



**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)**

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular points 1(c), 2(a) and 3(a) of Article 63 thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the European Parliament ⁽²⁾,

Having regard to the opinion of the European Economic and Social Committee ⁽³⁾,

Having regard to the opinion of the Committee of the Regions ⁽⁴⁾,

Whereas:

- (1) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.
- (2) The European Council at its special meeting in Tampere on 15 and 16 October 1999 agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees of 28 July 1951 (Geneva Convention), as supplemented by the New York Protocol of 31 January 1967 (Protocol), thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution.
- (3) The Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees.
- (4) The Tampere conclusions provide that a Common European Asylum System should include, in the short term, the approximation of rules on the recognition of refugees and the content of refugee status.

<p>UNHCR Comment on Recitals (1)-(4): UNHCR welcomes the aim of EU Member States to create a common European asylum system based on a full and inclusive application of the 1951 Convention. This includes the principle of <i>non-refoulement</i> and a comprehensive set of rights enabling the refugee to achieve self-reliance and integrate into his/her country of residence. The</p>
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¹ OJ C 51 E, 26.2.2002, p. 325.

² OJ C 300 E, 11.12.2003, p. 25.

³ OJ C 221, 17.9.2002, p. 43.

⁴ OJ C 278, 14.11.2002, p. 44.

recitals furthermore clarify that the Directive is not intended to modify existing international refugee law but provides binding guidance for its interpretation within the framework of the Convention. It has to be borne in mind, however, that the Convention is a multilateral instrument with universal application. To maintain the Convention's international character, UNHCR calls on EU Member States to take into consideration common understandings achieved in international fora, especially the UNHCR Executive Committee, and the development of State practice outside the EU when interpreting the Convention.

- (5) The Tampere conclusions also provide that rules regarding refugee status should be complemented by measures on subsidiary forms of protection, offering an appropriate status to any person in need of such protection.

UNHCR Comment on Recital (5): UNHCR welcomes the fact that the Directive also contains rules for persons who do not qualify as refugees but are nonetheless in need of international protection, thereby taking a holistic approach. It notes that many such persons are of concern to UNHCR under its mandate. However, the Office considers it important to clarify in national implementing provisions that any application for asylum shall first be considered under the criteria of the refugee definition of the Convention. (See also, comments on Articles 2(g) and 15).

- (6) The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States.

UNHCR Comment on Recital (6): Member States' obligations under the 1951 Convention and international human rights instruments are binding obligations which should be considered as the framework for any efforts by the EU to set supplementary standards, including the establishment of "minimum standards" only. The provisions of the Directive should be interpreted and applied in light of these international obligations.

- (7) The approximation of rules on the recognition and content of refugee and subsidiary protection status should help to limit the secondary movements of applicants for asylum between Member States, where such movement is purely caused by differences in legal frameworks.
- (8) It is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who request international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of Article 1(A) of the Geneva Convention, or a person who otherwise needs international protection.

UNHCR Comment on Recital (8): See comment on Article 3.

- (9) Those third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive.
- (10) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.
- (11) With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination.

UNHCR Comment on Recitals (10) and (11): UNHCR understands these recitals as a call for an interpretation of the Directive in conformity with international as well as regional human rights treaties. In addition to the 1951 Convention, these instruments and their interpretation as developed by the jurisprudence of the European Court of Human Rights and the international human rights treaty bodies contain binding obligations and offer important guidance as regards the qualification for international protection and standards of treatment.

- (12) The ‘best interests of the child’ should be a primary consideration of Member States when implementing this Directive.

UNHCR Comment on Recital (12): UNHCR welcomes the reference to the “best interest of the child” principle enshrined in Article 3 of the 1989 Convention on the Rights of the Child (CRC). It should always be the basis for any application of provisions concerning children. It will be relevant for example in an age-sensitive interpretation of the refugee definition (see comments to Article 4(3)(c), 9(2)(f) and 10(d)), and as regards the standard of treatment of refugee children, reflected in Chapter VII (Content of international protection, see especially comments to Article 30).

- (13) This Directive is without prejudice to the Protocol on asylum for nationals of Member States of the European Union as annexed to the Treaty Establishing the European Community.

UNHCR Comment on Recital (13): See comment on Article 2(c).

- (14) The recognition of refugee status is a declaratory act.

UNHCR Comment on Recital (14): UNHCR welcomes this clarification, which reflects generally accepted practice and is found in UNHCR’s *Handbook*⁵, paragraph 28. A person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfils the criteria contained in the

⁵ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1979.

definition. This would necessarily occur prior to the time at which his refugee status is formally determined.

- (15) Consultations with the United Nations High Commissioner for Refugees may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention.

UNHCR Comment on Recital (15): UNHCR welcomes this recital, which acknowledges UNHCR's supervisory responsibility under its Statute generally, and pursuant to Article 35 of the 1951 Convention specifically. UNHCR trusts that States will consult with UNHCR and take its position into account when determining refugee status or complementary/subsidiary protection needs. In this connection, reference is made to the UNHCR *Handbook* and the UNHCR Guidelines on International Protection⁶ as well as to other legal statements of the Office which provide valuable guidance to Member States. In addition, UNHCR's positions with respect to specific groups of concern should be taken into consideration. In UNHCR's view, a reference to UNHCR's legal guidance should be included in relevant national regulations.

- (16) Minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention.
- (17) It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention.

UNHCR Comment on Recitals (16) and (17): UNHCR welcomes the clarification that the Directive does not intend to replace, change or supplement the 1951 Convention but to provide guidance for its interpretation.

- (18) In particular, it is necessary to introduce common concepts of protection needs arising *sur place*; sources of harm and protection; internal protection; and persecution, including the reasons for persecution.
- (19) Protection can be provided not only by the State but also by parties or organisations, including international organisations, meeting the conditions of this Directive, which control a region or a larger area within the territory of the State.

UNHCR Comment on Recital (19): See comment on Article 7.

⁶ As of mid-2004, UNHCR Guidelines on International Protection have been issued on (i) gender-related persecution, (ii) membership of a particular social group, (iii) cessation under Article 1C(5) and (6) of the 1951 Convention, (iv) the internal flight or relocation alternative, (v) the exclusion clauses (including an accompanying Background Note) and (vi) religion-based claims. UNHCR issues these Guidelines pursuant to its mandate, as contained in its Statute and Article 35 of the 1951 Convention. They complement the UNHCR *Handbook* and are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary.

- (20) It is necessary, when assessing applications from minors for international protection, that Member States should have regard to child-specific forms of persecution.

UNHCR Comment on Recital (20): UNHCR welcomes the reference to child-specific forms of persecution, and calls on Member States to interpret the refugee definition in an age-sensitive manner (see comment on Article 9(f) and 10(d)). In this connection, reference should also be made to Article 22 CRC, which obliges the Member States to ensure appropriate protection.

- (21) It is equally necessary to introduce a common concept of the persecution ground ‘membership of a particular social group’.

UNHCR Comment on Recital (21): See comment on Article 10(d).

- (22) Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations Resolutions relating to measures combating terrorism, which declare that ‘acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations’ and that ‘knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations’.

UNHCR Comment on Recital (22): The broad and general terms of Articles 1 and 2 of the Charter of the United Nations, which set out its purposes and principles, offer little guidance as to the criminal acts which could exclude a person from refugee status through the application of Article 1F(c) of the 1951 Convention. Article 1F(c) should be interpreted restrictively in light of the gravity of the consequences of exclusion from refugee protection. An interpretation of the language of Article 1F(c) to include acts of ‘terrorism’ without proper qualification may lead to an overly extensive application of this particular exclusion clause, especially in view of the fact that ‘terrorism’ is without a clear or universally agreed definition. For the purposes of interpreting and applying Article 1F(c), only those acts within the scope of United Nations Resolutions relating to measures combating terrorism which impinge upon the international plane in terms of their gravity, international impact, and implications for international peace and security, should give rise to exclusion under this provision.⁷ (See Article 12(2)(c) for additional comments on the interpretation and application of Article 1F(c) of the 1951 Convention).

- (23) As referred to in Article 14, ‘status’ can also include refugee status.

UNHCR Comment on Recital (23): See comment on Article 14(4)–(6).

⁷ See UNHCR, “Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees”, 4 September 2003, paragraphs 46–49.

- (24) Minimum standards for the definition and content of subsidiary protection status should also be laid down. Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention.

UNHCR Comment on Recital (24): See comments to Articles 2(e)-(g) and 15.

- (25) It is necessary to introduce criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.
- (26) Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.

UNHCR Comment on Recital (26): This recital must be interpreted in light of the drafters' explicit intention to provide protection under this Directive going beyond Article 1 of the 1951 Convention. Article 15(c) provides the legal basis for granting subsidiary/complementary protection to persons fleeing from a serious and individual threat to their lives or persons by reasons of indiscriminate violence in situations of armed conflict. An interpretation which would not extend protection to persons in danger of serious and individualized threats if they form part of a larger segment of the population affected by the same risks would be in contradiction both to the clear wording as well as the spirit of Article 15(c). Moreover, such an interpretation could result in an unacceptable protection gap, at variance with international refugee law and human rights law.⁸

- (27) Family members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status.

UNHCR Comment on Recital (27): See comment on Article 23.

- (28) The notion of national security and public order also covers cases in which a third country national belongs to an association which supports international terrorism or supports such an association.

⁸ See also the Explanatory Memorandum to proposed article 11(c), from the Explanatory Memorandum presented by the European Commission on the Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection (COM(2001)510 final, 12.9.2001), page 20.

¹⁰ Council Directive 2001/44/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212/12 of 7 August 2001, Article 15.

UNHCR Comment on Recital (28): UNHCR is concerned about the broad wording of this recital which may have implications for the interpretation especially of Articles 32 and 33(2) of the 1951 Convention. Both provisions are exceptions to general protection principles and should therefore be applied restrictively. Article 32 of the 1951 Convention permits the expulsion of a refugee who is lawfully on the territory, on grounds of national security or public order, subject to strict procedural safeguards. Article 33(2) of the 1951 Convention permits the return of a refugee to a risk of persecution under certain exceptional circumstances related to overriding concerns of national security and the security of the host community. Membership in or support of a particular organization alone may not necessarily meet the criteria of these provisions. An assessment of the structure, the purpose, activities and methods of the association, the role of the individual in the organization and the nature of the risk posed is required for each individual case. (See also comments on Articles 14 and 21.)

- (29) While the benefits provided to family members of beneficiaries of subsidiary protection status do not necessarily have to be the same as those provided to the qualifying beneficiary, they need to be fair in comparison to those enjoyed by beneficiaries of subsidiary protection status.

UNHCR Comment on Recital (29): See comment on Article 23.

- (30) Within the limits set out by international obligations, Member States may lay down that the granting of benefits with regard to access to employment, social welfare, health care and access to integration facilities requires the prior issue of a residence permit.

UNHCR Comment on Recital (30): UNHCR welcomes the reference to international obligations of Member States and understands it to include any developments in international law, in particular in human rights law.

- (31) This Directive does not apply to financial benefits from the Member States which are granted to promote education and training.

UNHCR Comment on Recital (31): UNHCR notes that this recital should be read in light of Article 22 of the 1951 Convention which accords to refugees the same treatment as is accorded to nationals with respect to elementary education. See also comment on Article 27.

- (32) The practical difficulties encountered by beneficiaries of refugee or subsidiary protection status concerning the authentication of their foreign diplomas, certificates or other evidence of formal qualification should be taken into account.
- (33) Especially to avoid social hardship, it is appropriate, for beneficiaries of refugee or subsidiary protection status, to provide without discrimination in the context of social assistance the adequate social welfare and means of subsistence.
- (34) With regard to social assistance and health care, the modalities and detail of the provision of core benefits to beneficiaries of subsidiary

protection status should be determined by national law. The possibility of limiting the benefits for beneficiaries of subsidiary protection status to core benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, pregnancy and parental assistance, in so far as they are granted to nationals according to the legislation of the Member State concerned.

UNHCR Comment on Recitals (33)–(34): See comment on Article 28.

- (35) Access to health care, including both physical and mental health care, should be ensured to beneficiaries of refugee or subsidiary protection status.
- (36) The implementation of this Directive should be evaluated at regular intervals, taking into consideration in particular the evolution of the international obligations of Member States regarding non-refoulement, the evolution of the labour markets in the Member States as well as the development of common basic principles for integration.

UNHCR Comment on Recital (36): See comment on Article 26.

- (37) Since the objectives of the proposed Directive, namely to establish minimum standards for the granting of international protection to third country nationals and stateless persons by Member States and the content of the protection granted, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the Directive, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (38) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom has notified, by letter of 28 January 2002, its wish to take part in the adoption and application of this Directive.
- (39) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland has notified, by letter of 13 February 2002, its wish to take part in the adoption and application of this Directive.
- (40) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application,

HAS ADOPTED THIS DIRECTIVE.

Chapter I: General provisions

Article 1

Subject matter and scope

The purpose of this Directive is to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

UNHCR Comment on Article 1: UNHCR reiterates its concern at this *de facto* restriction of the refugee definition to third country nationals and stateless persons. The office recommends that implementing legislation make clear that protection under the 1951 Convention should be granted to all applicants who fulfil the Convention's refugee definition.

Article 2

Definitions

For the purposes of this Directive:

- (a) 'international protection' means the refugee and subsidiary protection status as defined in (d) and (f);
- (b) 'Geneva Convention' means the Convention relating to the status of refugees done at Geneva on 28 July 1951, as amended by the New York Protocol of 31 January 1967;
- (c) 'refugee' means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

UNHCR Comment on Article 2(c): This definition does not replicate the precise wording of the refugee definition contained in the 1951 Convention and its 1967 Protocol. See also comment on Article 1.

- (d) 'refugee status' means the recognition by a Member State of a third country national or a stateless person as a refugee;

UNHCR Comment on Article 2(d): UNHCR wishes to point out that the term "refugee status" may, depending on the context, cover two different notions. As also mentioned above in Recital 14, paragraph 28 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status reads: "(a) person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined." In this sense, "refugee status" means the condition of being a refugee. In contrast, the Qualification Directive appears to use the term "refugee status" to mean the

set of rights, benefits and obligations that flow from the recognition of a person as a refugee. This second meaning is, in UNHCR's view, better described by the use of the word "asylum" and recommends, accordingly, that the Directive be interpreted in this sense.

- (e) 'person eligible for subsidiary protection' means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;
- (f) 'subsidiary protection status' means the recognition by a Member State of a third country national or a stateless person as a person eligible for subsidiary protection;
- (g) 'application for international protection' means a request made by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately;

UNHCR Comment on Article 2 (e)–(g): UNHCR considers it important to interpret these provisions in such a way that any application for asylum is first considered under the criteria of the 1951 Convention refugee definition, and only if that fails, under the criteria for subsidiary protection (see also comments to Article 5c)). This is in keeping with Recital 24 of the Directive which defines subsidiary protection as "complementary and additional to" refugee protection under the 1951 Convention. It is also necessary to ensure that the Convention is not undermined by resorting to subsidiary protection in cases which actually fall under the refugee definition of the Convention. UNHCR recommends providing explicitly in national legislation that: "All applications for international protection will first be assessed on the basis of the refugee definition contained in the 1951 Convention and, only if this is not fulfilled, on the basis of the criteria for subsidiary protection."

- (h) 'family members' means, insofar as the family already existed in the country of origin, the following members of the family of the beneficiary of refugee or subsidiary protection status who are present in the same Member State in relation to the application for international protection:
 - the spouse of the beneficiary of refugee or subsidiary protection status or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens,
 - the minor children of the couple referred to in the first indent or of the beneficiary of refugee or subsidiary protection status, on condition that they are unmarried and dependent and regardless of

whether they were born in or out of wedlock or adopted as defined under the national law;

UNHCR Comment on Article 2(h): UNHCR encourages Member States to use a definition of the term “family member” which includes close relatives and unmarried children who lived together as a family unit and who are wholly or mainly dependent on the applicant. UNHCR notes in this regard that the definition which was agreed upon in the Temporary Protection Directive encompasses these family members.¹⁰ This is in line with the right to family unity, as outlined in the UNHCR *Handbook* which stipulates that other dependants living in the same household normally should benefit from the principle of family unity.¹¹ Furthermore, in UNHCR’s view, respect for family unity should not be made conditional on whether the family was established before flight from the country of origin. Families which have been founded during flight or upon arrival in the asylum State also need to be taken into account. With reference to the UNHCR Executive Committee Conclusion No. 24 (XXXII) paragraph 5 and No. 88 (L) paragraph (b)(ii), UNHCR recommends the application of liberal criteria in identifying those family members who can be admitted, with a view to promoting the unity of the family.

- (i) ‘unaccompanied minors’ means third-country nationals or stateless persons below the age of 18, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person; it includes minors who are left unaccompanied after they have entered the territory of the Member States;

UNHCR Comment on Article 2(i): UNHCR would prefer that implementing legislation use the term “child” instead of “minor”, in line with the terminology of the Convention on the Rights of the Child. Also, UNHCR would like to draw attention to the difference in terminology used on the international level where a distinction is made between “unaccompanied children” and “separated children”. The term “unaccompanied children” refers to children who have been separated from both parents and other relatives and are not cared for by an adult who, by law or custom, is responsible for doing so. The term “separated children” includes children who are separated from both their parents or their previous legal or customary guardian generally. They may have been accompanied by other relatives or adults who may, however, not be able, suitable or willing to assume responsibility for the child’s care.¹² UNHCR therefore suggests to make use of both terms in implementing legislation.

- (j) ‘residence permit’ means any permit or authorisation issued by the

¹¹ UNHCR, *Handbook*, para. 185. See also EXCOM, Conclusions Nos. 24 (XXXII) Family Reunification, 1981, para. 5, and 88 (L), 1999, para. (ii).

¹² See Save the Children, UNHCR, Separated Children in Europe Programme Statement of Good Practice: Third Edition, 2004, Section A, page 2; UNHCR, UNICEF, ICRC, IRC, Save the Children (UK), World Vision: “Inter-Agency Guiding Principles on Unaccompanied and Separated Children”, Geneva 2003.

authorities of a Member State, in the form provided for under that State's legislation, allowing a third country national or stateless person to reside on its territory;

- (k) 'country of origin' means the country or countries of nationality or, for stateless persons, of former habitual residence.

Article 3

More favourable standards

Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.

UNHCR Comment on Article 3: UNHCR welcomes this provision, which underlines that the Directive aims to set minimum standards which leave States free to retain or introduce higher standards of protection if they so choose. As outlined in this commentary, the provisions of the Directive do not fully reflect the standards of the 1951 Convention. UNHCR urges Member States to assess carefully, in consultation with UNHCR, where more favourable provisions need to be introduced or retained to ensure compliance with international refugee or human rights law. In this connection, more favourable national standards which reflect binding international obligations should always be understood to be compatible with the Directive. This is *inter alia* reflected in Recitals (2) and (3) of the Directive which present the Convention as the basis and “cornerstone” of the international legal regime for the protection of refugees. UNHCR further encourages Member States to consider the introduction of best standards, including those which have been developed in state practice in Europe or in other regions.

Chapter II: Assessment of applications for international protection

Article 4

Assessment of facts and circumstances

1. Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.

UNHCR Comment on Article 4(1): In line with the UNHCR Handbook (para. 196), the duty to ascertain and evaluate all the relevant facts should be considered a joint responsibility of the applicant and the examiner. If the applicant is unable to provide the necessary evidence, the examiner has to use all the means at his/her disposal to produce the necessary evidence in support of the application.

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

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

2. The elements referred to in of paragraph 1 consist of the applicant's statements and all documentation at the applicants disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection.

3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

- (a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied;
- (b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;
- (c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

UNHCR Comment on Article 4(2)(c): The fact that family members or close associates of the applicant have been exposed to persecution may be an important element in the assessment of a well-founded fear of persecution of the applicant.

- (d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country;
- (e) whether the applicant could reasonably be expected to avail himself of the protection of another country where he could assert citizenship.

UNHCR Comment on Article 4 (3)(e): The factor outlined in Paragraph (3)(e) should not form part of the refugee status determination assessment. There is no obligation on the part of an applicant under international law to avail him- or herself of the protection of another country where s/he could "assert" nationality. The issue was explicitly discussed by the drafters of the Convention. It is regulated in Article 1A(2) (last sentence), which deals with applicants of dual nationality, and in Article 1E of the 1951 Convention. There

is no margin beyond the limits of these provisions. For Article 1E to apply, a person otherwise included in the refugee definition would need to fulfil the requirement of having taken residence in the country and having been recognized by the competent authorities in that country “as having the rights and obligations which are attached to the possession of the nationality of that country”. Since Article 1E is already reflected in Article 12(1)(b) of the Directive, Article 4 (3)(e) should not be incorporated into national legislation and practice if full compatibility with Article 1 of the 1951 Convention is to be ensured.

4. The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

UNHCR Comment on Article 4(4): UNHCR would nonetheless advocate in line with general humanitarian principles that even where the assessment concludes that serious harm will not be repeated, compelling reasons arising out of previous persecution, may still warrant the granting of refugee status. The following formulation could be added in national implementing legislation to reflect this principle: “*Compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant the grant of asylum*”. (See also comment on Article 11).

5. Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following conditions are met:

- (a) the applicant has made a genuine effort to substantiate his application;
- (b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;
- (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 applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and

UNHCR Comment on Article 4 (5)(d): UNHCR points out that a late submission should not increase the standard of proof for the asylum applicant.

- (e) the general credibility of the applicant has been established.

UNHCR Comment on Article 4(5)(e): UNHCR welcomes the recognition that the applicant cannot provide documentary evidence in all circumstances.

In applying the provisions, the principle of the benefit of the doubt should apply in the case of a generally credible asylum-seeker. The requirements of evidence should be applied in a balanced manner, with the necessary flexibility to take account of the special character of asylum applicants who (due to the circumstances of their flight) are often unable to meet the regular standards of proof. Member States will be aware that cases where an applicant can provide full evidence of statements will be the exception rather than the rule.¹³ The principle of the benefit of the doubt is also relevant for asylum-seeking children. Here, the burden of proof should be applied flexibly and liberally, by fact-finding and gathering supporting evidence in any manner possible. The evaluation of the child's account of the situation should take the child's maturity and competences into account.

UNHCR further wishes to point out that regardless of the applicant's credibility there may be instances where there is other evidence to support the claim. In such cases, UNHCR advocates that due consideration will be given to that evidence.

Article 5

International protection needs arising *sur place*

1. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the applicant left the country of origin.
2. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which have been engaged in by the applicant since he left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.

UNHCR Comment on Article 5(2): UNHCR welcomes the inclusion of *sur place* claims in the scope of this Directive. Even where it cannot be established that the applicant has already held the convictions or orientations in the country of origin, the asylum-seeker is entitled to the right of freedom of expression, freedom of religion and freedom of association, within the limits defined in Article 2 of the 1951 Convention and other human rights instruments. Such freedoms include the right to change one's religion or convictions, which could occur subsequent to departure e.g. due to disaffection with the religion or policies of the country of origin, or greater awareness of the impact of certain policies.

3. Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall normally not be granted refugee status, if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin.

¹³ See UNHCR *Handbook*, paras. 203–204 and the UNHCR *Note on Burden and Standard of Proof in Refugee Claims* of 16 December 1998.

UNHCR Comment on Article 5(3): There may be instances where an individual outside his or her country of origin who would otherwise not have a well-founded fear of persecution acts for the sole purpose of “manufacturing” an asylum claim. UNHCR appreciates that States face difficulty in assessing the validity of such claims and agrees with States that the practice should be discouraged. It would be preferable, however, to address difficult evidentiary and credibility questions by appropriate credibility assessments. Such an approach would also be in line with Article 4(3)(d) of the Directive. In UNHCR’s view, such an analysis does not require an assessment of whether the asylum-seeker acted in “bad faith” but rather, as in every case, whether the requirements of the refugee definition are in fact fulfilled taking into account all the relevant facts surrounding the claim. There is no logical or empirical connection between the well-foundedness of the fear of being persecuted or of suffering serious harm, and the fact that the person may have acted in a manner designed to create a refugee claim. The 1951 Convention does not, either explicitly or implicitly, contain a provision according to which its protection cannot be afforded to persons whose claims for asylum are the result of actions abroad. The phrase “without prejudice to the Geneva Convention” in Article 5(3) would therefore require such an approach.

Article 6

Actors of persecution or serious harm

Actors of persecution or serious harm include:

- (a) the State;
- (b) parties or organisations controlling the State or a substantial part of the territory of the State;
- (c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.

UNHCR Comment on Article 6: One of the key elements of the Directive, which UNHCR fully supports, is the firm rule guaranteeing the recognition of refugee status irrespective of the source or agent of persecution, hence including persecution emanating from non-State actors. UNHCR has long maintained that the 1951 Convention does not restrict persecution to acts by State agents. Rather, persecutory acts committed by non-State agents against whom the State is unwilling or unable to offer effective protection similarly give rise to refugee status under the 1951 Convention, provided, of course, the other criteria of the refugee definition are met. In this connection, the question of whether a State actor exists who could be held accountable for not offering

protection is of no consequence.¹⁵ UNHCR recommends, for reasons of clarity, that an explanation to this effect be included in national legislation. Furthermore, the term “demonstrated” should not increase the applicant’s burden of proof. Lack of state protection should be assumed if the standard of proof for a well-founded fear of persecution is met. With respect to UNHCR’s position concerning a lack of protection by “international organizations”, see the comment on Article 7(1)(b).

Article 7

Actors of protection

1. Protection can be provided by:

- (a) the State; or
- (b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State.

UNHCR Comment on Article 7(1)(b): The article raises the question regarding the extent to which non-State entities can provide protection. In UNHCR’s view, refugee status should not be denied on the basis of an assumption that the threatened individual could be protected by parties or organizations, including international organizations, if that assumption cannot be challenged or assailed. It would, in UNHCR’s view, be inappropriate to equate national protection provided by States with the exercise of a certain administrative authority and control over territory by international organizations on a transitional or temporary basis. Under international law, international organizations do not have the attributes of a State. In practice, this generally has meant that their ability to enforce the rule of law is limited.

2. Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.

UNHCR Comment on Article 7(2): Determining the availability of protection requires an assessment of the effectiveness, accessibility and adequacy of available protection in the individual case. Possible guarantors of such protection or the existence of a legal system in a given country may be elements of this examination. However, the assessment to be made is whether the applicant’s fear of persecution continues to be well-founded, regardless of the steps taken to prevent persecution or serious harm.

3. When assessing whether an international organisation controls a State or a substantial part of its territory and provides protection as described in

¹⁵ This is acknowledged in the Explanatory Memorandum on Article 9(1), which clarified that the actor of the persecution was irrelevant: Explanatory Memorandum presented by the European Commission (COM(2001)510 final, 12.9.2001), page 18. See also comment on Article 9(1).

paragraph 2, Member States shall take into account any guidance which may be provided in relevant Council acts.

Article 8

Internal protection

1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.
2. In examining whether a part of the country of origin is in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.
3. Paragraph 1 may apply notwithstanding technical obstacles to return to the country of origin.

UNHCR Comment on Article 8: In analyzing the applicability of an internal relocation alternative, it has to be determined first whether the issue is of any relevance to an individual case. Otherwise there is no need to examine whether or not the proposed area would be a reasonable alternative. Such an assessment should, for example, not normally be necessary where the feared persecution emanates from State agents, as they are regularly able to act throughout the territory.

Article 8(1) recognizes that an assessment needs to be made as to whether the applicant is safe from persecution or real risk of suffering serious harm in another part of the country. Apart from considering whether the applicant would not have a well-founded fear of persecution or would face serious harm in the area, it should also be considered whether the applicant could safely and reasonably relocate, without undue hardship. UNHCR suggests that these considerations be reflected explicitly when implementing the Directive.

Subparagraph (3) which foresees the applicability of an internal relocation or flight alternative in cases where return to the proposed part of the country is not possible due to “technical obstacles to return”, is problematic in UNHCR’s view and should not be implemented in national law or practice. The effect of this provision is to deny international protection to persons who have no accessible protection alternative. In UNHCR’s view, this is not consistent with Article 1 of the 1951 Convention. An internal relocation or flight alternative must be safely and legally accessible for the individual concerned. If the proposed alternative is not accessible in a practical sense, an internal flight or relocation alternative does not exist and cannot be reasonable.¹⁶

¹⁶ See also, UNHCR, *Handbook*, para. 91 and UNHCR, “Guidelines on International Protection: ‘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”, HCR/GIP/03/04, 23 July 2003.

Chapter III: Qualification for being a refugee

Article 9

Acts of persecution

1. Acts of persecution within the meaning of article 1A of the Geneva Convention must:
 - (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
 - (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

UNHCR Comment on Article 9(1): In UNHCR's view, the interpretation of what constitutes persecution needs to be flexible, adaptable and sufficiently open to accommodate its changing forms. Furthermore, it will depend on the circumstances of each case whether prejudicial actions or threats would amount to persecution. While international and regional human rights treaties and the corresponding jurisprudence and decisions of the respective supervisory bodies influence the interpretation of the 1951 Convention, persecution cannot and should not be defined solely on the basis of serious or severe human rights violations. Severe discrimination, or the cumulative effect of various measures not in themselves amounting to persecution or severe violations of human rights, either alone or in combination with other adverse factors, can give rise to a well-founded fear of persecution; or, in other words, could make life in the country of origin so insecure from many perspectives for the individual concerned, that the only way out of the predicament is to leave the country of origin. Although there may be situations where a violation of human rights cannot formally be attributed to a government because of its inability to provide protection against "violations" by a non-state actor, as stated above (see comment on Article 6), refugee protection is to be granted independently from the responsibility of the country of origin for the persecutory act.¹⁷

2. Acts of persecution as qualified in paragraph 1, can, *inter alia*, take the form of:
 - (a) acts of physical or mental violence, including acts of sexual violence;
 - (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
 - (c) prosecution or punishment, which is disproportionate or discriminatory;

¹⁷ See UNHCR *Handbook*, paras 51-53.

- (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
- (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);

UNHCR Comment on Article 9(2)(e): UNHCR welcomes the recognition that prosecution or punishment for refusing to perform military service can constitute persecution. UNHCR understands that the provision will also apply where the refusal to serve relates to a conflict that in and of itself is contrary to public international law, such as for example when it has been condemned by the Security Council.

Additionally, in line with the UNHCR *Handbook*¹⁸ and evolving human rights law¹⁹, punishment for refusal to perform compulsory military service in the form of draft evasion or desertion may also be considered to be persecutory, if the reasons for refusal to serve are based on deeply held moral, religious or political convictions (conscientious objection). The question as to whether the objection is selective is irrelevant in this regard. UNHCR trusts that Member States will take this aspect into account.

- (f) acts of a gender-specific or child-specific nature.

UNHCR Comment on Article 9(2)(f): UNHCR welcomes the reference to gender-specific and child-specific persecution. Even though gender and age are not specifically referenced in the refugee definition, it has been UNHCR's position that the text, object and purpose of the 1951 Convention require such an interpretation. It is widely accepted that gender and age can influence, or dictate, the type of persecution suffered (see also comment on Article 10 (d).)²⁰

3. In accordance with Article 2(c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1.

¹⁸ See paras. 167–174, as well as UNHCR, “Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees”, HCR/GIP/04/06, 28 April 2004, paras. 25–26.

¹⁹ Thus, for example, the Human Rights Committee states, in General Comment No. 22(48) on Article 18 of the 1966 International Covenant on Civil and Political Rights (right to freedom of thought, conscience and religion), that a right to conscientious objection can be derived from Article 18 inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief.

²⁰ See also UNHCR, “Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees”, HCR/GIP/02/01, 7 May 2002.

Article 10

Reasons for persecution

1. Member States shall take the following elements into account when assessing the reasons for persecution:

UNHCR Comment on Article 10: While the Directive provides some guidance on the interpretation of the Convention grounds, it should in no way be considered to be conclusive or exhaustive. Other elements not outlined in this Article may prove equally relevant. The reasons for persecution are multifarious and may, moreover, change over time. The Convention grounds should therefore be interpreted accordingly.

- (a) the concept of race shall in particular include considerations of colour, descent, or membership of a particular ethnic group;
- (b) the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;

UNHCR Comment on Article 10(b): UNHCR recommends that States consult the Guidelines on International Protection relating to religion-based refugee claims as well as the UNHCR *Handbook*²¹ when deciding such claims. As noted above, in UNHCR's understanding, the freedom to change one's religion is included in the concept of religion or conviction as outlined in Article 10(b). It may give rise to a *sur place* claim.

- (c) the concept of nationality shall not be confined to citizenship or lack thereof but shall in particular include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;
- (d) a group shall be considered to form a particular social group where in particular:
 - members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
 - that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the

²¹ UNHCR Handbook, paras. 71–73 and UNHCR, “Guidelines on International Protection: Religion-Based Refugee Claims”, HCR/GIP/04/06, 28 April 2004.

Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article;

UNHCR Comment on Article 10(d): In UNHCR's view, the term "social group" should be interpreted in a manner open to the diverse and changing nature of groups in various societies and to evolving international human rights norms.²² Two main schools of thought as to what constitutes a social group within the meaning of the 1951 Convention are reflected in the Directive. The "protected characteristics approach" is based on an immutable characteristic or a characteristic so fundamental to human dignity that a person should not be compelled to forsake it. The "social perception approach" is based on a common characteristic which creates a cognizable group that sets it apart from the society at large. While the results under the two approaches may frequently converge, this is not always the case. To avoid any protection gaps, UNHCR therefore recommends that Member States reconcile the two approaches to permit alternative, rather than cumulative, application of the two concepts.

States have recognized women, families, tribes, occupational groups and homosexuals as constituting a particular social group for the purposes of the 1951 Convention. To avoid misinterpretation, UNHCR would encourage Member States, to provide in their legislation for further examples of groups which can qualify for refugee status, beyond the example of "sexual orientation". Other examples would be gender, age, disability, and health status.

With respect to the provision that "[g]ender related aspects might be considered, without by themselves alone creating a presumption for the applicability of the article", UNHCR notes that courts and administrative bodies in a number of jurisdictions have found that women, for example, can constitute a particular social group within the meaning of Article 1A(2). Gender is a clear example of a social subset of persons who are defined by innate and immutable characteristics and who are frequently subject to differentiated treatment and standards. This does not mean that all women in the society qualify for refugee status. A claimant must demonstrate a well-founded fear of being persecuted based on her membership in the particular social group.²³

Even though less has been said in relation to the age dimension in the interpretation and application of international refugee law, the range of potential claims where age is a relevant factor is broad, including forcible or

²² See also UNHCR, 'Guidelines on International Protection: 'Membership of a Particular Social Group' within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees', HCR/GIP/02/02, 7 May 2002, para. 12.

²³ See UNHCR, 'Guidelines on 'Membership of a Particular Social Group'', HCR/GIP/02/02, 7 May 2002; and "Guidelines on Gender-Related Persecution", HCR/GIP/02/01, 7 May 2002; and Explanatory Memorandum on proposed articles 7 and 12(d): Explanatory Memorandum presented by the European Commission (COM(2001)510) final, 12.9.2001, pages 14 and 22.

under-age recruitment into military service, (forced) child marriage, female genital mutilation, child trafficking, or child pornography or abuse. Some claims that are age-related may also include a gender element and compound the vulnerability of the claimant.

UNHCR encourages States, in cooperation with UNHCR, to adopt guidelines on assessing the asylum applications of women and children.²⁵

(e) the concept of political opinion shall in particular include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.

2. When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.

Article 11

Cessation

1. A third country national or a stateless person shall cease to be a refugee, if he or she:

(a) has voluntarily re-availed himself or herself of the protection of the country of nationality; or

UNHCR Comment on Article 11(1)(a): UNHCR notes that this cessation provision entails three requirements: that the refugee has acted voluntarily; that the refugee had the intention by his or her actions to re-avail him- or herself of the protection of the country of nationality; and that such national protection is available and has been obtained. A clear distinction should be drawn between actual re-availment of protection and occasional and incidental contacts with the national authorities.²⁷

²⁵ For elements of good practice relating to children in asylum determination procedures, see Save the Children, UNHCR: Separated Children in Europe Programme Statement of Good Practice: Third Edition, 2004, Section C.12, pages 24-27; and Explanatory Memorandum to proposed article 7, Explanatory Memorandum presented by the European Commission (COM(2001)510 final, 12.9.2001), page 15.

²⁷ See UNHCR, *Handbook*, paras. 118–128.

- (b) having lost his or her nationality, has voluntarily re-acquired it; or
- (c) has acquired a new nationality, and enjoys the protection of the country of his or her new nationality; or
- (d) has voluntarily re-established himself or herself in the country which he or she left or outside which he or she remained owing to fear of persecution; or

UNHCR Comment on Article 11 (d): In line with the UNHCR *Handbook*, this clause should be understood as return to the country of origin with a view to permanently residing there. A temporary visit by the refugee to his or her former home country would not constitute “re-establishment” and should not necessarily result in loss of refugee status.²⁸

- (e) can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail him or herself of the protection of the country of nationality;
- (f) being a stateless person with no nationality, he or she is able, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, to return to the country of former habitual residence.

2. In considering points (e) and (f) of paragraph 1, Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded.

UNHCR Comments to Article 11, Article 11(1)(e),(f) and 11(2): UNHCR advises States to refer to Chapter III of the UNHCR *Handbook* and the UNHCR Guidelines on International Protection on cessation of refugee status under Article 1C(5) and (6) of the 1951 Convention which provide clarification on the application of the cessation clauses. Changes in circumstances must be fundamental and durable. In the assessment as to whether such changes have taken place, inter alia the human rights situation needs to be considered.

UNHCR refers in particular to the exception to the “ceased circumstances” cessation clauses in Articles 1C(5) and 1C(6) of the 1951 Convention relating to “compelling reasons arising out of previous persecution”. UNHCR believes that this proviso should be interpreted to extend beyond the actual wording of the provision and to apply to refugees under Article 1A(2) of the Convention. As noted in the UNHCR *Handbook*, it reflects a general humanitarian principle that is well grounded in State practice. It should therefore be taken up in national legislation.²⁹

²⁸ See UNHCR, *Handbook*, para 134.

²⁹ See UNHCR, “Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the

Article 12

Exclusion

1. A third country national or a stateless person is excluded from being a refugee, if:
 - (a) he or she falls within the scope of Article 1 D of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Directive;

UNHCR Comment on Article 12(1)(a): The objective of Article 1D of the 1951 Convention is to avoid overlapping competencies between UNRWA and UNHCR, but also in conjunction with UNHCR's Statute, ensures the continuity of protection and assistance of Palestinian refugees as necessary. The fact that a Palestinian falls within paragraph 2 of Article 1D (automatic inclusion) does not necessarily mean that s/he cannot be returned to UNRWA's area of operations. Reasons not to return may be a danger of persecution or other serious protection related problems or his/her inability to return, for example, because the authorities of the country concerned refuse readmission. For further information, UNHCR recommends that States consult UNHCR's "Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees" of October 2002, when interpreting this provision.

- (b) he or she is recognised by the competent authorities of the country in which he or she has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country; or rights and obligations equivalent to those.

UNHCR Comment on Article 12(1)(b): It should be noted that Article 1E applies only to cases where the person is *currently* recognized by the country concerned as having these "rights and obligations". If the country granted such rights in the past but is no longer willing to do so, Article 1E does not apply. Similarly, Article 1E does not apply to the claims of individuals for whom the potential for such enjoyment of right exists, but who have never resided in that country.

Status of Refugees (the 'Ceased Circumstances' Clauses)", HCR/GIP/03/03, 10 February 2003; and Explanatory Memorandum on proposed Article 13(e), Explanatory Memorandum presented by the European Commission (COM(2001)510 final, 12.9.2001), page 23.

³¹ 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, and accompanying UNHCR "Background Note".

2. A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:

UNHCR Comment on Article 12(2): UNHCR recommends that States consult the UNHCR Guidelines on International Protection on application of the exclusion clauses: Article 1F of the 1951 Convention relating to the Status of Refugees³¹, when interpreting the exclusion clauses. It should be borne in mind that the grounds for exclusion are *exhaustively* enumerated in the 1951 Convention. While these grounds are subject to interpretation, they cannot be expanded in the absence of an agreement by all State Parties.

- (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;

UNHCR Comment on Article 12(2)(b): The phrase “which means the time of issuing a residence permit” to the wording of Article 1F(b) appears inconsistent with the wording of that Article, which contains both a geographical and temporal limitation requiring that serious non-political crimes must have been committed (i) outside the country of refuge and (ii) prior to admission there as a refugee. It would not be correct to interpret the phrase “prior to admission ... as a refugee” as referring to the time preceding the recognition of refugee status or the issuing of a residence permit based on the granting of refugee status. Given that the recognition of refugee status is declaratory, not constitutive, “admission” in this context includes mere physical presence in the country of refuge. Such an interpretation is based on the rationale that crimes committed in the country of refuge are considered in the context of Article 33(2) of the 1951 Convention, rather than in the context of the exclusion clauses.

It is furthermore understood that the phrase “particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes” refers to criminal acts which are particularly egregious.

- (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

UNHCR Comment on Article 12(2)(c): It is UNHCR’s understanding that only those criminal acts which are contrary to the purposes and principles of the United Nations in a fundamental manner may trigger the application of Article 1F(c). The purposes and principles are set out in Articles 1 and 2 of the United Nations Charter and relate to international peace and security, and

peaceful relations between States. Given that States must uphold these in their mutual relations, in principle only persons who have been in a position of power in their countries or in State-like entities would appear capable of violating these provisions. (See Comment on Recital (22).)

3. Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.

UNHCR Comment on Article 12: UNHCR notes that applicants excluded from the 1951 Convention and/or the scope of the Directive may nevertheless be protected against *refoulement* under international human rights law, such as for example Article 3 ECHR, as laid down in Article 21(1) of the Directive.

Chapter IV: Refugee Status

Article 13

Granting of refugee status

Member States shall grant refugee status to a third country national or a stateless person, who qualifies as a refugee in accordance with Chapters II and III.

Article 14

Revocation of, ending of or refusal to renew refugee status

1. Concerning applications for international protection filed after the entry into force of this Directive, Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if he or she has ceased to be a refugee in accordance with Article 11.

2. Without prejudice to the duty of the refugee in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his/her disposal, the Member State, which has granted refugee status, shall on an individual basis demonstrate that the person concerned has ceased to be or has never been a refugee in accordance with paragraph 1 of this Article.

UNHCR Comment on Article 14(2): The provision seems to confuse the legal concepts of cessation, cancellation and revocation. Cessation refers to the ending of refugee status pursuant to Article 1C of the 1951 Convention because international refugee protection is no longer necessary or justified. Cancellation means a decision to invalidate a refugee status recognition, which is appropriate where it is subsequently established that the individual should never have been recognized, including in cases where he or she should have been excluded from international refugee protection. Revocation refers to the withdrawal of refugee status in situations where a person properly determined to be a refugee engages in conduct which comes within the scope of Article 1F(a) or (c) of the 1951 Convention after recognition. UNHCR requests states

to differentiate between these concepts and their legal requirements in the implementing legislation.³²

3. Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person, if, after he or she has been granted refugee status, it is established by the Member State concerned that:

(a) he or she should have been or is excluded from being a refugee in accordance with Article 12;

UNHCR Comment on Article 14(3)(a): The language “is excluded from being a refugee in accordance with Article 12” is understood to refer to a situation where refugee status can be ended or revoked because a refugee has committed a crime within the scope of Article 1F(a) and 1F(c) of the 1951 Convention after recognition. Revocation on the basis of Article 1F(a) or 1F(c) is permitted, as neither of these clauses contain a geographical or temporal limitation. For crimes other than those falling within the scope of Article 1F(a) or 1F(c), criminal prosecution would be foreseen, rather than revocation of refugee status.

As noted above, Article 1F(b) specifies that the serious, non-political crimes must have been committed outside the country of refuge prior to admission. The logic of the Convention is that the type of crimes covered by Article 1F(b) committed after admission would be handled through rigorous domestic criminal law enforcement, as well as the application of Articles 32 and 33(2) of the 1951 Convention, where necessary. Neither Article 1F(b) nor Article 32 or 33(2) provides for the loss of refugee status of a person who, at the time of the initial determination, met the eligibility criteria of the 1951 Convention. In cases which involve serious non-political crimes, Article 14(3)(a) should therefore be understood as referring to crimes committed prior to admission outside the country of refuge. (See also comments on Article 14(4) of the Directive).

(b) his or her misrepresentation or omission of facts, including the use of false documents, were decisive for the granting of refugee status.

UNHCR Comment on Article 14(3)(b): Misrepresentations or omission of facts, including the use of false documents, can only serve as a basis for cancelling refugee status if this amounts to objectively incorrect statements by the applicant which relate to material or relevant facts (that is, elements which were clearly instrumental to the recognition) and if there was an intention on the part of the applicant to mislead the decision maker. The use of forged documents should also be assessed in light of the circumstances of the case: in many instances, asylum-seekers need to rely on false papers to flee persecution. The use of false documents does not of itself render a claim fraudulent and should not automatically result in the cancellation of refugee

³² See UNHCR’s Guidelines on Cessation (HCR/GIP/03/03); UNHCR’s Guidelines on Exclusion and Background Note (HCR/GIP/03/05); and UNHCR, Note on the Cancellation of Refugee Status, 22 November 2004.

status, provided the person revealed his/her true identity and nationality and it has formed the basis of the recognition decision.³³ The fact that refugees may sometimes be forced to make use of forged documents is also recognized by Article 31(1) of the 1951 Convention which exempts refugees (under specific conditions) from penalization on account of illegal entry into or stay in the country in which they apply for asylum.

4. Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when:

- (a) there are reasonable grounds for regarding 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 judgement of a particularly serious crime, constitutes a danger to the community of that Member State.

UNHCR Comment on Article 14(4): Similarly to the cases under Article 14(1-3), the burden of proof for establishing that the criteria under Article 14(4)(a) and (b) are fulfilled should be on the Member State applying the provision.

5. In situations described in paragraph 4, Member States may decide not to grant status to a refugee, where such a decision has not yet been taken.

6. Persons to whom paragraphs 4 or 5 apply are entitled to rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31 and 32 and 33 of the Geneva Convention in so far as they are present in the Member State.

UNHCR Comment on Article 14(4)-(6): Article 14(4) of the Directive runs the risk of introducing substantive modifications to the exclusion clauses of the 1951 Convention, by adding the provision of Article 33(2) of the 1951 Convention (exceptions to the *non-refoulement* principle) as a basis for exclusion from refugee status. Under the Convention, the exclusion clauses and the exception to the *non-refoulement* principle serve different purposes. The rationale of Article 1F which exhaustively enumerates the grounds for exclusion based on the conduct of the applicant is twofold. Firstly, certain acts are so grave that they render their perpetrators undeserving of international protection. Secondly, the refugee framework should not stand in the way of serious criminals facing justice. By contrast, Article 33(2) deals with the treatment of refugees and defines the circumstances under which they could nonetheless be refouled. It aims at protecting the safety of the country of refuge or of the community. The provision hinges on the assessment that the refugee in question is a danger to the national security of the country or, having been convicted by a final judgement of a particularly serious crime, poses a danger to the community. Article 33(2) was not, however, conceived

³³ See also UNHCR, Note on the Cancellation of Refugee Status, 22 November 2004.

as a ground for terminating refugee status (see comments to Article 21 (2-3). Assimilating the exceptions to the *non-refoulement* principle permitted under Article 33(2) to the exclusion clauses of Article 1 F would therefore be incompatible with the 1951 Convention. Moreover, it may lead to a wrong interpretation of both Convention provisions.

“Status granted to a refugee” is therefore understood to refer to the asylum (“status”) granted by the State rather than refugee status in the sense of Article 1A (2) of the 1951 Convention (see comment on Article 2(d)). States are therefore nonetheless obliged to grant the rights of the 1951 Convention which do not require lawful residence and which do not foresee exceptions for as long as the refugee remains within the jurisdiction of the State concerned.

UNHCR further notes that, similarly to the cases under Article 14 (1-3), the burden of proof for establishing that the criteria under Article 14(4) are fulfilled should be on the Member State applying the provision.

Chapter V: Qualification for subsidiary protection

Article 15

Serious harm

Serious harm consists of:

- (a) death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

UNHCR Comment on Article 15: UNHCR strongly supports the creation of a legal obligation to grant subsidiary protection to those at risk of serious harm for reasons and in circumstances not necessarily covered by the Convention. In this connection, it is important that measures to provide subsidiary protection are implemented with the objective of strengthening, not undermining, the existing global refugee protection regime. This presupposes that individuals who fulfil its criteria are granted Convention refugee status, rather than being accorded subsidiary protection. To this end, the refugee definition should be interpreted progressively and with the necessary flexibility to take changing forms of persecution into account.³⁴

The Directive’s provisions on subsidiary protection comprise grounds which would indicate a strong presumption for Convention refugee status in certain cases. For example, an act of torture perpetrated by State actors would

³⁴ This has also been acknowledged by the Commission in the Explanatory Memorandum on the Guiding Principles of the proposed Directive, and on then proposed article 5(2), Explanatory Memorandum presented by the European Commission (COM(2001)510 final, 12.9.2001), pages 5 and 13.

normally be linked to a Convention ground. Only where torture is inflicted out of purely criminal motivation could this give rise to a claim of subsidiary protection under Article 3 ECHR. Similarly, situations of armed conflict may well engender persecution linked to a Convention ground, for example, in the form of non-military acts of persecution by State and non State-actors or in the form of targeted military activities.³⁵ This is confirmed by State practice and jurisprudence. The nexus with a Convention ground is very relevant in situations of systematic or generalized violations of human rights. It is only in situations where such violations have no link to a Convention ground that subsidiary forms of protection are required.

UNHCR would therefore prefer a clarification to the effect that subsidiary protection should apply only if there is no link between the risk or threat of harm and any of the five Convention grounds (“... *for reasons outside the scope of the refugee definition.*”). The office understands, however, that the use of the term “subsidiary”, the definition in Article 2(e) and the headline of the chapter are to ensure that subsidiary protection only comes into play after a negative decision on the application for refugee status or when an applicant explicitly confines his/her application to subsidiary protection.

UNHCR Comment on Article 15(c): There is a consistent State pattern of granting subsidiary protection to persons risking indiscriminate but serious threats as a result of armed conflict or generalized violence. Moreover, Member States have over the years repeatedly reaffirmed their support for UNHCR’s mandate activities undertaken to secure international protection for persons fleeing the indiscriminate effects of violence associated with armed conflicts or serious public disorder. This evolution in the application of the UNHCR mandate has been matched by regional arrangements, in particular in Africa, in the form of the 1969 *Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa*, and in Latin America, by the 1984 *Cartagena Declaration*. In Europe, a series of Recommendations of the Parliamentary Assembly and the Committee of Ministers of the Council of Europe, in particular Recommendation (2001)18 of the Committee of Ministers on Subsidiary Protection, adopted on 27 November 2001, similarly recognize the need for international protection for such cases. UNHCR therefore welcomes the reflection of such needs in the Directive.

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

³⁵ See Explanatory Memorandum on proposed Article 11(2)(c), Explanatory Memorandum presented by the European Commission (COM(2001)510 final, 12.9.2001), page 21.

protection under this Directive.

UNHCR further notes that the provision is restricted to cases where the threshold of an “internal or international armed conflict” is reached. Persons fleeing indiscriminate violence and gross human rights violations more generally would, however, similarly be in need of international protection. It hopes that States will recognize the need to grant protection broadly in transposing and applying this provision.³⁶

Article 16

Cessation

1. A third country national or a stateless person shall cease to be eligible for subsidiary protection when the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required.

2. In applying paragraph 1, Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the person eligible for subsidiary protection no longer faces a real risk of serious harm.

UNHCR Comment on Article 16: UNHCR recommends that the “compelling reasons” exception of Article 1C(5), 2 of the 1951 Convention be equally applied to the cessation of subsidiary protection. As explained above (see comment on Article 11), it reflects a general humanitarian principle well grounded in state practice.

Article 17

Exclusion

1. A third country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that:

- (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he or she has committed a serious crime;
- (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;
- (d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present.

³⁶ See Explanatory Memorandum on Article 15(c), Explanatory Memorandum presented by the European Commission (COM(2001)510 final, 12.9.2001), page 26.

2. Paragraph 1 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.

3. Member States may exclude a third country national or a stateless person from being eligible for subsidiary protection, if he or she prior to his or her admission to the Member State has committed one or more crimes, outside the scope of paragraph 1, which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from these crimes.

UNHCR Comment on Article 17(3): Given the close linkages between refugee status and subsidiary forms of protection, in so far as they cover persons under UNHCR's mandate, similar concerns as those expressed with regard to Article 12 of the Directive would seem to apply. UNHCR notes, moreover, that Member States' obligations under international human rights law with regard to *non-refoulement* apply in such circumstances, as laid down in Article 21(1) of the Directive.

Chapter VI: Subsidiary Protection Status

Article 18

Granting of subsidiary protection status

Member States shall grant subsidiary protection status to a third country national or a stateless person eligible for subsidiary protection in accordance with Chapters II and V.

Article 19

Revocation of, ending of or refusal to renew subsidiary protection status

1. Concerning applications for international protection filed after the entry into force of this Directive, Member States shall revoke, end or refuse to renew the subsidiary protection status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if he or she has ceased to be eligible for subsidiary protection in accordance with Article 16.

2. Member States may revoke, end or refuse to renew the subsidiary protection status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if after having been granted subsidiary protection status, he or she should have been excluded from being eligible for subsidiary protection in accordance with Article 17(3).

3. Member States shall revoke, end or refuse to renew the subsidiary protection status of a third country national or a stateless person, if:

(a) he or she, after having been granted subsidiary protection status, should have been or is excluded from being eligible for subsidiary protection in accordance with Article 17(1) and (2);

(b) his or her misrepresentation or omission of facts, including the use of

false documents, were decisive for the granting of subsidiary protection status.

4. Without prejudice to the duty of the third country national or stateless person in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his/her disposal, the Member State, which has granted the subsidiary protection status, shall on an individual basis demonstrate that the person concerned has ceased to be or is not eligible for subsidiary protection in accordance with paragraphs 1, 2 and 3 of this Article.

UNHCR Comment on Article 19: Given the close linkages between refugee status and subsidiary forms of protection, in so far as they cover persons under UNHCR's mandate, similar concerns as those expressed with regard to Article 14 (4-6) of the Directive would seem to apply.

Chapter VII: Content of international protection

Article 20

General rules

1. This Chapter shall be without prejudice to the rights laid down in the Geneva Convention.

UNHCR Comment on Article 20(1): UNHCR notes that the Directive does not include or fully reflect all 1951 Convention rights. UNHCR would like to remind States that the 1951 Convention imposes binding obligations on Member States and as such represents a minimum standard to which all Member States have agreed. It also notes that relevant obligations deriving from international and/or regional human rights treaties which are not reflected in the Directive may be applicable, and may go beyond the provisions of the 1951 Convention.³⁷ For the sake of completeness and to avoid oversights in practice, UNHCR recommends that all provisions of the 1951 Convention be included in relevant national legislation.³⁸

2. This Chapter shall apply both to refugees and persons eligible for subsidiary protection unless otherwise indicated.

³⁷ With regard to the rights of recognised refugees and persons under subsidiary protection, relevant human rights treaties include the two International Covenants, the Covenant on Civil and Political Rights (ICCPR) and the Covenant on Social, Economic and Cultural Rights (ICESCR) of December 1966, the Convention on the Elimination of all Forms of Discrimination against Women of December 1979 (CEDAW), the Convention on the Rights of the Child of 20 November 1989, the European Convention on Human Rights (ECHR), the European Social Charter. While the comments below provide for some references to existing human rights obligations, these are not exhaustive.

³⁸ For further information on the interpretation of the Convention rights please see UNHCR: Refugee Resettlement, An International Handbook to Guide Reception and Integration, September 2002.

UNHCR's Comment on Article 20(2): As regards status and rights of those determined to be in need of international protection, it is UNHCR's long standing position that the rights of persons recognized to be in need of international protection should provide for the protection of basic civil, political, social and economic rights on an equal footing with those granted Convention status. UNHCR is concerned about the different standards in rights and benefits accorded throughout this Chapter respectively to beneficiaries of subsidiary protection whose need for international protection is equally compelling – and frequently as long in duration – as that of refugees.

3. When implementing this Chapter, Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

4. Paragraph 3 shall apply only to persons found to have special needs after an individual evaluation of their situation.

5. The best interest of the child shall be a primary consideration for Member States when implementing the provisions of this Chapter that involve minors.

UNHCR Comment on Article 20 (3-5): UNHCR welcomes that the specific situation of vulnerable persons is to be taken into account, and in particular that the best interest of the child is to be a primary consideration when implementing the provisions of this Chapter.

6. Within the limits set out by the Geneva Convention, Member States may reduce the benefits of this Chapter, granted to a refugee whose refugee status has been obtained on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised as a refugee.

UNHCR Comment on Article 20 (6): As explained above (see comment on Article 5), the 1951 Convention does not provide for sanctions in the case of persons who engage in activities for the sole purpose of securing refugee protection. The discretion of States to reduce benefits on that ground therefore is limited. Non-discriminatory treatment of all refugees is a basic principle in international refugee law (see Article 3 of the 1951 Convention).

7. Within the limits set out by international obligations of Member States, Member States may reduce the benefits of this Chapter, granted to a person eligible for subsidiary protection, whose subsidiary protection status has been obtained on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised as a person eligible for subsidiary protection.

UNHCR Comment on Article 20(7): See comment on Art 20(6).

Article 21

Protection from refoulement

1. Member States shall respect the principle of non-refoulement in accordance with their international obligations.

UNHCR Comment on Article 21(1): UNHCR understands that Article 21(1) is intended as a reminder to Member States of their obligations as regards the principle of *non-refoulement* outside the scope of the Directive.

2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, 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; or
- (b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.

3. Member States may revoke, end or refuse to renew or to grant the residence permit of (or to) a refugee to whom paragraph 2 applies.

UNHCR Comment on Article 21 (2) and (3): Article 21 (2) and (3), which in part reflects the exceptions to the *non-refoulement* principle under Article 33(2) 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. The two provisions are complementary. Article 32(3) stipulates, for example, that a refugee subject to expulsion pursuant to Article 32(1) shall be allowed “a reasonable period within which to seek legal admission into another country”. This specific procedural safeguard affects the operation of Article 33(2) where expulsion to the country of origin is envisaged. It also supports that *refoulement* is considered a measure of last resort, only applicable if other measures, such as prosecution or imprisonment in the country of refuge or removal to a third country, are unavailable or insufficient to address the security risks. See also comment on Article 14(3)(a) above.

UNHCR notes that Article 21(2) also refers to asylum-seekers. This is, however, not necessary since the applicability of the exception of Article 33(2) depends in the first place on whether or not the person fulfills the criteria of the refugee definition. Establishing the refugee character is an important element for the applicability of Article 33(2), not least to enable the assessment of proportionality considerations. See also comments to Article 14 of the Directive.

Article 22
Information

Member States shall provide persons recognised as being in need of international protection, as soon as possible after the respective protection status has been granted, with access to information, in a language likely to be understood by them, on the rights and obligations relating to that status.

UNHCR Comment on Article 22: UNHCR welcomes the provision of information to persons recognized as needing international protection, but would prefer the wording “in a language they understand” to be used in implementing legislation. In UNHCR’s view, proper counselling of refugees and persons under subsidiary protection facilitates the process of becoming self-reliant.

Article 23
Maintaining family unity

1. Member States shall ensure that family unity can be maintained.
2. Member States shall ensure that family members of the beneficiary of refugee or subsidiary protection status, who do not individually qualify for such status, are entitled to claim the benefits referred to in Articles 24 to 34, in accordance with national procedures and as far as it is compatible with the personal legal status of the family member.

In so far as the family members of beneficiaries of subsidiary protection status are concerned, Member States may define the conditions applicable to such benefits.

In these cases, Member States shall ensure that any benefits provided guarantee an adequate standard of living.

UNHCR Comment on Article 23(1)–(2): In UNHCR’s view, members of the same family should be given the same status as the principal applicant (derivative status). As noted above (see comment on Article 2(h)), the principle of family unity derives from the Final Act of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons and from human rights law. Most EU Member States provide for a derivative status for family members of refugees. This is also, in UNHCR’s experience, generally the most practical way to proceed. However, there are situations where this principle of derivative status is not to be followed, i.e. where family members wish to apply for asylum in their own right, or where the grant of derivative status would be incompatible with their personal status, e.g. because they are nationals of the host country, or because their nationality entitles them to a better standard.

The same holds true for family members of persons under subsidiary protection. UNHCR notes in this regard that Member States’ obligations to ensure family protection, according *inter alia* to Article 8 ECHR, are not restricted to Convention refugees but apply also to families of persons

otherwise in need of international protection. The conditions applicable to the benefits and rights of family members should therefore be defined accordingly.

3. Paragraphs 1 and 2 are not applicable where the family member is or would be excluded from refugee or subsidiary protection status pursuant to Chapters III and V.

4. Notwithstanding paragraphs 1 and 2, Member States may refuse, reduce or withdraw the benefits referred therein for reasons of national security or public order.

UNHCR Comment on Article 23(4): The broad formulation of the provision basically leaves it to the national law of Member States to decide when to refuse or withdraw benefits. In UNHCR's opinion, the provision is superfluous since Articles 24–34 already offer sufficient possibilities for restrictions. UNHCR recalls that according to general principles of human rights law, any restrictions on human rights must serve a legitimate purpose, be suitable to achieve that purpose and be proportionate. Additionally, adequate procedural safeguards should be followed.

5. Member States may decide that this Article also applies to other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of refugee or subsidiary protection status at that time.

UNHCR Comment on Article 23(5): As outlined above (see comment on Article 2(h)), UNHCR regrets that the definition of family members has been restricted to the core family. UNHCR urges States, in accordance with the jurisprudence developed under Article 8 ECHR, to make use of the possibility outlined in Article 23(5) and to apply the article more broadly, to encompass other relatives who are wholly or in part dependent on the core family unit.

Article 24

Residence permits

1. As soon as possible after their status has been granted, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least three years and renewable unless compelling reasons of national security or public order otherwise require, and without prejudice to Article 21(3).

Without prejudice to Article 23(1), the residence permit to be issued to the family members of the beneficiaries of refugee status may be valid for less than three years and renewable.

UNHCR Comment on Article 24(1): Refugees require a secure status to be able to achieve self-reliance and to integrate more easily into the society of the host country, including into the labour market. UNHCR therefore suggests that they be granted permanent residency either immediately or, at the latest,

following expiry of the initial permit. Similar rights to long-term residence should also be accorded to family members.

Further, UNHCR encourages Member States in line with Excom Conclusion No. 69 (XLIII)(1992) to favourably consider requests for renewal or re-issuance of the residence permit after the refugee or subsidiary protection status has ceased, and the individual concerned is well integrated in the host country.³⁹

2. As soon as possible after the status has been granted, Member States shall issue to beneficiaries of subsidiary protection status a residence permit which must be valid for at least one year and renewable, unless compelling reasons of national security or public order otherwise require.

UNHCR Comment on Article 24(2): There is no reason to expect the need for subsidiary protection to be of shorter duration than the need for protection under the 1951 Convention. In recognition of this, UNHCR would recommend that the residence permit provided to beneficiaries of subsidiary protection be for the same period as that of Convention refugees.

Article 25

Travel document

1. Member States shall issue to beneficiaries of refugee status travel documents in the form set out in the Schedule to the Geneva Convention, for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require.

UNHCR Comment on Article 25(1): This provision is in line with Article 28(1) of the 1951 Convention. The latter additionally provides that Member States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence. UNHCR would encourage States to provide for this possibility. Furthermore, refugees without travel document are regardless of the legality of their residence entitled to an identity paper according to Article 27 of the 1951 Convention.

2. Member States shall issue to beneficiaries of subsidiary protection status who are unable to obtain a national passport, documents which enable them to travel, at least when serious humanitarian reasons arise that require their presence in another State, unless compelling reasons of national security or public order otherwise require.

UNHCR Comment on Article 25(2): UNHCR welcomes that beneficiaries of subsidiary protection are entitled to travel documents, if they are unable to obtain a national passport. Similar to refugees, this is often the case. Member

³⁹ See also UNHCR's Guidelines on the Cessation of Refugee Status under Article 1 C (5) and (6), HCR/GIP/03/03, 10 February 2003.

States should therefore not put too high a burden of proof for the impossibility to obtain a national passport. At a minimum, beneficiaries of subsidiary protection should be provided identity documents, which could also serve as proof of their status. Otherwise, they may, in practice, face difficulties to access rights and benefits to which they are entitled.

Article 26

Access to employment

1. Member States shall authorise beneficiaries of refugee status to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service, immediately after the refugee status has been granted.

2. Member States shall ensure that activities such as employment-related education opportunities for adults, vocational training and practical workplace experience are offered to beneficiaries of refugee status, under equivalent conditions as nationals.

UNHCR Comment on Article 26(1)-(2): This provision largely reflects Articles 17-19 of the 1951 Convention, inasmuch as liberal professions in the sense of Article 19 of the 1951 Convention are included in the scope of this article. UNHCR notes that, for the right to be effective, a variety of practical measures are useful. Examples include identity/residency cards, preferably with longer periods of validity, strategies for dealing with a lack of documentary proof of educational and professional qualifications, waivers of conditions that are unduly burdensome or cannot be met by refugees, language courses in particular to ensure functional literacy, and housing that is compatible with employment opportunities. See also comment on Article 27.

3. Member States shall authorise beneficiaries of subsidiary protection status to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service immediately after the subsidiary protection status has been granted. The situation of the labour market in the Member States may be taken into account, including for possible prioritisation of access to employment for a limited period of time to be determined in accordance with national law. Member States shall ensure that the beneficiary of subsidiary protection status has access to a post for which the beneficiary has received an offer in accordance with national rules on prioritisation in the labour market.

4. Member States shall ensure that beneficiaries of subsidiary protection status have access to activities such as employment-related education opportunities for adults, vocational training and practical workplace experience, under conditions to be decided by the Member States.

UNHCR Comment on Article 26(3)-(4): In UNHCR's view, there is no valid reason to treat beneficiaries of subsidiary protection differently from Convention refugees as regards access to employment. UNHCR therefore

recommends that beneficiaries of subsidiary protection be entitled to work under the same conditions as refugees, and to benefit from available vocational training, workplace experience and other employment related educational opportunities. Access to work would also serve to lessen the burden on public and social assistance that might otherwise be required. Given that Article 28(2) envisages that social assistance for subsidiary protection beneficiaries may be restricted to ‘core benefits’, there may be a pressing need for them to ensure that they can derive a reasonable means of support for themselves and their families from legal employment. Access to employment can also greatly facilitate integration of refugees and subsidiary protection beneficiaries into their host societies, and reduce the risk of social disharmony which is of concern to many States.

5. The law in force in the Member States applicable to remuneration, access to social security systems relating to employed or self-employed activities and other conditions of employment shall apply.

UNHCR Comment on Article 25(5): UNHCR interprets this provision as subjecting refugees and beneficiaries of subsidiary protection to the same conditions for employment of nationals, in line with Article 24(1) of the 1951 Convention.

Article 27

Access to education

1. Member States shall grant full access to the education system to all minors granted refugee or subsidiary protection status, under the same conditions as nationals.

2. Member States shall allow adults granted refugee or subsidiary protection status access to the general education system, further training or retraining, under the same conditions as third country nationals legally resident.

3. Member States shall ensure equal treatment between beneficiaries of refugee or subsidiary protection status and nationals in the context of the existing recognition procedures for foreign diplomas, certificates and other evidence of formal qualifications.

UNHCR Comment on Article 27: UNHCR welcomes that children are granted full access to the education system under the same conditions as nationals. It notes that in accordance with Article 28 of the Convention on the Rights of the Child (CRC) and Article 2(2) and Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), *inter alia*, primary education is to be provided free of charge and compulsory for all. UNHCR further welcomes that equal treatment with nationals is granted with regard to recognition procedures for foreign diplomas etc. Regarding terminology, UNHCR prefers the term “child” instead of “minor” in accordance with the CRC.

As regards access to education for adults, the provision should be interpreted in a more flexible fashion to ensure consistency with the standards of the 1951

Convention (Article 22) and international human rights law which in part go beyond Article 22 of the 1951 Convention.⁴⁰ While most adults are not likely to need elementary education, there may be some who never had the possibility to attend a school and would like to profit from such opportunity now. In UNHCR's view, such schooling should be encouraged, as it would contribute to the refugee's integration. Adult refugees should further be entitled to treatment as favourable as possible with regard to education other than elementary education, with respect to fees and charges, and the award of scholarships.

To enable early integration, UNHCR considers it important, that refugees and beneficiaries of subsidiary protection have access to language courses, and suggests that such a right be included in national implementing provisions.

Article 28

Social Welfare

1. Member States shall ensure that beneficiaries of refugee or subsidiary protection status receive, in the Member State that has granted such statuses, the necessary social assistance, as provided to nationals of that Member State.

2. By exception to the general rule laid down in paragraph 1, Member States may limit social assistance granted to beneficiaries of subsidiary protection status to core benefits which will then be provided at the same levels and under the same eligibility conditions as nationals.

UNHCR Comment on Article 28: UNHCR notes that under Article 23 of the 1951 Convention, refugees lawfully staying in a contracting State are entitled to equal treatment with nationals with regard to "*public relief and assistance*". The terminology of the Convention is sufficiently wide to encompass all social benefits to which nationals are entitled. Furthermore, it provides States with the necessary flexibility to adapt it to their specific social systems. UNHCR understands this provision to mean that Member States will provide refugees with all social entitlements on the same basis as nationals.

UNHCR regrets that under Article 28(2) of the Directive, social assistance for beneficiaries of subsidiary protection may be limited to core benefits and appeals to Member States not to make use of the provision. Given the potential for restrictions on the access to labour markets under Article 26(3), the need to ensure adequate social assistance is important.

Article 29

Health care

1. Member States shall ensure that beneficiaries of refugee or subsidiary protection status have access to health care under the same eligibility

⁴⁰ See Article 26 of the Universal Declaration of Human Rights of 1948, Article 13(1) and (2) of the International Covenant on Economic, Social and Cultural Rights of December 1966, Article 28 of the Convention on the Rights of the Child of 20 November 1989 and Article 10 of the Convention on the Elimination of Discrimination against Women of 18 December 1979 (CEDAW).

conditions as nationals of the Member State that has granted such statuses.

2. By exception to the general rule laid down in paragraph 1, Member States may limit health care granted to beneficiaries of subsidiary protection to core benefits which will then be provided at the same levels and under the same eligibility conditions as nationals.

3. Member States shall provide, under the same eligibility conditions as nationals of the Member State that has granted the status, adequate health care to beneficiaries of refugee or subsidiary protection status who have special needs, such as pregnant women, disabled people, persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence or minors who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or who have suffered from armed conflict.

UNHCR Comment on Article 29: UNHCR regrets that health care may be limited for beneficiaries of subsidiary protection. Article 12 ICESCR⁴¹ recognizes the right of everyone to the highest attainable standard of physical and mental health. The Human Rights Committee has also found that the right to life contained in Article 6 of the ICCPR includes an obligation by States to take positive measures. The personal scope of the above instruments extends to everyone and is not limited to nationals. Additionally, both Conventions contain non-discrimination provisions. Other relevant international instruments such as CEDAW⁴² and CRC⁴³ provide further guidance on specific aspects of the right to health. UNHCR therefore hopes that Member States will read and implement this provision accordingly. In this context, States are urged also to ensure that the health needs of family members of subsidiary protection beneficiaries are adequately met, when defining their entitlements to benefits (Article 23(2)).

Article 30

Unaccompanied minors

1. As soon as possible after the granting of refugee or subsidiary protection status Member States shall take the necessary measures, to ensure the representation of unaccompanied minors by legal guardianship or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or Court order.

2. Member States shall ensure that the minor's needs are duly met in the implementation of this Directive by the appointed guardian or representative. The appropriate authorities shall make regular assessments.

⁴¹ International Covenant on Economic, Social and Cultural Rights of 16 December 1966.

⁴² Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979.

⁴³ Convention on the Rights of the Child of 20 November 1989.

3. Member States shall ensure that unaccompanied minors are placed either:
- (a) with adult relatives; or
 - (b) with a foster family; or
 - (c) in centres specialised in accommodation for minors; or
 - (d) in other accommodation suitable for minors.

In this context, the views of the child shall be taken into account in accordance with his or her age and degree of maturity.

4. As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.

5. Member States, protecting the unaccompanied minor's best interests, shall endeavour to trace the members of the minor's family as soon as possible. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis.

6. Those working with unaccompanied minors shall have had or receive appropriate training concerning their needs.

UNHCR Comment on Article 30: UNHCR welcomes this distinct article on minimum standards of treatment for unaccompanied/separated children. As regards the terminology, see comment on Article 2(i). On the implementation of Article 30, the *UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* of 1997 provide useful guidance.⁴⁴

Article 31

Access to accommodation

The Member States shall ensure that beneficiaries of refugee or subsidiary protection status have access to accommodation under equivalent conditions as other third country nationals legally resident in their territories.

UNHCR Comment on Article 31: UNHCR notes that Article 21 of the 1951 Convention obliges States to accord treatment to refugees which is as favourable as possible. Depending on the particular circumstances in the host State and the particular case at hand, the most favourable treatment obligation may entitle refugees to a better standard. The standards contained in

⁴⁴ See also Save the Children and UNHCR, *Separated Children in Europe Programme, "Statement of Good Practice"*, Third Edition, 2004; and *Inter-Agency Guiding Principles on Unaccompanied and Separated Children*, January 2004.

international and regional human rights instruments should also be considered when implementing this article.⁴⁵

Article 32

Freedom of movement within the Member State

Member States shall allow freedom of movement within their territory to beneficiaries of refugee or subsidiary protection status, under the same conditions and restrictions as those provided for other third country nationals legally resident in their territories.

UNHCR Comment on Article 32: UNHCR understands that, in line with Article 26 of the 1951 Convention and Article 2 of Protocol No. 4 to the ECHR, the right to choose the place of residence is included in the right to freedom of movement.

Article 33

Access to integration facilities

1. In order to facilitate the integration of refugees into society, Member States shall make provision for integration programmes which they consider to be appropriate or create pre-conditions which guarantee access to such programmes.

2. Where it is considered appropriate by Member States, beneficiaries of subsidiary protection status shall be granted access to integration programmes.⁴⁶

UNHCR Comment on Article 33: UNHCR welcomes the provision for integration programmes and offers its support to Member States in defining the aims and strategy of such programmes on a national level. It notes that integration has three inter-related dimensions (legal, economic and social, and cultural).⁴⁷ From a legal perspective, refugees should progressively be granted a wider range of rights and entitlements by the host state, which, over time, should include permanent residency and the possibility to acquire citizenship in the country of asylum. In accordance with Article 34 of the 1951 Convention, States shall as far as possible facilitate the naturalization of refugees. UNHCR regrets in this regard that the Directive makes no reference to the obligations of Member States in this regard, and invites Member States to include this in national legislation and integration programmes. UNHCR further expresses the hope that Member States will also grant beneficiaries of subsidiary protection access to integration programmes.

⁴⁵ See Article 25 UDHR; Article 11 (1) ICESCR; Article 14(2)(h) CEDAW and Article 27(3) CRC. Particularly relevant is the European Social Charter of 18 October 1961 and the jurisprudence of the ECHR on Article 8 (1) ECHR.

⁴⁶ See Explanatory Memorandum on Article 31, Explanatory Memorandum presented by the European Commission (COM(2001)510 final, 12.9.2001).

⁴⁷ See UNHCR, "Local Integration", Global Consultations on International Protection, EC/GC/02/06, 25 April 2002.

Article 34
Repatriation

Member States may provide assistance to beneficiaries of refugee or subsidiary protection status who wish to repatriate.

UNHCR Comment on Article 34: UNHCR welcomes the suggestion that assistance be provided for voluntary repatriation. It hopes that this assistance will not be restricted to financial or material support, but will include appropriate counselling services to allow an informed decision on whether to return.

Chapter VIII: Administrative cooperation

Article 35
Cooperation

Member States shall each appoint a national contact point, whose address they shall communicate to the Commission, which shall communicate it to the other Member States.

Member States shall, in liaison with the Commission, take all appropriate measures to establish direct cooperation and an exchange of information between the competent authorities.

UNHCR Comment on Article 35: The mechanism envisaged under Article 35 to facilitate cooperation and exchange of information could usefully build in opportunities for cooperation and information exchange with UNHCR. Such a role for UNHCR would be in line with its mandate to supervise the application of international conventions for the protection of refugees as set out in its Statute and in accordance with Articles 35 and 36 of the 1951 Convention.

Article 36
Staff

Member States shall ensure that authorities and other organisations implementing this Directive have received the necessary training and shall be bound by the confidentiality principle, as defined in the national law, in relation to any information they obtain in the course of their work.

UNHCR Comment on Article 36: UNHCR welcomes this provision for necessary training and the reference to the confidentiality principle. It notes that rules of confidentiality should be prescribed.

Chapter IX: Final Provisions

Article 37
Reports

1. By 10 April 2008, the Commission shall report to the European Parliament and the Council on the application of this Directive and shall

propose any amendments that are necessary. These proposals for amendments shall be made by way of priority in relation to Articles 15, 26 and 33. Member States shall send the Commission all the information that is appropriate for drawing up that report by 10 October 2007.

2. After presenting the report, the Commission shall report to the European Parliament and the Council on the application of this Directive at least every five years.

Article 38

Transposition

1. The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 10 October 2006. They shall forthwith inform the Commission thereof.

When the Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Article 39

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 40

Addressees

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Luxembourg, 29 April 2004.

For the Council
The President
M. McDOWELL