UNHCR
The UN Refugee Agency

UNHCR COMMENTS

on the European Commission Proposal for a Qualification Regulation – COM (2016) 466

(Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents – COM (2016) 466)

These comments complement UNHCR's overarching proposals for the EU as set out in: "Better Protecting Refugees in the EU and Globally" (December 2016), aimed at rebuilding trust through better management, partnership and solidarity.[1] Those proposals focus on four elements: engagement beyond EU borders, preparedness, a well-managed asylum system and greater emphasis on integration.

The pressures and shortcomings observed in some Member States following large-scale arrivals in 2015 highlighted the need for a revitalized asylum system in the EU. In its overarching proposals UNHCR recommends that, in addition to ensuring access to territory is guaranteed and new arrivals are registered and received properly, a new asylum system would also allocate responsibility for asylum-seekers fairly among EU Member States, and ensure that EU Member States are equipped to fulfil their task.

To complement and elaborate on these overarching proposals, UNHCR is setting out its position on the European Commission's proposals to reform the CEAS in a series of detailed commentaries. This paper contains UNHCR's comments on the specific aspects of the EC's proposal for a Qualification Regulation. UNHCR calls on States to apply all legal concepts for determining refugee or subsidiary protection status in full compliance with international refugee and human rights law, including EU law and EU fundamental rights standards. States should grant refugees and beneficiaries of subsidiary protection a secure and stable status, support their ability to integrate through granting of such status and associated rights, and facilitate their naturalization, with incentives used to reduce onward movement, rather than sanctions. UNHCR therefore considers that integration measures should be available, accessible and affordable or free of charge.

As the proposal would turn the current Qualification Directive into a Regulation, and thus give it directly binding effect, realizing these elements is even more essential for the purpose of achieving harmonised and high quality protection standards throughout the EU.

[1] UNHCR, *Better Protecting Refugees in the EU and Globally: UNHCR's proposals to rebuild trust through better management, partnership and solidarity*, December 2016, available at: http://www.refworld.org/pdfid/58385d4e4.pdf.

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EXECUTIVE SUMMARY

The proposal would convert the current recast Qualification Directive (QD) into a Regulation, giving it directly binding effect in EU Member States. The proposal contains both welcome clarifications and provisions that are of concern. Some of UNHCR's concerns regarding the current recast QD, which were expressed on previous occasions,[2] remain unresolved.

The purpose of the proposal is to further harmonise the criteria by which Member States define who qualifies for international protection, i.e. refugee as well as subsidiary protection status, as well as their rights; to achieve more convergence of asylum decisions in the EU; to ensure international protection is granted only for as long as the grounds for persecution or serious harm persist without affecting persons' integration prospects; and to address onward movement of beneficiaries of international protection.[3]

UNHCR supports the aims of the proposal and welcomes a number of important clarifications that the proposal makes. However, UNHCR is concerned about some of the measures introduced to achieve these aims as well as a number of provisions retained from the current recast QD. These concerns include:

Status review

The proposal introduces a mandatory review of protection status, in particular on two occasions:

- a significant change in the country of origin which is relevant for the protection needs of the individual beneficiary of international protection, and
- the first renewal of residence permits issued to refugees (which takes place after three years) and the first and second renewal of residence permits issued to beneficiaries of subsidiary protection (after one year and again after three years).

UNHCR has consistently underlined that refugees and beneficiaries of subsidiary protection are entitled to a secure and stable status, which should not be subject to regular review. UNHCR has called on States to support the ability of people in need of international protection to attain local integration through the timely grant of a secure legal status and residency rights, and to facilitate their naturalization. Short-term residence permits and regular review of status creates legal uncertainty and is likely to impact on the integration prospects of refugees. Finally, UNHCR expects the proposed reviews to place a heavy administrative burden on Member States, many of which are already struggling with large backlogs of asylum applications. UNHCR also questions the added value of mandatory reviews, as Member States always retain the right to review international protection needs and to revoke, end or refuse to renew status on certain grounds. UNHCR therefore recommends that the provisions on mandatory status review are deleted.

Withdrawal of international protection and exclusion from refugee status

Like the current recast QD, the proposal contains provisions for the revocation of, ending of and refusal to renew refugee status which depart from the framework of the 1951 Convention Relating to the Status of Refugees (the "1951 Convention") by adding grounds for exclusion which are not foreseen in international refugee law. Similarly, the proposed provision on exclusion from refugee status retains wording which goes beyond the text of the 1951 Convention. In addition, a new provision proposes that exclusion from status would depend exclusively on the conditions set out in the new Regulation, and explicitly excludes any additional proportionality assessment.

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2 See, in particular, UNHCR, *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)*, 29 July 2010, ("2010 UNHCR APD Comments") available at: http://www.refworld.org/docid/4c503db52.html.

3 European Union, *Regulation on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents*, ("Qualification Regulation"), Explanatory Memorandum, pp. 4-5.

UNHCR continues to advocate for provisions related to the withdrawal of international protection to be made fully consistent with the 1951 Convention. The same is true for exclusion clauses, which need to be brought fully in line with the wording of the 1951 Convention. Those provisions that extend the grounds for the revocation of, ending of and refusal to renew refugee status, as well as for exclusion beyond what is foreseen in international refugee law should not be adopted.

Applicants' obligations

The proposal maintains the requirement for applicants to substantiate their claims at the earliest opportunity or risk an adverse credibility finding. In addition, the proposal introduces an obligation on the applicant to substantiate the application, as well as to cooperate with the determining authority. Thus, the recast QD's parallel provision, which stipulates the duty of the *Member State* to assess the relevant elements of the application in cooperation with the applicant, has been replaced by a provision that places obligations solely on the applicant. UNHCR considers that due consideration should be given to the circumstances that may lead to delays in applying for international protection or appropriately substantiating the claim as there may be justifiable reasons for the delay. In addition, the duty to ascertain and evaluate all relevant facts is shared between the applicant and the determining authority. It may be necessary for the determining authority to use all means at its disposal to produce the necessary evidence in support of the application. In cases where such independent research is not successful, or where the applicant's statements are not susceptible of proof, the applicant may be given the benefit of doubt, if his or her account appears credible, in line with the case law of the European Court of Human Rights (ECtHR).

Amendment of the Long-Term Residents Directive

According to the proposal, the five year period of legal residence required as a precondition for long term residence in a Member State under the Long-term Residents Directive (LTRD)[4] is to re-start every time a person moves irregularly to another Member State. This is introduced for the purpose of "providing for additional disincentives" to "address[…] secondary movement of beneficiaries of international protection"[5].

UNHCR considers that incentives, rather than sanctions, should be used to reduce onward movement and advocates for the management of movement to be seen in the context of integration. It considers that refugees who are self-reliant should be able to establish themselves in any EU Member State after six months of having been granted international protection.

Internal protection checks

Under the proposal, assessing the availability of internal protection is a mandatory part of the asylum procedure.

UNHCR recalls that an internal protection or flight alternative is neither a stand-alone principle nor an independent test for determining refugee status. Further, requiring internal protection checks is not necessary to achieve more efficient asylum procedures. To the contrary, such a requirement could increase the scope of inquiries that decision-makers must undertake in each case, potentially entailing delays without strengthening the quality of decision-making. UNHCR therefore recommends that internal protection checks continue to be optional.

Sur place refugees

The proposal requires Member States normally not to grant protection status where an applicant has filed a subsequent application if the risk of persecution or serious harm is based on circumstances that s/he has created by his or her own decision since leaving the country or origin.

UNHCR recalls that 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 fulfilled, noting that an assessment on the need for international protection is forward-looking. Despite the fact that this provision is to be applied without prejudice to the 1951 Convention and the European

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4 European Union: *Council of the European Union, Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who are Long-Term Residents*, 23 January 2004, OJ L. 16-44; 23. 1. 2004, 2003/109/EC, ("Long-Term Residents Directive").

5 Qualification Regulation, note 3 above, Explanatory Memorandum, p. 5.

Convention on Human Rights (ECHR), to avoid confusion and a possible breach of both instruments, it is recommended that the provision is deleted.

Differentiation between statuses

The proposal differentiates between refugees and beneficiaries of subsidiary protection in three main areas:

- **Status review:** for refugees, status review takes place after three years; for beneficiaries of subsidiary protection review takes place after one year;
- **Social benefits:** benefits can be reduced to "core benefits" for beneficiaries of subsidiary protection;
- **Exclusion:** the criteria for exclusion in relation to beneficiaries of subsidiary protection status are broader.

UNHCR has welcomed the alignment of the two statuses as one of the previous (2013) recast QD's main goals, and continues to consider that differentiation is in most cases not justified. Where flight experiences and protection needs are very similar, differentiation may amount to discrimination under EU law and the ECHR. For these reasons it is suggested that the two statuses are aligned to decrease the risk of violations of rights and consequent litigation.

Linking social assistance to integration measures

Under the proposal, Member States may make integration measures obligatory by making social assistance dependent on participation in integration measures.

UNHCR is concerned that linking social assistance to integration measures may result in hardship. Further, individual circumstances may make it difficult for beneficiaries of international protection to participate in integration measures. UNHCR recalls that integration is a two way process, requiring participation of both the person and the host society, whereby integration measures must be available, accessible, and affordable or free of charge. The respective provision may therefore be clarified to this effect.

1 INTRODUCTION

Goals of the proposal

The proposed Qualification Regulation[6] would replace the current recast Qualification Directive (QD),[7] setting out the criteria for applicants to qualify for international protection, i.e. refugee status or subsidiary protection. Being directly applicable in the EU Member States, the Regulation aims to harmonise protection standards throughout the EU.

The proposal seeks to address three issues that the European Commission (EC) considers to be main challenges:

- "differences in recognition rates and in the level of rights in the national asylum systems attached to the protection status concerned", which is considered to "create incentives for applicants for international protection to claim asylum in Member States where those rights and recognition levels are perceived to be higher than others", i.e. producing **onward movement**;
- the **lack of cessation checks** which is considered to give "the protection a de facto permanent nature, thereby creating an additional incentive for those in need of international protection to come to the EU rather than to seek refuge in other places, including in countries closer to their countries-of-origin."; and
- **optional provisions** that "allow Member States a wide degree of discretion".[8]

Based on two studies on the application and implementation of the current recast QD commissioned in 2015, the EC concludes that there is a need for a more harmonised approach, and that protection should not be a permanent status.[9]

Concretely, the proposal aims at:[10]

- **harmonisation of the criteria for qualification for international protection**, by providing more prescriptive rules and making optional ones compulsory, including the applicant's duty to substantiate the application, the assessment of internal protection, and withdrawal grounds in cases in which the applicant is considered to be a threat to national security.
- **more convergence of asylum decisions**, by obliging determining authorities to take into account the common analysis and guidance on Country of Origin Information (COI) provided by the European Union Agency for Asylum (EUAA), which is to be established.[11]
- **ensuring international protection is granted only as long as needed**, without affecting the person's integration prospects. The proposal seeks to achieve this by regular mandatory status reviews, triggered by (i) significant changes in the country of origin and (ii) renewal of residence permits. A decision to end protection status takes effect after a three-month "grace period", during which a person can apply for another status. In order to facilitate active integration despite such status reviews, the proposal makes social assistance conditional on effective participation in integration measures.
- **preventing onward movement**, by prohibiting beneficiaries of international protection to reside in Member States other than the one that has granted protection, and amending the Long-term Residents Directive (LTRD)[12] to the effect that the required legal residence period of 5 years restarts when the person is found in another Member State without the right to stay or reside.
- **harmonising rights of beneficiaries of international protection**, in particular on residence permits and social assistance.

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6 See note 3 above.

7 European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)* ("recast Qualification Directive").

8 Qualification Regulation, note 3 above, Explanatory Memorandum, p. 4.

9 UNHCR considers that these studies are of limited scope, given that the current recast Qualification Directive was only adopted in late 2011, implementation varied between Member States, and therefore it is difficult to draw long-term conclusions from them.

10 Qualification Regulation, note 3 above, Explanatory Memorandum, pp. 4-5.

11 European Union, *Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM(2016) 271 final.*

12 Long-Term Residents Directive, note 4 above.

Main changes and observations

The main legislative change is turning the recast QD into a **regulation**. Given the direct legal applicability of a regulation at national level, and its prevalence over national legislation, this aims at contributing to a convergence of decision-making.

In terms of substance, main changes include the introduction of mandatory **status reviews** and mandatory **internal protection checks**. In addition, the proposal includes new sanctions in case of onward movement, mandatory integration measures, and an obligation normally not to grant international protection in "sur place" situations in case of subsequent applications where the risk of harm is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin.

In general, UNHCR welcomes a number of changes that codify case law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). This includes the addition of certain post-flight spouses in the definition of family members (Article 2(9)),[13] the fact that it is not necessary to categorize an armed conflict under Article 16(c) as an armed conflict within the meaning of international humanitarian law (IHL) (Recital 35), and the fact that persons fleeing indiscriminate violence do not necessarily need to prove that they are specifically targeted (Recital 36).[14] Further, while UNHCR appreciates the introduction of the rule that persons do not need to behave discreetly or abstain from certain practices in order to avoid persecution (Article 10(3)),[15] UNHCR is concerned that this is limited to cases where such behaviour or practices are inherent to the person's identity.

In addition, **UNHCR welcomes** proposals that would ensure that:

- when assessing an internal protection alternative, the determining authority must take into account the accessibility, effectiveness and durability of protection, as well as the applicant's personal circumstances;
- beneficiaries of international protection shall enjoy equal treatment with nationals regarding working conditions and collective labour rights, employment-related education and advice services afforded by employment offices; and
- beneficiaries of international protection shall enjoy equal treatment regarding the validation of prior experiences.

While UNHCR welcomes the proposal's aim to incorporate several **court rulings**, particularly those of the CJEU, it is to be noted that these are interpreted restrictively and distilled into narrow points, rather than reflecting the underlying principles. This is particularly clear in case of exclusion.[16]

In addition, **UNHCR is concerned** that some of the proposals may be at variance with international refugee law, international and European human rights law, and EU law. Of particular concern are the proposed:

- mandatory status reviews;
- provisions on revoking of, ending of or refusing to renew status;
- provisions on exclusion of status;
- mandatory internal protection checks;
- obligations on applicants, insofar they involve a shift of the burden of proof;
- differentiation between the rights of refugees and beneficiaries of subsidiary protection;
- obligation not to normally grant international protection in "sur place" situations in case of subsequent applications where the risk of harm is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin; linking of social assistance to integration measures.

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[13] *Hode and Abdi v. The United Kingdom*, (Application no. 22341/09), Council of Europe: European Court of Human Rights, 6 November 2012, available at: http://www.refworld.org/cases,ECHR,509b93792.html.

[14] Based on *Elgafaji v. Staatssecretaris van Justitie*, C-465/07, European Union: Court of Justice of the European Union, 17 February 2009, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007CJ0465:EN:HTML.

[15] Based on *X, Y, Z v. Minister voor Immigratie en Asiel*, C 199/12 – C 201/12, European Union: Court of Justice of the European Union, 7 November 2013, available at: http://www.refworld.org/cases,ECJ,527b94b14.html, para. 70. *Bundesrepublik Deutschland v. Y (C-71/11), Z (C-99/11)*, C-71/11 and C-99/11, European Union: Court of Justice of the European Union, 5 September 2012, available at: http://www.refworld.org/cases,ECJ,505ace862.html.

[16] See Article 12(6) and, for a discussion relating to the *B and D* case, Section 8. (Exclusion).

Importantly, EU asylum policy must not only be in accordance with EU law and the Charter of Fundamental Rights of the European Union (EU Charter),[17] but also with the 1951 Convention Relating to the Status of Refugees (hereafter the "1951 Convention").[18] This is clearly articulated in Article 78(1) of the Treaty on the Functioning of the European Union (TFEU)[19] and affirmed in Recitals 2, 21 and 27 of the proposal.

UNHCR's mandate

UNHCR offers these comments as the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with governments, seek permanent solutions for refugees.[20] Paragraph 8 of UNHCR's Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees.[21] This supervisory responsibility is reiterated in the preamble of the 1951 Convention whereas Article 35(1) of the 1951 Convention and Article II of the 1967 Protocol relating to the Status of Refugees (1967 Protocol)[22] oblige State Parties to cooperate with UNHCR in the exercise of its functions, in particular its supervisory responsibility.

UNHCR's supervisory responsibility is reflected in EU law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union (TFEU)[23]; in Article 18 of the Charter of Fundamental Rights of the European Union (EU Charter)[24]; as well as Declaration 17 to the Treaty of Amsterdam, which provides that "consultations shall be established with the United Nations High Commissioner for Refugees [...] on matters relating to asylum policy".[25] Lastly, the recast Qualification Directive mentions UNHCR's role in Recital 22, retained in proposed Recital 19 of the Regulation.

Structure

This document sets out UNHCR's key concerns and recommendations on the Proposal for a Qualification Regulation, focusing on specific issues of relevance from a refugee protection perspective. The legal analysis and recommendations are based on relevant international law, in particular the 1951 Convention and established UNHCR positions, European human rights and EU law, as well as case law, in particular from the CJEU and the ECtHR.

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17 European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, , ("EU Charter"), available at: www.refworld.org/docid/3ae6b3b70.html.

18 UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, , ("1951 Convention"), available at: www.refworld.org/docid/3be01b964.html.

19 European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, ("TFEU"), available at: www.unhcr.org/refworld/docid/4b17a07e2.html.

20 UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), para. 1, ("UNHCR Statute"), available at: www.refworld.org/docid/3ae6b3628.html.

21 UNHCR Statute note 20 above.

22 UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267: www.refworld.org/docid/3ae6b3ae4.html.

23 TFEU, see note 19 above.

24 European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, available at: www.refworld.org/docid/3ae6b3b70.html.

25 European Union: Council of the European Union, *Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts*, 10 November 1997, available at: www.refworld.org/docid/51c009ec4.html.

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APPLICANTS' OBLIGATIONS (ARTICLE 4)

Obligation to substantiate the application and to cooperate with the determining authority

Article 4(1) introduces the applicant's **obligation to substantiate** the application with all elements available to him or her, t**o cooperate** with the determining authority, and to remain present and available throughout the procedure. The determining authority has the obligation to assess the relevant elements of the application. Hereby reference is made to Article 33 of the proposed Asylum Procedures Regulation[26], obliging the determining authority to not only take into account the elements submitted by the applicant but *inter alia* also relevant, accurate and up-to-date country of origin information and the individual position and personal circumstances of the applicant.

UNHCR welcomes the reference to Article 33 of the proposed Asylum Procedures Regulation. It is UNHCR's longstanding position that while the burden of proof in principle rests on the applicant, the **duty to ascertain and evaluate all the relevant facts is shared** between the applicant and the examiner.[27] As such, it is not only the obligation of the applicant to cooperate with the determining authority, but also *vice versa*. Therefore, UNHCR recommends retaining in Article 4(3) an explicit obligation for the determining authority to cooperate with applicant, similar to that which is currently included in Article 4(1) – last sentence – of the recast QD.

In some cases, it may be for the determining authority to use all the means at its disposal to produce the necessary evidence in support of the statements made by the applicant. This is important, as it may be difficult and sometimes impossible for the applicant to provide supporting documentary or other evidence.[28] In cases where such independent research by the determining authority is not successful, or where the applicant's statements are not susceptible of proof, the applicant may be given the **benefit of the doubt**, if his or her account appears credible.[29] This does not depend on whether the applicant has applied for international protection at the earliest possible time as indicated by proposed Article 4(5)(d).

Obligation to apply at the earliest possible time

Proposed Article 4(5)(d), mirroring its predecessor provision (Article 4(5)(d) recast QD), provides that where aspects of the applicant's statements are not supported by documentary or other evidence, no additional evidence shall be required in respect of those aspects where, *inter alia*, the applicant has applied for international protection at the earliest possible time, unless s/he can demonstrate good reason for not having done so (Article 4(5)(d)). This means an effectively increased burden of proof which attaches to claimants who do not apply as early as possible.[30]

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[26] European Union, European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU* ("APR").

[27] UNHCR, *UNHCR Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, available at: http://www.refworld.org/docid/3ae6b3338.html, para. 6. UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, ("UNHCR Handbook"), available at: http://www.refworld.org/docid/4f33c8d92.html, para. 196. See also UNHCR, *Submissions by the Office of the United Nations High Commissioner for Refugees in the appeal of Dawoud* (13/26456 and 13/26784) para. 3.1 and 3.2. See also *R.C. v. Sweden*, Application no. 41827/07, Council of Europe: European Court of Human Rights, 9 March 2010, available at: http://www.refworld.org/docid/4b98e11f2.html, para. 52. See also *J.K. and Others v. Sweden*, Application no. 59166/12, Council of Europe: European Court of Human Rights, 23 August 2016, available at: http://www.refworld.org/cases,ECHR,57bc18e34.html, para. 98, in which the Court held that the general situation in a country must be established *proprio motu* by the competent immigration authorities, because they have "full access to information".

[28] *J.K. and Others v. Sweden*, note 27 above, para. 92.

[29] UNHCR Handbook, note 27 above, paras. 196, 204-205. UNHCR, *Summary of Deliberations on Credibility Assessment in Asylum Procedures, Expert Roundtable, 14-15 January 2015, Budapest, Hungary*, 5 May 2015, ("UNHCR Credibility Assessment Roundtable"), paras. 44-52, http://www.refworld.org/docid/554c9aba4.html. See also *J.K. and Others v. Sweden*, note 27 above, paras. 92-93. In this case, the ECtHR concluded that both Article 4(5) of the recast QD and UNHCR's Handbook recognise "explicitly or implicitly, that the benefit of the doubt should be granted in favour of an individual seeking international protection." (para. 97). In conclusion, the Court held that "[t]he lack of direct documentary evidence thus cannot be decisive per se." (para. 92).

[30] See already 2010 UNHCR APD Comments, note 2 above, p. 15.

In UNHCR's view, a **late submission should not increase the standard of proof** for the applicant. Due consideration should be given to any circumstances of the case that may lead to delays in applying for international protection or appropriately substantiating the claim, including trauma due to past experience, feelings of insecurity, or language problems.[31] UNHCR recalls that a late application or substantiation does not preclude the credibility of the applicant's statements. The facts asserted by an applicant may be credible even if they are demonstrated at a later time. For example, the CJEU has acknowledged that failure to reveal one's sexual orientation on the first occasion does not affect one's credibility.[32]

Recommendation:

In setting out clearly the obligations for the determining authority when assessing the relevant elements of an application, it is recommended to include in **Article 4(3)** a requirement that this is done in cooperation with the applicant. This emphasises the shared burden of proof applicable in assessing applications for international protection.

Regarding the proposed **Article 4(5)**, UNHCR recommends against including a link between the failure to apply for international protection at the earliest opportunity on the one hand, and the assessment of the credibility of an applicant's claim on the other. Instead, UNHCR recommends Article 4(5)(d) be deleted and that Article 4(5) include a reference to the benefit of doubt in line with the "benefit of the doubt" principle outlined in UNHCR's *Handbook*.[33] To this end, **Article 4(5)** may be amended as follows:

> Where aspects of the applicant's statements are not supported by documentary or other evidence, no additional evidence shall be required in respect of those aspects **and the applicant shall be give the benefit of the doubt** where the following conditions are met:
>
> (a) the applicant has made a genuine effort to substantiate his or her application;
>
> (b) all relevant elements at the applicant's disposal have been submitted **[...]**;
>
> (c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case; **[...]**
>
> (d) the general credibility of the applicant has been established."

UNHCR further recommends inclusion of the following as a new **Recital**:[34]

> **While the burden of proof in principle rests on the applicant to substantiate his or her application, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the determining authority. Where aspects of the applicant's statements are not supported by documentary or other evidence, he or she should be given the benefit of the doubt if he or she has made a genuine effort to substantiate his or her application and has submitted all relevant elements at his or her disposal, and his or her statements are found to be coherent and plausible."**

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31 UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report*, May 2013, available at: http://www.refworld.org/docid/519b1fb54.html; UNHCR Credibility Assessment Roundtable, note 29 above; UNHCR), Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/01, ("UNHCR Guidelines No. 9"), available at: http://www.refworld.org/docid/50348afc2.html.

32 The Court concluded that "**to hold that an applicant for asylum is not credible, merely because he did not reveal his sexual orientation on the first occasion** that he was given to set out the grounds of persecution, would be to fail to have regard to the requirement [of an individual assessment] referred to in the previous paragraph." See *A, B, C v. Staatssecretaris van Veiligheid en Justitie*, C 148/13 to C 150/13, European Union: Court of Justice of the European Union, 2 December 2014, available at: http://www.refworld.org/cases,ECJ,547d943da.html, para. 71 [emphasis added].

33 UNHCR Handbook, note 27 above, paras. 195-196.

34 Based on UNHCR, *UNHCR Note on Burden and Standard of Proof*, note 27 above, and in line with ECtHR case law, such as *J.K. and Others v. Sweden*, note 27 above.

Assessments must respect applicant's dignity and privacy

UNHCR welcomes the clarification in **Recital 29** that credibility assessments must respect the applicant's fundamental rights, in particular the right to human dignity and the respect for private and family life. UNHCR also welcomes the reference to CJEU case law,[35] according to which the competent authorities "should use methods for the assessment of the applicant's credibility in a manner that respects the individual's rights as guaranteed by the Charter, in particular the right to human dignity and the respect for private and family life."[36]

The proposal also states that "[s]pecifically as regards homosexuality, the individual assessment of the applicant's credibility should not be based on stereotyped notions concerning homosexuals and the applicant should not be submitted to detailed questioning or tests as to his or her sexual practices."[37] According to UNHCR, a person's sexual orientation is not a matter of fact, easily identifiable through evidence. Sexual orientation and gender identity are broad concepts, which create space for self-identification. Sexual orientation is far more than sexual conduct or a sexual act and rather is fundamental to a person's identity; who they are, how they live in society and how they express who they are. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.[38] It is important to note, however, that sexual orientation and sexual identity are not limited to homosexual persons. In consequence, the reference to homosexuality in the proposal is excessively narrow in scope.

Recommendation:

UNHCR recommends that **Recital 29** should be amended to reflect a wider application to persons of diverse sexual orientation and/or gender identity in line with UNHCR Guidelines on International Protection No. 9.[39]

Recital 29 should therefore be amended as follows:

> In accordance with relevant case law of the Court of Justice of the European Union, when assessing applications for international protection, the competent authorities of the Member States should use methods for the assessment of the applicant's credibility in a manner that respects the individual's rights as guaranteed by the Charter, in particular the right to human dignity and the respect for private and family life. **[A]**s regards **[…]sexual orientation or gender identity**, the individual assessment of the applicant's credibility should not be based on stereotyped notions **[…]**and the applicant should not be submitted to detailed questioning or tests as to his or her sexual practices."

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35 See *A, B, C v. Staatssecretaris van Veiligheid en Justitie*, note 32 above.

36 Recital 29.

37 Recital 29.

38 UNHCR, *UNHCR's Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on Persecution due to Sexual Orientation*, April 2011, available at: http://www.refworld.org/docid/4daeb07b2.html.

39 UNHCR Guidelines No. 9, note 31 above.

3
SUR PLACE REFUGEES (ARTICLE 5)

UNHCR welcomes retention of the provision concerning "international protection needs arising sur place". According to Article 5(1) and (2) the well-founded fear of persecution or risk of serious harm may be based on post-flight events or activities. However, UNHCR is concerned that the proposal also maintains, in Article 5(3), the provision that where an applicant has filed a **subsequent application** s/he shall **normally not be granted an international protection status** if the risk of persecution or serious harm is based on circumstances that s/he has created by his or her own decision since leaving the country or origin.

International protection needs arising sur place is a basic principle of international refugee law: a person who was not a refugee when s/he left the country of origin may become a **refugee 'sur place'** due to circumstances arising in his country of origin during his absence, or as a result of his own actions.[40] This is irrespective of whether the person has created the situation giving rise to a well-founded fear of persecution by his or her own decision. 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.[41] 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. Article 5(3) acknowledges that qualification for international protection needs to be interpreted "without prejudice to the Geneva Convention". As such, Article 5(3) of the proposal may be left without meaning. Therefore, UNHCR recommends Article 5(3) to be deleted.[42]

Recommendation:

A person may become a refugee "sur place" due to circumstances arising in his country of origin during his absence, or as a result of his or her own actions, irrespective of whether the person has created the situation giving rise to a well-founded fear of persecution by his or her own decision. In accordance with the 1951 Convention, a 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.

Therefore, UNHCR recommends the deletion of **Article 5(3)**.

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40 UNHCR Handbook, note 27 above, paras. 95-96.

41 UNHCR Handbook, note 27 above, para. 96. See also See also *Danian v. Secretary of State for the Home Department (Appeal)*, [2000] Imm AR 96, United Kingdom: Court of Appeal (England and Wales), 28 October 1999, para. 28, available at: http://www.refworld.org/docid/3e71dd564.html, and *YB (Eritrea) v. Secretary of State for the Home Department*, [2008] EWCA Civ 360, United Kingdom: Court of Appeal (England and Wales), 15 April 2008, available at: http://www.refworld.org/docid/4805f3312.html, para. 13. This is also supported by the ECtHR's recent case of *F.G. v. Sweden*, a "sur place" case, in which the Court underlined the State's obligation to assess "of its own motion" whether an applicant would face a risk of ill-treatment, where the State is made aware of facts that could create such a risk. This holds true even if the applicant did not rely on these facts. See *F.G. v. Sweden*, Application no. 43611/11, Council of Europe: European Court of Human Rights, 23 March 2016, available at: http://www.refworld.org/cases,ECHR,56fd485a4.html, para. 127. See also recent CJEU cases, in which the Court has held that an applicant does not have to behave discreetly in order to avoid persecution, CJEU in *X, Y, Z* (LGBTI claimants), see note 15 above, and *Bundesrepublik Deutschland v. Y, Z*, note 15 above (on religion).

42 2010 UNHCR APD Comments, note 2 above, p. 16.

4
ACTORS OF PERSECUTION (ARTICLE 6)

Under Article 6 of the current recast QD, the list of actors of persecution or serious harm is non-exhaustive, referring to the state, parties or organisations controlling the state, and, in certain circumstances, non-state actors. By contrast, in the proposal, the list is exhaustive (Article 6).

UNHCR has long maintained that the 1951 Convention does not confer protection exclusively against persecution by state agents. Rather, persecutory conduct can also be committed by non-state agents.[43] As the EC noted in a 2010 report, Member State practice has acknowledged that a broad range of actors are capable of persecution which gives rise to a need for refugee protection.[44] In UNHCR's view, the question as to whether an actor exists that is able and willing to provide *protection* against persecution as included in Article 6(c) is not relevant to determining who can be an actor of *persecution*. While, in cases involving non-State actors, it is necessary to review the extent to which the State is able and/or willing to provide protection against persecution, the question of the existence of potential actors of protection goes beyond the issue of actors of persecution and is regulated separately in Article 7.

Recommendation:

In UNHCR's view the issues of "actors of persecution or serious harm" should be regulated separately from the issue of "actors of protection". In light of Article 7, concerning "actors of protection", UNHCR recommends clarifying the formulation in **Article 6(c)** and deleting the following: "[I]f it can be demonstrated that the actors referred to in points (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as referred to in Article 7".

[43] See UNHCR Handbook, note 27 above, para. 65; See most recently, UNHCR, *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions*, 2 December 2016, HCR/GIP/16/12, ("UNHCR Guidelines No. 12"), paras. 28-30, http://www.refworld.org/docid/583595ff4.html.

[44] An EC QD implementation report states "*Non-State actors accepted as actors of persecution in the practice of different Member States are reported to include guerrillas and paramilitaries, terrorists, local communities and tribes, criminals, family members, members of political parties or movements*". European Commission, *Report from the Commission to the European Parliament and to the Council on the application of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection* granted, COM(2010)314 final, 16 June 2010, p. 6, section 5.1.3, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0314:FIN:EN:PDF.

5
ACTORS OF PROTECTION (ARTICLE 7)

Article 7 maintains the recast QD's provision that protection against persecution may be provided by the State, as well as by "parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State" (Article 7(1)(b)).

UNHCR reiterates that generally, **national protection can only be provided by the State**, and not by non-State actors. It would be inappropriate to equate national protection provided by States with the activities of a certain administrative authority, which may exercise some level of *de facto* – but not *de jure* – control over territory. Such control is often temporary and without the range of functions and authority of a State. Importantly, such non-State entities and bodies are not parties to international human rights treaties, and therefore cannot be held accountable for their actions in the same way as a State. In practice, this generally means that their ability to enforce the rule of law is limited.[45] Specifically in respect of international organisations, such as organs and agencies of the United Nations, they enjoy privileges and immunities.

UNHCR acknowledges that for determining whether actors controlling the State or a substantial part of the State's territory, Article 7(2) requires protection to be effective, durable and accessible for the individual concerned. UNHCR is however concerned that according to Article 7(2), protection shall be considered to be provided when the aforementioned actors "take reasonable steps to prevent persecution or suffering of serious harm […] by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm".[46] According to UNHCR, using the term "reasonable steps" as taken by actors of protection introduces a high level of subjectivity into the determination and is not necessarily conclusive for the availability and effectiveness of protection. Further, while the initial burden of proof correctly lies on the State, the applicant faces a disproportionate burden if required to demonstrate that the measures taken by the actor of protection are insufficient or "unreasonable".

Recommendation:

For these reasons, and in line with its previous position,[47] UNHCR recommends deletion of the phrase "including international organisations" from **Article 7(1)(b)**, as well as of **Article 7(3)**.

To clarify that protection is provided by the operation of an effective legal system as opposed to taking steps to prevent persecution or serious harm as the text currently stipulates, UNHCR recommends amending **Article 7(2)** as follows:

> Protection against persecution or serious harm shall be effective and of a non-temporary nature. **Such […]**protection **may generally […]**be considered to be provided when the actors referred to in paragraph 1 **[…]are** operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to that protection."

[45] See UNHCR Guidelines No. 12, note 43 above, para. 41.

[46] The current Directive refers in this regard not that "protection shall be considered", but that "[s]uch protection is generally provided".

[47] 2010 UNHCR APD Comments, note 2 above, p. 6.

6
INTERNAL PROTECTION CHECKS (ARTICLE 8)

Article 8(1) introduces a **mandatory assessment on internal protection**. Under the current recast QD, this is optional. According to the proposal, the determining authority is obliged to check the availability of internal protection as soon as it establishes that the qualification criteria otherwise apply.

UNHCR is concerned with the proposed **mandatory** nature of this provision. The concept of an Internal Flight Alternative (IFA) is not contained in the 1951 Convention. It is neither a stand-alone principle nor an independent test in the determination of refugee status.[48] Rather, IFA considerations are applied as part of an integrated assessment of a person's well-founded fear of persecution, and of whether the person is "unable or, owing to such fear, is unwilling to avail himself of the protection of [her or his] country."[49] UNHCR **does not consider mandatory IFA checks necessary** to achieve more efficient asylum procedures. Making an IFA assessment[50] mandatory once it has been determined that the applicant is otherwise in need of international protection, risks creating duplication, delaying procedures and frustrating the EC's goal of speeding up decision making. Applying an IFA check requires two main sets of analyses,[51] which increase the workload of the determining authority. In particular, any IFA check requires strong and up-to-date COI, which may not always be readily available. Further, the efficiency of a mandatory test is even more questionable where the state is the actor of persecution or serious harm. The proposal correctly notes in Recital 25 that in cases where persecution emanates from State agents, there is a "presumption that effective protection is not available". In addition, mandatory application of IFA checks will not necessarily lead to further harmonization of asylum decisions, as the determination of whether internal protection is available or not may still greatly vary between Member States.

UNHCR welcomes the clarification, in Article 8(2), that the **burden of demonstrating** the availability of internal protection rests on the determining authority[52] and that the applicant shall not be required to prove to have exhausted all possibilities to obtain protection in the country of origin. This is an important clarification to ensure that the applicant does not face unreasonable obstacles to receiving protection.

UNHCR further welcomes the new **safeguard** provision in Article 8(4), which specifies that when assessing the situation in the part of the country considered safe, the determining authority must take into account the accessibility, effectiveness and durability of protection. In this regard, it is important to note that according to UNHCR "protected zones" or "safe zones" and other similar areas should not necessarily be considered a relevant or reasonable internal protection alternative.[53] Further, according to Article 8(4), the applicant's personal circumstances shall be taken into account. These include, but are not limited to, health, age, gender, sexual orientation, gender identity and social status.[54] In addition, an assessment of whether living in that part of the country imposes undue hardship is required. UNHCR also welcomes that, according to Recital 25, in the case of unaccompanied **children**, IFA assessments under the proposal must satisfy a higher standard. The availability of "appropriate care and custodial arrangements" (Recital 25) must be considered in determining whether internal protection is relevant and reasonable.

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48 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, available at: http://www.refworld.org/docid/3f2791a44.html.

49 Article 1A(2) of the 1951 Convention.

50 In accordance with Article 8(1) of the proposal an IFA assessment includes a relevance and reasonableness test and, in accordance with Recital 25, for children an additional test of the availability of appropriate care and custodial arrangements.

51 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, para. 7, available at: http://www.refworld.org/docid/3f2791a44.html. See, for example, *L.O. v. Ministry of Interior*, 5 Azs 40/2009, Supreme Administrative Court of the Czech Republic, 28 July 2009, where the court defines the criteria for the assessment of IFA. See a summary of the case, available at: http://www.refworld.org/docid/51bec4f04.html.

52 This was confirmed also in *J.K. and Others v. Sweden*, note 27 above, para. 98.

53 UNHCR Guidelines No. 12, note 39 above, para. 43, available at: http://www.refworld.org/docid/583595ff4.html.

54 For the case of SOGI claims, see *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, United Kingdom: Supreme Court, 7 July 2010, para. 21, available at: http://www.refworld.org/docid/4c3456752.html, where the court held that "[t]here is no place, in countries such as Iran and Cameroon, to which a gay applicant could safely relocate without making fundamental changes to his behaviour which he cannot make simply because he is gay."

Despite these increased safeguards, UNHCR is concerned on how the proposed mandatory nature of IFA checks would change their application in **practice**. A 2012 UNHCR Study on the IFA practice in Central Europe shows that while the legal frameworks in the countries surveyed did not raise major concerns, "IFA analysis in the region is often superficial and fragmentary". In particular, "[t]he analysis of IFA during asylum interviews is often performed as a matter of fact, without an informed opportunity for the applicant to comment or rebut it".[55] A new obligation to perform IFA checks is likely to exacerbate this situation.

Recommendation:

UNHCR recommends States retain their discretion to assess the availability on an internal protection alternative, rather than amending EU law to make this mandatory. Therefore, UNHCR recommends **Article 8(1)** to be adjusted as follows:

> As part of the assessment of the application for international protection, the determining authority **[…]may** determine that an applicant is not in need of international protection if he or she can safely and legally travel to and gain admittance to a part of the country of origin and can reasonably be expected to settle there and if, in that part of the country, he or she:
>
> (a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or
>
> (b) has access to protection against persecution or serious harm."

Further, UNHCR recommends the EU position as expressed in **Recital 25 be incorporated into Article 8**, clarifying that an internal protection alternative is presumed not to be available where the state is the actor of persecution or serious harm, and that an additional test of the availability of appropriate care and custodial arrangements is required in the case of an unaccompanied child. Therefore, UNHCR recommends inclusion of an additional paragraph 5 to Article 8:

> **5. Where the State or agents of the State are the actors of persecution or serious harm, it may be presumed that effective protection is not available to the applicant. When the applicant is an unaccompanied minor, the availability of appropriate care and custodial arrangements, which are in the best interests of the unaccompanied minor, should form part of the assessment as to whether that protection is effectively available."**

[55] UNHCR, *The Internal Flight Alternative Practices: A UNHCR Research Study in Central European Countries*, June 2012, available at: http://goo.gl/a8CrQ2.

7
REASONS FOR PERSECUTION (ARTICLE 10)

Based on recent CJEU case law,[56] Article 10(3) clarifies that an **applicant cannot be expected** to behave discreetly or **to abstain** from certain **practices that are inherent to his or her identity**, to avoid the risk of persecution in his or her country of origin. According to UNHCR, a person cannot be denied refugee status on the ground that s/he could change or conceal his or her **identity, opinions or characteristics** in order to avoid persecution.[57] This not only applies to behaviour or practices inherent to the person's identity, but also to other characteristics or practices, e.g. religion[58] or political opinion. For example, requiring an individual to take steps to avoid the imputation of a political opinion would deny him or her the very right to hold or not to hold a political opinion which the 1951 Convention is intended to protect.[59]

Recommendation:

UNHCR recommends amendment of **Article 10(3)** as follows:

> "When assessing if an applicant has a well-founded fear of being persecuted, the determining authority cannot reasonably expect an applicant to behave discreetly or abstain from certain practices**[…]** to avoid the risk of persecution in his or her country of origin."

In addition, Article 10(1)(d) retains the current wording of "particular social group". UNHCR reiterates its longstanding position that the two main schools of thought as to what constitutes a **social group** within the meaning of the 1951 Convention, and as reflected in this Article, should be applied alternatively, not cumulatively.[60] The term "social group" should be interpreted in a manner which reflects the diverse and changing nature of groups in various societies and to evolving international human rights norms.[61] Two main approaches exist as to what constitutes a social group within the meaning of the 1951 Convention.[62] 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. On the other hand, the "social perception approach" is based on a common characteristic creating a cognizable group that sets it apart from the society at large. While the results under the two approaches may frequently converge, this is not always the case. In order to avoid any protection gaps, UNHCR recommends Member States apply the two approaches as alternative, rather than cumulative, criteria.

Recommendation:

To reflect the alternative approach to applying the "particular social group" concept, UNHCR recommends amending **Article 10(1)(d)**, by replacing the word "and" with "or" at the end of the first dot point.

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56 *X, Y, Z v. Minister voor Immigratie en Asiel*, see note 15 above; and *Bundesrepublik Deutschland v. Y, Z*, note 15 above.

57 UNHCR, *UNHCR Observations in the cases of Minister voor Immigratie en Asiel v. X, Y and Z (C-199/12, C-200/12, C-201/12) regarding claims for refugee status based on sexual orientation and the interpretation of Articles 9 and 10 of the EU Qualification Directive*, available at: http://www.refworld.org/pdfid/5065c0bd2.pdf.

58 See *Bundesrepublik Deutschland v. Y, Z*, note 15 above .

59 See UNHCR's submission in *MSM (Somalia)*, C5/2015/3380, available at: http://www.refworld.org/docid/56a23f2b4.html.

60 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*, HCR/GIP/02/02, 7 May 2002, ("UNHCR Guidelines on Particular Social Group"), available at: http://www.unhcr.org/3d58de2da.html, para. 11.

61 UNHCR Guidelines on Particular Social Group, note 60 above, para. 3.

62 See UNHCR, *The "Ground with the Least Clarity": A Comparative Study of Jurisprudential Developments relating to "Membership of a Particular Social Group"*. August 2012, PPLA/2012/02, available at: http://www.unhcr.org/refworld/docid/4f7d94722.html. On whether persons making claims based on sexual orientation may constitute a particular social group see Reference for a preliminary ruling from the *Raad van State (Netherlands)* lodged on 27 April 2012 – *Minister voor Immigratie en Asiel v. X* (Case C-199/12) (2012/C 217/14), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:217:0007:0008:EN:PDF. See also: UNHCR, *UNHCR Statement on the Application of Article 1A(2) of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol to Victims of Trafficking in France*, 12 June 2012, available at: http://www.unhcr.org/refworld/docid/4fd84b012.html.

8
EXCLUSION (ARTICLES 12 AND 18)

In Article 12(1), (2) and (3), the proposal contains provisions for exclusion from refugee status which retain the wording of Article 12 recast QD. In its Article 12(2), the proposal restates the criteria for exclusion based on a person's involvement in criminal conduct. Like the corresponding provisions in the recast QD, the exclusion clauses in proposed Article 12(2)(a), (b) and (c) replicate the wording of Article 1 F(a), (b) and (c) of the 1951 Convention, while adding further elements to define the material scope of two of these exclusion grounds, Article 12(2)(b) and Article 12(2)(c).

Article 12(2)(b) retains the interpretation of the term "prior to admission as a refugee" to mean the time of issuing a residence permit based on the granting of refugee status already provided in Article 12(2)(b) recast QD. Given that the recognition of refugee status is a declaratory act,[63] the expression "admission as a refugee" in Article 12(2)(b) should be understood as the **mere physical presence** of the asylum seeker in the host country. This interpretation is based on the rationale that crimes committed in the country of refuge should be dealt with through rigorous domestic criminal law enforcement and/or the application of Article 32 or Article 33(2) of the 1951 Convention, where applicable.[64]

The final clause in proposed Article 12(2)(b) ("particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes") is not part of the wording of Article 1F(b) of the 1951 Convention. An examination of a particularly cruel crime in light of the relevant tests – that is, assessing factors such as the motivation, context, methods and proportionality of the crime to its objectives – would generally result in a determination that the acts in question would be considered "**non-political**" despite their alleged political motivation or purpose. While the reference to "*particular cruel actions*" could thus be seen as "summarising UNHCR's interpretative guidelines",[65] international refugee law nevertheless requires an **individualized examination** of whether or not a crime is "non-political" for the purposes of Article 1F(b) in each case. For exclusion based on this provision to be justified, all other criteria – including the geographic and temporal requirements – must also be met.

Proposed Article 12(2)(c) adds a reference to the Preamble and Articles 1 and 2 of the Charter of the United Nations. While they are not explicitly cited in Article 1F(c) of the 1951 Convention, the scope of this exclusion ground is nevertheless derived from these provisions, which set out fundamental principles that govern the conduct of States in relation to each other and in relation to the international community as a whole. It follows that "acts contrary to the purposes and principles of the United Nations" must have an **international dimension**. Crimes capable of affecting international peace, security and peaceful relations between States, as well as serious and sustained violations of human rights, would fall into this category.[66]

The proposal also retains the current provision in Article 12(3) recast QD. UNHCR recalls that the application of an exclusion clause requires a finding that the person concerned incurred **individual responsibility**, either through the commission of excludable acts or one of the modes of participation in the commission of such acts by others.[67] UNHCR considers that the provision in Article 12(3) is not necessary, and proposes to delete it, as it could lead Member States to exclude persons without having regard to the *actus reus* and *mens rea* requirements to commit, or participate in the commission of, excludable crimes.

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63 See also Recital 18 of the proposal.

64 See also UNHCR, *UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (OJ L 304/12 of 30.9.2004)*, 28 January 2005, ("2005 UNHCR APD Comments"), available at: http://www.refworld.org/docid/4200d8354.html.

65 See *Opinion of Advocate General Mengozzi*, *Bundesrepublik Deutschland v. B and D*, C-57/09 and C-101/09, European Union: European Court of Justice, 9 November 2010, para. 56, http://goo.gl/clw99G. For more detailed guidance see UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 4 September 2003, ("UNHCR Exclusion Clauses Guidelines"), available at: http://www.unhcr.org/refworld/docid/3f5857684.html, and accompanying *Background Note* ("UNHCR Background note on Exclusion"), available at: http://www.unhcr.org/refworld/docid/3f5857d24.html.

66 See, e.g., *Bundesrepublik Deutschland v. B and D*, note 65 above, para. 84.

67 See, e.g., *Bundesrepublik Deutschland v. B and D*, note 65 above, paras. 95-99.

More generally, UNHCR reiterates its position that the exclusion clauses in Article 12(2) must be interpreted narrowly. This has been confirmed by national case law regarding exclusion. As the UK Supreme Court held in *Al-Sirri*, Article 1F(c) "should be interpreted restrictively and used with caution".[68] Similarly, the Austrian Supreme Administrative Court held in a 2015 case that having regard to the severe consequences of exclusion for the person concerned, the exclusion clauses of the 1951 Convention are not only to be interpreted narrowly, but also require sufficient findings of fact, including with regard to possible mitigating factors and defences, in order to determine the conduct which would give rise to exclusion and to weigh the reprehensibility of the offense against the applicant's need for protection.[69] As noted in previous comments, UNHCR also remains particularly concerned about the mixing of grounds for exclusion with grounds for exception to the principle of *non-refoulement*.[70]

Similar considerations as those set out above arise with regard to the parallel provision for beneficiaries of subsidiary protection (Article 18). More specifically, proposed Article 18(1)(b) provides that for a person to be excluded from being eligible for subsidiary protection, the commission of a "**serious crime**" suffices. Further, two additional grounds for exclusion are introduced in Article 18(1) regarding subsidiary protection. First, under Article 18(1)(d) a person shall be excluded from subsidiary protection where s/he constitutes a danger to the community or to the security of the Member State in which s/he is present. Second, according to Article 18(1)(e) a person shall be excluded from being eligible for subsidiary protection where s/he has committed a crime prior to his or her admission, which is punishable by imprisonment if committed in the Member State, and s/he left the country of origin solely to avoid sanctions for the crime. Given the close linkages between refugee status and subsidiary protection status, in so far as they cover persons under UNHCR's mandate, and to avoid differentiation between the two statuses, UNHCR recommends aligning the exclusion grounds for refugee status and subsidiary protection status in accordance with its comments set out in this section.[71] UNHCR notes, moreover, that Member States' obligations under international human rights law with regard to *non-refoulement* apply in the case of exclusion, as laid down in Article 23(1) of the proposal. Therefore, even in a case of exclusion, a potential subsequent return must not violate the principle of *non-refoulement*.[72]

Recommendation:

In accordance with the foregoing, UNHCR recommends that **Article 12(2)(b)** be amended to reflect the wording of 1951 Convention, and more specifically, that the phrase "which means the time of issuing a residence permit based on the granting of refugee status" be deleted, along with **Article 12(3)**.

Further, UNHCR recommends **Article 18(1)(b)** to be amended as follows: "he or she has committed a serious non-political crime, **prior to his or her admission to the Member State concerned**;"

Finally, UNHCR recommends deletion of **Article 18(1)(d)** and **Article 18(1)(e)**.

Serious non-political crimes

Based on the CJEU's decision in *B. and D.*,[73] the proposal introduces a new provision – Article 12(5) – to clarify that certain crimes are to be considered "serious non-political crimes" for the purpose of exclusion under Article 12(2)(b) and (c). Unlike the "particularly cruel actions" mentioned in Article 12(2)(b) – which *may* be classified as serious non-political crimes "even if committed with an allegedly political objective" – the following acts *shall* be classified as **serious non-political crimes** under Article 12(5):

- particularly cruel actions disproportionate to the alleged political objective, and
- terrorist acts, characterised by violence towards civilians, even if committed with a purportedly political objective.

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68 *Al-Sirri (FC) (Appellant) v. Secretary of State for the Home Department (Respondent) and DD (Afghanistan) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, [2012] UKSC 54, United Kingdom: Supreme Court, 21 November 2012, para. 16, available at: http://www.refworld.org/docid/50b89fd62.html.

69 Austria – Supreme Administrative Court, 21 April 2015, Ra 2014/01/0154.

70 2010 UNHCR APD Comments, note 2 above, p. 12.

71 See also Section 13. (Differentiation in duration between protection statuses).

72 See, among others, *J.S.A. v. Ministry of Interior*, 6 Azs 40/2010-7023, Supreme Administrative Court of the Czech Republic, March 2011, where the court held that notwithstanding the exclusion clauses of the 1951 Convention and the QD, there is an obligation under Article 3 of the ECHR not to return any individual to a country where there is a risk of torture or other inhuman or degrading treatment.

73 *Bundesrepublik Deutschland v. B and D*, note 65 above.

UNHCR notes that proposed Article 12(5) seeks to clarify that certain crimes are to be considered "serious" and "non-political" for the purposes of Article 1F(b) of the 1951 Convention (Article 12(2)(b)). The elements set out in proposed Article 12(5) are not, as such, related to the criteria for determining whether or not the acts in question constitute "acts contrary to the purposes and principles of the United Nations".

Proposed Article 12(5) could be read as suggesting that acts falling within the two categories referred to in this provision should automatically be considered as falling within the scope of Article 12(2)(b) and/or (c). As in all instances where exclusion considerations arise, however, a **detailed case-by-case analysis** is required. As the CJEU underlines, the application of exclusion clauses "presuppose[s] a full investigation into all the circumstances of each individual case".[74] The mandatory classification of certain acts as "serious non-political crimes" under these provisions does not, therefore, justify exclusion without an assessment of the individual circumstances of the case, nor does it obviate the need to determine whether the acts in question are appropriately qualified as "terrorist acts".

With regard to **terrorist acts** which may give rise to the application of Article 12(2)(c), the UK Supreme Court held in *Al-Sirri* that "the appropriately cautious and restrictive approach would be to adopt para 17 of the UNHCR Guidelines: 'Article 1F(c) is only triggered in extreme circumstances by activity which attacks the very basis of the international community's coexistence. Such activity must have an international dimension. Crimes capable of affecting international peace, security and peaceful relations between states, as well as serious and sustained violations of human rights would fall under this category.'"[75] UNHCR further notes that acts properly considered to be of a terrorist nature will generally fall within the scope of Article 1F(a), (b) or (c) of the 1951 Convention, depending on the circumstances.

Lack of a proportionality assessment

The proposal contains a new provision in Article 12(6) which states that: "[t]he exclusion of a person from refugee status shall depend exclusively on whether the conditions set out in paragraphs (1) to (5) are met and shall not be subject to any additional proportionality assessment". No similar provision is proposed for beneficiaries of subsidiary protection under Article 18.

It is UNHCR's longstanding view that **proportionality considerations are an important safeguard in the application of exclusion clauses**.[76] In view of the serious consequences of exclusion, which denies the benefit of refugee status to certain persons who otherwise qualify as refugees, proportionality is an essential consideration. While the proportionality principle is not expressly articulated in the 1951 Convention, it is derived from the nature and rationale of the exclusion clauses, as well as the overriding humanitarian object and purpose of the 1951 Convention. As an exception to a human rights guarantee, exclusion clauses must be applied in a manner **proportionate to their objective**. This principle of proportionality has been recognised under international human rights law and international humanitarian law. In the context of an exclusion determination, this requires an assessment of the seriousness of the person's criminal conduct, which should be weighed against the consequences of exclusion. More specifically, a balancing test was mentioned in relation to Article 1F(b) during the negotiation of the 1951 Convention,[77] and has been developed in subsequent case law and expert analysis.[78]

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74 *Bundesrepublik Deutschland v. B and D*, note 65 above, para. 93.

75 See *Al-Sirri (FC) (Appellant) v. Secretary of State for the Home Department (Respondent) and DD (Afghanistan) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, [2012] UKSC 54, United Kingdom: Supreme Court, 21 November 2012, available at: http://www.refworld.org/docid/50b89fd62.html.

76 See UNHCR, *UNHCR Statement on Article 1F of the 1951 Convention Issued in the context of the preliminary ruling references to the Court of Justice of the European Communities from the German Federal Administrative Court regarding the interpretation of Articles 12(2)(b) and (c) of the Qualification Directive*, available at: http://goo.gl/c8wS8r.

77 A/CONF.2/SR. 29, p. 23 and A/CONF.2/SR.24, 13. Proportionality will most frequently be relevant in cases relating to the application of Article 1F(b). This is because the exceptional gravity of the acts covered by Articles 1F(a) and (c), namely war crimes, crimes against peace, crimes against humanity and acts contrary to the principles and purposes of the UN, are likely in many cases, to outweigh the degree of persecution feared. See UNHCR Background note on Exclusion, note 65 above, para. 78.

78 Under Article 1F(b), the terms "serious" and "non-political" warrant a proportionality test to determine if the seriousness and the non-political nature of the crime justify exclusion. UNHCR Background note on Exclusion, note 65 above, paras. 76-78. The Supreme Court of Canada also took this view in the case of *Pushpanathan v. Canada* [1998] 1 SCR 982, stating at para 62, "Article 1F(b) contains a balancing mechanism in so far as the specific adjectives "serious" and "non-political" must be satisfied [...]. This approach reflects the intention of the signatory states to create a humanitarian balance between the individual fear of persecution on the one hand and the legitimate concern of states to sanction criminal activity on the other", cited in Goodwin-Gill and McAdam, *The Refugee in International Law*. For proportionality assessments in expulsion cases, see *Daoudi v. France*, 3 December 2009, Application no. 19576/08, available at: http://www.refworld.org/cases,ECHR,4b1e5c852.html, *H.R. v. France*, 22 September 2011, Application no. 64780/09, available at: http://www.refworld.org/cases,ECHR,4fb232bf2.html and *Labsi v. Slovakia*, 15 May 2012, Application no. 33809/08, available at: http://www.refworld.org/cases,ECHR,4fba49b52.html.

While proposed Article 12(6) seems to echo the CJEU's conclusion in *B. and D.*, it is essential to note that the CJEU arrived at this conclusion only after carving out important caveats, and that both the CJEU and national courts require strong **safeguards** to ensure that exclusion clauses are properly applied.

The most important of these is the requirement that finding a person to have committed a serious non-political crime is conditional on an **individual assessment**. This individual assessment needs to be supported by a case-by-case analysis based on specific facts. Therefore, before the authority may exclude a person from refugee status, it is "necessary to examine all the relevant circumstances"[79] with a view to determining whether the person incurred individual responsibility. "[T]he seriousness of the acts committed" must be considered to decide whether or not a person may be excluded from refugee status, as well as "all the circumstances surrounding the acts in question and the situation of that person".[80] It is only in the light of these safeguards, which ensure that relevant considerations are taken into account as part of the determination of whether or not exclusion is applicable, that an *additional* proportionality assessment is no longer required.

UNHCR is concerned that these safeguards, on which the CJEU's conclusion is based, are not adequately reflected in Article 12(6). Due consideration of the above-mentioned elements is essential to avoid a reading of Article 12(6) that would be at variance with Member States' obligations under international and European law. A literal reading could suggest that a single provision under EU law would abolish proportionality as a central principle of any human rights analysis. This would not only contradict the generally accepted hierarchy of norms, but EU primary law itself.[81]

Proportionality is recognised as a general principle of EU law.[82] For example, **Article 52(1) of the EU Charter of Fundamental Rights** requires a proportionality assessment for "[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter":

> *"Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."*[83]

The **CJEU's case law** in areas in which fundamental rights are limited on the basis of security concerns strongly underlines the need for a proportionality assessment. In *H.T.*, the CJEU engaged in a proportionality assessment to decide whether a person posed a threat to the public order or national security.[84] It held that it was the referring court's obligation "to assess the degree of seriousness of danger to national security or public order of the acts committed". While the CJEU held that the applicant's criminal conviction in that case "must be taken into account, it was nevertheless for that court to ascertain, *regard being had to the principle of proportionality* that the measure to be taken was required".[85]

Recommendation:

In UNHCR's view, proposed **Article 12(5) and (6)** are not required for an interpretation and application of the exclusion provisions in EU law in line with relevant international standards; rather, these proposed provisions risk resulting in decisions that are inconsistent with the object and purpose of the corresponding provisions in Article 1F of the 1951 Convention. For this reason, UNHCR recommends that proposed **Article 12(5) and (6)** be deleted.

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79 *Bundesrepublik Deutschland v. B and D*, note 65 above, para. 98.

80 *Bundesrepublik Deutschland v. B and D*, note 65 above, para. 109. See also Supreme Administrative Court of the Czech Republic, J.S.A. v. Ministry of Interior, 6 Azs 40/2010-7023, March 2011.

81 As the EU Charter is primary EU law and EU law itself needs to be fully compliant with human rights law, of which proportionality is a central test. According to Article 52 of the EU Charter, any limitation of fundamental rights must respect the principle of proportionality, or is otherwise considered void. See European Parliament, *Fundamental Rights in the European Union. The role of the Charter after the Lisbon Treaty*, available at: http://goo.gl/7HU6Qb, p. 1.

82 Article 5 EC Treaty, recognised by the ECR as early as 1970 in I*nternationale Handelsgesellschaft*, [1970] ECR 1125 Case 11/70, where the Advocate General considered the fundamental right of the individual not to have "his freedom of action limited beyond the degree necessary for the general interest" is guaranteed by the general principles of Community law, see Opinion of Mr. Advocate-general Dutheillet de Lamothe delivered on 2 December 1970, 1147.

83 EU Charter, Article 52(1) [emphasis added].

84 *H. T. v. Land Baden-Württemberg*, C 373/13, European Union: Court of Justice of the European Union, 24 June 2015, available at: http://www.refworld.org/cases,ECJ,558bb4a04.html.

85 *H. T. v. Land Baden-Württemberg*, note 84 above, para. 92 [emphasis added].

9

REVOCATION OF, ENDING OF OR REFUSAL TO RENEW REFUGEE OR SUBSIDIARY PROTECTION STATUS (ARTICLES 14, 20)

The proposal provides for **mandatory revocation, ending or refusal to renew** refugee status where the grounds provided for in proposed Article 14(1) are met.

This includes different scenarios:

- Proposed Article 14(1)(a) corresponds to the grounds for **cessation** of refugee status in accordance with Article 11 of the proposal (currently Article 11 recast QD).
- Proposed Article 14(1)(b) (currently Article 14(3)(a) recast QD) contemplates two distinct situations: the first concerns the **invalidation of refugee status** which was wrongly granted in the first place ("cancellation", in UNHCR's terminology) because the person should have been excluded at the time of the initial determination, while the second refers to the application of the **exclusion grounds provided for in Articles 12(2)(a) or 12(2)(c)** ("revocation", in UNHCR's terminology) to persons who were correctly recognized as refugees, but who engage in conduct within the scope of these provisions after recognition.
- Proposed Article 14(1)(c) (currently Article 14(3)(b) recast QD) provides for the withdrawal of refugee status where misrepresentations or omissions were decisive for the granting of refugee status to a person who did not meet the inclusion or exclusion criteria at the time of recognition – this, too, is a scenario in which refugee status that was wrongly granted is to be **invalidated** ("cancellation", in UNHCR's terminology).

Thus, Articles 14(1)(a), (b) and (c) of the proposal (in the same way as the corresponding provisions in the recast QD) provide for different situations in which refugee status may be ended in a manner consistent with the 1951 Convention, provided the relevant criteria are met.[86]

In addition, proposed Articles 14(1)(d) and (e) *oblige* Member States to **revoke, end or refuse to renew refugee status** where the person is considered to be a danger to the security, or a danger to the community after having been convicted of a particularly serious crime. Currently, withdrawal of refugee status on these grounds based on Article 14(4) recast QD is optional. Article 14(1)(f) further specifies that refugee status shall be withdrawn where an exception to protection against *refoulement* based on proposed Article 23(2) is applied. In Article 14(2), the proposal also retains the possibility of not **granting refugee status** in the situations provided for in proposed Articles 14(1)(d), (e) and (f), where such a decision has not yet been taken (currently Article 14(4) recast QD), while also providing that persons to whom these provisions are applied are nevertheless entitled to certain rights (proposed Article 14(3), currently Article 14(6) recast QD).[87]

As noted previously with regard to their predecessor provisions (Articles 14(4)-(6) recast QD),[88] proposed **Articles 14(1)(d)-(f) and 14(2) run the risk of departing substantively from the framework of the 1951 Convention** by adding exclusion grounds which are not foreseen in international refugee law: proposed Article 14(1)(d) and (e), as well as proposed Article 23(2), to which proposed Article 14(1)(f) refers, are based on the exceptions to the principle of *non-refoulement* in Article 33(2) of the 1951 Convention.

Under the 1951 Convention, the **exclusion clauses** (Article 1F) and the **exceptions to the principle of *non-refoulement*** (Article 33(2)) serve **different purposes**. The rationale of Article 1F, which exhaustively enumerates the grounds for exclusion based on criminal conduct of the applicant, is twofold. First, certain acts are so grave that they render their perpetrators undeserving of international protection. Secondly, the refugee protection framework should not stand in the way of prosecution of criminals. By contrast, Article 33(2) deals with the treatment of refugees and defines the circumstances under which they may exceptionally

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[86] See 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, ("UNHCR Cessation Guidelines"), available at: http://www.refworld.org/docid/3e50de6b4.html; UNHCR Exclusion Clauses Guidelines, note 65 above; and *Note on the Cancellation of Refugee Status*, 22 November 2004, available at: http://www.refworld.org/docid/41a5dfd94.html.

[87] Proposed Article 14(3) (retaining the same wording as in Article 14(6) recast QD) refers to Articles 3, 4, 16, 22, 31, 32 and 33 of the 1951 Convention.

[88] 2005 UNHCR APD Comments, note 64 above.

lose their entitlement to protection against *refoulement* under international refugee law. The provision aims at protecting the safety of the country of refuge or of the community. Its application 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. Article 33(2) was not, however, conceived as a ground for terminating refugee status. Unless the person has engaged in conduct which justifies exclusion based on Article 1F(a) or (c) of the 1951 Convention, s/he remains a refugee in the sense of Article 1 of the 1951 Convention. Assimilating the exceptions to the *non-refoulement* principle permitted under Article 33(2) to the exclusion clauses of Article 1F would therefore be incompatible with the 1951 Convention. Moreover, it may lead to an incorrect interpretation of both provisions of the 1951 Convention.[89] In addition, it may have serious negative effects outside the European Union, were it to be replicated and used as a basis for the cancellation or revocation of refugee status in regions with less stringent human rights and rule of law safeguards in place.

Against this background, UNHCR recommends that cases of refugees who are considered a danger to the security of the country of refuge or the community should be dealt with in the light of Article 23 of the proposal (and thus pursuant to the criteria set out in Article 33(2) of the 1951 Convention).

It should also be noted that these clauses, as they are reflected in the current recast QD currently form the basis of a reference for a **preliminary ruling** of the CJEU. In its request to the CJEU, the Czech Supreme Administrative Court asks, *inter alia*, **whether Article 14(4) recast QD is invalid** because it infringes Article 18 of the EU Charter, Article 78(1) of the TFEU, and general principles of EU law.[90] As noted earlier, Article 78(1) of the TFEU states that EU asylum policy "must be in accordance with the Geneva Convention" (the 1951 Convention). Non-conformity would create grounds for the CJEU to invalidate the measure or provision in question.

Recommendation:

UNHCR recommends that the provisions in **Article 14** on revocation of, ending of, or refusal to renew refugee status be amended to bring them into conformity with the 1951 Convention. **Article 20** providing for revocation of subsidiary protection may be similarly amended. This could be achieved by **deleting Articles 14(1)(d)-(f), 14(2)-(3) and 20(1)(d)**. In addition, UNHCR recommends that **Article 23(2), last indent**, be amended to read as follows:

> 2. Where not prohibited by the international obligations referred to in paragraph 1, refugee or a beneficiary of subsidiary protection may be refouled, whether formally recognised or not, when:
>
> (a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present;
>
> (b) he or she, having been convicted by a final judgment of a particularly serious crime constitutes a danger to the community of that Member State.
>
> **[…]**Persons to whom points (a) and (b) shall be entitled to rights set out in or similar to those set out in Articles 3, 4, 13, 16, 20, 22, 25, 27, 29, 31 and 32 of the Geneva Convention in so far as they are present in the Member State."

This is essential in order to avoid the risk of invalidation by the CJEU, in particular as these provisions are proposed to become mandatory.

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[89] Among other things, 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. That these concerns are justified has been confirmed by a 2007 review of national implementing legislation and state practice. UNHCR, *Asylum in the European Union, A study on the implementation of the Qualification Directive*, November 2007, available at: http://www.refworld.org/docid/473050632.html.

[90] CJEU, Case C-391-16 *M*, reference for preliminary ruling by the Supreme Administrative Court of the Czech Republic.

Regarding **non-renewal or revocation of residence permits**, UNHCR notes that the proposal introduces revisions to the predecessor provision in Article 24(2) recast QD, in that the withdrawal of residence permits would be mandatory, requiring Member States not to renew or to revoke residence permits "where reasons of national security or public order so require" (Article 26(2)(c)). UNHCR is concerned with the mandatory nature of proposed Article 26(2)(c) and notes that this provision, which in part reflects the provisions on expulsion of refugees lawfully in the territory under Article 32 of the 1951 Convention, does not comprehensively reflect the Convention obligations applicable in such a case. UNHCR therefore suggests that Article 32 of the 1951 Convention which lays down conditions and procedural safeguards for the expulsion of a refugee to a third country be explicitly reflected in implementing legislation.

Recommendation:

Article 26(2)(c) should be amended as follows:

"2. A residence permit **[…]may** not be renewed or **[…]may** be revoked in the following cases:

(a) where competent authorities revoke, end or refuse to renew the refugee status of a third-country national in accordance with Article 14 and the subsidiary protection status in accordance with Article 20;

(b) where Article 23(2) is applied;

(c) where reasons of national security or public order so require."

10
MANDATORY STATUS REVIEW (ARTICLES 15, 21)

One of the proposal's most significant changes is the introduction of **mandatory status review**. Unlike the recast QD, which does not mention such reviews, the proposal introduces regular and systematic checks on whether the criteria for refugee or subsidiary protection status continue to be met.

According to the proposed Recital 39 – as well as the second sentence of Recital 5 – and Articles 15 (review of refugee status) and 21 (review of subsidiary protection status), status reviews are triggered "*in particular*" when:

- there is a significant **change in the country of origin** (Articles 15(1)(a), 21(1)(b)); or
- **residence permits** are to be renewed:
  - for the first time in the case of refugees, i.e. after three years (Articles 15(1)(a), 26(1)(a))
  - for the first and the second time in the case of beneficiaries of subsidiary protection, i.e. after one year and, again, after three years (Articles 21(1)(b), 26(1)(b)).

According to UNHCR, refugees and others in need of international protection are entitled to a **secure status**. Anything else would be detrimental to refugees' sense of security, which international protection is intended to provide.[91] UNHCR's Executive Committee has called upon States to support refugees' ability to attain local integration through the timely grant of a secure legal status and residence rights, and to facilitate their naturalization.[92] Short-term residence permits and frequent reviews thereof are counter-productive to integration objectives. Further, UNHCR cautions against a potential effect the proposed provisions may have, which is to dissuade people from seeking asylum by creating the perception that it may provide short-term protection only.

More generally, UNHCR questions the added value of Articles 15 and 21 of the proposal. In accordance with Article 26(1) of the proposal the residence permit for both refugees and beneficiaries of subsidiary protection has a temporary validity, with its renewal being regulated by Articles 14 (for refugee status) and 20 (for subsidiary protection status) respectively, in conjunction with Article 26(2)(a). These articles oblige Member States to revoke, end or refuse to renew the international protection status, including because the person has ceased to be a refugee in accordance with Article 11. As such, the implied cessation ground included in Article 15(a) and 21(a) of the proposal has no added value and is confusing in light of Article 11(2) of the proposal. Mandatory status reviews are therefore an improper mechanism to give effect to the cessation clauses under the 1951 Convention. Further, mandating status reviews when renewing residence permits may create an unnecessary burden on the asylum authorities when the grounds listed in Articles 14 and 20 respectively are not applicable. It is therefore unclear what purpose Articles 15 and 21 serve.

Concretely, UNHCR considers status reviews to be problematic for six main reasons.

First, regular and systematic status reviews risk undermining **legal certainty**. UNHCR is especially concerned that the list of grounds in Article 15 is **non-exhaustive** ("in particular"). This leaves open the possibility for Member States to apply status reviews in other, undefined, circumstances, compounding the above concerns. Beneficiaries of international protection would have no legal certainty on how long they will receive protection, as their status may be reviewed not only as a result of new COI or on the occasion of residence permit renewal, but at any time. In a recent case, the ECtHR addressed this issue of legal uncertainty

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[91] UNHCR Handbook, note 27 above, para. 135. See also EXCOM Conclusion No. 69 (XLIII) 1992, where in the context of applying the cessation clauses EXCOM stated that it is important that refugees have the assurance that their status will not be subject to unnecessary review in the light of temporary changes, not of a fundamental character, in the situation prevailing in the country of origin. See also, UNHCR, *Note on the Integration of Refugees in the European Union*, May 2007, available at: http://www.unhcr.org/463b462c4.pdf, ("UNHCR Integration Note"), para. 18.

[92] UNHCR, *ExCom Conclusion No. 104, Conclusion on Local Integration No. 104 (LVI)* – 2005, para. (j), available at: http://www.unhcr.org/excom/exconc/4357a91b2/conclusion-local-integration.html.

and found a violation of Article 8 based on the State authorities' failure to take appropriate measures to keep the applicant's state of uncertainty to a minimum.[93]

Second, the proposed reviews are unlikely to end protection status in many cases, as **protection needs** of persons seeking international protection in the EU are not typically of a short duration. Many current refugee-producing situations worldwide are of a protracted nature, with the average duration being an estimated 26 years.[94] Global forced displacement hit a record high in 2015, with 63.5 million persons being forced to leave their homes due to conflict and persecution.[95] Given the nature of many of the underlying conflicts, it seems likely that the protection needs in the EU of those forcibly displaced by these conflicts are likely to continue. Cessation procedures without any substantive ground for review, such as those proposed in Article 15(b), will therefore be unnecessary in many cases.

Third, UNHCR is concerned that the proposal does not fully reflect the need for **cessation of status to be subject to extensive legal safeguards**. While the proposed Asylum Procedures Regulation (APR)[96] applies to withdrawal procedures and its Articles 51 and 52 specifically apply to regular status reviews as provided for in Articles 15 and 21 QR,[97] its procedural guarantees[98] do not fully correspond to the ones that UNHCR has recommended and which are set out below. In particular, cessation requires an individual assessment and access to firm procedural guarantees (including a right to have the cessation decision reviewed). In addition, it is noteworthy that the QR itself refrains from making reference to said guarantees.

To be in accordance with international law, application of cessation clauses must strictly adhere to the following:[99]

- Most fundamentally, any cessation check must be an **individualised, case-by-case process**. In cases where cessation is applied based on an alleged change of circumstances, this change in the country of origin must remove the basis for any fear of persecution, before cessation could be considered.[100]
- The **change** in the country of origin must be fundamental, stable and durable for cessation to be considered in any individual case.
- For a cessation clause to be applicable, national protection in the country of origin must be **effective and available**.
- National protection means **more than mere physical security** or safety, and would also need to include the presence of a functioning governing authority, the existence of basic structures of administration, including a functioning justice system based on rule of law and justice and the existence of adequate infrastructures to enable residents to exercise their **right to a basic livelihood**.[101]
- The b**urden of proof** to show that the conditions for cessation of status are fulfilled is on the Member State.

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93 *B.A.C. v. Greece*, Application no. 11981/15, Council of Europe: European Court of Human Rights, 13 October 2016, available at: http://www.refworld.org/cases,ECHR,580a37de4.html, paras. 69 and 263. A similar result was reached by the Grand Chamber in *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, available at: http://www.refworld.org/docid/4d39bc7f2.html. See also *A v. Secretary of State for the Home Department*, 27 May 2016, CSIH 38, available at: https://goo.gl/KD37sI, in which a British court held that ""[t]he circumstances in which refugee status may be lost are extremely limited" (para. 66).

94 UNHCR, *Global Trends, Forced Displacement in 2015*, p. 20, available at: http://www.unhcr.org/576408cd7.pdf.

95 UNHCR, *Global Trends: Forced Displacement in 2015*, 20 June 2016, available at: http://www.refworld.org/docid/57678f3d4.html.

96 APR, note 26 above.

97 Article 1(1) in conjunction with Article 4(2)(g), as well as Articles 51 and 52(1) APR, which specifically refer to regular status reviews as provided for in Articles 15 and 21 QR.

98 APR, note 26 above, Article 52.

99 Goodwin-Gill and McAdam, *The Refugee in International Law*, 3rd edition, p. 140; UNHCR Statement on the "Ceased Circumstances" Clause of the EC Qualification Directive, available at: http://goo.gl/Iftplk; UNHCR Cessation Guidelines, note 86 above; Cessation of Status No. 69 (XLIII) – 1992. Executive Committee 43rd session. Contained in United Nations General Assembly Document No. 12A (A/47/12/Add.1). Conclusion endorsed by the Executive Committee of the High Commissioner's Programme upon recommendation of the Sub-Committee of the Whole on International Protection of Refugees, available at: http://www.unhcr.org/excom/exconc/3ae68c431c/cessation-status.html; UNHCR, *Note on Cessation Clauses*, 30 May 1997, EC/47/SC/CRP.30, ("UNHCR Note on Cessation Clauses"), available at: http://www.refworld.org/docid/47fdfaf1d.html; see also Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Aydin Salahadin Abdulla and Others*, 2 March 2010, available at: http://www.refworld.org/cases,ECJ,4b8e6ea22.html.

100 Article 1C(5) of the 1951 Convention does not refer to a general change of conditions, but to a change of "circumstances in connection with which he has been recognised as a refugee". It therefore emphasises the *individual* circumstances, not the general circumstances in the country of origin.

101 UNHCR Note on Cessation Clauses, note 99 above.

- Cessation does not apply to a person 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".[102] In such a case, refugee status should be continued.[103]
- The person concerned must be given the **opportunity to challenge** the authorities' decision to invoke the cessation clause, where its application would result in the termination of residential rights, or in the person's deportation.[104]

Fourth, all of the above requirements mean that status reviews create significant additional **burden for asylum authorities**. Cessation procedures are significantly more onerous than procedures used for renewing a residence permit, requiring significant administrative and judicial resources. If status reviews become a frequent and mandatory obligation, it is likely to exacerbate already large backlogs of asylum processing in many Member States – something that Member States had already cautioned against in the EC stakeholder consultations.[105]

Fifth, mandatory status reviews **risk undermining integration**. UNHCR has observed that the duration of residence permits has a considerable impact on refugees' attitudes. Short-term residence permits are detrimental to refugees' security and stability.[106] UNHCR has therefore urged EU Member States to administer cessation policies in a limited fashion so as to minimize disruptive effects for refugees.[107] Among other main challenges, such as to access housing, status review are particularly likely to harm **employment** prospects, which conflicts with the proposal's goal to ensure effective and non-discriminatory access to labour markets for refugees. Member States have already highlighted the "importance of not unduly undermining integration prospects via the perception that the protection may only be temporary."[108] In light of local integration in the host country being one of the traditional durable solutions, UNHCR has consistently called on States to continue supporting refugees' ability to attain this durable solution through the timely grant of a secure legal status and residence rights, and/or through facilitating naturalization.[109] This is also required by the 1951 Convention[110] and relevant case law[111]. Short-term residence permits and regular status reviews may also expose refugees to risks of labour market exploitation, as precarious status reduces their bargaining power in the employment sector. In addition, a study by mental health experts in Australia in 2006 found that refugees holding temporary protected status experienced higher levels of anxiety, depression and post-traumatic stress disorder than refugees with permanent status, even though both groups of refugees had experienced similar levels of past trauma and persecution in their home countries.[112] Recent UNHCR participatory research shows similar results for Latvia,[113] Lithuania,[114] and Estonia.[115] Mandatory and frequent status reviews are therefore neither in the interests of States nor those of refugees.

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[102] Article 1C(5) of the 1951 Convention.

[103] UNHCR, Note on Cessation Clauses, note 99 above, para. 35.

[104] UNHCR, Note on Cessation Clauses, note 99 above, para. 35.

[105] Qualification Regulation, note 3 above, Explanatory Memorandum, p. 10.

[106] See UNHCR Integration Note, note 91 above, para. 18.

[107] UNHCR Integration Note, note 91 above, para. 21.

[108] Qualification Regulation, note 3 above, Explanatory Memorandum, p. 10.

[109] UNHCR, ExCom Conclusion No. 104, note 92 above.

[110] According to Article 34 of the 1951 Convention, States "shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings [...]."

[111] See *A v. Secretary of State for the Home Department*, note 93 above, para. 66, in which the court holds that "[o]nce refugee status is acknowledged, international obligations require the state to facilitate assimilation and naturalisation".

[112] Shakeh Momartin et al. (2006), *A comparison of the mental health of refugees with temporary versus permanent protection visas*, Medical Journal of Australia 185, pp. 357–361, available at: https://www.mja.com.au/system/files/issues/185_07_021006/mom10496_fm.pdf.

[113] It was found that "persons with alternative status [conferring residence permits valid for only one year] suffer from long-term uncertainty and insecurity and concludes that this inequality impacts negatively on the post-recognition integration." This produces "significant and chronic income, housing and employment insecurity" (p. 77). See UNHCR, *Integration of refugees in Latvia. Participation and Empowerment. Understanding Integration in Latvia through the participation of refugees, integration stakeholder' experiences, and research*, available at: http://www.emn.lv/wp-content/uploads/UNHCR_Integration-of-refugees-in-Latvia.pdf.

[114] It was also found that "Employers are less interested in recruiting refugees with short term legal status as they foresee that their residence permit may not be prolonged", see UNHCR, *Integration of refugees in Lithuania: Participation and Empowerment*, September 2014, available at: http://www.refworld.org/docid/58a486e34.html, p. 44.

[115] The research showed that "the one year duration of the residence permit can create a significant barrier to integration, if the beneficiary is unsure of whether the permit will be prolonged or not" and "refugees explicitly stated that the use of renewable, short-term residence permits, was in itself an obstacle to integration as it created stress and diverted their attention from other areas of importance for the integration process.", see UNHCR, *Integration of refugees in Estonia – Participation and Empowerment*, December 2016, available at: http://www.refworld.org/docid/586e251d4.html, pp. 63, 64.

Sixth and lastly, UNHCR queries the procedural and principle-based rationale for making a **current infrequent practice mandatory**. As the EC points out, "current provisions on cessation of status are not systematically used in practice". [116]This reflects practice at the global level, where cessation is infrequently invoked, although large numbers of refugees voluntarily repatriate without an official declaration that conditions in their countries of origin no longer justify international protection.[117] Furthermore, many States Parties to the 1951 Convention grant permanent residence status to refugees in their territories after several years, facilitating their integration and naturalization. In sum, cessation determinations both on an individual basis as well as through periodic reviews are rare, in recognition of the "need to respect a basic degree of stability for individual refugees".[118]

Recommendation:

For these reasons, UNHCR recommends to delete **Articles 15 and 21**, as well as **Recital 39** and the second sentence of **Recital 5**.

[116] Qualification Regulation, note 3 above, Explanatory Memorandum, p. 4.

[117] UNHCR Cessation Guidelines, note 86 above.

[118] UNHCR Cessation Guidelines, note 86 above, para. 3; UNHCR, *Summary Conclusions on Cessation of Refugee Status, Global Consultations on International Protection Lisbon Expert Roundtable*, May 2001, no. B (17). See also, UNHCR Handbook, note 27 above, para. 135.

11
SUBSIDIARY PROTECTION (ARTICLE 16)

UNHCR welcomes the reaffirmation in Recital 32 of the fact that subsidiary protection is complementary and additional to refugee protection under the 1951 Convention. According to Article 2(5), subsidiary protection applies to those who do not qualify as a refugee, but face a real risk of suffering serious harm in their country of origin. While the provision on "serious harm" itself (Article 16) remains unchanged, Recitals 34 to 36 provide welcome clarifications, based on CJEU case law, regarding the meaning of serious harm consisting of "a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict" (Article 16(c)).

Because of the **primacy of refugee protection** and the limitation under which subsidiary protection only applies to persons who do not qualify as refugees, claims for international protection related to situations of armed conflict require first a full and inclusive assessment of the criteria for refugee status, before being assessed against subsidiary protection criteria.[119] As UNHCR outlined in its Guidelines on International Protection No. 12, many persons fleeing situations of armed conflict and violence may be refugees as such situations may be rooted in, motivated or driven by, and/or conducted along lines of race, ethnicity, religion, politics, gender or social group divides, or may impact people based on these factors. In fact, conduct that may appear to be indiscriminate, may in reality be aimed at whole communities or areas whose inhabitants are actual or perceived supporters of one of the sides in the conflict.[120]

In this context, UNHCR supports the legal obligation to grant subsidiary protection to those who are not refugees but are in need of international protection because they are at risk of serious harm in their country of origin by reason of indiscriminate violence. In this regard, UNHCR would like to address the reference to "situations of international or internal armed conflict" and "individual threat" in Article 16(c) of the proposal.

UNHCR welcomes the clarification in Recital 35 that reference to "**armed conflict**" in Article 16(c) is not limited to armed conflicts within the meaning of International Humanitarian Law (IHL). However, it should be noted that indiscriminate violence may occur outside the context of an armed conflict, i.e. more broadly in situations marked by a material level or spread of violence that affects the civilian population and results in serious and individual threats to people's lives warranting international protection.[121] For the purpose of international protection, the relevant consideration is the level of violence present in the country of origin and the risk of serious harm it creates. UNHCR therefore recommends deleting reference to situations of international or internal armed conflict in Article 16(c) of the proposal and instead suggests reference is made generally to armed conflict and other situations of violence.

On the "**individual threat**" element, the proposal clarifies, in Recital 36, that the applicant is not required to prove that s/he is specifically targeted by reason of factors particular to his personal circumstances.[122] However, when the applicant is able to show s/he is specifically affected by reason of factors particular to her or his personal circumstance, a lower standard of proof applies to the level of indiscriminate violence required to substantiate the claim. A "serious and individual threat" solely on account of the applicant's presence in the country of origin is only exceptionally established, i.e. when the level of violence is at such a high level that every civilian is at risk.[123]

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[119] UNHCR Guidelines No. 12, note 39 above, para. 9.

[120] UNHCR Guidelines No. 12, note 39 above, para. 33.

[121] UNHCR Guidelines No. 12, note 39 above, para. 5.

[122] This is codifying CJEU case *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides*, C-285/12, European Union: Court of Justice of the European Union, 30 January 2014, available at: http://www.refworld.org/docid/52ea51f54.html.

[123] This reflects the ECtHR's case law on Article 3 ECHR. The ECtHR held that, "in the most extreme cases", a real risk of being subjected to treatment contrary to Article 3 ECHR may exist "simply by virtue of an individual being exposed to such violence on return.", See *Sufi and Elmi v. United Kingdom*, Applications nos. 8319/07 and 11449/07, Council of Europe: European Court of Human Rights, 28 June 2011, available at: http://www.refworld.org/cases,ECHR,4e09d29d2.html, para. 218, *NA. v. The United Kingdom*, Appl. No. 25904/07, Council of Europe: European Court of Human Rights, 17 July 2008, available at: http://www.refworld.org/cases,ECHR,487f578b2.html, para. 115, *F.G. v. Sweden*, note 41 above, para. 116.

In UNHCR's view, the notion of an "individual" threat should not lead to a higher threshold and a heavier burden of proof for the applicant. Situations of indiscriminate violence are unpredictable regarding the risks people face. The seriousness of the harm does not depend on the individual character of the threat. UNHCR therefore recommends deletion of the word "individual" in Article 16(c) of the proposal. Further, UNHCR agrees that threats to people resulting from indiscriminate violence must not merely be a remote possibility. As such, UNHCR considers that the criteria for granting subsidiary protection require the risk of serious harm to be "real", as mentioned in Article 2(5) of the proposal, including when resulting from serious threats to life by reason of indiscriminate violence.

Recommendation:

UNHCR recommends to amend **Article 16(c)** of the proposal as follows:

> a serious**[…]** threat to a civilian's life or person by reason of indiscriminate violence in **[…]**armed conflict **and other situations of violence**."

UNHCR also recommends to amend **Recital 36** as follows:

> As regards the required proof in relation to the existence of a serious**[…]** threat to the life or person of an applicant, in accordance with relevant case law of the Court of Justice of the European Union, determining authorities should not require the applicant to adduce evidence that he **or she** is specifically targeted by reason of factors particular to his **or her** personal circumstances. **[T]**he existence of a serious threat **[…]can** be established by the determining authorities solely on account of the presence of the applicant on the territory or relevant part of the territory of the country of origin provided the degree of indiscriminate violence characterising the **situation of** armed conflict **or violence** taking place reaches such a high level that there are substantial grounds for believing that a civilian, returned to the country of origin**[…]**, would, solely on account of his **or her** presence on the territory of that country**[…]**, face a real risk of being subject to the serious threat."

12
DEFINITION OF FAMILY MEMBERS (ARTICLE 2(9)) AND MAINTAINING FAMILY UNITY (ARTICLE 25)

UNHCR welcomes the proposal's **extension of the scope of family members (Article 2(9))**, i.e. to include not only families that already existed in the country of origin, but also families that were formed after leaving the country of origin, including while in transit, but before arrival on the territory of the Member State. This reflects the circumstances of forced displacement whereby applicants may have stayed for a protracted period of time outside the country of origin before reaching the EU.[124] This is also consistent with ECtHR case law. In a 2012 case against the UK, the ECtHR could not find a justification for a different treatment of pre- and post-flight spouses.[125] Differentiating between couples who married in the country of origin and couples who married after leaving the country of origin may therefore amount to discrimination.

However, UNHCR is concerned that **other close family relations**,[126] such as dependent adult children or the dependent parents of an adult, as well as same sex couples, **are not included in the definition**. Further, and by contrast with the recast Dublin proposal,[127] **siblings are also not included**. The recast Dublin proposal states that "the enlargement of the definition including siblings is of particular importance for improving the chances of integration of applicants and hence reduce secondary movements" (proposed Recital (19) of the recast Dublin proposal).[128] Allowing close family members to be accommodated would restore a sense of normalcy and reduce anxiety while applicants await the outcome of the asylum procedure. It may also lead to enhanced compliance, e.g. with restrictions on freedom of movement when close family members are allowed to stay together in one place.

Despite the absence of dependent adult children, dependent parents of an adult, same sex couples and siblings in the definition of "family members", Article 25(6) introduces a discretionary clause **allowing Member States to grant other close relatives** who lived as part of the family at the time of leaving the country of origin or before arriving in the Member State, and who were at the time dependent on the beneficiary of international protection, **a derivative status** under the rubric of "maintaining family unity". While UNHCR welcomes this clause, it recommends these family members be included in the definition contained in Article 2(9) of the proposal and that Article 25(6) become a mandatory clause to ensure a consistent and harmonized approach in the EU.

UNHCR welcomes that, under Article 25 of the proposal, family members of beneficiaries of international protection who do not individually qualify for such protection are entitled to claim a residence permit and have access to the rights granted to beneficieries of international protection. In this regard, UNHCR particularly welcomes that such a derivative status is accessible only when it is determined that the family has no independent grounds for refugee status or subsidiary protection status.

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[124] UNHCR, *Refugee Family Reunification. UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC)*, February 2012, available at: http://www.refworld.org/docid/4f55e1cf2.html. *Hode and Abdi v. The United Kingdom*, note 13 above, paras. 55-56.

[125] *Hode and Abdi v. The United Kingdom*, note 13 above.

[126] UNHCR uses the term "close" family members *in lieu* of "nuclear" family members as it more neutrally and accurately reflects the categories of family members for whom a relationship of social, emotional or economic dependency is presumed, see UNHCR, *UNHCR RSD Procedural Standards – Processing Claims Based on the Right to Family Unity*, 2016, available at: http://www.refworld.org/docid/577e17944.html, para. 5.2.3.

[127] See European Union: European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) – COM (2016) 271*, 22 December 2016, Article 2(g).

[128] UNHCR, *UNHCR comments on the European Commission proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) – COM (2016) 271*, 22 December 2016, http://www.refworld.org/docid/585cdb094.html.

UNHCR appreciates that **national security or public order** grounds may justify the refusal of a residence permit for a family member of a refugee or a beneficiary of subsidiary protection, or its withdrawal if such a permit has already been issued. UNHCR is, however, **concerned by the broad exceptions** formulated in Article 25(4), i.e. requiring Member States to refrain from issuing, withdrawing or not renewing a derivative status where reasons of national security or public order so require. This broad formulation leaves Member States broad discretion to determine when to refuse a residence permit to a family member of a beneficiary of international protection. In this regard, UNHCR recalls that according to general principles of human rights law, any restriction on human rights obligations must serve a legitimate purpose, be suitable to achieve that purpose and be proportionate. In addition, adequate procedural safeguards need to be followed.

Recommendation:

While the inclusion of family formed after having left the country of origin is welcome, the definition of family members in **Article 2(9)** should be aligned with the proposal to recast the Dublin Regulation and **include siblings**, as well as further extended to also include other close family members, such as **dependent adult children or the dependent parents of an adult**, in light *inter alia* of **Article 25(6)** of the proposal. Same sex couples should also be considered favourably in line with the principle of family unity.

Further, to address the broad scope of **Article 25(4)**, UNHCR recommends to amend the text as follows:

> “**Within the limits set by international obligations**, **[w]**here reasons of national security or public order so require, a residence permit shall not be issued for a family member and such residence permits which have already been issued shall be withdrawn or shall not be renewed.”

Finally, UNHCR recommends the discretionary clause of **Article 25(6)** be converted into a mandatory provision.

13
DIFFERENTIATION IN DURATION BETWEEN PROTECTION STATUSES (ARTICLES 26(1))

In **2011**, **UNHCR welcomed the approximation of rights** between refugees and beneficiaries of subsidiary protection as a key change effected by the recast QD.[129] The current proposal however maintains a **differentiation** between refugee status and subsidiary protection status when it comes to duration of residence permits associated with the respective status (Article 26(1)). In addition to a differentiation in duration, other differences include: the possibility for Member States to limit social assistance to core benefits for beneficiaries for international protection but not for refugee status (Article 34(2), discussed in section 18 below), and broader grounds for exclusion as well as withdrawal of subsidiary protection status where the person has committed a serious crime, either within the Member State concerned or outside (Article 18(1)(b) and (e)), and where the person constitutes a danger to the community of the Member State in which s/he is present (Article 18(1)(d), discussed in section 8 above).

UNHCR maintains that distinctions between beneficiaries of international protection are often **neither necessary nor objectively justified** in terms of flight experience and protection needs. This is evidenced by practice, as the application of the protection statuses across the EU varies widely. Some Member States regularly grant refugee status to people from a particular country of origin, while other Member States grant subsidiary protection status to people with similar profiles from the same country of origin. It is thus not clear which objective criteria may justify a different duration of status.[130]

UNHCR considers that there is no reason to expect the **protection needs** of subsidiary protection beneficiaries to be of a different nature or shorter duration than the need for protection as refugees. In practice, beneficiaries of subsidiary protection are generally not able to return home earlier than refugees. Further, their integration prospects would benefit from the certainty provided by a status of longer duration. UNHCR therefore recommends that **all beneficiaries of international protection shall receive a residence permit for a period of five years** and renewable thereafter for periods of five years.

The principles of **equal treatment** and **non-discrimination**[131] allow for a differentiated treatment according to immigration status only when the grounds therefore are objectively and reasonably justified. In UNHCR's view, such justification will not be present in relation to refugees and beneficiaries of subsidiary protection, sharing the same experiences and protection needs. ECtHR case law clearly shows that differences in treatment between persons who are similarly situated – such as refugees and subsidiary protection beneficiaries – can only be justified if they pursue a legitimate aim and there is a proportionate relationship between this aim and the means employed to realise it.[132] In a number of cases, the ECtHR found a violation of the non-discrimination guarantee under Article 14 ECHR on the grounds of differentiating between different categories of migrants.[133] Differentiation between protection statuses is also not necessarily justified by **state practice**. In the Netherlands, for example, there is only one, uniform status, which confers the same level of rights upon all beneficiaries of international protection.

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[129] UNHCR, *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence*, 27 July 2011, available at: http://www.refworld.org/docid/4e2ee0022.html; see also UNHCR, *Moving Further Toward a Common European Asylum System. UNHCR's statement on the EU asylum legislative package*, June 2013, available at: http://goo.gl/TJrT7A.

[130] UNHCR, *Safe at Last?*, note 129 above.

[131] Article 21 EU Charter; Article 14 ECHR and Recital 12 of the proposal.

[132] According to the ECtHR's ruling in the *Niedzwiecki v. Germany* 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". See *Niedzwiecki v. Germany*, 58453/00, ECtHR, 25 October 2005, at: http://www.refworld.org/docid/4406d6cc4.html, and Okpisz v. Germany, 59140/00, ECtHR, 25 October 2005, at: http://www.unhcr.org/refworld/docid/4406d7ea4.html. 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.

[133] See, for example, *Hode and Abdi v. The United Kingdom*, note 13 above, *Niedzwiecki v. Germany, Okpisz v. Germany*, note 132 above. See also *Biao v. Denmark (Grand Chamber)*, Application no. 38590/10, Council of Europe: European Court of Human Rights, 24 May 2016, available at: http://www.refworld.org/cases,ECHR,574473374.html (indirect discrimination on grounds of ethnicity). For cases at the national level, see, for example, Decision of the *AAC of 7 March 2006; in re: M.D., Egypt*, interpreting Article 14 Swiss Federal Constitution (right to marry and to have a family), available at: http://www.ark-cra.ch/emark/2006/english.htm, and Arrêt n° 121/2013, Belgium: Cour constitutionelle, 26 September 2013, available at: http://www.refworld.org/publisher,BEL_CC,,BEL,5270ce364,0.html.

On a more practical note, reintroducing differences between the two statuses is likely to contravene the EC's goal of **reducing onwards movement**. Pronounced differences in providing refugee or subsidiary protection status across the EU for the same groups/nationalities are already fuelling onwards movements. Attaching different rights to the two statuses is likely to further exacerbate this situation.

On the length of residence permits, **UNHCR suggests a period of validity of five years**, in line with the practice in a number of EU Member States,[134] and coherent with the time frames foreseen under the LTRD.[135]

Recommendation:

UNHCR **recommends to amend Article 26(1)(a)** as follows:

> **For beneficiaries of international protection, the residence permit shall have a period of validity of five years and be renewable thereafter for periods of five years."**

UNHCR recommends to delete proposed A**rticle 26(1)(b)** (and the amended **Article 26(1)(a)** therefore turned into Article 26(1) second sentence).

[134] See ECRE, *Asylum on the clock? Duration and review of international protection status in Europe*, AIDA Legal Briefing No 6, June 2016, p. 10, available at https://goo.gl/yazr9v.

[135] See Long-Term Residents Directive, above note 4. See also UNHCR, *Updated UNHCR Observations on the Proposal for a Directive of the European Parliament and of the Council Amending Directive 2003/109/EC Establishing a Long-Term Residence Status to Extend its Scope to Beneficiaries of International Protection*, August 2010, available at: http://www.refworld.org/docid/4c601c5e2.html.

14
TRAVEL DOCUMENTS (ARTICLE 27)

Article 27 of the proposal maintains an obligation for Member States to issue travel documents to beneficiaries of international protection. In UNHCR's view, in order to render effective beneficiaries' right to travel, the **minimum duration** for travel documents should not be too short. While the Schedule to the 1951 Convention originally intended for Convention Travel Documents (CTDs) to have a validity of either one or two years, at the discretion of the issuing authority, this schedule also foresaw the possibility of renewal of CTDs. As machine-readable CTDs or other travel documents are not to be renewed,[136] a longer validity would, in UNHCR´s view, be justified, also taking into consideration the improved security features inherent in machine-readable travel documents. In UNHCR´s experience, state practice among countries that issues machine readable CTDs varies between a validity of two and ten years. The proposed minimum duration of one year (Article 27(1)) should therefore be extended to, at a minimum, **five years**, reflecting the duration of residence permits.

Travel documents should be issued in line with international standards, as set by the International Civil Aviation Organisation (ICAO), in particular ICAO Standard 3.12, which was adopted in June 2015, and requires all CTDs to be issued in machine-readable format in accordance with ICAO Doc 9303.[137] The technical details of these standards are outlined in the joint *UNHCR-ICAO Guide on the Issuance of Convention Travel Documents to Refugees and Stateless Persons*.[138]

Recommendation:

UNHCR recommends to amend **Article 27(1)** as follows:

> "Competent authorities shall issue travel documents to beneficiaries of refugee status, in the form set out in the Schedule to the Geneva Convention, **updated in line with international aviation standards, as set by the International Civil Aviation Organisation (ICAO), in particular ICAO Standard 3.12 requiring Convention Travel Documents to be issued in machine-readable format** and with the minimum security features and biometrics outlined in Council Regulation (EC) No 2252/200445. Those travel documents shall be valid for at least **[…]five** years."

Equally, UNHCR recommends amending **Article 27(2)** to oblige Member States to issue machine-readable travel documents for beneficiaries of subsidiary protection for a validity of at least five years.

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[136] ICAO, *International Standards and Recommended Practices, Annex 9 to the Convention on International Civil Aviation – Facilitation, Fourteenth Edition*, October 2015, ("ICAO Standards"), para. 3.4.

[137] See ICAO Standards, note 136 above, para. 3.12.

[138] UNHCR, *Guide for Issuing Machine Readable Convention Travel Documents for Refugees and Stateless Persons, jointly published by UNHCR and the ICAO*, February 2017, available at: http://www.refworld.org/docid/52b166a34.html.

15
AMENDMENT TO THE LONG-TERM RESIDENTS DIRECTIVE (ARTICLES 29, 44)

The proposal aims to achieve its objective of preventing onward movement in two ways. First, it explicitly states that beneficiaries of international protection have an **obligation to reside** in the Member State which granted them protection. They retain, however, their right to apply and be admitted to reside in other Member States pursuant to relevant EU or national law as well as their right to move freely for up to three months in the Schengen Area under certain conditions, pursuant to Article 21 of the Convention Implementing the Schengen Agreement[139] (Article 29(1)). If a beneficiary of international protection is found in another Member State without a right to stay or reside, s/he is subject to the take back procedure provided for in the EC's proposal for a recast Dublin Regulation (Article 29(2)). Second, the proposal amends the Long Term Residents Directive (**LTRD**), to the effect that **the required 5-year period of legal residence** is re-started every time a person is found to be unlawfully present in a Member State other than the one that granted protection (Article 44(1)).

To balance these two amendments, **information rights** are strengthened. Article 24 provides that the information provided to the applicant shall explicitly refer to the consequences of not complying with the obligation to remain in the Member State that granted protection (Article 29).

In UNHCR's view, the most sustainable way of preventing onward movement is creating better and **more harmonious conditions for integration** across the EU so that there are less incentives to move to other Member States.

UNHCR has also suggested that refugees who have the means to be self-reliant should be able to **establish themselves** in another Member State **six months** after being granted protection.[140]

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[139] Under Article 21 of the Convention Implementing the Schengen Agreement beneficiaries of international protection who hold valid residence permits and travel documents may move freely within the Schengen Area for up to three months, if they fulfil the entry conditions referred to in this Convention. *Inter alia*, these conditions are "that the aliens produce, if necessary, documents justifying the purpose and conditions of the intended stay and that they have sufficient means of substance, both for the period of the intended stay and for the return to their country of origin or transit to a third State into which they are certain to be admitted" (Article 5(1)(c) of the Convention Implementing the Schengen Agreement).

[140] UNHCR, *Better Protecting Refugees in the EU and Globally*, note 1 above, p. 17.

16

ACCESS TO EMPLOYMENT (ARTICLES 30, 32) LINKED TO THE ISSUANCE OF A RESIDENCE PERMIT (ARTICLE 26(1))

UNHCR welcomes the proposal's clarification of employment-related **equal treatment** rights (Article 30(2)). It provides that beneficiaries of international protection shall enjoy equal treatment with nationals regarding working conditions, collective labour rights employment-related education and advice services afforded by employment offices. In addition, Article 32(2) strengthens the Member States' obligation to facilitate **recognition of qualifications**. Further, Article 32(3) clarifies that beneficiaries of international protection shall enjoy equal treatment regarding the validation of prior learning and experience.

UNHCR, however, regrets that Article 22(3) and Recital 47 of the proposal requires the prior issuing of a residence permit before Member States can grant benefits with regard to access to employment, as long as this is permitted by international obligations. UNHCR is concerned that this new obligation may lead to delays in the ability for beneficiaries of international protection to access employment, given that under Article 26(1) of the proposal a residence permit shall be issued no later than 30 days after international protection has been granted. According to UNHCR, this is undesirable for both refugees and host Member States. UNHCR therefore recommends to retain the language of the current recast QD according to which residence permits are issued as soon as possible after international protection has been granted,[141] and maintain the 30 days as a maximum.

Recommendation:

In light of the foregoing, UNHCR recommends to **delete Article 22(3) and Recital 47** and to amend **Article 26(1)** as follows:

> "**As soon as possible after international protection has been granted, but [n]**o later than 30 days **[…]thereafter**, a residence permit shall be issued using the uniform format as laid down in Regulation (EC) No 1030/2002."

[141] Article 24(1) recast QD.

17
LINKING SOCIAL ASSISTANCE TO INTEGRATION MEASURES AND LIMITATIONS TO BENEFICIARIES OF INTERNATIONAL PROTECTION (ARTICLES 34, 38)

UNHCR welcomes the distinction the proposal makes between "social security" (Article 33 in conjunction with Article 2(17)) and "social assistance" (Article 34 in conjunction with Article 2(18)). This was done on the basis of the CJEU's *Brey* decision[142] and corresponds with a similar distinction made in the 1951 Convention between "social security" (Article 24(1)(b) of the 1951 Convention) and "public relief" (Article 23 of the 1951 Convention). UNHCR also welcomes that beneficiaries of international protection enjoy equal treatment with nationals of the Member State that has granted protection as regards to both social security (Article 33) and social assistance (Article 34).

UNHCR is, however, concerned that Member States have discretion under Article 34(1), second indent, to make access to **certain** social assistance **conditional on the effective participation in integration measures**. To facilitate integration, Article 38(1) requires Member States to ensure beneficiaries of international protection have access to integration measures provided by the Member State, in particular language courses, civic orientation and integration programs and vocational training which take into account the beneficiaries' specific needs. Further, Article 38(2) proposes that participation in integration measures may be made compulsory. Similar language is included in Recital 53.

While UNHCR supports the participation of beneficiaries of international protection in integration measures, UNHCR is concerned that linking social assistance to effective participation in integration measures may result in **social hardship**, as social assistance is aimed at "ensuring that the basic needs of those who lack sufficient resources are met" (Article 2(18)). According to Recital 51, social hardship is to be avoided.[143] In this regard, it would be helpful when the meaning of "certain" social assistance is clarified, to ensure a harmonized approach across the EU and to avoid that the basic needs of beneficiaries of international protection are not met. At all times an adequate standard of living in accordance with international human rights law must be maintained.[144] In addition, the approach taken in Article 34(1) is problematic in light of Article 23 of the 1951 Convention requiring State Parties to accord to lawfully staying refugees the same treatment as is accorded to nationals with respect to public relief and assistance.

Further, individual circumstances may make it difficult for the beneficiary of international protection to participate in integration measures. As such, their effective participation in integration measures **depends on the responsible Member State making integration measures readily available, easily accessible, and affordable or free of charge**. It should also be noted that the CJEU requires Member States to take into account individual hardship when obliging persons to participate in such measures.[145]

While UNHCR recommends to delete Article 34(1), second indent, under the present circumstances, it considers that if the meaning of "certain social assistance" were to be clarified, with effective integration measures available throughout the Union, new consideration could be given as to whether it might be appropriate in specific situations.

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[142] *Pensionsversicherungsanstalt v. Peter Brey*, C-140/12, European Union: Court of Justice of the European Union, 19 September 2013, available at: http://curia.europa.eu/juris/liste.jsf?num=C-140/12&language=EN.

[143] See also, Article 34(3) of the EU Charter of Fundamental Rights, according to which the Union recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources.

[144] Article 11 of the International Covenant on Economic, Social and Cultural Rights.

[145] CJEU, C-153/14, *Minister van Buitenlandse Zaken v. K and A*, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0153, in particular para. 58.

Recommendation:

UNHCR recommends to delete **Article 34(1) second indent**.

UNHCR recommends to amend **Article 38(1)** as follows:

> "In order to facilitate the integration of beneficiaries of international protection into society, beneficiaries of international protection shall have access to integration measures provided by the Member States, in particular language courses, civic orientation and integration programs and vocational training which **shall be easily accessible, affordable or free of charge, and** take into account their specific needs."

UNHCR recommends to amend **Recital 53** as follows:

> "In order to facilitate the integration of beneficiaries of international protection into society, beneficiaries of international protection shall have access to integration measures, modalities to be set by the Member States. **Such integration measures shall be easily accessible, affordable or free of charge and take into account the specific needs of beneficiaries of international protection, in particular regarding their educational background, age, gender, physical and mental health condition, family responsibilities and economic or housing circumstances.** Member States may make the participation in such integration measures, such as language courses, civic integration courses, vocational training and other employment-related courses compulsory."

In addition, the proposal maintains the provision that social assistance may be **limited to core benefits for beneficiaries of subsidiary protection** (Article 34(2)). Such core benefits are understood to cover "minimum income support, assistance in the case of illness, or pregnancy, and parental assistance, in so far as those benefits are granted to nationals under national law." (Recital 51). UNHCR regrets that levels of social assistance have not been approximated as between refugees and beneficiaries of subsidiary protection. In UNHCR's view, such differentiation between protection statuses is unwarranted as both are beneficiaries of international protection with similar flight experiences and protection needs.[146] Further, such differentiation may run counter to the EC's own previous assessment that the two statuses should be aligned for precisely these reasons. Lastly, it might also be inconsistent with European case law. The ECtHR has held in two cases that differentiating social benefits according to type of residence permit amounts to discrimination.[147] Therefore, UNHCR recommends Article 34(2) be deleted.

Recommendation:

UNHCR recommends to **delete Article 34(2)**.

[146] See further under Section 13. (Differentiation in duration between protection statuses).

[147] 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*, note 132 above, and *Okpisz v. Germany*, note 132 above.

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CONCLUSION

While UNHCR supports the goal of harmonising protection standards throughout the EU, harmonisation should not take place at the price of lowering standards. The proposal's main policy goals – preventing protection status to become a permanent status, and preventing onward movement – are proposed to be implemented in a way that is of concern in many respects. In particular, UNHCR considers that any form of termination of status must be in strict compliance with international refugee law, European human rights law, and EU law. This is necessary in order not to endanger the status of those who are in need of international protection. In addition, exclusion must not be applied in a disproportionate manner, and satisfy all criteria set out under international human rights law, including proportionality.

Regarding onward movement, UNHCR recommends incentives to replace the proposed punitive measures. In line with UNHCR's recommendation set out in its Better Protecting Refugees paper of December 2016[148], refugees should be able to move freely after six months, provided that they are self-reliant.

Concepts such as "internal protection alternative" and "sur place" analysis should be applied in a manner that is consistent with the 1951 Convention. This means that the first and foremost criteria for the determination of international protection is whether a person has a well-founded fear of persecution or faces a real risk of serious harm. Further, unnecessary procedural steps should be avoided, not least to avoid additional administrative burden and costs of lengthy appeals.

On differentiation between refugee and subsidiary protection status, UNHCR recommends to align the two statuses and continue the path taken in the recast QD in this regard. Differentiation between the two statuses, in so far as it is not justified by a legitimate aim as well as necessary and proportionate means to achieve this aim, is likely to give rise to successful discrimination claims – a trend that is already materialising.

Lastly, integration is a two way process that is unlikely to be successful when obligations on the applicant are not accompanied by an adequate offer from the State. UNHCR therefore encourages states to ensure that integration services are available, accessible, and affordable or free of charge.

While the current proposal contains welcome aspects, it maintains and introduces many concerning elements. UNHCR therefore urges EU institutions and Member States to seriously consider these comments and recommendations, in order to achieve strong international protection standards that are fully in line with international and European law. UNHCR is ready to continue to assist in these efforts.

UNHCR, February 2018

[148] UNHCR, *Better Protecting Refugees in the EU and Globally*, note 1 above.