



## **Note on UNHCR's Interpretation of Article 1D of the 1951 Convention relating to the Status of Refugees and Article 12(1)(a) of the EU Qualification Directive in the context of Palestinian refugees seeking international protection<sup>1</sup>**

This Note provides UNHCR's interpretation of Article 1D of the 1951 Convention relating to the Status of Refugees ("1951 Convention")<sup>2</sup> and the corresponding article in the EU Qualification Directive, Article 12(1)(a).<sup>3</sup> It also reflects upon and draws attention to the recent jurisprudence of the Court of Justice of the European Union ("CJEU").<sup>4</sup>

Article 1D of the 1951 Convention provides as follows:

This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively 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 Convention.<sup>5</sup>

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<sup>1</sup> This Note provides UNHCR's updated position on the proper interpretation of Article 1D of the 1951 Refugee Convention and the corresponding provision in the Qualification Directive (Article 12(1)(a)), taking into account the recent decisions of the Court of Justice of the European Union (CJEU) in *Bolbol* (C-31/09) and *El Kott* (C-364/11), and UNHCR's amicus curiae intervention in *El Kott*. Further guidance will be issued in due course.

<sup>2</sup> 1951 Convention relating to the Status of Refugees, 189 UNTS 137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>.

<sup>3</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* [OJ L 304/12, 30.09.2004], Recital 15, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:304:0012:0023:EN:PDF>.

<sup>4</sup> *Mostafa Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal*, C-364/11, CJEU, 19 December 2012, available at: <http://www.unhcr.org/refworld/docid/50d2d7b42.html> ("*El Kott*") and *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, C-31/09, CJEU, 17 June 2010, available at: <http://www.refworld.org/docid/4c1f62d42.html> ("*Bolbol*").

<sup>5</sup> The corresponding provision of the EU asylum acquis, Article 12(1)(a) of the Qualification Directive provides as follows: "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 1D 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 definitively 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."

## **1. The purpose of Article 1D of the 1951 Convention**

First and foremost, the two related purposes of Article 1D need to be kept in mind in order to ensure its proper interpretation. The first purpose is to avoid overlapping competencies between UNHCR and other organs or agencies of the United Nations, including specifically the United Nations Relief and Works Agency for Palestine Refugees in the Near East (“UNRWA”). Article 1D reflects this purpose through the “exclusion clause” contained in the first paragraph of Article 1D. In this regard, it should be noted that UNRWA’s areas of operation, where it provides assistance to some five million registered Palestinian refugees, are limited to Jordan, Lebanon, Syria, the West Bank (including Jerusalem East) and Gaza. The second purpose is to ensure the continuity of protection and assistance for Palestinian refugees whose refugee character has already been established and recognized by various United Nations General Assembly resolutions, in circumstances where that protection or assistance has ceased in accordance with the “inclusion clause” contained in the second paragraph of Article 1D.

## **2. The exclusion clause contained in the first paragraph of Article 1D/the first sentence of Article 12(1)(a) – persons receiving protection or assistance of UNRWA**

It is UNHCR’s view that the following groups of Palestinians who were either actually receiving or eligible to receive protection or assistance from UNRWA are considered to be “receiving protection or assistance of UNRWA”, as per the first paragraph of Article 1D:

- a) Palestinians who are “Palestine refugees” within the sense of UN General Assembly Resolution 194 (III) of 11 December 1948 and subsequent UN General Assembly Resolutions,<sup>6</sup> and who, as a result of the 1948 Arab-Israeli conflict, were displaced from that part of Mandate Palestine which became Israel;<sup>7</sup>

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<sup>6</sup> UNRWA’s mandate for “Palestine refugees” was established pursuant to UN General Assembly Resolution 302 (IV) of 8 December 1949 and subsequent General Assembly resolutions. The term “Palestine refugees” has never been expressly defined by the UN GA. However, for early work on interpreting the term, see for example the following documents of the UN Conciliation Commission for Palestine (UNCCP): UN Doc. A/AC.25/W.45, *Analysis of paragraph 11 of the General Assembly’s Resolution of 11 December 1948*, 15 May 1950, UN Doc. W/61/Add.1, *Addendum to Definition of a “Refugee” Under paragraph 11 of the General Assembly Resolution of 11 December 1948*, 29 May 1951; UN Doc. A/AC.25/W.81/Rev.2, *Historical Survey of Efforts of the United Nations Commission for Palestine to secure the implementation of paragraph 11 of General Assembly resolution 194 (III). Question of Compensation*, 2 October 1961, section III. UNRWA’s operational definition of the term “Palestine refugees” has evolved over the years but since 1984 has been “persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict”, see UNRWA’s Consolidated Eligibility and Registration Instructions (October 2009), available at: <http://www.unrwa.org/userfiles/2010011995652.pdf>. The GA has tacitly approved the operational definition used in annual reports of the Commissioner-General of UNRWA setting out the definition.

<sup>7</sup> The UN GA resolved in para. 11 of Res. 194 (III) that “the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date” and that “compensation should be paid for the property of those choosing not to return and for loss of or damage to property”. In the same paragraph, the GA instructed the UNCCP to “facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation”. The GA has since noted on an annual basis that UNCCP has been unable

- b) Palestinians not falling within paragraph (a) above who are “displaced persons” within the sense of UN General Assembly Resolution 2252 (ES-V) of 4 July 1967 and subsequent UN General Assembly resolutions,<sup>8</sup> and who, as a result of the 1967 Arab-Israeli conflict, have been displaced from the Palestinian territory occupied by Israel since 1967.<sup>9</sup>

Included within the above groups are not only persons displaced at the time of the 1948 and 1967 hostilities, but also the descendants of such persons.<sup>10</sup>

Because these persons were actually receiving or eligible to receive UNRWA’s protection or assistance, they are generally excluded from the protection of the 1951 Convention, unless they meet the conditions for inclusion set forth in the second paragraph of Article 1D (see Section 3 below).

Palestinians who were not actually receiving or eligible to receive the protection or assistance of UNRWA as per the first paragraph of Article 1D may nevertheless qualify as refugees if they fulfill the criteria of Article 1A(2) of the 1951 Convention. Such persons are entitled to apply for refugee status in the normal way under the 1951 Convention via Article 1A(2).

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to find a means of achieving progress in the implementation of para. 11 of Res. 194 (III). See, most recently, Res. 67/114 of 18 December 2012, in which the GA notes with regret “that repatriation or compensation of the refugees, as provided for in paragraph 11 of GA Res. 194 (III), has not yet been effected, and that, therefore, the situation of the Palestine refugees continues to be a matter of grave concern ...”; and that UNCCP “has been unable to find a means of achieving progress in the implementation of para. 11 of GA Res. 194 (III); and reiterates its request to UNCCP “to continue exerting efforts towards the implementation of that paragraph ...”.

<sup>8</sup> UNRWA’s mandate for “displaced persons” was established pursuant to UN GA Res. 2252 (ES-V) of 4 July 1967 and subsequent GA resolutions. Essentially two groups of Palestinian “displaced persons” have been displaced from the Palestinian territory occupied by Israel since 1967: (i) Palestinians originating from that territory; and (ii) “Palestine refugees” who had taken refuge in that territory prior to 1967. The territory concerned comprises the West Bank, including East Jerusalem, and the Gaza Strip.

<sup>9</sup> UN GA Res. 2452 (XXIII) A of 19 December 1968 called for the return of the “displaced persons”, as reiterated by subsequent UN GA resolutions on an annual basis. The most recent such resolution is Res. 67/115 of 18 December 2012, which “[r]eaffirms the rights of all persons displaced as a result of the June 1967 and subsequent hostilities to return to their homes or former places of residence in the territories occupied by Israel since 1967”, and stresses the necessity for “an accelerated return of displaced persons” and calls for compliance with “the mechanism agreed upon by the parties in Article XII of the Declaration of Principles on Interim Self-Government Arrangements of 13 September 1993 on the return of displaced persons has not been complied with”; and stresses the necessity for “an accelerated return of displaced persons”.

<sup>10</sup> The concern of the UN GA with the descendants both of “Palestine refugees” and of “displaced persons” was expressed in UN GA Res. 37/120 I of 16 December 1982, which requested the UN Secretary-General, in cooperation with the Commissioner-General of UNRWA, to issue identity cards to “all Palestine refugees and their descendants [...] as well as to all displaced persons and to those who have been prevented from returning to their home as a result of the 1967 hostilities, and their descendants”. In 1983, the UN Secretary-General reported on the steps that he had taken to implement this resolution, but said that he was “unable, at this stage, to proceed further with the implementation of the resolution” without significant additional information [becoming] available through further replies from Governments” (para. 9, UN Doc. A/38/382, *Special Identification cards for all Palestine refugees. Report of the Secretary-General*, 12 September 1983). From 1983 to 1987 UN GA resolutions dropped all reference to the issuance of identity cards, and then from 1988 onwards, starting with Res. 43/57 of 6 December 1988, the GA has annually urged issuance of identity cards only to Palestine refugees and their descendants in the Palestinian territory occupied by Israel since 1967. The most recent such resolution is Resolution 67/116 of 18 December 2012, para. 20, which requests “the Commissioner-General to proceed with the issuance of identification cards for Palestine refugees and their descendants in the Occupied Palestinian Territory”.

Although in its judgment in *Bolbol v. Bevándorlási és Állampolgársági Hivatal* (“*Bolbol*”),<sup>11</sup> the CJEU concluded that only Palestinians who had “actually availed” themselves of the protection or assistance of UNRWA (as opposed to also those who are eligible) would be considered to fall within the first paragraph of Article 1D,<sup>12</sup> UNHCR takes a different position. UNHCR’s position is based on the dual purposes of Article 1D to avoid overlapping competencies and to ensure the continuity of protection and assistance of Palestinian refugees.

By capturing those Palestinians who were eligible as well as those who were receiving protection or assistance, their continuing refugee character is acknowledged. They will be entitled to the benefits of the 1951 Convention only should that protection or assistance cease for any reason in accordance with the second paragraph of Article 1D. However, if that refugee character is not acknowledged in the first place – even if they have not themselves needed protection or assistance previously – they would not have access to the Article 1D regime, specifically designed for their particular circumstances. A narrow interpretation of the first paragraph of Article 1D would actually lead to the denial of protection for many Palestinians in need of the 1951 Convention protection regime provided by Article 1D, and therefore create protection gaps in that regime.

For the purposes of how this should be approached and reconciled as a matter of European law, UNHCR notes that Article 3 of the Qualification Directive provides that Member States may introduce or retain more favourable standards for determining who qualifies as a refugee. Member States are thus recommended to adopt the more favourable interpretation put forward by UNHCR, which is more in line with the object and purpose of Article 1D.

### **3. The inclusion clause contained in the second paragraph of Article 1D/the second sentence of Article 12(1)(a) – persons who are *ipso facto* entitled to the benefits of the 1951 Convention/Qualification Directive because the protection or assistance of UNRWA has “ceased for any reason”**

The phrase “ceased for any reason” in the second paragraph of Article 1D of the 1951 Convention/Article 12(1)(a) of the Qualification Directive should not be construed restrictively. The phrase would include the following: (i) the termination of UNRWA as an agency; (ii) the discontinuation of UNRWA’s activities; or (iii) any objective reason outside the control of the person concerned such that the person is unable to (re-)avail themselves of the protection or assistance of UNRWA. Both protection-related as well as practical, legal or safety barriers to return are relevant to this assessment.<sup>13</sup>

Objective reasons why the applicant is unable to return or re-avail himself or herself of the protection or assistance of UNRWA would include, but are not limited to:

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<sup>11</sup> *Bolbol*, footnote 4 at paras 53 and 57(1).

<sup>12</sup> *Ibid.*, at paras. 53 and 57(1).

<sup>13</sup> UNHCR’s Oral Intervention at the Court of Justice of the European Union- Hearing of the case of *El Kott and Others v. Hungary* (C-364/11), 15 May 2012, available at: <http://www.refworld.org/4fbd1e112.html>, at para. 19.

- **Threats to life, physical security or freedom, or other serious protection-related reasons.**
  - Examples would include situations such as armed conflict or other situations of violence, civil unrest and general insecurity, or events seriously disturbing public order.
  - It would also include more individualized threats or protection risks such as sexual and gender-based violence, human trafficking and exploitation, torture, inhuman or degrading treatment or punishment, or arbitrary arrest or detention.
  
- **Practical, legal and safety barriers to return.**
  - **Practical barriers** would include being unable to access the territory because of border closures, road blocks or closed transport routes.
  - **Legal barriers** would include absence of documentation to travel to, or transit, or to re-enter and reside, or where the authorities in the receiving country refuse his or her re-admission or the renewal of his or her travel documents.
  - **Safety barriers** would include dangers en route such as mine fields, factional fighting, shifting war fronts, banditry or the threat of other forms of harassment, violence or exploitation.

Thus a Palestinian falling within the personal scope of Article 1D and who is unable to return to an UNRWA area of operation, for example, where the authorities refuse his or her re-admission or the renewal of his or her travel documents, is a refugee for the purposes of Article 1D of the 1951 Convention.

It is UNHCR's position that where the protection or assistance of UNRWA has ceased "for any reason" within the meaning of Article 1D, a Palestinian refugee (who falls within the personal scope of Article 1D and is eligible for UNRWA assistance), is automatically entitled to the benefits of the 1951 Convention/Qualification Directive.

Broadly similar to UNHCR's position, the CJEU in *Mostafa Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal* held that the phrase "when such protection or assistance has ceased for any reason" (without the position of those persons concerned being definitely settled in accordance with the relevant UN General Assembly resolutions) includes the following situations:

- Situations where a person who, after actually availing him/herself of UNRWA's assistance, ceases to receive it for a reason beyond his/her control and independent of his/her volition which forces him/her to leave the UNRWA area and therefore prevents him/her from receiving UNRWA's assistance. This includes situations where a Palestinian refugee has been forced to leave UNRWA's area of operation where his/her personal safety is at serious risk and if

it is impossible for UNRWA to guarantee his/her living conditions in accordance with that organization's mission.<sup>14</sup>

- The cessation of UNRWA as an agency or the cessation of UNRWA's activities. This would include the fact that it has become impossible for UNRWA to carry out its mission. However, the CJEU noted that it is primarily the actual assistance provided by UNRWA and not the existence of UNRWA as an agency that must cease in order for the second sentence of Article 12(1)(a) to be triggered.<sup>15</sup>

The CJEU's conclusions on the meaning of "ceased for any reason" are nearly identical to UNHCR's position. Likewise, the CJEU held that as refugees, they are entitled to the benefits of the 1951 Convention (and equivalent standards of treatment of refugees in the EU Qualification Directive).<sup>16</sup>

#### **4. The Applicability of Articles 1C, 1E or 1F of the 1951 Convention to Palestinian Refugees**

Articles 1C, 1E or 1F of the 1951 Convention apply to Palestinians falling within the scope of the second paragraph of Article 1D, even if they remain "Palestine refugees" or "displaced persons" whose position is yet to be definitively settled in accordance with the relevant UN General Assembly resolutions and would otherwise *ipso facto* be entitled to the benefits of the 1951 Convention.

The CJEU shares UNHCR's view in this regard, such that the exclusion clauses contained in Article 12(1)(b) or (2) and (3) and the cessation clauses contained in Article 11(f), read in conjunction with Article 14(1) of the Qualification Directive, apply to Palestinians falling within the scope of the second sentence of Article 12(1)(a) of the Qualification Directive.<sup>17</sup>

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<sup>14</sup> *El Kott*, footnote 4, at paras. 65, 82(1).

<sup>15</sup> *Ibid.*, at paras. 56–58.

<sup>16</sup> *Ibid.*, at paras. 71–74, 81 and 82(2).

<sup>17</sup> *Ibid.*, at paras. 76, 77 and 82(2).