QD Study, op. cit. Note 9, p. 13.
[12] European Union: Council of the European Union, *European Pact on Immigration and Asylum*, 24 September 2008, 13440/08, p. 11, at: http://register.consilium.europa.eu/pdf/en/08/st13/st13440.en08.pdf.

phrase to refer to both reflects a general and positive trend to align the standards for these two groups (See Articles 1, 2). UNHCR supports the proposed change in scope which, according to the Commission, could "streamline procedures and reduce administrative costs and burdens associated with maintaining two protection statuses, as the costs associated with creating and maintaining different infrastructures will be reduced."[13] This approach recognizes that distinguishing between beneficiaries of protection, and thereby between their rights and obligations, may not be justified in terms of the individual's flight experience, protection needs[14] or ability to participate and contribute to society.

UNHCR supports a wider definition of "applicant" in Article 2 (i), which would apply to anyone who applies for international protection. The current proposal refers only to citizens of countries which are not EU Member States. Even though, pursuant to the Protocol on asylum for nationals of Member States of the European Union, [15] claims by EU nationals in most EU Member States are subject to accelerated procedures as "manifestly unfounded claims", under international law the right to seek asylum is not limited by nationality or geography.

Recommendation: UNHCR supports the suggested changes in the scope, but would propose that Member States, in incorporating this article in domestic legislation, replace "a third country national or a stateless person" in Article 2 (i) with "person who is not a citizen of the Member State in question".

3. Actors of Protection (Article 7)

The proposed amendments to Article 7 (1) stipulate that the protection must be effective and durable,[16] specify who can provide such protection, and that actors of protection must be willing and able to enforce the rule of law. Reference is also made to "effective and durable" protection in Article 7 (2).

[13] Op. cit. Note 1.

[14] Although not dealing directly with discrimination between refugees and subsidiary protection beneficiaries, according to the ECtHR's ruling in the *Niedzwiecki* and *Okpisz* decisions, a difference of treatment is discriminatory for the purposes of Article 14 ECHR if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. See *Niedzwiecki v. Germany*, 58453/00, Council of Europe: European Court of Human Rights, 25 October 2005, at: http://www.unhcr.org/refworld/docid/4406d6cc4.html, and *Okpisz v. Germany*, 59140/00, Council of Europe: European Court of Human Rights, 25 October 2005, at: http://www.unhcr.org/refworld/docid/4406d7ea4.html.

[15] European Union, Protocol annexed to the Treaty establishing the European Community, *Protocol on asylum for nationals of Member States of the European Union*, C 310/362, 16.12.2004, at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:310:0362:0363:EN:PDF.

[16] This reflects CJEU case law, placing emphasis on the durability of protection and that "factors which formed the basis of the refugee's fear of persecution may be regarded as having been permanently eradicated". See *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08; C-176/08; C-178/08 & C-179/08, European Union: European Court of Justice, 2 March 2010, at: http://www.unhcr.org/refworld/docid/4b8e6ea22.html.

Recommendation: UNHCR welcomes the amendments and clarifications to Article 7, intended to address strongly divergent state practice and meet the standards of the 1951 Convention. In particular, UNHCR agrees that "willingness to protect" is not sufficient in the absence of the "ability to protect".[17]

UNHCR would suggest further amendments to Article 7. Sections 7 (1) (b) and 7 (3) should be deleted, as non-state actors in principle should not be considered actors of protection. Parties and organizations, including international organizations, do not have the attributes of a state and do not have the same obligations under international law. In practice, this means that their ability to enforce the rule of law is limited, and thus their ability to render protection, especially according to the proposal's amended definition, would not qualify an international body as capable of providing protection.

In the alternative, and if these sections are retained, the recast directive sets an important standard by requiring that actors, including non-state actors, be "willing and able to enforce the rule of law." While a clan or armed force may be capable of meeting some basic needs, the likelihood of establishing or sustaining an "effective legal system" is properly brought forth as a criterion to demonstrate "effective and durable" protection. Moreover, the phrase "willing and able to enforce the rule of law", should also apply explicitly to the state (Article 7 (1) (a)), as it should not be presumed that the state from which an asylum-seeker seeks protection is "willing and able to enforce the rule of law". In gender-based claims, among others, a state's unwillingness to extend protection may be critical to establishing a valid claim for refugee status on 1951 Convention grounds.

It is neither realistic nor practical to equate the protection generally provided by states with the exercise of a limited administrative authority and control over a territory by international organizations. Moreover, the CJEU in *Abdulla* stresses the importance of access to protection.[18] If retained, UNHCR would also encourage that the list of actors of protection listed in Article 7 (1) be considered exhaustive.

Article 7 (2) also does not provide a clear meaning of "reasonable steps". While the proposal includes a reference to "effective and durable" protection, the proposed text does not clarify that the "reasonable steps" must be those which can actually ensure "effective and durable" protection. Based on the present recast formulation, it is possible to consider that an actor has provided sufficient protection if reasonable steps have been taken, although the protection is neither effective nor durable. Thus the recast wording should be strengthened.

[17] The Proposal, op. cit. Note 1, page 7.

[18] "[t]he competent authorities of the Member State must verify, having regard to the refugee's individual situation, that the actor or actors of protection referred to in Article 7 (1) of Directive 2004/83 have taken reasonable steps to prevent the persecution, that they therefore operate, inter alia, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status." Op. cit. Note 16.

Recommendation: UNHCR recommends rewording Article 7 (2) to reflect that protection is provided when "reasonable steps" taken lead to effective and durable protection against the feared harm or persecution. Hence, UNHCR recommends removing the sentence "and which are willing and able to enforce the rule of law" from the end of Article 7 (1) (b) and its replacement by a general sentence at the end of Article 7 (1) stating *"When the actors of protection set out in (a) and (b) are willing and able to enforce the rule of law"*. Furthermore, UNHCR recommends deletion of the phrase *"including international organizations"* from Article 7 (1) (b), and of Article 7(3). Finally, UNHCR would propose deletion of the term "generally" in Article 7(2).

4. Internal Protection (Article 8)

UNHCR welcomes the amendments to Article 8 on internal protection, as they provide greater clarity in the determination of when a part of a country may be considered a safe internal protection alternative, and are in line with the ECtHR's judgment in *Salah Sheekh.*[19]

The Proposal would require states to consider "whether the applicant has access to protection against persecution or serious harm" in the relevant location, based on "precise and up-to-date information from sources including UNHCR and the European Asylum Support Office."

UNHCR agrees with the deletion of Article 8 (3), enabling application of the internal protection concept, "notwithstanding technical obstacles to return" to the country of origin. The effect of this provision at present is to deny international protection to persons who have no practically accessible protection alternative. In UNHCR's view, this is not consistent with Article 1 of the 1951 Convention. An internal relocation or flight alternative must be safely and legally accessible for the individual concerned, at the time of the decision. Attempted predictions regarding whether the obstacles will be temporary or permanent detract from requisite legal certainty in the application of this concept. If the proposed alternative is not accessible in a practical sense, an internal flight or relocation alternative does not exist and cannot be considered reasonable. [20]

UNHCR would advocate for the retention of an explicit reference to the reasonableness test. By deletion of the part of the sentence in Article 8 (1) relating to the reasonableness test, one may infer that there will no longer be a review of whether it may reasonably be expected of the person concerned to live in the alternative region, i.e. whether he or she can lead a relatively normal life there, without facing undue

[19] *Salah Sheekh v. The Netherlands*, 1948/04, Council of Europe: European Court of Human Rights, 11 January 2007, at: http://www.unhcr.org/refworld/docid/45cb3dfd2.html.

[20] See also, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, para. 91 at: http://www.unhcr.org/refworld/docid/3ae6b3314.html, and UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, at: http://www.unhcr.org/refworld/docid/3f2791a44.html.

hardship.[21] Retaining such a reference would also reflect established jurisprudence confirming the relevance of the reasonableness test.[22]

Recommendation: In addition to the proposed amendments, UNHCR recommends retaining the phrase *"the applicant can reasonably be expected to stay"*, to ensure full application of the reasonableness test.

5. Acts of Persecution (Article 9)

UNHCR welcomes the proposed amendment to Article 9 (3), as it clarifies that status should be granted not only where there is an act of persecution, but also where there is an absence of or failure to provide protection. This point is of particular relevance to gender-based claims where serious discriminatory or other offensive acts committed by individuals or the local population can also be considered as persecution, if such acts are knowingly tolerated by the authorities, or if the authorities refuse, or are unable, to offer effective protection.[23] This new formulation thus refers not only to actors of persecution, but also the failure or refusal to act on the part of so-called actors of protection.

6. Membership of a Particular Social Group (Article 10)

In determining whether an applicant can be considered a member of a "particular social group" for the purposes of the refugee definition, UNHCR welcomes the added requirement in Article 10 (1) (d) for gender-related aspects to be "given due consideration", combined with the deletion of the present statement that gender creates no presumption of membership of a group. This will strengthen the protection of women and girls in particular. In 2009, women and girls constituted 47% of the world's 983,000 asylum-seekers and 15.2 million refugees,[24] and 30.5% of all applicants in EU Member States.[25]

Nevertheless, the Article should further be amended to clarify the term "particular social group". Members of a particular social group may be subject to persecution for either real or ascribed characteristics: it is not necessary for the attributed characteristics to be factual. The term should also be interpreted in a manner open to the diverse and changing nature of groups in various societies and to evolving

[21] See Guidelines, op. cit. Note 20, paras. 22-30.
[22] See for instance *Januzi v. Secretary of State for the Home Department* [2006] UKHL 5, para. 15, "This reasonableness test of internal relocation was readily and widely accepted. It was applied by the Federal Court of Appeal in Canada in *Rasaratnam v Canada* (*Minister of Employment and Immigration*) [1992] 1 FC 706, 711 and again in *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* (1993) 109 DLR (4th) 682. It has been applied in Australia and New Zealand," at: http://www.unhcr.org/refworld/docid/43f5907a4.html.
[23] UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 7 May 2002, at: http://www.unhcr.org/publ/PUBL/3d58ddef4.pdf.
[24] UNHCR, *2009 Global Trends Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*, Division of Programme Support and Management, 15 June 2010, at: http://www.unhcr.org/4c11f0be9.html.
[25] Eurostat, 2009.

international human rights norms.[26] Two main schools of thought in international refugee law theory have emerged as to what constitutes a particular social group within the meaning of the 1951 Convention and are reflected in the Directive. The "protected characteristics approach" is based on an immutable characteristic or a characteristic so fundamental to human dignity that a person should not be compelled to forsake it. The "social perception approach" is based on a common characteristic which creates a cognizable group that sets it apart from society at large. This means that people may require protection because they are perceived to belong to a group irrespective of whether they actually possess the group's characteristics. While the results under the two approaches may frequently converge, this is not always the case. To avoid any protection gaps, UNHCR therefore recommends that the Directive permit the alternative, rather than cumulative, application of the two concepts.

Recommendation: UNHCR recommends amending Article 10 (1) (d) to replace "and" at the end of the first subsection with "or". This will clarify that a person requires protection both in cases where he or she is a member of a particular group and in cases where he or she is perceived to be such.

7. Cessation of Refugee and Subsidiary Protection Status (Article 11)

UNHCR welcomes the addition of a new paragraph 3 to Article 11, providing grounds for protection where compelling reasons based on past persecution exist, based on 1951 Convention Article 1C (5) and (6).[27] As time elapses between the moment when an individual fled his or her country of origin in circumstances fulfilling the conditions of Article 1A of the 1951 Convention, and the decision of an asylum authority, UNHCR recommends that "compelling reasons based on past persecution" are taken into consideration not only when applying cessation to recognised refugees, but also when adjudicating an application for protection. Furthermore, UNHCR recalls in relation to cessation that developments which would appear to evidence significant and profound changes should be given time to consolidate before any decision on cessation is made.[28]

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[26] See also UNHCR, *Guidelines on International Protection: Membership of a Particular Social Group Within the Context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02, para. 12, at: http://www.unhcr.org/refworld/docid/3d36f23f4.html.

[27] Article 1C (5) and (6) provides that "the 1951 Convention shall cease to apply to any person falling under the terms of Article 1 (A) if:

(5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence; Provided that this paragraph shall not apply to a refugee falling under section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence."

UNHCR, *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C (5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, 10 February 2003, HCR/GIP/03/03, at: http://www.unhcr.org/refworld/docid/3e50de6b4.html.

[28] For further discussion of the application of "ceased circumstances", see op. cit. Note 27.

Recommendation: UNHCR recommends adoption of the proposed amendment to Article 11, adding sub-paragraph 3.

8. Content of International Protection

UNHCR supports the proposed amendments to Articles 20-34, which will ensure more that rights afforded subsidiary protection beneficiaries are amore effectively aligned with those enjoyed by recognized refugees, as called for in proposed Recital 37. These amendments are in line with recent ECtHR's jurisprudence. As pointed out in the Explanatory Memorandum to the Qualification Directive proposals, the ECtHR has held in two cases that differentiating social benefits according to type of residence permit amounts to discrimination.[29]

UNHCR considers that there is no reason to expect the protection needs of subsidiary protection beneficiaries to be of shorter duration than the need for protection under the 1951 Convention. Access for subsidiary protection beneficiaries to similar rights as those of refugees would be a significant element in facilitating their early participation and contribution to the host community. It can thereby support social cohesion contribute to preventing racism and xenophobia, and can play an important role in ensuring protection is effective.

The current proposal foresees that all beneficiaries of international protection should in principle have the same rights. This includes:

a. Recognizing extended rights for family members of subsidiary protection beneficiaries by removing the provision enabling Member States to determine their conditions of residence (recast Article 23 (2));
b. Requiring at least a 3-year residence permit for subsidiary protection beneficiaries, (the same period as that for refugees, rather than the present one-year permit (recast Article 24);
c. Facilitating subsidiary protection beneficiaries' travel outside the territory of the Member State (recast Article 25 (2));
d. Removing limits on the rights to work of subsidiary protection beneficiaries (deleting present Article 26 (3));
e. Giving refugees and subsidiary protection beneficiaries equal access to new, specific procedures for recognition of qualifications (recast Article 28);
f. Deleting provisions limiting subsidiary protection beneficiaries access' to the level of 'core benefits' in terms of social assistance and health care (recast Article 29, 30); and
g. Entitling subsidiary protection beneficiaries to integration facilities (recast Article 34).

The Proposal would also remove provisions allowing States to reduce benefits attached to both forms of status if the grant was based on "activities engaged in for the sole/main purpose of creating the necessary conditions for being recognised…." (Article 20(6), (7)). UNHCR also welcomes this change, which acknowledges the objective need for

[29] For further discussion, see op. cit. Note 14.

protection which applies to all refugees and subsidiary protection beneficiaries who may become exposed to threats "*sur place*".

UNHCR particularly welcomes proposed recast Article 28, replacing existing Article 27 (3) on access to procedures for recognition of qualifications. Recognition of qualifications for beneficiaries of international protection is a significant element in ensuring their equal employment opportunities and integration. As explained in recast Recital 42, special measures are needed effectively to address the practical difficulties encountered by beneficiaries of international protection such as authentication of evidence of formal qualifications and difficulty meeting the costs related to the recognition procedures.

Recommendation: UNHCR recommends adoption of the proposed amendments to Article 20-34. In particular, UNHCR supports the proposed Article 23, to clarify the right of family members to benefits provided for under the Directive, and to enable them to participate fully in and contribute to the host society. It also welcomes recast Article 28 facilitating recognition of qualifications, which can also enhance integration.

9. Definitions of "family members" and of "minors"

UNHCR supports the proposed extension of the definition of family members in recast Recital 18 and in Article 2 (j), indent 2, to include unmarried minor children regardless of whether they are dependent on the applicant; in Article 2 (j) indent 3 to include married minor children, where it is in their best interest to reside with the adult applicant; and indent 4 to include parents or guardians of a minor applicant who is married, where it is in the minor applicant's best interest to reside with the parent or guardian. A further important proposal in indent 5 amends the definition to include minor siblings of the applicant (including where the applicant or sibling is married, if it is in the best interest of one of them that they stay together).

These amendments are in line with the right to family unity, as outlined in the UNHCR *Handbook*, which stipulates that dependants living in the same household normally should benefit from the principle of family unity.[30]

The proposal in recast Recital 17 includes a specific and positive reference to the UN Convention on the Rights of the Child (CRC).[31]

UNHCR welcomes the proposed definition of "minor" in recast Article 2 (k) to include all persons under 18. [32] Aware that a number of States have used different age limits for children for the purposes of certain entitlements, UNHCR encourages all to adopt the 18-year standard, to enable all children to benefit from the Directive's safeguards.

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[30] UNHCR, *Handbook*, op. cit. Note 20, para. 185. See also EXCOM, Conclusions Nos. 24 (XXXII) Family Reunification, 1981, para. 5, and 88 (L), 1999, para. (ii).

[31] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, at: http://www.unhcr.org/refworld/docid/3ae6b38f0.html, or http://www.unicef.org/crc/.

[32] The Convention on the Rights of the Child, op. cit. Note 31, provides in Article 1 that "a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier." This definition is endorsed by the UNHCR's Executive Committee No. 107 (LVIII) – 2007 – *Children at Risk*, at: http://www.unhcr.org/3d4ab3ff2.html.

While welcoming these proposed amendments, UNHCR would suggest deletion of the wording "insofar as the family already existed in the country of origin" from Article 2 (j), as in UNHCR's view, respect for family unity should not be conditional on the family having been established before flight from the country of origin. Families which have been formed during flight or upon arrival in the asylum state also need to be taken into account. This principle has been underlined by the UNHCR Executive Committee in Conclusions No. 24 (XXXII) paragraph 5 and No. 88 (L) paragraph (b) (ii).

Recommendation: UNHCR recommends adoption of the changes in recast Recital 18 and in Article 2 (j), as well as Recital 17 and Article 2(k). UNHCR would support further amendments to Article 2 (j) to allow for the application of broader criteria in identifying those family members who are entitled to basic rights under the Directive, with a view to protecting the unity of the family.

10. Unaccompanied Minors

The proposal contains a more positive obligation to carry out family tracing for separated children (Article 31(5)) than the current Directive. Family tracing has been identified as an area with some shortcomings under current practice, *inter alia*, in the Odysseus Study.[33]

Recommendation: UNHCR welcomes the suggested amendment and recommends extending the scope of Article 31 (5) to require initiation both of guardianship and family tracing processes before, and not merely after, international protection has been granted. Key decisions, including whether to apply for protection, should take into account the outcome of family tracing, and are best done with the support of a guardian.

11. UNHCR recommendations for additional amendments

The EC's proposals constitute an important step towards more fully reflecting the principles and obligations of the 1951 Convention, human rights law, and other relevant treaties in EU law. However, these amendments may not be sufficient to ensure full and effective implementation of these instruments.

Some of UNHCR's additional recommendations, including those below, would require the substantive amendment of parts of the Qualification Directive which remain unchanged in the Commission's recast proposal. In these cases, aware of the recast rules and considering the importance of the amendments it proposes, UNHCR suggests use be made of the provisions set out by Article 8 of the "Interinstitutional Agreement on the more structured use of the recasting techniques for legal acts".[34] Among the provisions where UNHCR sees scope for further improvement, but which are not addressed, are:

[33] Op. cit. Note 8.

[34] European Union, *Interinstitutional Agreement on a more structured use of the recasting technique for legal acts*, Official Journal C 077 , 28/03/2002, P. 0001 – 0003, Article 8: "Where, in the course of the legislative procedure, it appears necessary to introduce substantive amendments in the recasting act to those provisions which remain unchanged in the Commission's proposal, such amendments shall be made to that act in compliance with the procedure laid down by the Treaty according to the applicable legal basis". See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002Q0328:EN:HTML.

- exclusion provisions (recast Articles 12, 17);
- revocation (recast Articles 14, 19);
- the effectively increased burden of proof which attaches to claimants who do not apply as early as possible (recast Articles 4 (1) read with 4 (5));
- scope for Member States to reject "*sur place*" claims where the risk of persecution is based on circumstances created by the applicants' "own decision" (recast Article 5) – see comments on recast Article 20 (6) and (7) above;
- retention of the reference to international organisations as potential "actors of protection" (recast Article 7);
- on particular social group, clarification that the alternative, and not cumulative approach to social perceptions and shared characteristics (recast Article 10);
- subsidiary protection criteria for individuals threatened by indiscriminate violence in situations of armed conflict (recast Article 15 (c)).

Detailed comments are provided below to some of these points.

a. Exclusion from Refugee Status and Subsidiary Protection (Articles 12, 17)

The Qualification Directive creates an obligation to exclude persons from refugee status when the clauses set out in the present Article 12 (2) apply. The Qualification Directive, in its Article 12 (2) and (3), restates the exclusion criteria of Article 1 F of the 1951 Convention, but in addition offers a partial interpretation of two of the criteria. These additional elements should be construed in a way which is consistent with the UNHCR Guidelines. UNHCR has called for the narrow interpretation of the exclusion clauses of the Directive[35] and remains particularly concerned about the mixing of grounds for exclusion with grounds for exception to principle of *non-refoulement.*

UNHCR would propose the deletion of Article 12 (3), as it could lead Member States to exclude persons lacking the intent to commit crimes, who thus could not be deemed individually responsible under international criminal law. Furthermore, Article 12 (2) (b) interprets the term "prior to admission as a refugee" to mean the time of issuing a residence permit based on the granting of refugee status. Given that the recognition of refugee status is a declaratory act (as stated in Recital 14 of the Directive), the expression "admission as a refugee" in Article 12 (2) (b) should be understood as the physical arrival of the asylum seeker in the host country. The exclusion clause contained in this provision should therefore only cover "serious non-political crimes" committed outside the host country. Acts committed by the refugee during his stay in the host country, prior to grant of any residence permit, should be dealt with through criminal procedures and, where applicable, in the context of the exception to the *non-refoulement* principle.

[35] Advocate General Mengozzi, in his opinion on the preliminary reference in *Bundesrepublik Deutschland v B (C-57/09) and D (C101/09)* (pending as of July 2010 before the Court of Justice) acknowledged that a particularly careful approach is required given the potential consequences of application of the exclusion clauses (See para. 46 etc., at http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&Submit=Submit&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoj=docnoj&docnoor=docnoor&radtypeord=on&typeord=ALL&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=B&domaine=&mots=&resmax=100 (not available in English).

Recommendation: UNHCR believes that Article 12 should be amended to reflect the wording of 1951 Convention and that the sentence "which means the time of issuing a residence permit based on the granting of refugee status" should be deleted, along with section 12 (3).

b. Revocation of Refugee Status or Subsidiary Protection (Articles 14, 19)

In its comments to the current Directive, UNHCR has noted that Article 14 and 19 concerning revocation of refugee status and subsidiary protection seem to confuse the legal concepts of cessation, cancellation and revocation. Cessation refers to the ending of refugee status pursuant to Article 1C of the 1951 Convention because international refugee protection is no longer necessary or justified. Cancellation means a decision to invalidate the recognition of refugee status, where it is subsequently established that the individual should never have been recognized, including in cases where he or she should have been excluded from international refugee protection. Revocation refers to the withdrawal of refugee status in situations where a person properly determined to be a refugee engages in excludable conduct which comes within the scope of Article 1F (a) or (c) of the 1951 Convention after recognition.

Article 14 (4) expands the grounds for exclusion far beyond the clauses enshrined in Article 1 (F) of the 1951 Convention and in Article 12 (2) of the Qualification Directive, as Article 14 (4) deprives the concerned individual from the refugee status on the grounds that he/she poses a danger to the security or to the community of the host Member State. These terms are undefined, and could be susceptible to subjective and/or arbitrary interpretation, as well as widely different approaches among Member States. There is a risk that decisions on whether a person poses a danger to the security or community of a Member State may be taken in proceedings where the concerned persons are not entitled to see all the evidence against them or to respond effectively, which increases the possibility of incorrect application of these provisions.

Article 14 (4) of the Directive runs the risk of substantive departure from the exclusion clauses of the 1951 Convention, by adding the provision of Article 33 (2) of the 1951 Convention (exceptions to the non-*refoulement* principle) as a basis for exclusion from refugee status. Under the Convention, the exclusion clauses and the exception to the *non-refoulement* principle serve different purposes. The rationale of Article 1F, which exhaustively enumerates the grounds for exclusion based on the conduct of the applicant, is twofold. Firstly, certain acts are so grave that they render their perpetrators undeserving of international protection. Secondly, the refugee framework should not prevent serious criminals from facing justice.

By contrast, Article 33 (2) deals with the treatment of refugees and defines the circumstances under which they could nonetheless be *refouled*. It aims at protecting the safety of the country of refuge or of the community. The provision hinges on the assessment that the refugee in question is a danger to the national security of the country or, having been convicted by a final judgment of a particularly serious crime, poses a danger to the community.

In practice, Member States have very different interpretations of a "*serious non-political crime*" and some are using a very broad interpretation of crimes that can lead to exclusion. For example, some states consider any acts punishable with four years of imprisonment under their national law as "*serious crimes*" leading to exclusion. Many states improperly exclude people from refugee recognition based on criteria which could permit expulsion under the Convention (and Article 21 of the Directive), but not the loss of protected status. Many of those states fall yet further short of international standards through very broad interpretations of concepts such as "*particularly serious crime*."

Beyond these provisions, the Directive has added an additional exclusion clause in Article 14 (5). UNHCR's concern that Article 14 (5) runs the risk of departing substantively from the exclusion clauses of the 1951 Convention would appear to be justified following the review of national implementing legislation and state practice in UNHCR's study on the implementation of the Qualification Directive.[36] UNHCR has consistently stressed that refugee status is declaratory, not constitutive. Therefore, UNHCR has recommended that the word "status" in Article 14 (5) -- which provides that Member States may decide not to grant status to a refugee on national security grounds -- should be understood by Member States to refer to the protection extended by the state, rather than to refugee status in the sense of Article 1A (2) of the 1951 Convention.[37]

UNHCR recommends that when assessing cessation, revocation, or exclusion, Member States should refer to the 1951 Convention rather than to the Directive's corresponding provisions.[38] UNHCR further notes that, similarly to the cases under Article 14 (1-3), the burden of proof for establishing that the criteria under Article 14 (4) are fulfilled should lie with the Member State applying the provision.

Recommendation: UNHCR recommends that Articles 12 and 14 on exclusion from and revocation of refugee status be amended to bring them into conformity with the 1951 Convention. Articles 17 and 19 providing for exclusion from and revocation of subsidiary protection should be similarly amended.

[36] UNHCR, QD Study, op. cit. Note 9.

[37] UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, at: http://www.unhcr.org/refworld/docid/3f5857684.html. These Guidelines summarize the Background Note on the Application of the Exclusion Clauses, UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003*, at: http://www.unhcr.org/refworld/docid/3f5857d24.html, which forms an integral part of UNHCR's position on this issue.

[38] Op. cit. Note 37, UNHCR Background Note on Exclusion Clauses, paras. 6-7.

c. The effectively increased burden of proof which attaches to claimants who do not apply as early as possible (Article 4 (1) read with 4 (5))

The Directive in Article 4 (1) sets out that the Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. Read together with Article 4 (5), this could be interpreted in a manner prejudicial to the rights of an asylum applicant, depending on the meaning attributed to "as soon as possible".

While the UNHCR *Handbook* (para. 195) sets out that the relevant facts of the individual case will have to be furnished in the first place by the applicant, the *Handbook* also makes clear that the duty to ascertain and evaluate all the relevant facts should be considered a joint responsibility of the applicant and the examiner. If the applicant is unable to provide the necessary evidence, the examiner has to use all means at his/her disposal to produce the necessary evidence in support of the application (para. 196).

UNHCR would like to recall that there may be limits to what the asylum-seeker is able to submit. Due consideration should be given to the circumstances of the case. Persons in need of international protection may arrive in asylum countries with the barest necessities, and without any documents.[39]

Moreover, it should be kept in mind that various circumstances such as, for example, trauma due to past experience, feelings of insecurity, or language problems, may result in a delay in the appropriate substantiation of the claim. In UNHCR's view, such circumstances should be taken into account and late submissions considered in substance, depending on the grounds for the delay and the merits of the claim.

Recommendation: UNHCR would see value in a specific reference in Article 4 that a late submission should not increase the burden of proof for the asylum applicant. Member States are encouraged to interpret Article 4 in accordance with the principles of UNHCR's *Handbook*.

d. Scope to reject "*sur place*" claims where the risk of persecution is based on circumstances created by the applicant's "own decision" (Article 5)

UNHCR welcomes the inclusion of "*sur place*" claims in the scope of this Directive, and the deletion of Article 20 clauses (6) and (7). Even where it cannot be established that the applicant has already held the relevant convictions or orientations in the country of origin, the asylum-seeker is entitled to freedom of expression, freedom of

[39] The ECtHR acknowledges "the special situation in which asylum-seekers often find themselves". See, for instance *Matsiukhina and Matsiukhin v Sweden*, 31260/04, Council of Europe: European Court of Human Rights Admissibility decision of 21 June 2005, p. 9, at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Matsiukhin&sessionid=56879738&skin=hudoc-en, and *Collins and Akaziebie v. Sweden*, 23944/05, Council of Europe: European Court of Human Rights, Admissibility decision of 8 March 2007, p. 13, at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Akaziebie&sessionid=56879624&skin=hudoc-en.

religion and freedom of association, within the limits defined in Article 2 of the 1951 Convention and other human rights instruments. Such freedoms include the right to change one's religion or convictions, which could occur subsequent to departure, e.g. due to disaffection with the religion or policies of the country of origin, or greater awareness of the impact of certain policies.

In UNHCR's view, the "*sur place*" analysis does not require an assessment of whether the asylum-seeker has created the situation giving rise to persecution or serious harm by his or her own decision. Rather, as in every case, what is required is that the elements of the refugee definition are in fact fulfilled. The person who is objectively at risk in his or her country of origin is entitled to protection notwithstanding his or her motivations, intentions, conduct or other surrounding circumstances. The 1951 Convention does not, either explicitly or implicitly, contain a provision according to which its protection is unavailable to persons whose claims for asylum are the result of actions abroad. The phrase "without prejudice to the Geneva Convention" in Article 5 (3) would require such an approach.

Recommendation: UNHCR recommends deletion of Article 5 (3).

e. Subsidiary protection for individuals threatened by indiscriminate violence in situations of armed conflict (Article 15 (c)).

There is a consistent State pattern of granting subsidiary protection to persons who face indiscriminate but serious threats as a result of armed conflict or generalized violence. Moreover, Member States have over the years repeatedly reaffirmed their support for UNHCR's mandate activities to secure international protection for persons fleeing the indiscriminate effects of violence associated with armed conflicts or serious public disorder. This evolution in the application of the UNHCR mandate has been matched by regional arrangements, in particular in Africa, in the form of the 1969 *Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa*, and in Latin America, by the 1984 *Cartagena Declaration.* In Europe, a series of Recommendations of the Parliamentary Assembly and the Committee of Ministers of the Council of Europe, in particular Recommendation (2001)18 of the Committee of Ministers on Subsidiary Protection, adopted on 27 November 2001, similarly recognize the need for international protection in such cases.[40] UNHCR therefore welcomes the reflection of such needs in the Directive.

UNHCR considers that the added value of Article 15 (c) is its ability to provide protection from serious risks which are situational, rather than individually targeted. Article 15(c) should be construed as a basis for the grant of subsidiary protection to persons, including former combatants, at risk from indiscriminate violence in broadly-defined situations of armed conflict. The requirement for an "individual" threat should therefore not be interpreted in an excessively narrow manner, but rather as requiring that the risk faced by the individual claimant is real, and not remote, in his or her individual circumstances. Even though applications for protection are assessed in an

[40] See also *NA. v. The United Kingdom*, 25904/07, Council of Europe: European Court of Human Rights, 17 July 2008, at: http://www.unhcr.org/refworld/docid/487f578b2.html, para. 115, and *F.H. v. Sweden*, 32621/06, Council of Europe: European Court of Human Rights, 20 January 2009, at: http://www.unhcr.org/refworld/docid/4978a2192.html, para. 90, referring to extreme cases of general violence, including outside the context of an armed conflict.

individual asylum procedure, eligibility for subsidiary protection under Article 15 (c) should extend to risks which (potentially) threaten groups of people.[41]

The notion of "individual" threat should, in UNHCR's view, serve to remove from the scope of the provision persons for whom the alleged risk is merely a remote possibility, for example because the violence is limited to a specific region, or because the risk they face is below the relevant "real risk" threshold.

In UNHCR's view and with reference to *Elgafaji v. Staatssecretaris van Justitie*, the notion of an "individual" threat should not lead to an additional threshold and higher burden of proof.[42] Situations of generalized violence are characterized precisely by the indiscriminate and unpredictable nature of the risks civilians may face. At the same time, UNHCR agrees that such risks should be immediate and not merely be a remote possibility as, for example, when the conflict and the situation of generalized violence are located in a different part of the country concerned. Since a harmonized understanding regarding beneficiaries of temporary protection has been achieved, it would be consistent if individuals fleeing for similar reasons (but outside the context of a mass influx) were to be granted protection under this Directive.

UNHCR further notes that the provision is restricted to cases where the threshold of an "internal or international armed conflict" is reached. Persons fleeing indiscriminate violence and gross human rights violations more generally would, however, also be in need of international protection. UNHCR suggests that States should recognize the need to grant protection broadly in transposing and applying this provision.

Recommendation: UNHCR recommends that in the application of Article 15(c), the requirement for an "*individual*" threat should not be interpreted by States in an excessively narrow manner, but rather as requiring that the risk faced by the individual claimant be real, and not remote, in his or her individual circumstances.

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[41] UNHCR, *Statement on Subsidiary Protection under the EC Qualification Directive for People Threatened by Indiscriminate Violence*, January 2008, at: http://www.unhcr.org/refworld/docid/479df7472.html.

[42] See *Elgafaji v. Staatssecretaris van Justitie*, C-465/07, European Union: European Court of Justice, 17 February 2009, at: http://www.unhcr.org/refworld/docid/499aaee52.html.