



## **Updated UNHCR Observations on the Proposal for a Directive of the European Parliament and of the Council Amending Directive 2003/109/EC Establishing a Long-Term Residence Status to Extend its Scope to Beneficiaries of International Protection**

### **1. Introduction**

On 6 June 2007, the European Commission issued a Proposal for a Council Directive (hereinafter “Commission proposal”)<sup>1</sup> amending Directive 2003/109/EC<sup>2</sup> concerning the status of third-country nationals who are long-term residents in an EU Member State (hereinafter “LTR Directive”) to extend its scope to beneficiaries of international protection. Article 3(2) of the LTR Directive in its current form excludes refugees and beneficiaries of subsidiary protection from its application.

On 23 April 2008, the European Parliament (hereinafter “EP”) adopted its position on the proposal supporting the proposed extension of the LTR Directive to beneficiaries of international protection (hereinafter “EP resolution”).<sup>3</sup> Following discussions in the Council, the Presidency of the Council noted during the Justice and Home Affairs Council meeting of 27-28 November 2008, “that all the delegations but one agreed on the text of the Directive” and “concluded that, given that the unanimity required to adopt the Directive could not be reached on that day, the negotiations on this file should continue”.<sup>4</sup> In December 2008, the majority of the Council reached agreement on proposed

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<sup>1</sup> European Commission, *Proposal for a Council Directive amending Directive 2003/109/EC to extend its scope to beneficiaries of international protection*, COM(2007) 298 final, 6 June 2007, at: <http://europa.eu/eur-lex/lex/LexUriServ/LexUriServ.do?uri=COM:2007:0298:FIN:EN:PDF>.

<sup>2</sup> European Union, *Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents*, OJ L16/44, 23 January 2004, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:016:0044:0053:EN:PDF>.

<sup>3</sup> European Parliament, *Legislative resolution of 23 April 2008 on the proposal for a Council directive amending Directive 2003/109/EC to extend its scope to beneficiaries of international protection*, 23 April 2008, at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2008-0168&language=EN&ring=A6-2008-0148>.

<sup>4</sup> Council of the European Union, *Press Release, 2908th meeting of the Council Justice and Home Affairs*, Brussels, 27 and 28 November 2008, at: <http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/08/344&format=HTML&aged=0&lg=en&guiLanguage=en>.

amendments to the Commission proposal (hereinafter “Council position”);<sup>5</sup> this Council position is the last publicly available text on this proposal.

The entry into force of the Lisbon Treaty has changed decision-making rules by extending the co-decision procedure between the Council and the European Parliament, and the majority rule within the Council for instruments relating to legal migration provided under Article 79 of the Treaty on the Functioning of the European Union (hereinafter “TFEU”),<sup>6</sup> in line with the ordinary legislative procedure. In a Communication of December 2009 on the consequences of the entry into force of the Lisbon Treaty,<sup>7</sup> the European Commission proposed that the legal basis of the Commission proposal on the LTR Directive be amended to Article 79 (2) (a) and (b) TFEU.

Following this change, the Belgian Presidency of the European Union has identified the proposed amendment of the LTR Directive as one of its priorities.<sup>8</sup> Discussions will resume between the EP and the Council on the basis of the last Council position.

## **2. UNHCR’s mandate regarding the LTR Directive**

The proposal to extend the scope of the LTR Directive has direct consequences for persons of concern to UNHCR. Paragraph 8 of UNHCR’s Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,<sup>9</sup> whereas Article 35 of the 1951 Refugee Convention<sup>10</sup> and Article II of the 1967 Protocol Relating to the Status of Refugees<sup>11</sup> oblige State Parties to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR’s duty of supervising the application of the provisions of the 1951 Refugee Convention and 1967 Protocol.

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<sup>5</sup> Council of the European Union, *Proposal for a Council Directive amending Directive 2003/109/EC to extend its scope to beneficiaries of international protection* (hereinafter Council position), 2007/0112(CNS), 16476/08, 2 December 2008, at:

<http://register.consilium.europa.eu/pdf/en/08/st16/st16476.en08.pdf>.

<sup>6</sup> European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>.

<sup>7</sup> European Commission, *Communication from the Commission to the European Parliament and the Council, Consequence of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures*, COM(2009) 665 final/2, 11 December 2009, at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0665:FIN:EN:PDF>.

<sup>8</sup> Programme of the Belgian Presidency of the European Union, at:

[http://www.eutrio.be/files/bveu/media/documents/Programme\\_EN.pdf](http://www.eutrio.be/files/bveu/media/documents/Programme_EN.pdf).

<sup>9</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), paragraph 8(a), at:

<http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

<sup>10</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951 (hereinafter “1951 Refugee Convention”), United Nations Treaty Series No. 2545, vol. 189, p. 137, at: <http://www.unhcr.org/refworld/docid/3be01b964.html>. According to Article 35(1) of the 1951 Refugee Convention, UNHCR has the “duty of supervising the application of the provisions of this Convention”.

<sup>11</sup> UN General Assembly, *Protocol Relating to the Status of Refugees*, 30 January 1967 (hereinafter “1967 Protocol”), United Nations Treaty Series No. 8791, vol. 606, p. 267, at:

<http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>.

UNHCR's supervisory responsibility extends to each EU Member State, all of whom are States Parties to these instruments. UNHCR's supervisory responsibility is reflected in European Union law, including pursuant to Article 78 (1) of the TFEU,<sup>12</sup> which stipulates that a common policy on asylum, subsidiary protection and temporary protection must be in accordance with the 1951 Convention. Its role is also reaffirmed in Declaration 17 to the Treaty of Amsterdam, which provides that "consultations shall be established with the United Nations High Commissioner for Refugees (...) on matters relating to asylum policy."<sup>13</sup> As such, UNHCR has a direct competence to advise Member States and EU institutions in relation to EU legislative proposals affecting persons of concern, and therefore a direct interest in the proposal for amending the existing LTR Directive.

In February 2008, following the Commission proposal to extend the scope of the LTR Directive to beneficiaries of international protection, UNHCR had welcomed the proposal and made some initial observations (hereinafter "2008 Observations").<sup>14</sup> These observations remain valid. However, in light of the Council position which introduces new amendments, UNHCR takes this opportunity to raise additional observations and concerns. UNHCR encourages Member States and the European Parliament to address these concerns during the negotiation process.

### 3. Scope of the LTR Directive

At the time of the adoption of the LTR Directive, UNHCR had advocated for the inclusion of refugees who are long-term residents in its scope. This was not agreed at the time. UNHCR thus welcomes the re-opening of discussions on the proposal to extend the scope of the LTR Directive, and appreciates the support of the Council and European Parliament for this proposed extension. If this proposal is adopted, a long-standing gap in the legal framework of the first phase asylum Directives will be closed. In UNHCR's view there are two important reasons that speak in favour of including refugees and beneficiaries of subsidiary protection in the scope of the LTR Directive.

First, refugees and beneficiaries of subsidiary protection, who reside lawfully in Member States for many years, should be able to enjoy *at least* the same rights under EU law as other legally residing third-country nationals. The 1951 Refugee Convention provides that as a minimum "Contracting States accord to refugees the same treatment as is accorded to aliens generally"<sup>15</sup> i.e. ensure that refugees receive the benefits of all laws and policies which normally apply to aliens. The Convention also specifically requires that for more substantive rights, refugees are to be granted "treatment as favourable as

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<sup>12</sup> Op. cit., Treaty on the Functioning of the European Union.

<sup>13</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, 2 September 1997, *Declaration on Article 73k of the Treaty establishing the European Community* [OJ C 340, 10.11.1997] at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX :11997D/AFI/DCL/17:EN:HTML>.

<sup>14</sup> UN High Commissioner for Refugees, *UNHCR Observations on the Commission Proposal for a Council Directive Amending Directive 2003/109/EC Establishing a Long-Term Residence Status to Extend its Scope to Beneficiaries of International Protection* (hereinafter "2008 Observations"), 29 February 2008, at: <http://www.unhcr.org/refworld/docid/47cc017a2.html>.

<sup>15</sup> Op. cit., 1951 Refugee Convention, Article 7 (1).

possible and, in any event, not less favourable than that accorded to aliens generally”,<sup>16</sup> “the most favourable treatment”<sup>17</sup>, or “the same treatment as is accorded to nationals”.<sup>18</sup>

The proposed amendment would therefore put an end to the less favorable treatment beneficiaries of international protection are facing with regards to residence rights in comparison to other third country nationals. This amendment would also bring this Directive in line with the principle of non discrimination pursuant to Article 21 of the Charter of Fundamental Rights of the European Union (hereinafter “Charter on Fundamental Rights”).<sup>19</sup>

Second, if adopted, the proposed amendment would constitute an important contribution by EU Member States to the search for durable solutions for refugees and beneficiaries of subsidiary protection status.<sup>20</sup> The timely grant of a secure legal status and residency rights is of utmost importance, as it will enable beneficiaries of international protection to focus on their future in the European Union and to work towards local integration in their host communities. This aspect is also emphasized in Article 34 of the 1951 Refugee Convention, which calls on States to facilitate the integration and naturalization of refugees, and could be applied analogously to Member States’ role in facilitating access to LTR status. In addition, the proposed amendment would *inter alia* enable refugees and beneficiaries of subsidiary protection who are long-term residents to take up residence in a Member State other than that in which they were recognized.

UNHCR particularly welcomes the inclusion of both refugees and beneficiaries of subsidiary protection in the scope of the LTR Directive. This reflects the positive and general trend proposed by the Commission to align standards and rights for these two groups.<sup>21</sup> This approach recognizes that distinguishing between beneficiaries of protection, and thereby between their rights and obligations, may not be justified in terms of the individual’s flight experience, protection needs or ability to participate in and contribute to society. The circumstances that force people to flee their countries are complex and often of a composite nature. The extension of the scope of the LTR Directive to beneficiaries of subsidiary protection is important, especially in light of the

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<sup>16</sup> Op. cit. 1951 Refugee Convention, Articles 13, 18, 19, 21, and 22.

<sup>17</sup> Op. cit. 1951 Refugee Convention, Articles 15 and 17.

<sup>18</sup> Op. cit. 1951 Refugee Convention, Articles 14, 16, and 24.

<sup>19</sup> European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01), at: [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf).

<sup>20</sup> Agenda for Protection Goal 5, Objective 4 and the Conclusion No. 104 (LVI) – 2005 on local integration adopted by the Executive Committee of the UNHCR Programme, letter (j) and (l).

<sup>21</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted*, 21 October 2009, COM(2009) 551 final; 2009/0164 (COD), at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0551:FIN:EN:PDF>; and European Commission, *Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast)*, 21 October 2009, COM(2009) 554 final; 2009/0165 (COD), available at: <http://www.unhcr.org/refworld/docid/4ae96002.html>

fact that an ever-growing percentage of applicants are granted subsidiary protection, rather than refugee status according to the 1951 Convention.<sup>22</sup>

*UNHCR welcomes the proposed inclusion of both refugees and beneficiaries of subsidiary protection in the scope of the LTR Directive; and the alignment of the definition of international protection in Article 2 (f) with that provided in Council Directive 2004/83/EC.*<sup>23</sup>

#### **4. General safeguard clause**

Article 78 (1) TFEU requires that the Common European Asylum Policy must be in accordance with the 1951 Refugee Convention; this requirement also extends to Article 79 (2) (a) and (b) in the framework of this proposal, which has direct implications for the situation of beneficiaries of international protection, who derive their right to legal residence from Article 78 TFEU.

In order to ensure compliance with obligations under EU and international law, UNHCR reiterates its recommendation to clearly stipulate that the LTR Directive should apply without prejudice to the 1951 Refugee Convention and the principle of *non-refoulement*.

*UNHCR recommends including in the body of the Directive under Article 3, or in Recital 7 of the Council position, a reference to the fact that the Directive should apply without prejudice to the 1951 Refugee Convention and the principle of non-refoulement.*

#### **5. Transfer of protection**

The Commission proposes that the transfer of the responsibility for the protection of a refugee or beneficiary of subsidiary protection from one Member State to another is specifically excluded from the scope of the Directive (Recital 9). Legal obligations covering the transfer of responsibility for the protection of refugees already exist for all Member States under Paragraph 11 of the Schedule to the 1951 Refugee Convention. UNHCR therefore welcomes the Council proposal to include a reference to Paragraph 11 of the Schedule to the 1951 Refugee Convention and to the European Agreement on Transfer of Responsibility for Refugees,<sup>24</sup> which has been signed by 15 EU Member

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<sup>22</sup> European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Policy Plan on Asylum. An Integrated Approach to Protection Across the EU*, 17 June 2008, COM(2008) 360, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0360:FIN:EN:PDF>.

<sup>23</sup> Council of the European Union, *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* (hereinafter “Qualification Directive”), OJ L 304/12, 30 September 2004, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:304:0012:0023:EN:PDF>.

<sup>24</sup> European Agreement on Transfer of Responsibility for Refugees (adopted in Strasbourg on 16 October 1980, entry into force 1 December 1980), Council of Europe Treaty Series No. 107, at: <http://conventions.coe.int/Treaty/en/Treaties/Html/107.htm>.

States<sup>25</sup>, in Article 3 of the Directive as recommended by UNHCR in its 2008 Observations.

UNHCR also welcomes the Council's proposed amendments aiming at ensuring the continuity of the protection status, including the detailed "remark" mechanism on the residence permit issued to beneficiaries of international protection, and the obligation for the Member State which granted international protection to reply to queries from another Member State about the status of the international protection granted to a beneficiary within a set period of time.<sup>26</sup>

UNHCR reiterates its view that a mechanism for the transfer of protection should be a goal of the Common European Asylum System.<sup>27</sup> While this may not be possible yet under the scope of this proposal, UNHCR welcomes the European Council's call in the Stockholm Programme<sup>28</sup> for the European Commission to look into the possibilities for creating a framework for the transfer of protection of beneficiaries of international protection when exercising their acquired residence rights under EU law, in line with Article 78 (a) of the TFEU.<sup>29</sup>

In addition, this measure could contribute to alleviating the particular pressures felt by some Member States as a result of granting protection to significant numbers of applicants, by providing international protection beneficiaries with opportunities to take up residence in other Member States, subject to fulfillment of relevant conditions.

*UNHCR welcomes the Council proposal to include a reference to Paragraph 11 of the Schedule to the 1951 Refugee Convention and to the European Agreement on Transfer of Responsibility for Refugees.*

*In UNHCR's view, there is a continuing need to elaborate rules, including potentially in the context of future measures providing for "uniform status" under Article 78 TFEU, clarifying under which circumstances responsibility for a refugee or beneficiary of subsidiary protection would be transferred to another Member State. UNHCR therefore calls on the European institutions to create under EU law a framework for the transfer of international protection responsibilities from one Member State to another*

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<sup>25</sup> Belgium, Czech Republic, Denmark, Finland, Germany, Greece, Italy, Luxembourg, the Netherlands, Poland, Portugal, Romania, Spain, Sweden, the United Kingdom.

<sup>26</sup> Op. cit Council position, proposals in Article 8 paragraphs 5 and 6, Article 12 paragraph 3a, and Article 19a.

<sup>27</sup> UNHCR, From Principles to Action: UNHCR's Recommendations to Spain for its European Union Presidency January – June 2010, December 2009, at:

<http://www.unhcr.se/Pdf/Spain%20Pres%20paper%2015%20xii%2009.pdf>

<sup>28</sup> Council of the European Union, *The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, at: [http://ec.europa.eu/justice\\_home/news/intro/doc/stockholm\\_program\\_en.pdf](http://ec.europa.eu/justice_home/news/intro/doc/stockholm_program_en.pdf).

<sup>29</sup> Op. cit., Treaty on the Functioning of the European Union, Article 78 (a) states that the European Parliament and the Council shall adopt "a uniform status of asylum for nationals of third countries, valid throughout the Union."



## **6. Possibility of expulsion of a beneficiary of international protection to a country other than the Member State which granted international protection**

UNHCR notes with grave concern that the Council position includes proposals to insert the possibility for a Member State to remove a long term resident, who is a beneficiary of international protection, to a country other than the Member State which granted international protection,<sup>30</sup> or from the territory of the Union,<sup>31</sup> under the conditions set out in Article 21 (2) of the Qualification Directive. While recognizing the sovereign right of States to expel foreign nationals, UNHCR is concerned that this provision may lead to *refoulement* to a third country or open the possibility of chain *refoulement*.

While the mention in the proposed amendments by the Council of derogation “in accordance with its international obligations”<sup>32</sup> or “without prejudice to Article 21 of Directive 2004/83/EC”<sup>33</sup> should exclude violations of the principle of *non refoulement* pursuant to Article 33 of the 1951 Refugee Convention and other international human rights obligations, UNHCR is concerned that this does not provide sufficient safeguards against the risk of *refoulement*. In legal terms, Member States have very different interpretations of a “*particularly serious crime*”<sup>34</sup> and some States are using a very broad interpretation of crimes that can lead to expulsion. For example, some states consider any acts punishable with four years of imprisonment under their national law as “*serious crimes*” leading to exclusion and exception to protection from *refoulement*.

Likewise, while the principle of *non refoulement* has to be respected by all Contracting States to the 1951 Refugee Convention, the Member State which granted international protection is the only country with guaranteed access to the full information on the asylum claim, and the considerations for granting international protection. This Member State is therefore the country which should assess whether the expulsion of the refugee or beneficiary of subsidiary protection pursuant to Article 21 (2) of the Qualification Directive can be effected in accordance with the State’s international obligations on *non-refoulement*.

In addition, Recital 9 of the Commission proposal specifically excludes the transfer of responsibility for protection from one Member State to another. The proposal to allow a Member State to expel a long-term resident to a country other than the Member State which granted international protection, would permit transfers which are in contravention of this principle, as the Member State taking the expulsion decision would have to take responsibility for the assessment of the applicability of Article 21 (2) of the Qualification Directive.

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<sup>30</sup> Op. cit. Council position, proposal for a new paragraph 3c to Article 12.

<sup>31</sup> Op. cit. Council position, proposal for a new paragraph 3a to Article 22.

<sup>32</sup> Op. cit. Council position, proposal for a new paragraph 3c to Article 12.

<sup>33</sup> Op. cit. Council position, proposal for a new paragraph 3a to Article 22.

<sup>34</sup> Op. cit. Qualification Directive, Article 14 (3) (b) on Revocation of, ending of or refusal to renew refugee status, and Article 21 (2) (b) on Protection from refoulement.

Finally, the expulsion to the Member State which granted international protection without having to consider the applicability of Article 21 (2) of the Qualification Directive, is faster, less costly and more efficient for the Member State which took the expulsion decision.

UNHCR recalls in this context that in its first position on the Commission proposal, the European Parliament had specifically reinforced the provision that a beneficiary of international protection should *only* be expelled to the Member State which granted international protection, to ensure respect for the principle of *non-refoulement*.<sup>35</sup>

Likewise, in the case of withdrawal of residence permit, the Commission proposal clearly stated that the provision on removal from the territory of the Union *shall not apply* to beneficiaries of international protection.<sup>36</sup> UNHCR also notes that Article 22 (3) of the LTR Directive provides for the consultation of the first Member State in case of removal of a third-country national from the territory of the Union. However, such a safeguard is missing from the proposed Council amendment regarding the removal of beneficiaries of international protection from the territory of the Union.<sup>37</sup>

*UNHCR strongly recommends that expulsion be permitted under the proposal only to the Member State which granted international protection, as provided for in the proposal of the Commission.*

*As a less preferable alternative, the Member State from which removal is envisaged should as a minimum and prior to the expulsion, be required to request from the Member State which granted protection, information to enable it to assess whether the expulsion to a third country would contravene international refugee law and in particular the principle of non-refoulement. Where the Member State which granted international protection raises such possibility, the person shall only be removed to that Member State. A time limit could be introduced for the Member State which granted protection to reply to the request.*

## **7. Family unity in case of expulsion**

UNHCR expresses its concern at the Council's proposed wording for Article 12, paragraph 3b specifying that, when expelling a long-term resident beneficiary of international protection to the Member State which granted protection, that Member State shall readmit family members "provided the family was already constituted in that Member State".<sup>38</sup>

<sup>35</sup> Op. cit. EP Resolution, amendment 7.

<sup>36</sup> Op. cit. Commission proposal, Article 1 (7).

<sup>37</sup> Op. cit. Council position, proposal for a new paragraph 3a to Article 22.

<sup>38</sup> Op. cit. Council position, proposal for a new paragraph 3b to Article 12.



Though the Council proposal would apply in line with Directive 2003/86/EC on the right to family reunification<sup>39</sup> as provided under Article 16(5) of the LTR Directive,<sup>40</sup> UNHCR is concerned that the Family Reunification Directive does not apply to beneficiaries of subsidiary protection. The proposed amendment would therefore introduce a distinction in treatment between refugees and beneficiaries of subsidiary protection, and less favourable treatment for beneficiaries of subsidiary protection. The proposed wording may lead to family separation for beneficiaries of subsidiary protection contrary to Article 7 of the Charter on Fundamental Rights<sup>41</sup> and Article 8 of the European Convention on Human Rights<sup>42</sup> on respect for private and family life, which bind all EU Member States.

The European Court of Human Rights (hereinafter “ECtHR”) has, on a number of cases, supported the prevention of family separation in the context of expulsion.<sup>43</sup> In a recent judgment, the ECtHR ruled that, in the context of long expulsion procedures and where the family life cannot be carried out elsewhere, maintaining a geographical separation between family members constitutes a violation of the right to family life under Article 8 ECHR.<sup>44</sup> In UNHCR’s view, respect for family unity in such cases should not be conditional on the family having been established in the first Member State.

*In line with the Commission proposal and in order to protect the family life of all beneficiaries of international protection, UNHCR recommends that the Member State which granted international protection and to which the long-term resident could be expelled, admit the family members without formalities.*

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<sup>39</sup> Council of the European Union, *Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification* (hereinafter “Family Reunification Directive”), 3 October 2003, 2003/86/EC, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:251:0012:0018:EN:PDF>.

<sup>40</sup> Article 16(5) of the LTR Directive states that, “where the family was not already constituted in the first Member State, Directive 2003/86/EC shall apply”.

<sup>41</sup> Op. cit. Charter on Fundamental Rights.

<sup>42</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (hereinafter *ECHR*), 4 November 1950, ETS 5, at: <http://www.unhcr.org/refworld/docid/3ae6b3b04.html>.

<sup>43</sup> European Court of Human Rights, *Berrebah v. The Netherlands*, Application No. 10730/84, judgment of 21 June 1988, at: <http://www.legislationline.org/topics/organisation/4/topic/10/subtopic/39>.

<sup>44</sup> European Court of Human Rights, *Agraw v. Switzerland*, Application No. 3295/06 judgment of 29 July 2010, at:

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=3295/06%20%7C%203295/06&sessionid=57703518&skin=hudoc-en>; and *Mengesha Kimfe v. Switzerland*, Application No. 24404/05, judgement of 29 July 2010, at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=24404/05%20%7C%2024404/05&sessionid=57703365&skin=hudoc-en>

## **8. Calculation of the duration of legal residence for beneficiaries of international protection**

UNHCR notes with concern the compromise reached by the Council proposing that “at least half of the period” between the asylum application and the date on which status is granted will be taken into account, when calculating the five year period of legal residence required to obtain the LTR status.

Recital 6 of the LTR Directive states that “[t]he main criterion for acquiring the status of long-term resident should be the duration of residence in a Member State. Residence should be both legal and continuous in order to show that the person has put down roots in a country”. As such, in deciding whether a beneficiary of international protection meets the residence duration requirement, the point at issue is the legal and continuous residence. While awaiting a decision on their claim for international protection, asylum seekers fulfill the “legal and continuous” residence criteria. This is acknowledged by the Council in its proposal to take into account part of this period.

UNHCR is concerned that the Council proposal to only take into account half of this period introduces less favourable treatment for beneficiaries of international protection, which would be contrary to the principle of non-discrimination set out in Article 21 of the Charter on Fundamental Rights<sup>45</sup> and Article 3 of the 1951 Refugee Convention<sup>46</sup>. Fair treatment of beneficiaries of international protection would require that the full length of the asylum application be taken into account in the calculation of the five years of legal residence. The European Parliament had also supported such an approach in its initial resolution.<sup>47</sup> UNHCR adds that pursuant to the Commission’s horizontal proposals to align the rights of refugees and beneficiaries of subsidiary protection, fair treatment in the calculation of the duration of legal and continuous residence should be extended to all beneficiaries of international protection, and no distinction should be introduced between refugees and beneficiaries of subsidiary protection. Though Member States tend to grant subsidiary protection to a growing number of applicants, the reasons why beneficiaries of subsidiary protection are forced to flee may be as serious as those of refugees, and their stay may be as long as that of refugees. The calculation of the duration of legal residence should therefore be the same for all.

Additional uncertainties are raised with the mention of “at least half of the period”, which may give rise to varying practice between Member States and may further delay the integration prospects of the applicant.

*UNHCR urges the Council and the European Parliament to agree on the inclusion of the full period of residence during the asylum procedure in the calculation of the 5 year period of legal and continuous residence required to have access to the Long Term Resident status, to ensure equal treatment and non-penalization of beneficiaries of international protection.*

<sup>45</sup> Op. cit. Charter on Fundamental Rights.

<sup>46</sup> Op.cit. 1951 Refugee Convention.

<sup>47</sup> Op. cit. EP resolution.

## 9. Exceptions to economic means requirements

In both the Commission proposal and the Council position, all beneficiaries of international protection must meet an economic means test on the same footing as other third-country nationals.

UNHCR is concerned that the economic means requirement, including the requirement not to have recourse to the social assistance system of the Member State, does not take into account the particular circumstances of persons who have had to flee persecution and/or serious human rights violations. While in principle advocating for the equal treatment with other third country nationals, the ‘forced migration’ element justifies a different treatment, at least on a case-by-case basis, of those refugees and beneficiaries of subsidiary protection who may have suffered physical harm or traumatizing experiences, which may prevent them from meeting the economic means requirement. This is already recognized in Article 34 of the 1951 Refugee Convention, which calls on Contracting States specifically to facilitate the integration of refugees.

Furthermore, restrictions to the right to employment applied during the asylum procedure<sup>48</sup> and to beneficiaries of subsidiary protection<sup>49</sup> place beneficiaries of international protection in a situation not comparable to other third-country nationals, and require them to have recourse to the social assistance system.

The duty brought in by the 1951 Refugee Convention to grant refugees “treatment as favourable as possible” requires Member States to give due consideration to the non-application to beneficiaries of international protection of requirements otherwise applied to aliens. As such, UNHCR recalls that in the Commission’s 2001 proposal for a LTR Directive,<sup>50</sup> refugees were included in the instrument, but exempted from the requirement to demonstrate stable and regular resources and sickness insurance. UNHCR also recalls that in its initial resolution, the EP had proposed exemptions for beneficiaries of international protection from both economic and integration requirements in order to take into account the “particularly vulnerable situation” of beneficiaries of international protection.<sup>51</sup>

Certain beneficiaries of international protection, due to their specific condition, may be in such a vulnerable situation that they may not be able to access LTR rights if economic requirements are applied without taking into account their particular circumstances. This could affect *inter alia* some victims of torture and trauma, persons with specific medical needs, separated or unaccompanied children, or single heads of households. In some of

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<sup>48</sup> Article 11 of *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers* (OJ L31/18 of 6 February 2003), at:

[http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/l\\_031/l\\_03120030206en00180025.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/l_031/l_03120030206en00180025.pdf).

<sup>49</sup> Op. cit. Qualification Directive, Article 26.

<sup>50</sup> European Commission, *Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents*, COM(2001) 127 final, 13 March 2001, at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0127:FIN:EN:PDF>

<sup>51</sup> Op. cit. European Parliament Resolution, amendments 5 and 6.

these cases, it may be unreasonable to require stable and regular resources without recourse to social systems as a condition for long-term residence status.

*In view of the particular circumstances of some vulnerable beneficiaries of international protection, UNHCR recommends that a provision in Article 5 of the LTR Directive foresee an exception on a case-by-case basis to the economic means requirements in order to take into account the individual circumstances of these persons.*

## **10. Conclusion**

UNHCR welcomes the proposed extension of the LTR Directive to beneficiaries of international protection and encourages the Council and the European Parliament to work towards an agreement on the proposed amendment as soon as possible, to close the gap left by excluding beneficiaries of international protection from the entitlements related to long-term residency status.

UNHCR urges the Commission to seek to ensure henceforth that people who have been determined to be in need of international protection are included in future legislation bestowing rights on legal migrants.

UNHCR  
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