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The Office of United Nations High Commissioner for Refugees ('UNHCR') Statement on the Interpretation and Application of Article 1D of the 1951 Convention and Article 12(1)(a) of the EU Qualification Directive

Issued in the context of the preliminary ruling reference to the Court of Justice of the European Union from the Bundesverwaltungsgericht (Germany) lodged on 3 July 2019 – Federal Republic of Germany v XT (C-507/19)

1. Introduction

1. On 3 July 2019, the *Bundesverwaltungsgericht* (Federal Administration Court) referred five questions to the Court of Justice of the European Union (the 'Court'),[1] concerning the interpretation of the second sentence of Article 12(1)(a) of Directive 2011/95/EU[2] ('Qualification Directive').

2. A main area of focus in the referring court's request is the geographic scope of the assessment of whether UNRWA's protection or assistance has ceased when evaluating the applicability of the second sentence of Article 12(1)(a) of the Qualification Directive. Clarification is sought as to which UNRWA field or fields of operation[3] the assessment of whether its protection or assistance has ceased is to be made against, and the factors or criteria to be used in determining the relevant field(s). The referring court also seeks guidance on whether the *ipso facto* entitlement to the benefits of the Directive also applies to a Palestinian refugee who has left the UNRWA area of operations because his personal safety is at serious risk in the field of operation of his actual residence and it is impossible for UNRWA to grant him protection or assistance there, but who had moved there from another field of operation without his personal safety having been at serious risk and without being able to expect, at the time of the move, to experience protection or assistance by UNRWA in that field, or to return to the field of operation of his previous residence in the foreseeable future.

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[1] For the questions referred see: *Request for a preliminary ruling from the Bundesverwaltungsgericht (Germany) lodged on 3 July 2019 — Federal Republic of Germany v XT, (Case C-507/19)*.

[2] European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU (hereinafter Qualification Directive).

[3] In its *Guidelines on International Protection No. 13: Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees,* December 2017, HCR/GIP/17/13 (hereinafter *UNHCR Guidelines on Article 1D*), UNHCR used the term 'UNRWA's areas of operation' to refer to the five geographical areas or 'fields' in which UNRWA operates (Jordan, Lebanon, the Syrian Arab Republic, the West Bank (including East Jerusalem) and Gaza) and the term 'area of operation' to refer to one of the five fields. In this Statement, UNHCR will use the terms 'area of operations' to refer to all five fields, and 'field of operation' to refer to one of the five geographical areas. This is in accordance with how these terms have been used by the Court of Justice of the European Union in *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, C-31/09, CJEU, 17 June 2010, ("*Bolbol*"), *Mostafa Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal*, C-364/11, CJEU, 19 December 2012, ("*El Kott")*, and *Alheto v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite,* ("*Alheto*") C-585/16, CJEU, 25 July 2018; and by UNRWA in its *Consolidated Eligibility and Registration Instructions* (2009).

3. The main proceedings concern a Palestinian refugee, XT, who was born in Syria, where he was registered with UNRWA. As per the *Summary of the Referral*, the Applicant stated that he lived and performed casual work in Lebanon from October 2013 to November 2015 while holding no right of residence. He returned to Syria in November 2015 where he remained for a short time before departing from there for Germany, which he entered in December 2015 and where he applied for asylum in February 2016.[4]

4. Against this background, the present statement will set out UNHCR's observations on a number of aspects of the interpretation and application of the second paragraph of Article 1D of the 1951 Convention and the second sentence of Article 12(1)(a) of the Qualification Directive that arise in the context of the preliminary reference. The interest and expertise of UNHCR in this matter is explained in Part 2. Part 3 provides a brief overview of the object and purpose of Article 1D, as this must guide the interpretation and application of the second paragraph of that article as well as the second sentence of Article 12(1)(a) of the Qualification Directive. Part 4 focuses on two key issues: Part 4.1 addresses the circumstances which determine whether protection or assistance has ceased for a Palestinian refugee who has left the UNRWA area of operations; and Part 4.2 sets out UNHCR's views as to which UNRWA field(s) of operation the requirement that "protection or assistance has ceased for any reason" is to be assessed.

2. UNHCR's interest and expertise in the matter

5. UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and together with governments to seek solutions for them.[5] UNHCR fulfils its mandate, *inter alia*, by supervising the application of international conventions for the protection of refugees.[6] State parties to the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol* (together, '1951 Convention'),[7] including all EU Member States, are obliged to cooperate with UNHCR in the exercise of its mandate and to facilitate its supervisory role.[8]

6. As part of its supervisory role, UNHCR issues guidelines on the interpretation and application of the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention.[9] In the area of claims based on Article 1D of the 1951 Convention, to which Article 12(1)(a) of the Qualification Directive makes explicit reference, UNHCR refers the Court to its *Guidelines on International Protection No. 13:*

[4] Federal Administrative Court, *Decision to request a preliminary ruling concerning interpretation of article 12(1)(a) of Directive 2011/95/EU*, 14 May 2019, BverwG 1 C 5.18; and Case C-507/19, *Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice*, 3 July 2019.
[5] United Nations General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), para. 1.
[6] *Ibid.,* para. 8(a).
[7] United Nations General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series No. 2545, vol. 189, p. 137.
[8] Article 35 of the *1951 Convention relating to the Status of Refugees* ('1951 Convention') and Article II of the *1967 Protocol Relating to the Status of Refugees* ('1967 Protocol').
[9] Such guidelines are included in the 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*, 1979, reissued February 2019, HCR/1P/4/ENG/REV.4.

Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees.[10]

7. UNHCR's supervisory responsibility is also provided for under EU law, both in primary law and secondary legislation. Article 78(1) of the Treaty on the Functioning of the European Union ('TFEU') stipulates that a common policy on asylum, subsidiary protection and temporary protection "must be in accordance with the [1951] Convention"[11] and Article 18 of the Charter of Fundamental Rights of the European Union states that "the right to asylum shall be guaranteed with due respect for the rules of the [1951] Convention." The recast Qualification Directive states that consultations with UNHCR "may provide valuable guidance for Member States when determining refugee status."[12] Finally, Directive 2013/32/EU specifically refers to UNHCR's supervisory responsibility and obliges Member States to allow UNHCR to present its views regarding individual asylum applications "at any stage of the procedure."[13]

8. EU law, as well as case-law of the Court, confirms that the 1951 Convention is the cornerstone of the international legal regime for the protection of refugees and that the EU asylum system must be based on the full and inclusive application of this Convention.[14] EU legislation and the Court have accordingly considered that "documents from the United Nations High Commissioner for Refugees (UNHCR) are particularly relevant in the light of the role conferred on the UNHCR by the Geneva Convention."[15] Importantly, the Court has repeatedly reiterated that the Qualification Directive must be interpreted "in a manner consistent with the 1951 Convention and the other relevant treaties" referred to in Article 63(1) Treaty Establishing the European Community.[16]

3. UNHCR's observations on the object and purpose of Article 1D of the 1951 Convention and Article 12(1)(a) of the Qualification Directive

9. 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.

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[10] *UNHCR Guidelines on Article 1D,* see *supra* Note 3.
[11] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01.
[12] Recital 22, Qualification Directive, *supra* Note 2.
[13] Article 29, European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L. 180/60 180/95; 29.6.2013, 2013/32/EU, (hereinafter *Asylum Procedures Directive*).
[14] Recitals 3, 4, 22, 23, and 24 Qualification Directive, as well as Recital 3 Asylum Procedures Directive. For CJEU cases, see *Alo and Osso [GC]*, Joined Cases C-443/14 and C-444/14, 1 March 2016, para. 30, restated in *Bilali*, C-720/17, 23 May 2019, para. 54. See also *M and X, X [GC]*, Joined Cases C-391/16, C-77/17 and C-78/17, 14 May 2019, paras. 80-83, and *Ahmed*, C-369/17, 13 September 2018, para. 37. Where not otherwise indicated, case-law references refer to judgments of the CJEU.
[15] *Bilali*, see note 14 above, para. 57, restating *Halaf*, C-528/11, 30 May 2013, para. 44. See also Recital 22, Qualification Directive.
[16] *Bundesrepublik Deutschland v. B. and D.*, C-57/09 and C-101/09, CJEU, 9 November 2010, at para. 78. See also, Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957. Now Article 78 para. 1 TFEU. See *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08, C-176/08, C-178/08 and C-179/08, CJEU, 2 March 2010, at paras. 52-53; *Bolbol*, para. 38.

> 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.

10. Article 12(1)(a) of the Qualification Directive states that a third-country national or a stateless person is excluded from being a refugee if:

> he or she falls within the scope of Article 1(D) of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, those persons shall *ipso facto* be entitled to the benefits of this Directive;

11. Article 12(1)(a) governs the application of the Qualification Directive to persons who fall "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". That provision therefore has a decisive impact on Member States' interpretation and implementation of Article 1D of the 1951 Convention.[17]

12. In UNHCR's view, Article 1D of the 1951 Convention 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 UNHCR. Article 1D applies to Palestinian refugees,[18] for whom the United Nations Relief and Works Agency for Palestine Refugees in the Near East ("UNRWA")[19] was established in order to respond to their situation.[20]

13. Palestinian refugees who fall within the scope of Article 1D are persons whom the international community has already recognized as refugees.[21] As noted by the Court, "… the States signatories to the Geneva Convention deliberately decided in 1951 to afford [Palestinian

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[17] UNHCR notes that the Court held that Article 12(1)(a) "constitute[s] a *lex specialis"*; see *Alheto*, para. 87.

[18] The following groups of Palestinian refugees fall within the personal scope (*ratione personae*) of Article 1D:

(i) Persons who are "**Palestine refugees**" within the sense of UN General Assembly Resolution 194 (III) of 11 December 1948 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;

(ii) 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. It also includes those persons displaced by "subsequent hostilities".

(iii) **Descendants** of "Palestine refugees" or "displaced persons".

For further explanations, please see *UNHCR Guidelines on Article 1D*, para. 8.

[19] United Nations 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*, para. 44: "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.

[20] *UNHCR Guidelines on Article 1D*, para. 1.

[21] *Ibid.*, para. 3

refugees] the special treatment provided for in Article 1D of the convention, to which Article 12(1)(a) of Directive 2004/83 refers".[22] The primary purpose of Article 1D is thus to ensure that Palestinian refugees continue to be recognized as a specific category of refugees, and that they continue to receive protection and associated rights as persons "whose *refugee character has already been established"*[23] until their position has been definitively settled in accordance with the relevant resolutions of the United Nations General Assembly.[24] The second purpose of Article 1D is to avoid duplicating and overlapping competencies between UNRWA and UNHCR for this group of refugees.[25]

4. The interpretation and application of the second paragraph of Article 1D of the 1951 Convention and the second sentence of Article 12(1)(a) of the Qualification Directive

14. Under the second paragraph of Article 1D, Palestinian refugees falling within the personal scope of this Article are *ipso facto* entitled to the benefits of the 1951 Convention when protection or assistance of UNRWA has ceased for any reason without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations. When such conditions are met, Palestinian refugees falling within the scope of Article 1D are also *ipso facto* entitled to the benefits of the Qualification Directive as per the second sentence of Article 12(1)(a) of the Qualification Directive.

4.1 "Protection or assistance has ceased for any reason"

15. For the second paragraph of Article 1D of the 1951 Convention and the second sentence of Article 12(1)(a) of the Qualification Directive to be applicable, it is necessary that "protection or assistance [from organs or agencies of the United Nations other than UNHCR] has ceased for any reason".

16. In the context of assessing the cessation of the protection or assistance of UNRWA where Palestinian refugees departed from UNRWA's area of operations in threatening circumstances,[26] the Court stated that "[m]ere absence from such an area or a voluntary decision to leave it cannot be regarded as cessation of assistance. On the other hand, if the person concerned has been forced to leave for reasons unconnected with that person's will, such a situation may lead to a finding that the assistance from which that person benefited has ceased within the meaning of the second sentence of Article 12(1)(a) of Directive 2004/83."[27]

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[22] *El Kott*, para. 80. Furthermore, in his Opinion in *Alheto*, Advocate General Mengozzi stated that "persons falling into that category are *already recognised as refugees* by the international community and, as such, benefit from a special programme of protection entrusted to the bodies of the UN", para. 36.
[23] *AD (Palestine)*, *supra* note 19, para. 159.
[24] *UNHCR Guidelines on Article 1D*, para. 6. See also, *El Kott*, 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 definitely settled …".
[25] *UNHCR Guidelines on Article 1D*, para. 7.
[26] *El Kott*, para. 45 and paras 27, 30 and 32.
[27] *Ibid.,* para 59.

17. The Court went on to rule that the "cessation of protection or assistance from organs or agencies of the United Nations other than [UNHCR] 'for any reason' includes the situation in which a person who, after actually availing himself of such protection or assistance, ceases to receive it for a reason beyond his control and independent of his volition".[28] The Court further held that it is for the national authorities responsible for examining the asylum application made by such a person to ascertain whether that person was forced to leave the UNRWA area of operations, "which will be the case where [his or her] personal safety was at serious risk and it was impossible for [UNRWA] to guarantee that his living conditions in that area would be commensurate with the mission entrusted to that organ or agency".[29] In assessing whether "protection or assistance [from organs or agencies of the United Nations other than UNHCR] has ceased for any reason", the Court thus turned its consideration to objective factors for this determination, including the threatening circumstances of the departure.

18. In addition to situations where a person was forced to leave the UNRWA area of operations where his or her personal safety was at risk, there may be other circumstances whereby the protection or assistance may have ceased for reasons beyond the control of the person concerned. The Court's approach of assessing whether protection or assistance has ceased against objective factors for leaving the UNRWA area of operations is equally applicable in circumstances whereby the person is prevented from (re)availing him or herself of UNRWA's protection or assistance. Under such circumstances, the reason why the person left an UNRWA field of operation (for example, for work or study purposes, or because he or she was forced to leave for protection reasons) is not of itself determinative.[30] In keeping with the object and purpose of Article 1D of the 1951 Convention, protection or assistance has ceased when a person is subsequently prevented from returning for 'objective reasons'.[31]

19. What is pivotal is whether the protection or assistance of UNRWA has ceased owing to one or more objective reasons which either compelled the person to leave the UNRWA field of operation, or which prevent him or her from (re)availing him/herself of UNRWA's protection or assistance.[32]

20. It follows that the protection of the 1951 Convention granted under the second paragraph of Article 1D "does not extend to those applicants who, being outside an UNRWA [field] of operation, refuse to (re-)avail themselves of the protection or assistance of UNRWA for reasons of personal convenience."[33] Conversely, if a Palestinian refugee who voluntarily left the UNRWA area of operations is unable for objective reasons to return and (re)avail him or herself of UNRWA's protection or assistance, then that protection or assistance must be considered to have ceased for any reason. This will be the case even in a situation where the

[28] *Ibid.*, para 82(1).
[29] *Ibid.*, para 82(1).
[30] *UNHCR Guidelines on Article 1D*, para. 19
[31] UNHCR considers that there is no significant difference between 'objective reasons' and 'reasons beyond the person's control'; *Ibid.*, footnote 40.
[32] *UNHCR Guidelines on Article 1D*, para. 19.
[33] *Ibid.*

objective reasons which would prevent the person's return already existed at the time of leaving and the person left without being able to expect to return to the relevant UNRWA field of operation in the foreseeable future.

21. Objective reasons include threats to the applicant's life, physical integrity, security or liberty or other serious protection-related reasons which compelled him or her to leave or which prevent his/her return.[34] Other objective reasons for which the protection or assistance of UNRWA must be considered to have ceased also include practical, legal and/or safety barriers that prevent access or return to the relevant UNRWA field of operation. Practical barriers would include border closures, while safety barriers would include dangers *en route* or other threats that prevent the person from being able to return safely to the relevant UNRWA field of operation.[35] Legal barriers would include the absence of documentation or authorization to travel to, or transit through, or (re)enter and reside in the relevant UNRWA field of operation.[36] It is the State authorities which have jurisdiction over the relevant UNRWA field of operation, not UNRWA, that control whether a Palestinian refugee will be permitted to (re)enter its territory and (re)establish him/herself there.[37]

22. In UNHCR's view, the requirement under Article 4(3)(a) of the Qualification Directive that the assessment of an application for international protection is to be carried out taking into account all relevant facts as they relate to the country of origin at the time of taking a decision, which is applicable by analogy in cases being assessed under Article 12(1)(a),[38] supports its position that objective reasons preventing a person who was previously resident in an UNRWA field of operation to return and (re)avail him or herself of UNRWA's protection or assistance must be part of the assessment of whether the protection or assistance of UNRWA has ceased for the Applicant.[39]

4.2 Against which field of operation is the assessment to be made

23. The assessment of whether protection or assistance has ceased is not to be made against each of UNRWA's fields of operation. For a Palestinian refugee who was previously resident in UNRWA's area of operations it is rather to be made against the field of operation in which the person was previously residing.[40] In most cases an individual Palestinian refugee will only have been previously resident in one UNRWA field of operation, and thus the assessment would generally be made against a single field of operation. In circumstances where the person was previously resident in more than one UNRWA field of operation, however, the assessment

[34] *Ibid.*, para. 22(d), (e), and (f).
[35] *Ibid.*, para. 22(g) and (i).
[36] *Ibid.*, para 22 (h).
[37] *Ibid.*, para. 22(j).
[38] See *El Kott*, where the Court stated: "It should be added that, where the competent authorities of the Member State in which the application for asylum has been made seek to determine whether, for reasons beyond his control and independent of his volition, it was in point of fact no longer possible for the person concerned to benefit from the assistance of which he had availed himself before leaving the UNRWA area of operations, those authorities must carry out an assessment, on an individual basis, of all the relevant factors, in which Article 4(3) of Directive 2004/83 may be applicable by analogy.", para. 64.
[39] *UNHCR Guidelines on Article 1D*, para. 38.
[40] *Ibid.*, para 22 (k).

of whether "protection or assistance has ceased for any reason" can be made against more than one area where the person had previously resided.

24. No State can safely assume that a Palestinian refugee will be able to access the protection or assistance of UNRWA in a field of operation where they have never resided, or other than that in which he or she was formerly residing. As such, when assessing whether protection or assistance of UNRWA has ceased pursuant to Article 12(1)(a) of the Qualification Directive, decision-makers should not assess the lawfulness of return in relation to an UNRWA field of operation to which the individual has no previous connection. Doing so would impose unreasonable and insurmountable obstacles on applicants and ignore the general workings of the State-based system of international relations and State sovereignty.[41]

5. Conclusion

25. It must always be borne in mind that the overriding consideration when assessing the applicability of the second paragraph of Article 1D of the 1951 Convention and the second sentence of Article 12(1)(a) of the Qualification Directive is whether, for the individual concerned, protection or assistance of UNRWA has ceased for any reason. This includes having been compelled to leave the UNRWA area of operations or being unable to (re)avail oneself of UNRWA's protection or assistance (including the inability to (re)enter the person's place of previous residence), for objective reasons (that is, for reasons beyond the person's control and independent of his or her volition). The assessment of whether the protection or assistance of UNRWA has ceased is to be made only against the field(s) of operation in which the person formerly resided.

26. This interpretation ensures that the object and purpose of Article 1D of the 1951 Convention and of Article 12(1)(a) of the Qualification Directive are fulfilled, which require a continuity of protection and associated rights for Palestinian refugees who fall within its scope.

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[41] *Ibid.*, para. 22(k). Moreover, it cannot be expected that a Palestinian refugee try to seek admission to another country or territory in UNRWA's area of operations before he or she departed from the field of operation where he or she was residing in order to fall within the second sentence of Article 12(1)(a) of the Qualification Directive.