

## **GUIDELINES ON INTERNATIONAL PROTECTION No. 13:**

### **Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees**

UNHCR issues these Guidelines pursuant to its mandate, as contained in the Office's *Statute*, in conjunction with Article 35 of the 1951 *Convention relating to the Status of Refugees* and Article II of its 1967 Protocol, as well as relevant regional instruments. These Guidelines complement the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention* (Geneva: UNHCR, 1979; reissued 2011) and other Guidelines on International Protection. They replace the *Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees*, October 2009, and all prior relevant guidance. By contrast, the *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*, May 2013, remains applicable.

These Guidelines, having benefited from broad public consultation, are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR personnel carrying out mandate refugee status determination under its mandate.

These Guidelines have been prepared in close cooperation with the United Nations Relief and Works Agency for Palestine Refugees in the Near East ("UNRWA").

In light of UNHCR's equality and non-discrimination policies, wherever the original text of an international agreement was drafted in gender-specific language and gender was not in issue, the text needs to be read and understood today as if it applied equally to men and women; for that reason, texts quoted in UNHCR publications reflect this principle through the inclusion of appropriate wording in square brackets.

UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* are available at:  
<http://www.refworld.org/docid/4f33c8d92.html>.

Calls for public consultation on future guidelines will be posted at:  
<http://www.unhcr.org/544f59896.html>.

## I. INTRODUCTION

1. Article 1D of the 1951 Convention relating to the Status of Refugees (“1951 Convention”)<sup>1</sup> acknowledges that certain categories of refugees may benefit from separate arrangements for their protection or assistance by organs or agencies of the United Nations other than the Office of the United Nations High Commissioner for Refugees (“UNHCR”). At present, Article 1D applies to Palestinian refugees, for whom the United Nations Relief and Works Agency for Palestine Refugees in the Near East (“UNRWA”)<sup>2</sup> was established in order to respond to their situation.<sup>3</sup>

2. Article 1D of the 1951 Convention provides:

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>4</sup>

3. Article 1D of the 1951 Convention is often characterised as an “exclusion clause”, whereas it has both exclusionary and inclusionary aspects<sup>5</sup> and its two paragraphs are

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<sup>1</sup> 1951 *Convention relating to the Status of Refugees* (28 July 1951) 189 UNTS 137 (1951 Convention), <http://www.refworld.org/docid/3be01b964.html>, and its Protocol Relating to the Status of Refugees (31 January 1967) 606 UNTS 267 (1967 Protocol), <http://www.refworld.org/docid/3ae6b3ae4.html>.

<sup>2</sup> UN General Assembly Resolution 302 (IV), *Assistance to Palestine Refugees*, 8 December 1949, A/RES/302, created UNRWA, which has responsibilities to provide assistance and protection to Palestinian refugees. The role of UNRWA is also acknowledged by courts: see, for example, *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, (“*Bolbol*”), C-31/09, Court of Justice of the European Union (“CJEU”), 17 June 2010, para. 44, <http://www.refworld.org/docid/4c1f62d42.html>: “It is not in dispute that UNRWA constitutes one of the organs or agencies of the United Nations other than UNHCR which are referred to in Article 12(1)(a) of the Directive and in Article 1D of the Geneva Convention ...”. See also, *AD (Palestine)*, (“*AD Palestine*”) [2015] NZIPT 800693-695, New Zealand: Immigration and Protection Tribunal, 23 December 2015, paras 101-116, <http://www.refworld.org/docid/56b1bcc24.html>.

<sup>3</sup> Prior to the establishment of UNRWA, the United Nations had also established the UN Conciliation Commission for Palestine (“UNCCP”) to *inter alia* “facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation, and to maintain close relations with the Director of the United Nations Relief for Palestine Refugees and, through him [or her], with the appropriate organs and agencies of the United Nations.” UNGA Resolution 194 (III), *Palestine - Progress Report of the United Nations Mediator*, 11 December 1948, A/RES/194, para. 11. By 1951, the UNCCP had informed the General Assembly, and began noting on an annual basis, that it was unable to find a means of achieving progress in the implementation of paragraph 11 of Resolution 194 (III). See, UNCCP, *Progress Report of the United Nations Conciliation Commission for Palestine*, UN Doc. A/1985, 20 November 1951 at paras 79 and 80 for first report, and more recently, Report of the UNCCP, 13 August 2015, A/70/319, Annex; UN General Assembly resolution 69/86.

<sup>4</sup> In these Guidelines, UNHCR refers to the first paragraph of Article 1D as ‘Article 1D(1)’ and the second paragraph as ‘Article 1D(2)’.

<sup>5</sup> The French representative to the Conference of Plenipotentiaries, Mr. Rochefort, stated that “the clause in question was really one which provided for deferred inclusion”. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary of the Third Meeting, 19 November 1951, UN doc. A/Conf.2/SR.3, p. 10. All UN documents are available through the UN Official Document System database at <http://www.un.org/en/documents/index.html>. See also, James Hathaway and Michelle Foster, *The Law of Refugee Status*, (Cambridge: Cambridge University Press, 2<sup>nd</sup> edn., 2014),

to be read sequentially. In other words, one must first come within the scope of the first paragraph before coming within the second paragraph. Paragraph 1 generally excludes from the protection of the 1951 Convention those Palestinian refugees who are receiving protection or assistance from UNRWA, while paragraph 2 of Article 1D operates to include those very same Palestinian refugees when that protection or assistance has ceased. Once the protection or assistance has ceased (see section II E below), they are entitled *ipso facto* to the benefits of the 1951 Convention. As refugees already recognised by the international community,<sup>6</sup> no separate or additional assessment under Article 1A(2) is required for them to qualify for Convention protection. Claimants need only demonstrate that they fall within the terms of Article 1D.

4. All States parties to the 1951 Convention and/or 1967 Protocol need to ensure that Article 1D is fully incorporated in national law and practice. Fully incorporating this provision in national law and practice is a matter of States parties' obligations under the international refugee instruments.

5. These Guidelines address the interpretation of Article 1D of the 1951 Convention in respect of Palestinian refugees applying for protection under the 1951 Convention *outside* of UNRWA's areas of operation. They provide UNHCR's substantive interpretation of Article 1D (Part II), and also address a number of procedural and evidentiary matters (Part III), drawing on State practice, international and national jurisprudence, as well as the views of leading jurists and academic experts.

## II. ANALYSIS

### A. Object and purpose

6. In interpreting Article 1D, it is appropriate to have regard to its object and purpose and its context, including through recourse to the *travaux préparatoires* of the 1951 Convention and to other contemporaneous international instruments intended to address the questions of protection and institutional responsibility for Palestinian refugees. A broad interpretation is warranted, based on the intention of the parties as expressed in the ordinary meaning of the terms of the treaty, considered in context and in the light of its object and purpose.<sup>7</sup> By applying such, it is clear that Article 1D of the 1951 Convention has two related purposes which guide its interpretation and application. The first purpose is to ensure that Palestinian refugees continue to be

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513; and Lex Takkenberg, *The Status of Palestinian Refugees in International Law*, (Oxford: Oxford University Press, 1998), p. 66. See also, Guy Goodwin-Gill and Jane McAdam, who state that Article 1D "should be seen not so much as an 'exclusion' clause," but rather as a "contingent inclusion clause". *The Refugee in International Law*, (Oxford: Oxford University Press, 3<sup>rd</sup> edn., 2007), 153; and Atle Grahl-Madsen, who refers to it as a "suspensive clause", *The Status of Refugees in International Law*, Volume I Refugee Character, A.W. Sijthoff-Leyden, 1966, p. 263.

<sup>6</sup> "[P]alestinian refugees - and there is no doubt but that the displaced Palestinians were considered at all relevant stages to be *refugees* - were regarded, in and out of the United Nations, as belonging to a special category." *Amer Mohammed El-Ali v. The Secretary of State for the Home Department and Daraz v. The Secretary of State for the Home Department (The United Nations High Commissioner for Refugees, Intervener)*, ("El-Ali") United Kingdom: Court of Appeal (England and Wales), 26 July 2002, [2002] EWCA Civ 1103, [http://www.refworld.org/cases,GBR\\_CA\\_CIV,3f278a3a4.html](http://www.refworld.org/cases,GBR_CA_CIV,3f278a3a4.html), para. 15.

<sup>7</sup> Article 31 of the *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, <http://www.refworld.org/docid/3ae6b3a10.html>. See also, Ian Brownlie, *Principles of Public International Law*, (Oxford: Oxford University Press, 7<sup>th</sup> edn., 2008), 631.

recognized as a specific class,<sup>8</sup> and that they continue to receive protection and associated rights, until their position has been definitively settled in accordance with the relevant resolutions of the United Nations General Assembly.<sup>9</sup> This purpose is also reflected in the discussions regarding the drafting of the Statute of the Office of the United Nations High Commissioner for Refugees, in which it was emphasized that Palestinian refugees should continue to be granted special status.<sup>10</sup> It was also recognized as essential that the continuity of protection be ensured<sup>11</sup> for Palestinians as a *sui generis* class of refugees under the 1951 Convention.

7. The second purpose of Article 1D is to avoid duplicating and overlapping competencies between UNHCR and UNRWA. The responsibilities of the two agencies are intended to be complementary.<sup>12</sup> In this regard, it is noted that while UNHCR's mandate is global, its competence "shall not extend to a person ... who continues to receive from other organs or agencies of the United Nations protection or assistance."<sup>13</sup> In contrast, UNRWA has competence in five geographical areas or 'fields' of operation: Jordan, Lebanon, the Syrian Arab Republic, the West Bank (including East Jerusalem) and Gaza.<sup>14</sup> Taken together, these territories constitute

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<sup>8</sup> "The Article aims, fundamentally, to ensure continued protection of Palestinians as persons whose *refugee character had already been established*". *AD (Palestine)*, para.159, note 2 above. Article 1D was "intended for an existing category of refugees in respect of which the General Assembly had already taken certain action." Takkenberg, note 5 above, 97.

<sup>9</sup> See also, *Mostafa Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal*, C-364/11, European Union: Court of Justice of the European Union, 19 December 2012, ("*El Kott*"), <http://www.refworld.org/cases,ECJ,50d2d7b42.html>, para 62, where the CJEU affirmed that the objective of Article 1D was to "ensure that Palestinian refugees continue to receive protection, as Palestinian refugees, until their position has been definitively settled ...".

<sup>10</sup> General Assembly, Fifth Session, Official Records, Third Committee, 328<sup>th</sup> Meeting, 27 November 1950, paras 52, 55 (Mr. Baroody, Saudi Arabia), UN doc. A/C.3/SR.328, available through the UN Official Document System database at <http://www.un.org/en/documents/index.html>. Also cited in UNHCR's intervention before the Court of Appeal of England and Wales in the case of *El-Ali*, <http://www.refworld.org/docid/3d1c73c04.html> ("*UNHCR intervention in El-Ali*").

<sup>11</sup> General Assembly, Fifth Session, Official Records, Third Committee, 344<sup>th</sup> Meeting, 11 December 1950, paras 24-25 (Mr. Baroody, Saudi Arabia); para. 28 (Mr. Lesage, Canada); paras 29-30 (Mr. Davin, New Zealand); para. 39 (Mr. Noriega, Mexico); para. 42 (Mr. Raafat, Egypt), UN doc. A/C.3/SR.344, available through the UN Official Document System database at <http://www.un.org/en/documents/index.html>. Also cited in *UNHCR intervention in El-Ali*, note (10) above.

<sup>12</sup> See Goodwin Gill and McAdam, note 5 above, 152. The importance of this complementarity is reflected in the current practice of the two agencies. Since 2005, UNHCR and UNRWA have held annual high-level meetings in order to address issues of common concern; and since 2010, a joint working group has been established which remains in regular contact and meets twice per year.

<sup>13</sup> *Statute of the Office of the United Nations High Commissioner for Refugees*, ("*Statute*"), 14 December 1950, A/RES/428(V), <http://www.refworld.org/docid/3ae6b3628.html>, paragraphs 1 and 7(c). With regards to the differences between the language of the Statute ("continues to receive") and that of Article 1D ("at present receiving"), UNHCR interprets the phrases as having the same meaning. "For reasons which are not clear (but which may have been dictated by time constraints), the draft Convention refugee definition was not amended to bring it into line with the UNHCR Statute before being sent on to the Conference of Plenipotentiaries." Goodwin-Gill and McAdam, note 5 above, p. 154. See also on the issue of UNHCR's Mandate, UNHCR, *Note on the Mandate of the High Commissioner for Refugees and his Office*, October 2013, <http://www.refworld.org/docid/5268c9474.html>.

<sup>14</sup> See for example, General Assembly Resolution 58/95 of 17 December 2003 and, more recently, UNGA Resolution 71/91, *Assistance to Palestine refugees: Resolution adopted by the General Assembly*, 22 December 2016, A/RES/71/91: <http://www.refworld.org/docid/586cbe334.html>.

UNRWA's areas of operation, in which it provides protection<sup>15</sup> or assistance to a population of over five million Palestinian refugees.<sup>16</sup>

## **B. *Ratione personae*: Personal scope of Article 1D**

8. The following groups of persons fall within the personal scope of Article 1D:

**Palestine refugees:** Persons who are "Palestine refugees"<sup>17</sup> within the sense of UN General Assembly Resolution 194 (III) of 11 December 1948<sup>18</sup> and subsequent UN General Assembly Resolutions and who, as a result of the 1948 Arab-Israeli conflict, were displaced from that part of Mandate Palestine which became Israel, and who have been unable to return there.

**Displaced persons:** Persons 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, and who, as a result of the 1967 conflict, have been displaced from the Palestinian territory occupied by Israel since 1967 and have been unable to return there.<sup>19</sup> It also includes those persons displaced by "subsequent hostilities".<sup>20</sup>

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<sup>15</sup> It is important to note that UNRWA has had a protection mandate from its inception. Nevertheless, the protection function has grown over time and has increased since 2010 with the adoption of a protection policy and the development of protection tools and standards. See UNRWA, *Protecting Palestine Refugees*, 2015, <http://www.refworld.org/docid/5703647f4.html> and <https://www.unrwa.org/what-we-do/protection>. However, UNRWA "does not own, administer or police the camps, as this is the responsibility of the host authorities." <https://www.unrwa.org/palestine-refugees>. See also note 48 below.

<sup>16</sup> For latest UNRWA figures, see: <http://www.unrwa.org/>.

<sup>17</sup> The term "Palestine refugees" has never been expressly defined by the General Assembly. However, for early work on interpreting the term, see 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 which is to be read with its Note by the Principal Secretary, UN Doc. A/AC.25/W/61, <https://unispal.un.org/DPA/DPR/unispal.nsf/0/418E7BC6931616B485256CAF00647CC7>. UNRWA's operational definition of the term "Palestine refugee" for registration purposes has evolved over the years as it was initially a subcategory of persons who were 'in need'. Since 1984 it 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.*"

<sup>18</sup> The UN General Assembly resolved in para. 11 of Resolution 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".

<sup>19</sup> UN General Assembly Resolution 2452 (XXIII) A of 19 December 1968 called for the return of "displaced persons", as reiterated by subsequent UN General Assembly resolutions on an annual basis, <https://unispal.un.org/DPA/DPR/unispal.nsf/0/0F32DC9EB80EE553852560DF004F1352>. See, also, *Bolbol*, (note 2 above) para. 47: "[I]t cannot be maintained, as an argument against including persons displaced following the 1967 hostilities within the scope of Article 1D of the Geneva Convention, that only those Palestinians who became refugees as a result of the 1948 conflict who were receiving protection or assistance from UNRWA at the time when the original version of the Geneva Convention was concluded in 1951 are covered by Article 1D of that convention [...]."

<sup>20</sup> See UN General Assembly Resolution A/RES/37/120, 16 December 1982, which extended UNRWA's mandate to those displaced by subsequent hostilities; <http://www.un.org/documents/ga/res/37/a37r120.htm>.

**Descendants:** “Descendants” refers to all persons born to Palestine refugees or displaced persons, as defined above.<sup>21</sup> Based on principles of gender equality and non-discrimination on the basis of sex, as well as the principle of family unity, these descendants, whether they are descended through the male or female line,<sup>22</sup> would be considered to fall within the purview of Article 1D.<sup>23</sup> This includes descendants who were born outside of and who have never resided in UNRWA’s areas of operation, where the criteria for the application of Article 1D are met.

9. For the purposes of these Guidelines, the term “Palestinian refugees” is used to encompass “Palestine refugees”, “displaced persons” and “descendants” or one or more of these groups, whose position has not been definitively settled in accordance with relevant resolutions of the UN General Assembly.

10. Not all Palestinians fall within the class of Palestinian refugees to whom Article 1D applies.<sup>24</sup> Such cases are to be assessed in the same manner as other claimants for refugee status, under Article 1A(2).

### **C. Sequential reading**

11. The two paragraphs in Article 1D are to be read jointly and operate sequentially. This means that decision-makers need to assess (i) whether the applicant falls within the class of Palestinians to whom the protection of the 1951 Convention does not apply because he or she “is at present receiving” the protection or assistance of UNRWA; and if so, (ii) whether such an applicant is nonetheless included under the second paragraph owing to the cessation of that protection or assistance.

### **D. “Exclusion clause” of Article 1D(1): Palestinian refugees receiving or eligible to receive the protection or assistance of UNRWA**

12. “Exclusion” from protection under the 1951 Convention pursuant to Article 1D(1) does not mean that persons within the scope of this provision are not to be considered refugees. Quite the contrary, the express intention of the drafters was to provide a separate regime for an entire class of persons already receiving specific benefits from UN organs or agencies. Thus, Article 1D is clearly intended to cover all Palestinian refugees “falling under the mandate of UNRWA, regardless of when, or whether, they

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<sup>21</sup> UNRWA’s *Consolidated Eligibility and Registration Instructions*, 1 January 2009, (“UNRWA’s CERI (2009)”), <http://www.refworld.org/docid/520cc3634.html>, at Part III(A)(1), p. 3, provide that “Palestine Refugees, and descendants of Palestine refugee males, including legally adopted children, are eligible to register for UNRWA services.” Descendants of women who are Registered Refugees and are (or were) married to husbands who are not registered refugees are not considered to meet UNRWA’s Palestine refugee criteria, but they (including legally adopted children) “are eligible to register to receive UNRWA services”, Part II(A)(2).

<sup>22</sup> Including descendants of a Palestine refugee woman and a non-refugee male within the first paragraph of Article 1D of the 1951 Convention is compatible with the principle of non-discrimination on the basis of sex and avoids serious consequences for family unity. Further, the approach adopted in these Guidelines, which recognises descendants of Palestinian refugees, is consistent with UNHCR’s general approach to protracted refugee situations in which children born to refugees in exile are registered as refugees until a durable solution has been found.

<sup>23</sup> Some of these descendants may have acquired the nationality of their non-refugee/non-Palestinian parent, hence an individual assessment will be required, which also considers the principle of family unity.

<sup>24</sup> For example, a Palestinian originally from the West Bank, who was never displaced.

are actually registered with that agency, or actually receiving assistance.”<sup>25</sup> To interpret Article 1D(1) as an exclusion clause in that sense would be incorrect, as it would ignore the character of Article 1D as a “contingent inclusion clause.”<sup>26</sup> It would also be inconsistent with the object and purpose of the 1951 Convention and, in particular, with the aim of Article 1D itself, which is to ensure continuity of protection for a class of persons who are already recognised as refugees by the international community.

13. Moreover, the object and purpose of the 1951 Convention and of its provisions relating to Palestinians require that the words “at present receiving” in the first paragraph of Article 1D are understood to mean (i) “persons who were and/or are now receiving” protection or assistance, or (ii) who are eligible for such protection or assistance. Those Palestinians who are eligible are described at paragraph 8. By capturing both those actually receiving, as well as those eligible to receive the protection or assistance of UNRWA within Article 1D(1), the continuing refugee character of Palestinian refugees is acknowledged, as is their entitlement to protection.

14. In UNHCR’s view, it would be incompatible with the object and purpose of Article 1D to remove from its scope those Palestinian refugees who have not accessed UNRWA protection or assistance, despite being eligible, but are nonetheless in need of 1951 Convention protection under the second paragraph in Article 1D.<sup>27</sup> Such a narrow interpretation of the first paragraph of Article 1D would actually result in the denial of protection for many Palestinian refugees, *whose refugee character is already established*, creating gaps in the protection regime.<sup>28</sup>

15. Moreover, similarly situated persons who were displaced as a result of the same conflict would be subject to different treatment depending on whether they availed themselves of assistance or not and depending on where they fled. Some would be examined under Article 1D while others would be examined under Article 1A(2). An interpretation which differentiates these similarly situated persons is “clearly unreasonable and in conflict with the intentions of the drafters.”<sup>29</sup>

16. In the same vein, interpreting Article 1D in a way that would not cover those Palestinian refugees who are eligible for UNRWA’s protection or assistance would lead

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<sup>25</sup> Guy Goodwin Gill and Susan M. Akram, ‘Brief Amicus Curiae’, *Palestine Yearbook of International Law*, 2000/2001, Vol. XI, 185, at p. 236. See also, *AD (Palestine)*, note 2 above, where the scope of Article 1D was found to encompass persons “who have not in fact availed themselves of protection and assistance which they are otherwise eligible to receive.” Para. 160 and see paragraphs 150-153 for a discussion of the difficulties of the “actually availed” approach.

<sup>26</sup> See footnote 5.

<sup>27</sup> This interpretation is distinct from the position taken by the CJEU in *Bolbol*, (note 2 above), where only those who had “actually availed” themselves of that protection or assistance were considered to fall within the first paragraph of Article 1D, based on a “clear reading” of Article 1D (para. 51). 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.

<sup>28</sup> See UNHCR, *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*, May 2013, <http://www.refworld.org/docid/518cb8c84.html>.

<sup>29</sup> Brenda Goddard, ‘UNHCR and the International Protection of Palestinian Refugees’, (2009) 28 *Refugee Survey Quarterly*, 475 at 493.

to the duplication of mandates in respect of the same refugee population between UNHCR and UNRWA *inside* UNRWA's areas of operation. In UNHCR's view, this same interpretation also guides the interpretation of the provision *outside* UNRWA's areas of operation. Thus, the provision ought to be interpreted in a way that reflects the complementary mandates of the two agencies, both within and outside UNRWA's areas of operation.<sup>30</sup>

17. It would also be incorrect to read Article 1D as applying only to those persons who were Palestinian refugees in 1951.<sup>31</sup> This would run contrary to the intentions of the Convention's drafters, who sought to ensure continuity of protection for the specific class of persons addressed in Article 1D until their position was definitively settled, a need which continues not only for those who were Palestinian refugees in 1951, but also persons who were displaced by the 1967 conflict as well as their descendants. Moreover, it disregards the critical change effected by the 1967 Protocol, which removed the temporal limitation on the 1951 Convention, with the aim, as expressed in the Preamble, of ensuring "equal status" for "all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951."<sup>32</sup>

#### **E. "Inclusion clause" of Article 1D: the protection or assistance has ceased for any reason**

18. Palestinian refugees (see paragraph 8) benefit from 1951 Convention protection under Article 1D(2) when the protection or assistance of UNRWA has ceased. Read in light of its ordinary meaning, considered in context and with due regard to the object and purpose of the 1951 Convention,<sup>33</sup> the phrase "ceased for any reason" is not to be construed restrictively. As noted in jurisprudence, exclusion from the 1951 Convention of Palestinian refugees by way of Article 1D "was intended to be conditional and temporary, not absolute and permanent."<sup>34</sup>

19. The application of the second paragraph of Article 1D is not, however, unlimited.<sup>35</sup> Protection under the 1951 Convention does not extend to those applicants who, being outside an UNRWA area of operation, refuse to (re-)avail themselves of the protection or assistance of UNRWA for reasons of personal convenience.<sup>36</sup> That said, the reasons why one has left an UNRWA area of operation (for example, for work or study purposes, or for protection reasons) is not of itself determinative. What is pivotal is whether the protection or assistance of UNRWA has ceased owing to one or more of

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<sup>30</sup> *AD (Palestine)*, note 2 above, para. 159.

<sup>31</sup> The "historical" argument that Article 1D is limited only to those persons who were Palestinian refugees in 1951, accepted by the United Kingdom Court of Appeal in *El-Ali* note 6 above, was rejected by the CJEU in *Bolbol*, note 2 above, paras 47-48. See also the rejection by Advocate General Sharpston, paras 62, 65-68, in her Opinion in *Bolbol*, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CC0031>.

<sup>32</sup> 1967 Protocol, preamble, third paragraph, note 1 above. See also, Goodwin-Gill and McAdam, note 5 above, p. 158, footnote 110.

<sup>33</sup> *Vienna Convention on the Law of Treaties*, article 31, note 7 above.

<sup>34</sup> *AD (Palestine)*, note 2 above, para. 99f.

<sup>35</sup> "Mere absence from such an area or a voluntary decision to leave it cannot be regarded as cessation of assistance.", *El Kott*, note 9 above, para. 59.

<sup>36</sup> See, *El Kott*, note 9 above, paras 49-51 and 59-63. See also by way of analogy regarding personal convenience, Statute of the Office of the United Nations High Commissioner for Refugees, paragraphs 6(ii)(e) and (f), note 13 above.

the “objective reasons” for leaving or preventing them from (re)availing themselves of UNRWA’s protection or assistance as set out in paragraph 22 below (see also paragraph 26ff on *sur place* claims). If a person has no objective reasons for not (re)availing themselves of UNRWA’s protection or assistance, then such protection or assistance cannot be regarded or construed as having ceased within the meaning of the second paragraph of Article 1D when a Palestinian refugee can safely enter the UNRWA area of operation.

20. The inclusion assessment needs to be carried out not only having regard to UNRWA’s mandate and operations, but also to the circumstances of the individual and to relevant and up-to-date country of origin information (COI).<sup>37</sup>

### **Objective reasons bringing the applicant within the second paragraph of Article 1D**

21. While the drafters of the 1951 Convention envisaged primarily the application of the second paragraph in the event of the termination of UNRWA’s mandate, the phrase “for any reason” is sufficiently broad to include circumstances other than the cessation of UNRWA’s mandate. The *travaux préparatoires* of the 1951 Convention confirm this interpretation.<sup>38</sup> Importantly, where the drafters intended to limit the scope of provisions in other parts of the Convention, they did so explicitly and outlined the possible exceptions.<sup>39</sup>

22. Objective reasons,<sup>40</sup> which bring an applicant within the second paragraph of Article 1D, include:

#### **(i) Termination of the mandate of UNRWA<sup>41</sup>**

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<sup>37</sup> “Country of Origin Information (COI) is information which is used in procedures that assess claims to refugee status or other forms of international protection. COI supports legal advisors and persons making decisions on international protection in their evaluation of: the human rights and security situation; the political situation and the legal framework; cultural aspects and societal attitudes; the humanitarian and economic situation; events and incidents; as well as the geography in claimants’ countries of origin (or, in the case of stateless people, countries of former habitual residence) or countries of transit. To qualify as COI it is essential that the source of the information has no vested interest in the outcome of the individual claim for international protection.” Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), *Researching Country of Origin Information: Training Manual*, October 2013, <http://www.refworld.org/docid/5273a56b4.html>.

<sup>38</sup> See for example the statement of the Egyptian delegate, Mr. Raafat, General Assembly, Fifth Session, Official Records, Third Committee, 344<sup>th</sup> Meeting, 11 December 1950, para. 13, UN doc. A/C.3/SR.344. See also the views of the French delegate, Mr. Rochefort, at the Conference of Plenipotentiaries, Summary of the Second Meeting, 20 July 1951, UN doc. A/CONF.2/SR.2, p. 27. Both documents are available through the UN Official Document System database at <http://www.un.org/en/documents/index.html>.

<sup>39</sup> For example, the drafters of the 1951 Convention set out, in a clearly limited fashion, the list of grounds on which refugee status may be considered to have ceased under Article 1C of the 1951 Convention. See, *El Kott*, note 9 above, para. 57.

<sup>40</sup> In *El Kott*, the CJEU considered that “objective reasons” included “reasons beyond the person’s control” (i.e. independent of their volition), note 9 above, para. 58. UNHCR considers that there is no significant difference between objective reasons and reasons beyond the person’s control, except as noted in paragraphs 26-28 in relation to *sur place* claims, where the CJEU’s judgment needs to be read with particular care as it did not apply to *sur place* claims.

<sup>41</sup> See note 2 and paragraph 7 above.

- a. The termination of UNRWA's mandate would in principle require a resolution of the United Nations General Assembly. This element would consequently apply to the entire class of Palestinians, rather than particular individuals.

**(ii) Inability of UNRWA to fulfil its protection or assistance mandate**

- b. The discontinuation of UNRWA's protection or assistance, which would apply to all Palestinians, would need to be determined to have occurred as a matter of fact, in an area of operations or on a country-wide basis. This might occur if, notwithstanding the continued existence of the agency, it were to become impossible for UNRWA to carry out its mission.<sup>42</sup> Evidence of this circumstance may be established, for example, by a resolution of the United Nations General Assembly, annual reports of UNRWA, statements by UNRWA that it has discontinued its activities, or other evidence brought forward by the applicant.<sup>43</sup>
- c. "Protection or assistance" are alternatives: an applicant is not required to establish that both the protection *and* the assistance of UNRWA have ceased. In relation to the discontinuation of assistance, however, the applicant would need to establish that the assistance pursuant to UNRWA's mandate has ceased.<sup>44</sup>

**(iii) Threat to the applicant's life, physical integrity, security or liberty or other serious protection-related reasons**

- d. Palestinian refugees – as refugees already recognized by the international community via various UN General Assembly resolutions – are not required to establish individually that their treatment constitutes persecution within the meaning of Article 1A(2) of the 1951 Convention or that they meet the other requirements of the refugee definition in that paragraph, in order to benefit from Article 1D.<sup>45</sup> That said, a Palestinian refugee at risk of persecution in the sense of Article 1A(2) would clearly fall within the second paragraph of Article 1D.
- e. Beyond this, there is a range of threats that may compel a Palestinian to leave UNRWA's area of operation, with the result that UNRWA's protection and assistance would cease for him or her. In UNHCR's view, both group-

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<sup>42</sup> *El Kott*, note 9 above, para. 56. The suspension of non-core services for a short period of time would not suffice.

<sup>43</sup> A comparison can be made with the UNCCP, which continues to exist but reports annually to the General Assembly that it is not able to carry out its mandate: see note 3 above.

<sup>44</sup> "Given the long-standing and continuing reality of funding deficits, should UNRWA continue to exist but in fact be unable to provide effective protection or assistance due to a lack of funding, there is no reason in principle why this should also not qualify as a cessation of activities under Article 1D, which expressly contemplates cessation 'for any reason' as activating the inclusion clause". *AD (Palestine)*, note 2 above, para. 172. See also, *El Kott*, note 9 above, paras 63, 65.

<sup>45</sup> See for example the Belgian Conseil du Contentieux des Étrangers, (Council of Alien Law Litigation) decision, which states that the recognition of the refugee status is not based on the existence of a real risk to personal safety, but is automatically granted based on Article 1D given that the person concerned is already a refugee and has demonstrated that he or she can no longer benefit from UNRWA assistance. *Arrêt No. 144 563*, Belgium: Conseil du Contentieux des Étrangers, 30 April 2015, [http://www.refworld.org/cases,BEL\\_CCE,5963b1794.html](http://www.refworld.org/cases,BEL_CCE,5963b1794.html).

based and individualised threats would qualify as circumstances beyond the applicant's control. Examples of group-based threats would include armed conflict or other situations of violence, such as civil unrest, widespread insecurity or events seriously disturbing public order.<sup>46</sup> Threats of a more individualised nature, which could also compel a Palestinian to leave an UNRWA area for reasons beyond his or her control, would include sexual or gender-based violence, torture, inhuman or degrading treatment or punishment, human trafficking and exploitation, forced recruitment, severe discrimination,<sup>47</sup> or arbitrary arrest or detention.

- f. Where any of these above-mentioned threats emanate from the authorities, protection under Article 1D would be required. Similarly, where the authorities are unable or unwilling to provide protection against threats emanating from non-State actors, protection under Article 1D(2) would also apply. A case-by-case assessment is necessary to determine the application of Article 1D in these cases.<sup>48</sup>

**(iv) Practical, legal and/or safety barriers preventing an applicant from (re)availing him/herself of the protection or assistance of UNRWA**

- g. Practical barriers include obstacles which prevent access the UNRWA area of operation, for example, because of border closures.
- h. Legal barriers would include absence of documentation allowing the individual to travel to, or transit through, or (re)enter and reside in the relevant UNRWA area of operation. Where the authorities refuse (re)admission or the renewal of travel or other requisite documents, the second paragraph of Article 1D would be satisfied. An applicant would not, however, benefit from protection under the 1951 Convention pursuant to Article 1D(2) if he or she were to seek to frustrate his or her (re)admission and stay by refusing to co-operate, for example, in acquiring documents.<sup>49</sup>
- i. Barriers relating to safety or personal security which prevent (re)availment could include dangers *en route* such as minefields, factional fighting, shifting

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<sup>46</sup> See, UNHCR, *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions*, 2 December 2016, HCR/GIP/16/12, <http://www.refworld.org/docid/583595ff4.html>.

<sup>47</sup> This would often but not always include systematic or a pattern of consistent discrimination. See UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, <http://www.refworld.org/docid/3b20a3914.html>, at para. 17. It also includes measures of discrimination which "lead to consequences of a substantially prejudicial nature [... for example,] serious restrictions on the right to earn a livelihood, the right to practise religion, or access to normally available educational facilities." UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, <http://www.refworld.org/docid/4f33c8d92.html>, ("UNHCR Handbook") para. 54.

<sup>48</sup> The provision of services by UNRWA is not relevant for this assessment. Non-state actors, including international organisations, do not have the attributes of a State, and are not in a position to provide protection and enforce the rule of law in the same fashion as a State.

<sup>49</sup> Article 2 of the 1951 Convention notes that every refugee has duties to the country in which he or she finds himself or herself, which require in particular that he or she conform to its laws and regulations as well as to measures taken for the maintenance of public order.

battle fronts or the threat of other forms of harassment, violence or exploitation, preventing the applicant from being able to return safely. Up-to-date information on the realistic prospect of being able to re-avail oneself of the protection or assistance is required. The feasibility of (re)availment cannot be assessed in the abstract.

- j. Although Article 1D focuses on the cessation of the protection or assistance of UNRWA, the situation in the State in whose jurisdiction UNRWA is operating will not only be relevant, but may be determinative of the need for 1951 Convention protection. For example, the host State or authorities – not UNRWA – will control whether a Palestinian refugee will be permitted to (re)enter their territory and (re)establish him/herself there, including whether he or she is able to obtain the necessary legal documentation establishing a right to stay in the State or territory.<sup>50</sup> The risk facing the applicant may emanate, for example, from the authorities directly. These assessments are to be based on reliable and up-to-date information, and special care needs to be exercised where the situation is fluid or unclear.
- k. No State can safely assume that a Palestinian refugee will be able to access the protection or assistance of UNRWA in an area of operation where they have never resided, or other than that in which he or she was formerly residing. As such decision-makers should not assess the lawfulness of return in relation to an UNRWA area of operation to which the individual has no previous connection. That would impose unreasonable and insurmountable obstacles on applicants, and ignore the general workings of the State-based system of international relations and State sovereignty. Moreover, consistent with general principles of international refugee law, the assessment as to whether the protection or assistance of UNRWA has ceased for a person previously resident in an UNRWA area is to be made vis-à-vis the UNRWA area of operation where the applicant was previously residing.<sup>51</sup> The assessment is not to be made against each of UNRWA's areas of operation but to a single UNRWA area of operation.<sup>52</sup>

23. The circumstances listed above are alternative, not conjunctive, such that depending on the case at hand, one or more of the aforementioned circumstances may be present, bringing the applicant within the scope of Article 1D(2).<sup>53</sup> The evidentiary

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<sup>50</sup> For example, in relation to the West Bank, the position of the Israeli authorities will be determinative. Likewise, for passage across the border to Gaza from Egypt, permission from Egypt is likely to be required, noting that at some times, the border is closed.

<sup>51</sup> See also, *El Kott*, note 9 above, para. 77: "... the person concerned ceases to be a refugee if he is able to return to the UNRWA area of operations in which he was formerly habitually resident because the circumstances which led to that person qualifying as a refugee no longer exist".

<sup>52</sup> This is supported by the language of the CJEU in *El Kott* which repeatedly uses the expression "area of operation" in the singular when referring to the scope of the assessment to be carried out. *El Kott*, note 9 above, paras 49, 50, 55, 58, 61, 62, 63, 64, 65.

<sup>53</sup> While the inclusionary aspects of Article 1D(2) will be established where an applicant 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, the applicant is not required to establish both. In *El Kott*, (note 9 above), the CJEU accepted in the context of the facts before it, that such circumstances "will" fall within the second paragraph of Article 1D (para. 65). The CJEU did not however exhaust other circumstances in which such protection or assistance would be considered to have ceased, as this will depend on the case at hand. An interpretation that

aspects of establishing the existence of the above-mentioned circumstances are dealt with in Part III.

### ***Personal circumstances of applicant***

24. The personal circumstances of the applicant are relevant to the determination of whether one of the objective reasons exists to justify the application of the second paragraph of Article 1D. Thus, each claim must be determined on its individual merits, enabling consideration of factors that are specific to the applicant.<sup>54</sup> These personal circumstances may include age, sex, gender, sexual orientation and gender identity, health, disability, civil status, family situation and relationships, social or other vulnerabilities, ethnic, cultural or religious considerations, political and social links and compatibility, language abilities, and any past experiences of serious harm and its psychological effects.

### ***Internal relocation***

25. The protection or assistance of UNRWA will not be considered to have ceased if an individual is able to access and receive protection or assistance from UNRWA elsewhere in the same UNRWA area of operation. For example, if a camp is destroyed by an armed attack and the protection or assistance of UNRWA is as a matter of fact available elsewhere within another part of that country or territory, and the individual has access to that protection or assistance, then the second paragraph of Article 1D would not be satisfied without additional factors. However, it cannot be expected that the applicant relocate (or be returned) to a different country or territory where he or she has no previous connection.<sup>55</sup>

### ***Sur place protection needs***

26. A *sur place* claim arises after arrival in the country of asylum, either as a result of the applicant's activities in the country of asylum or as a consequence of events, which have occurred or are occurring in the applicant's country of origin since their departure.<sup>56</sup> The recognition of *sur place* claims of Palestinian refugees under Article 1D is in line with general principles of international refugee law applicable to Article 1 of the 1951 Convention that accept *sur place* refugee claims, recognizing that changes in the country of origin whilst abroad may make them a refugee.<sup>57</sup> For example, should the mandate or activities of UNRWA cease as described in paragraph 22 above while the individual is outside UNRWA's area of operation, she or he would qualify for 1951 Convention protection under Article 1D.

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requires both would lead to perverse results. For example, if an applicant's personal safety is at serious risk, the assistance provided by UNRWA in the form of cash or food rations would be irrelevant to their need for protection.

<sup>54</sup> An exception would be in circumstances where UNRWA has ceased to operate as an agency (see paragraph 22(i) above).

<sup>55</sup> UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, <http://www.refworld.org/docid/3f2791a44.html>.

<sup>56</sup> UNHCR Handbook, note 47 above, paras 94-96.

<sup>57</sup> *Ibid.*. There is no reason to apply a different approach to Palestinian applicants under Article 1D.

27. Although “ceased for any reason” does not generally include reasons of mere personal convenience for refusing to (re-)avail oneself of the protection or assistance of UNRWA, (as noted in paragraph 19 above),<sup>58</sup> it is not relevant whether the applicant departed in the first place on a voluntary basis from an UNRWA area of operation (for example, for study or work purposes). They are still eligible to benefit from the 1951 Convention pursuant to Article 1D should they meet its criteria.<sup>59</sup> A careful examination of the circumstances in each case would be required.

28. A person may become a refugee *sur place* in a country in which she or he claims asylum, as a result of his or her own actions, such as associating with refugees already recognized, or expressing political views in his or her country of residence.<sup>60</sup> Politically active Palestinian refugees who may attract attention because of their beliefs or activities, and who may even do so at great personal risk to themselves or their families, cannot be required to cease such activities as a precondition for protection under Article 1D; that would undermine the object and purpose of the 1951 Convention overall.<sup>61</sup>

## **F. Automatic or “*ipso facto*” entitlement to the benefits of the 1951 Convention**

29. When it is established that UNRWA’s protection or assistance has ceased for any of the reasons mentioned in paragraph 22, the Palestinian refugee is automatically or “*ipso facto*” entitled to the benefits of the 1951 Convention,<sup>62</sup> provided Articles 1C, 1E or 1F of the 1951 Convention do not apply [see Parts G, H, and I below].<sup>63</sup> The term “*ipso facto*” would be entirely redundant if the provision merely meant that a Palestinian refugee could apply for international protection in accordance with the general rules and in the same way as all asylum-seekers via Article 1A(2) of the 1951 Convention.<sup>64</sup>

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<sup>58</sup> This interpretation is closely aligned with State practice which has not generally accepted automatic entitlement to Article 1D by reason simply of being outside an UNRWA area of operation.

<sup>59</sup> *El Kott*, note 9 above, para. 59.

<sup>60</sup> UNHCR Handbook, note 47 above, para. 96.

<sup>61</sup> By analogy with the general position that one cannot be required to conceal or be discreet about a protected characteristic, see *X, Y, Z v Minister voor Immigratie en Asiel*, C-199/12 - C-201/12, European Union: Court of Justice of the European Union, 7 November 2013, <http://www.refworld.org/docid/527b94b14.html>; UNHCR *Observations in X, Y and Z*, 28 September 2012, <http://www.refworld.org/docid/5065c0bd2.html>; *Bundesrepublik Deutschland v Y and Z*, Judgment of the Court (Grand Chamber) of 5 September 2012 <http://www.refworld.org/pdfid/505ace862.pdf>; *RT (Zimbabwe) and others v Secretary of State for the Home Department*, [2012] UKSC 38, United Kingdom: Supreme Court, 25 July 2012, <http://www.refworld.org/docid/500fdacb2.html>.

<sup>62</sup> See UNHCR, *Written Intervention before the Court of Justice of the European Union in the case of El Kott*, 27 October 2011, para 4.3, C-364/11, <http://www.refworld.org/docid/4eaa95d92.html> and UNHCR, *Oral intervention before the Court of Justice of the European Union in the case of El Kott and Others v. Hungary*, 15 May 2012, C-364/11, <http://www.refworld.org/docid/4fbd1e112.html>, paras 10, 12-14. (“UNHCR Oral intervention in *El Kott*”). UNHCR’s views were accepted by the Court in *El Kott*, note 9 above, paras 80-81.

<sup>63</sup> “There can be no doubt that the category of refugees considered in the present Paragraph is subject to the exclusion clauses contained in Article E and F, as well as to the cessation clauses enumerated in Article 1C of the Refugee Convention.” Grahl-Madsen, note 5 above, 142.

<sup>64</sup> UNHCR *Oral intervention in El Kott*, note 63 above, para. 13. Although a common interpretation of this provision is that it only entitles the person to be considered under Article 1A(2) and that they must still meet the well-founded fear standard, “this is not the correct interpretation of Art. 1D as read in light of its history and protection purpose. The plain meaning of the term ‘*ipso facto*’ holds that no other criteria need to be used for assessing the situation – they are by the fact of that precondition alone *de*

30. The phrase “benefits of this Convention” in the second paragraph of Article 1D refers to the substantive rights contained in Articles 2 to 34 of the 1951 Convention and which are attached to being a refugee, as defined in Article 1 of the 1951 Convention. The term “benefits” cannot mean simply access to asylum procedures for determining refugee status as Article 1 does not itself contain any benefits – it simply defines who *is* and who *is not* entitled to have access to those benefits.<sup>65</sup> This interpretation is also supported by the equally authentic French version of Article 1D, which uses the expression “*bénéficieront de plein droit du régime de cette convention.*” They benefit by operation of law and “as of right” once they fulfil the criteria in Article 1D.<sup>66</sup>

31. Palestinian refugees protected under Article 1D are entitled to receive the same rights, benefits and standards of treatment as other refugees recognized under Articles 1A(1) or 1A(2), so there is no more favourable treatment provided to Article 1D refugees than other refugees. They each enjoy the benefits of the Refugee Convention set out in Articles 2 to 34.<sup>67</sup>

## G. Applicability of Article 1C

32. The 1951 Convention will cease to apply under certain conditions, clearly defined in Article 1C.<sup>68</sup> Article 1C applies in principle to Palestinian refugees benefiting from the 1951 Convention on an individual basis. Although a literal interpretation of Article 1C, which explicitly references only refugees recognised under “Article 1A” of the 1951 Convention, would render it inapplicable to Article 1D Palestinian refugees, such an interpretation no longer corresponds to the reality that a number of Palestinian refugees have acquired the nationality and protection of other countries,<sup>69</sup> such that they no longer need the protection of the 1951 Convention. Notwithstanding the special situation of Palestinian refugees provided for by Article 1D, the provisions of Article 1C may be applied, account being taken of the considerable passage of time, changing

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*jure* refugees under the 1951 Convention and should thereby be entitled to refugee status in any State party to the 1951 Convention.” Mutaz M. Qafisheh and Valentina Azarov, ‘Article 1D’, in A. Zimmermann (ed.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary*, (Oxford University Press, 2011), 537-569, at 567.

<sup>65</sup> *Ibid.* UNHCR Oral intervention in *El Kott*. This view is supported by the use of the term “benefits” elsewhere in the Refugee Convention, for example in Articles 5 and 7, in a context that can only mean the substantive rights conferred by the Refugee Convention. Nor can the term benefits merely refer to *non-refoulement*.

<sup>66</sup> *El Kott*, note 9 above, paras 70-71. See also, *AD (Palestine)*, note 2 above, para. 192.

<sup>67</sup> See, UNHCR Oral intervention in *El Kott*, para. 16, note 70 above. The discrimination argument was roundly rejected by the CJEU in *El Kott*, note 9 above, para 78.

<sup>68</sup> UNHCR, “The Cessation Clauses: Guidelines on their Application”, 26 April 1999, <http://www.refworld.org/docid/3c06138c4.html> and UNHCR, *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses)*, 10 February 2003, HCR/GIP/03/03, <http://www.refworld.org/docid/3e50de6b4.html>.

<sup>69</sup> “A great number of Palestinian refugee residing in Jordan have acquired Jordanian citizenship in accordance with the relevant provisions of the Nationality Law of 4 February 1954. Citizenship has also been obtained by a number of Palestinian refugees residing in Iraq, Kuwait, Lebanon, Saudi Arabia and other countries in the region. As a result of the acquisition of a new nationality such persons are no longer to be considered as refugees for the purpose of the 1951 Convention” [depending on whether the relevant criteria set out in Article 1C paragraph 3 are met]. Takkenberg, note 5 above, 127 (footnotes omitted).

circumstances, the practice of States, and the fact that many Palestinians have established themselves in other States, often acquiring a new nationality. This interpretation of the 1951 Convention is necessarily without prejudice to the meaning of ‘the Palestinian people’, as well as to the meaning of the terms ‘refugees’ and ‘displaced persons’ as used in various UN General Assembly and UN Security Council Resolutions.

33. Despite the decision by the UN General Assembly in 2012<sup>70</sup> to accord non-member observer State status in the United Nations to Palestine, Article 1D should continue to be interpreted and applied as outlined in these Guidelines and until the situation of Palestinians is definitively settled in accordance with General Assembly resolutions. It is premature to consider that the protection of the 1951 Convention should cease to apply to Palestinian refugees, merely by reason of Palestine having been accorded non-member observer status.

## H. Applicability of Article 1E

34. The fact that some Palestinian refugees have been living in countries where they exercise rights and obligations ordinarily attached to the possession of nationality may render Article 1E<sup>71</sup> applicable to their case. In the case of children and other descendants of Palestinian refugees who may be enjoying rights and obligations identical to those of nationals of another country, consideration of the application of Article 1E of the 1951 Convention would also be required.<sup>72</sup>

35. Historically, States party to the League of Arab States *Protocol for the Treatment of Palestinians in Arab States (“Casablanca Protocol”)*<sup>73</sup> have pledged to provide a range of rights on par with their own citizens to Palestinian refugees, but many remain unimplemented in practice. Close scrutiny of the situation on the ground prior to applying Article 1E on the basis of the *Casablanca Protocol* would be required.

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<sup>70</sup> UN General Assembly Resolution 67/19, *Status of Palestine in the United Nations*, 29 November 2012, [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/67/19](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/19).

<sup>71</sup> “The Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.” Article 1E, 1951 Convention, note 1 above.

<sup>72</sup> See UNHCR, *Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees*, March 2009, <http://www.refworld.org/pdfid/49c3a3d12.pdf>.

<sup>73</sup> League of Arab States, *Protocol for the Treatment of Palestinians in Arab States (“Casablanca Protocol”)*, 11 September 1965, <http://www.refworld.org/docid/460a2b252.html>. The Casablanca Protocol provides for the right of employment on par with citizens, residency rights, travel documents, the right to leave and to return. However, it has not been consistently implemented and was weakened in 1991 with resolution 5093 that allows States to implement the Protocol “in accordance with the rules and laws in force in each state”. See also, Goddard, note 29 above, 507.

## I. Applicability of Article 1F

36. Persons with respect to whom there are serious reasons for considering that they have committed acts within the scope of Article 1F of the 1951 Convention<sup>74</sup> are not entitled to international protection as refugees.<sup>75</sup>

## III. PROCEDURAL AND EVIDENTIARY ISSUES

### A. Individual assessment

37. Although Article 1D recognizes a specific class of refugees receiving the protection or assistance of a United Nations entity other than UNHCR, the application of Article 1D will normally be assessed on an individual basis.<sup>76</sup>

### B. Time of assessment

38. The assessment is whether, at the time the individual claim is considered, the protection or assistance of UNRWA has ceased such that the applicant is unable or unwilling to (re)avail him/herself of that protection or assistance for an objective reason beyond his/her control.

### C. Burden and standard of proof

39. In applications for refugee status or protection, including those under Article 1D, the burden generally rests on the applicant to produce evidence as far as possible to support his or her statements and to substantiate the claim. The applicant is required to give a truthful account of facts relevant to his or her claim so far as these are within his or her own knowledge, and insofar as there is information that is available to him or her and which s/he can reasonably be expected to provide to the decision-maker. A decision-maker shares the duty of ascertaining the facts relevant to the determination.<sup>77</sup>

40. Article 1D requires an examination of whether (i) the applicant falls within the category of Palestinian refugees who is receiving or eligible to receive the protection or assistance of UNRWA and (ii) the protection or assistance of UNRWA has ceased

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<sup>74</sup> Article 1F states that the provisions of the 1951 Convention “shall not apply to any person with respect to whom there are serious reasons for considering that: a) he 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 has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; c) he has been guilty of acts contrary to the purposes and principles of the United Nations.”

<sup>75</sup> UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, <http://www.refworld.org/docid/3f5857684.html>. See also, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, <http://www.refworld.org/docid/3f5857d24.html>.

<sup>76</sup> A group-based approach, such as the prima facie recognition of refugee status, may be appropriate in certain circumstances: see UNHCR, *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status*, (“Prima Facie Guidelines”), 24 June 2015, HCR/GIP/15/11, <http://www.refworld.org/docid/555c335a4.html>.

<sup>77</sup> UNHCR Handbook, note 47 above, paras 196-205; UNHCR, *Note on the Burden and Standard of Proof in Refugee Claims*, 16 December 1998, <http://www.refworld.org/docid/3ae6b3338.html>.

for any reason. These are questions of fact. The decision-maker has a duty to inquire into the matter and to take into account all of the available evidence.

41. The assessment must consider whether, at the time the individual's claim is considered, he or she is unable to or unwilling to (re)avail himself or herself of the protection or assistance of UNRWA for a reason beyond his or her control. Inquiries also need to be made in relation to the circumstances in the State or authority, as well as the applicant's individual circumstances (see paragraphs 22(j) and 25).<sup>78</sup> The burden of proof lies on the decision-making authorities where it is asserted by them that the applicant could relocate internally within the same UNRWA area of operation, or absent other factors, be able to enter safely and with appropriate legal documentation per paragraph 22(iv) above.

### ***UNRWA registration***

42. Being registered by UNRWA or possessing UNRWA documentation would serve as conclusive, albeit not necessary, proof of falling within the scope of Article 1D(1).<sup>79</sup> In the absence of such documentation or other relevant proof, adjudicators may rely on other evidence to this effect, including through, for example, the applicant's own statements, the affidavits of others or the production of other relevant documentation.<sup>80</sup> Evidence of registration with UNRWA should not, however, be considered as a necessary precondition to recognition.<sup>81</sup> "Displaced persons" for example, are not "registered" in UNRWA's registration system, however, UNRWA keeps "due records" of such persons.<sup>82</sup> Lastly, by definition, a person who, despite being eligible to receive UNRWA protection and assistance, has not received such, may not be registered nor have such proof. They may nevertheless still fall within Article 1D.

### ***Evidence of objective reasons bringing the applicant within the second paragraph of Article 1D***

43. The evidence in relation to the inclusionary part of the assessment may come from a variety of sources. The applicant may provide evidence that is relevant in his or her own statements. A statement by UNRWA that it has discontinued activities in a given area of operation would be clear evidence that it had done so. Evidence from other sources that UNRWA had discontinued its activities could also be persuasive. It is

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<sup>78</sup> The ability of Palestinian refugees to move from one area of operation to another is contingent upon the recognition or granting of legal status by the host government of the receiving area, and the individual circumstances of the Palestinian refugee. This is also the case for a person who was never resident in an UNRWA area of operation.

<sup>79</sup> UNRWA, *CERI*, 2009, Section III.A.1, page 3, note 21 above. The CJEU found that "[w]hile registration with UNRWA is sufficient proof of actually receiving assistance from it, it has been explained in paragraph 45 above that such assistance can be provided even in the absence of such registration, in which case the beneficiary must be permitted to adduce evidence of that assistance by other means." *Bolbol*, note 2 above, paras 46 and 52.

<sup>80</sup> Special consideration would need to be given to descendants of Palestinian refugee women married to persons other than Palestine refugees registered with UNRWA, since they are not under UNRWA's *CERI*, registered as Palestine refugees but may be otherwise recorded for the purpose of receiving services. See, note 21 above.

<sup>81</sup> "Registration with UNRWA is of a declaratory nature, confirming rather than establishing that an individual falls under UNRWA's mandate." Takkenberg, note 5 above, 100.

<sup>82</sup> UNRWA, *CERI*, 2009, Section III.B - "Persons eligible to receive services without being registered in UNRWA's registration system" at page 6, note 21 above.

important however that the applicant is not required to produce or point to any such possible statement.<sup>83</sup> If such a requirement were to be imposed, it would place an undue burden on UNRWA, one which it may not be able to satisfy in every case, owing to, for example, resources or logistical reasons or those of confidentiality.<sup>84</sup> Finally, the applicant should not be required to approach UNRWA directly, given the practical difficulties involved.<sup>85</sup> There may also be circumstances relevant to the particular applicant about which UNRWA would not know and could not provide relevant information.

#### **D. Individual Procedures**

44. Fair and efficient procedures for the determination of refugee status under the 1951 Convention need to take particular account of claims relating to Article 1D, with clear identification of the issues relevant to Palestinians.

45. When requesting asylum, applicants must be given adequate time to exercise their rights, including, *inter alia*, the right to be informed, in a language which they understand, of the procedure to be followed, of their rights and obligations during the procedure, the possible consequences of not complying with their obligations and not cooperating with the authorities, the right to receive the services of an interpreter, to consult in an effective manner a legal adviser or other counsellor. Access to legal advice is paramount to a fair asylum procedure and often constitutes a prerequisite to ensure effective access to legal remedies.<sup>86</sup>

46 For Palestinians who do not come within the personal scope of Article 1D, an assessment under Article 1A(2) would then normally proceed.

47. Even though protection pursuant to Article 1D is normally carried out in individual procedures, there may be situations in which a group of Palestinian refugees may be recognised on a *prima facie* basis. For example, where the mandate of UNRWA is terminated in one of UNRWA's areas of operation, or comes to an end for reasons beyond its control, such as an international or non-international armed conflict, they would be considered – as a group – not to be receiving the protection or assistance of UNRWA.<sup>87</sup>

48. Where an applicant raises both a refugee and a statelessness claim, the latter made pursuant to the 1954 *Convention relating to the Status of Stateless Persons*, it

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<sup>83</sup> Whether protection or assistance has ceased is a matter of fact susceptible of proof in the normal way.

<sup>84</sup> Here an analogy can be made with UNHCR's position regarding information relating to mandate recognition, see submission in *I. A. v. Secretary of State for the Home Department: Case for the Intervener*, 27 October 2013, United Kingdom Supreme Court, UKSC2012/0157, <http://www.refworld.org/docid/52a098e34.html>.

<sup>85</sup> Although verification that a person is a registered "Palestine refugee", or is recorded as receiving UNRWA services, can be sought from UNRWA.

<sup>86</sup> UNHCR, *Public statement in relation to Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration pending before the Court of Justice of the European Union*, 21 May 2010, <http://www.refworld.org/docid/4bf67fa12.html>, paras 12-16.

<sup>87</sup> UNHCR, *Prima Facie Guidelines*, note 82 above.

is important that each claim is assessed and that both types of status are explicitly recognized.<sup>88</sup>

49. Best State practice ensures that Palestinian refugees recognised under Article 1D are properly recorded and separately registered in national asylum statistics.

#### **E. Regional refugee instruments**

50. Palestinian refugees are, like all other asylum applicants, entitled to apply for refugee status pursuant to any applicable regional refugee instruments, should they be in countries in which these apply.<sup>89</sup>

#### **F. Refugee status and subsidiary or complementary protection**

51. Palestinians found not to fall within the scope of Article 1D could have their claims for protection considered under Article 1A(2). Should they not fall within either provision, they are entitled, like all other asylum applicants, for any national or regional forms of subsidiary or complementary protection; and also to benefit from protection under international human rights law.

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<sup>88</sup> UNHCR, *Handbook on Protection of Stateless Persons*, 30 June 2014, <http://www.refworld.org/docid/53b676aa4.html>, para. 78.

<sup>89</sup> See, Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 UNTS 45, <http://www.refworld.org/docid/3ae6b36018.html>; *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984, <http://www.refworld.org/docid/3ae6b36ec.html>.