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UNHCR Observations in the case C-364/11 *El Kott and Others* regarding the interpretation of Article 1D of the 1951 Convention and Article 12(1)(a) of the Qualification Directive

1. Introduction

1.1 These observations are submitted by the Office of the United Nations High Commissioner for Refugees (“UNHCR”) in relation to the order for reference made by the Metropolitan Court of Budapest (“MCB”) in the joined cases of *El Kott, Radi and Hazem v. the Office of Immigration and Nationality* (“*El Kott and Others*”).¹

1.2 In that order, the MCB has requested a preliminary ruling from the Court of Justice of the European Union (“the Court”) concerning the interpretation of key concepts of Article 12(1)(a) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (“Qualification Directive”).²

1.3 The questions posed by the MCB are as follows:

1. Do the benefits provided by the Directive mean the granting of refugee status, or do they mean either of the two forms of protection (granting of refugee status and beneficiary of subsidiary protection status), on the basis of the decision of the Member State, or neither of the two automatically, but only the fact that the person concerned is subject to the Directive?

2. Does the fact that protection or assistance from the agency ceases refer to residence outside the operating area of the agency, the termination of the agency itself or the termination of the opportunities for protection and assistance by the agency, or does it refer to an obstacle beyond the intention of the person concerned, occurring for an equitable or objective reason, as a result of which the person entitled to such protection and assistance is unable to use the same?

1.4 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 the protection or assistance from organs or agencies of the United Nations other than the

¹ This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoys under applicable international legal instruments and recognised principles of international law.

² Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304/12 of 30.9.2004, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:304:0012:0023:EN:PDF>.

Office of 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 relating to the Status of Refugees (“1951 Convention”).³

1.5 UNHCR has a direct interest in this matter, as the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek permanent solutions to the problems of refugees.⁴ According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]”⁵ UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (“UNHCR Handbook”)⁶ and subsequent Guidelines on International Protection⁷. This supervisory responsibility is reiterated in Article 35 of the 1951 Convention and Article II of the 1967 Protocol relating to the Status of Refugees (“1967 Protocol”).⁸

1.6 UNHCR’s supervisory responsibility has been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article 78 (1) of the Treaty on the Functioning of the European Union (“TFEU”),⁹ as well as in Declaration 17 to the Treaty of Amsterdam, which provides that “consultations shall be established with the United Nations High Commissioner for Refugees ... on matters relating to asylum policy”.¹⁰ Secondary EC legislation also emphasizes the role of UNHCR. For instance, Recital 15 of the Qualification Directive states that consultations with UNHCR “may provide valuable guidance for Member States when determining refugee status

³ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series No. 2545, vol. 189, p. 137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>.

⁴ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3628> (“UNHCR Statute”).

⁵ *Ibid.*, paragraph 8(a).

⁶ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1 January 1992, available at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html>.

⁷ UNHCR issues “Guidelines on International Protection” pursuant to its mandate, as contained in the Statute of the Office of the United Nations High Commissioner for Refugees, in conjunction with Article 35 of the 1951 Convention. The Guidelines complement the UNHCR Handbook (see above footnote 6) and are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

⁸ According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of th[e] 1951] Convention”. See above footnote 3.

⁹ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, OJ C 115/47 of 9.05.2008, available at: <http://www.unhcr.org/refworld/docid/4b17a07e2.html>.

¹⁰ European Union, *Declaration on Article 73k of the Treaty establishing the European Community*, OJ C 340/134 of 10.11.1997, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/17: EN:HTML>.

according to Article 1 of the Geneva Convention”. The supervisory responsibility of UNHCR is specifically articulated in Article 21 of Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status.¹¹

1.7 In supervising the application of the 1951 Convention throughout the world for 60 years, a Convention widely recognised, inter alia by this Court, as “*the cornerstone of the international legal regime for the protection of refugees*,”¹² UNHCR has developed unique expertise on asylum issues. Such expertise has been acknowledged in the context of the Union’s asylum *acquis*¹³ and beyond, including in the pronouncements of the European Court of Human Rights (“ECtHR”), which has highlighted the reliability and objectivity of UNHCR in this field.

2. The context of the reference

2.1 The three applicants are Palestinians previously resident in camps in Lebanon in which the United Nations Relief and Works Agency for Palestine Refugees in the Near East (“UNRWA”) provides services including education, health and relief and social services. The applicants were forced to flee due either to destruction of the camp in which they were resident as a result of armed conflict or to serious threats to their lives if they remained in the camps. The MCB found that the claims of each of the applicants were credible, but requested the Court to provide an interpretation of the second sentence of Article 12(1)(a) of the Qualification Directive prior to providing a ruling in the application for the review of the asylum claims of the applicants. In its order for reference, the MCB noted that Article 12(1)(a) of the Qualification Directive was subject

¹¹ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13 of 13.12.2005. Article 21(c) in particular obliges Member States to allow UNHCR “to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure.”

¹² *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08; C-176/08; C-178/08 & C-179/08, European Court of Justice, 2 March 2010, paragraph 52, available at: <http://www.unhcr.org/refworld/docid/4b8e6ea22.html>; *Bundesrepublik Deutschland v. B and D*, C-57/09 and C-101/09, European Court of Justice, 9 November 2010, paragraph 77, available at: <http://www.unhcr.org/refworld/docid/4cda83852.html>.

¹³ The ‘Union’s asylum *acquis*’ refers to the accumulated legislation, legal acts, and court decisions which constitute the body of European Union asylum law. In this regard, see Recital 10 of *Regulation 439/2010 of 19 May 2010 establishing the European Asylum Support Office*, OJ L 132/11 of 29.05.2010; Recital 15 of *Council Directive 2004/83/EC on minimum standards for the qualification and status of third-country nationals as refugees or as persons who otherwise need international protection and the content of the protection granted*, OJ L 304/12 of 30.09.2004. See also the opinion of Advocate-General Sharpston in Case C-31/09, *Nawras Bolbol v Bevándorlási és Állampolgársági Hivata*, recognising the persuasive force of UNHCR’s statements, paragraph 16; and the references to quotations of UNHCR’s positions in the opinion of Advocate-General Mazák in Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Aydin Salahadin Abdulla and others v Bundesrepublik Deutschland*, paragraph 20; Opinion of Advocate-General Poiares Maduro in Case C-465/07, *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-921, which also recognises UNHCR’s expertise, paragraph 27.

to different interpretations in Europe,¹⁴ and indicated that the reference aimed to obtain the Court's interpretation of this article, with a view to promoting consistent practice across the European Union in line with the establishment of a common European asylum system.

2.2 The present reference is the second request by the MCB for an interpretation of Article 12(1)(a) of the Qualification Directive. In its judgment in *Bolbol v. Bevándorlási és Állampolgársági Hivatal*,¹⁵ the Court provided its interpretation of the first sentence of Article 12(1)(a) of the Qualification Directive relating to persons receiving protection or assistance from organs or agencies of the United Nations other than UNHCR. On the facts of the case in *Bolbol*, i.e. that the applicant had not availed herself of protection or assistance from UNRWA, the Court determined that it was not necessary to reply to the other questions. In relation to this case, UNHCR issued a *Revised Statement on Article 1D of the 1951 Convention in October 2009*.¹⁶ At the same time, UNHCR updated its *Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees*.¹⁷ The MCB has now referred two questions on the interpretation of the second sentence in Article 12(1)(a) in circumstances where the applicants have availed themselves of the protection or assistance of UNRWA.

3. Preliminary observations on the Qualification Directive and the 1951 Convention

3.1 The TFEU creates an explicit obligation for EU secondary legislation on asylum to conform to the 1951 Convention.¹⁸ The primacy of the 1951 Convention is further recognised in European Council Conclusions and related Commission policy documents, which affirm that the Common European Asylum System is based on the “full and inclusive application” of the 1951 Convention.¹⁹ It follows that the transposition of the

¹⁴ The practice of EU Member States is not homogeneous, as supported by the review of jurisprudence and State practice contained in BADIL Resource Centre, *Closing Protection Gaps: Handbook on the Protection of Palestinian Refugees in States Signatories to the 1951 Convention*, Revised 2nd Edition, August 2011, available at:

http://www.badil.org/phocadownload/Badil_docs/publications/handbook/update2011/country%20profile/handbook2010.pdf.

¹⁵ *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, C-31/09, European Court of Justice, 17 June 2010, available at: <http://www.unhcr.org/refworld/docid/4c1f62d42.html>.

¹⁶ UNHCR, *UNHCR Revised Statement on Article 1D of the 1951 Convention issued in the context of the preliminary ruling reference to the Court of Justice of the European Communities from the Budapest Municipal Court regarding the interpretation of Article 12(1)(a) of the Qualification Directive*, October 2009, available at: <http://www.unhcr.org/refworld/docid/4add79a82.html> (“Revised Statement”).

¹⁷ UNHCR, *Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees*, October 2009, available at: <http://www.unhcr.org/refworld/docid/4add77d42.html>, (“Revised Note”). This Revised Note replaces the Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees of October 2002.

¹⁸ Article 78 paragraph 1 TFEU provides that the policy on asylum “must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties”.

¹⁹ See paragraph 13 of the *Presidency Conclusions of the Tampere European Council* of 15-16.10.1999, at: http://www.europarl.europa.eu/summits/tam_en.htm?redirected=1; paragraph 6 of *The Hague Programme*:

Qualification Directive into national legislation of EU Member States, all of which are States Parties to the 1951 Convention and therefore bound by its obligations, must also be in line with the 1951 Convention.²⁰

3.2 The Qualification Directive recognises the 1951 Convention as the “cornerstone of the international legal regime for the protection of refugees”²¹ and stipulates that the Directive’s minimum standards are aimed at ensuring “full respect for [...] the right to asylum”²² as well as guiding Member States in the application of the 1951 Convention.²³ Certain provisions of the Qualification Directive replicate the wording of the 1951 Convention almost exactly, including Article 12(1)(a) of the Qualification Directive.²⁴ One of the purposes of the Qualification Directive is thus not only to ensure compliance with the 1951 Convention, but to contribute to its full implementation.

3.3 The Court itself has acknowledged these important principles and, accordingly, the central role of the 1951 Convention when applying the Qualification Directive. More particularly, the Court has repeatedly underlined that this instrument must be interpreted “in a manner consistent with the 1951 Convention and the other relevant treaties” referred to in Article 63(1) TEC.²⁵ This implies that the interpretation of the 1951 Convention under international law informs the interpretation of the Qualification Directive as an instrument under EU Law. This is all the more relevant in the present case, since Article 12(1)(a) of the Qualification Directive defines its own scope with reference to Article 1D and largely replicates the wording of that provision of the 1951 Convention.

Strengthening Freedom, Security and Justice in the European Union, 13.12.2004, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:053:0001:0014:EN:PDF>; paragraph 1 of the Green Paper of the Commission on the Future Common European Asylum System COM(2007) 301 final, 06.06.2007, available at: http://ec.europa.eu/justice_home/news/intro/doc/com_2007_301_en.pdf; part 1.1 of the European Commission’s *Policy Plan on Asylum: an integrated approach to protection across the EU*, COM(2008) 360, 17.06. 2008, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0360:FIN:EN:PDF>. The Policy Plan recognises the fundamental role played by the 1951 Convention in the existing Treaty provisions and those resulting from the Lisbon Treaty. See also p. 11 of the European Pact on Immigration and Asylum adopted on 16 October 2008, in which the European Council reiterates that “any persecuted foreigner is entitled to obtain aid and protection on the territory of the European Union in application of the Geneva Convention [...]”, *European Pact on Immigration and Asylum*, 13440/08, 16.10.2008, p. 11, available at: <http://register.consilium.europa.eu/pdf/en/08/st13/st13440.en08.pdf>.

²⁰ For UNHCR’s remarks on the Qualification Directive, see: UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC of 29.04.2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection granted (OJ L 304/12 of 30.9.2004)*, 28 January 2005, available at: <http://www.unhcr.org/refworld/docid/4200d8354.html>.

²¹ Recital 3 of the Qualification Directive.

²² Recital 10 of the Qualification Directive.

²³ Recital 16 of the Qualification Directive.

²⁴ For instance, Article 2(c) of the Qualification Directive replicates almost exactly Article 1A of the 1951 Convention.

²⁵ Now Article 78 paragraph 1 TFEU. See *Salahadin Abdulla and Others*, paragraphs 53 and 54; *Bolbol*, paragraph 38; *Germany v. B and D.*, paragraph 78.

3.4 In this connection, the Court has acknowledged that international treaties must be interpreted using the rules of interpretation enshrined in Articles 31 et seq. of the Vienna Convention on the Law of Treaties, including the ordinary meaning to be given to its terms in their context and in the light of the relevant treaty's object and purpose.²⁶

3.5 In general, the Conclusions adopted by Member States of UNHCR's Executive Committee,²⁷ the UNHCR Handbook as well as subsequent Guidelines on International Protection issued by UNHCR, should also be taken into account in interpreting the provisions of the EU asylum *acquis*, in particular those which include references to provisions of the 1951 Convention like Article 12(1)(a) of the Qualification Directive. These documents provide guidance on the interpretation and application of provisions of the 1951 Convention, and influenced significantly the drafting of the Qualification Directive. The Explanatory Memorandum of the Commission's proposal²⁸ quotes the UNHCR Handbook and Executive Committee Conclusions as sources, along with the 1951 Convention itself.²⁹

3.6 The above considerations about the documents and standards relevant to the interpretation of the 1951 Convention are all the more significant since the Court undertook to directly interpret the meaning of some provisions of the 1951 Convention,³⁰ in particular those which are referred to in the Qualification Directive.³¹

²⁶ Case C-344/04, *IATA*, 10 January 2006, paragraph 40, available at: <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=c-344/04&nomusuel=&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docdecision=docdec>.

²⁷ The Executive Committee of the High Commissioner's Programme ("ExCom") was established in 1958 and functions as a subsidiary organ of the United Nations General Assembly. It has both executive and advisory functions. Its terms of reference are found in United Nations General Assembly Resolution 1166(XII) which states *inter alia* that it is "to advise the High Commissioner, at his request, in the exercise of his functions under the Statute of his Office." This includes issuing Conclusions on International Protection (often referred to as "ExCom Conclusions"), which address issues in the field of refugee protection and serve as "international guidelines to be drawn upon by States, UNHCR and others when developing or orienting their policies on refugee issues"; see: UNHCR, *General Conclusion on International Protection*, ExCom Conclusion No. 55 (XL) – 1989, 13 October 1989, paragraph (p), available at: <http://www.unhcr.org/excom/EXCOM/3ae68c43c.html>. ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees. At present, 85 States are Members of the UNHCR Executive Committee.

²⁸ European Commission, *Proposal for a Council Directive on minimum standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection*, COM(2001) 510 final, 12.09.2001, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0510:FIN:EN:PDF>

²⁹ *Ibid*, part 3, p. 5. The 1996 Joint Position of the Council on the harmonized application of the definition of the term "refugee", which constituted the "starting point" of the Qualification Directive, recognised that the Handbook is a "valuable aid to Member States in determining refugee status"; see *Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term "refugee" in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees*, OJ L 63/2 of 13.3.1996, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996F0196:EN:HTML>

³⁰ *Salahadin Abdulla and Others*, paragraphs 57 and 65.

³¹ *Bolbol*, paragraphs 34, 50 and 51.

4. UNHCR's comments on the questions referred to the Court

4.1 General comments

4.1.1 Article 1D of the 1951 Convention has two related purposes. The first purpose is to avoid overlapping competencies between UNHCR and other organs or agencies of the United Nations, including UNRWA for Palestinian refugees, through the exclusion clause contained in first paragraph of Article 1D. The second purpose is to ensure the continuity of protection and assistance for refugees, in circumstances where that protection or assistance has ceased in accordance with paragraph 2 of Article 1D.³²

4.1.2 Article 1D of the 1951 Convention is applicable to certain groups of Palestinian refugees who fulfil the criteria contained in that article. The following groups of Palestinian refugees fall within the scope of Article 1D of the 1951 Convention:

- a) Palestinians who are "Palestine refugees" within the sense of UN General Assembly Resolution 194 (III) of 11 December 1948 and subsequent UN General Assembly Resolutions,³³ 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;³⁴

³² Paragraph 7(c) of the UNHCR Statute similarly excludes persons who "continue to receive from other organs or agencies of the United Nations protection or assistance".

³³ UNRWA's mandate for "Palestine refugees" was established pursuant to UN General Assembly Resolution 302 (IV) of 8 December 1949 and subsequent General Assembly resolutions. The term "Palestine refugees" has never been expressly defined by the UN General Assembly. However, for early work on interpreting the term, see for example the following documents of the UN Conciliation Commission for Palestine (UNCCP): UN Doc. A/AC.25/W.45, *Analysis of paragraph 11 of the General Assembly's Resolution of 11 December 1948*, 15 May 1950, UN Doc. W/61/Add.1, *Addendum to Definition of a "Refugee" Under paragraph 11 of the General Assembly Resolution of 11 December 1948*, 29 May 1951; UN Doc. A/AC.25/W.81/Rev.2, *Historical Survey of Efforts of the United Nations Commission for Palestine to secure the implementation of paragraph 11 of General Assembly resolution 194 (III). Question of Compensation*, 2 October 1961, section III. UNRWA's operational definition of the term "Palestine refugees" has evolved over the years but since 1984 has been "persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict", see UNRWA's Consolidated Eligibility and Registration Instructions (October 2009), available at : <http://www.unrwa.org/userfiles/2010011995652.pdf>. The General Assembly has tacitly approved the operational definition used in annual reports of the Commissioner-General setting out the definition.

³⁴ The UN General Assembly resolved in paragraph 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". In the same paragraph, the General Assembly instructed the UNCCP to "facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation". The General Assembly has since noted on an annual basis that UNCCP has been unable to find a means of achieving progress in the implementation of paragraph 11 of Resolution 194 (III). See, most recently, Resolution 65/98 of 10 December 2010, in which the General Assembly notes with regret "that repatriation or compensation of the refugees, as provided for in paragraph 11 of General Assembly resolution 194 (III), has not yet been effected, and that, therefore, the situation of the Palestine

b) Palestinians not falling within paragraph (a) above who are “displaced persons” within the sense of UN General Assembly Resolution 2252 (ES-V) of 4 July 1967 and subsequent UN General Assembly resolutions,³⁵ and who, as a result of the 1967 Arab-Israeli conflict, have been displaced from the Palestinian territory occupied by Israel since 1967 and have been unable to return there.³⁶

Included within the above groups are not only persons displaced at the time of the 1948 and 1967 hostilities, but also the descendants of such persons.³⁷

4.1.3 Persons falling within Articles 1C, 1E or 1F of the 1951 Convention do not fall within the scope of Article 1D, even if they remain “Palestine refugees” or “displaced persons” whose position is yet to be definitively settled in accordance with the relevant UN General Assembly resolutions.³⁸ Moreover, Palestinians who do not fall within the

refugees continues to be a matter of grave concern ...”; and that UNCCP “has been unable to find a means of achieving progress in the implementation of paragraph 11 of General Assembly Resolution 194 (III); and reiterates its request to UNCCP “to continue exerting efforts towards the implementation of that paragraph ...”.

³⁵ UNRWA’s mandate for “displaced persons” was established pursuant to UN General Assembly Resolution 2252 (ES-V) of 4 July 1967 and subsequent General Assembly resolutions. Essentially two groups of Palestinian “displaced persons” have been displaced from the Palestinian territory occupied by Israel since 1967: (i) Palestinians originating from that territory; and (ii) “Palestine refugees” who had taken refuge in that territory prior to 1967. The territory concerned comprises the West Bank, including East Jerusalem, and the Gaza Strip.

³⁶ UN General Assembly Resolution 2452 (XXIII) A of 19 December 1968 called for the return of the “displaced persons”, as reiterated by subsequent UN General Assembly resolutions on an annual basis. The most recent such resolution is Resolution 65/99 of 10 December 2010, which “[r]eaffirms the rights of all persons displaced as a result of the June 1967 and subsequent hostilities to return to their homes or former places of residence in the territories occupied by Israel since 1967”, and stresses the necessity for “an accelerated return of displaced persons” and calls for compliance with “the mechanism agreed upon by the parties in Article XII of the Declaration of Principles on Interim Self- Government Arrangements of 13 September 1993 on the return of displaced persons has not been complied with”; and stresses the necessity for “an accelerated return of displaced persons”.

³⁷ The concern of the UN General Assembly with the descendants both of “Palestine refugees” and of “displaced persons” was expressed in UN General Assembly Resolution 37/120 I of 16 December 1982, which requested the UN Secretary-General, in cooperation with the Commissioner-General of UNRWA, to issue identity cards to “all Palestine refugees and their descendants [...] as well as to all displaced persons and to those who have been prevented from returning to their home as a result of the 1967 hostilities, and their descendants”. In 1983, the UN Secretary-General reported on the steps that he had taken to implement this resolution, but said that he was “unable, at this stage, to proceed further with the implementation of the resolution” without significant additional information [becoming] available through further replies from Governments” (paragraph 9, UN Doc. A/38/382, *Special Identification cards for all Palestine refugees. Report of the Secretary-General*, 12 September 1983). From 1983 to 1987 UN General Assembly resolutions dropped all reference to the issuance of identity cards, and then from 1988 onwards, starting with Resolution 43/57 of 6 December 1988, the General Assembly has annually urged issuance of identity cards only to Palestine refugees and their descendants in the Palestinian territory occupied by Israel since 1967. The most recent such resolution is Resolution 65/100 of 10 December 2010, paragraph 21, which requests “the Commissioner-General to proceed with the issuance of identification cards for Palestine refugees and their descendants in the Occupied Palestinian Territory”.

³⁸ For example, a person who is considered by the competent authorities of the country in which he or she has taken residence as having the rights and obligations attached to the possession of the nationality of that country, would be excluded from the benefits of the 1951 Convention in accordance with Article 1E.

scope of Article 1D, as explained in paragraph 4.1.2 above, may nevertheless qualify as refugees if they fulfill the criteria of Article 1A(2) of the 1951 Convention. Such persons would be entitled to apply for refugee status under the 1951 Convention via Article 1A(2).

4.1.4 UNHCR's overall position on the applicability of Article 1D of the 1951 Convention to Palestinian refugees is set out in the Revised Note issued in October 2009³⁹ and annexed to these observations. In light of that position, the two specific questions referred to the Court are answered below.

Question 1 - *Do the benefits provided by the Directive mean the granting of refugee status, or do they mean either of the two forms of protection (granting of refugee status and beneficiary of subsidiary protection status), on the basis of the decision of the Member State, or neither of the two automatically, but only the fact that the person concerned is subject to the Directive?*

4.2 The meaning of the phrases “benefits of this Convention” in paragraph 2 of Article 1D of the 1951 Convention and “benefits of this Directive” in Article 12(1)(a) of the Qualification Directive

4.2.1 It is UNHCR's position that the phrase “benefits of this Convention” in the second paragraph of Article 1D refers to the rights and standards of treatment 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.⁴⁰ This interpretation of the phrase is consistent with the wording as well as the object and purpose of Article 1D.

4.2.2 The 1951 Convention, and in particular, Articles 2 to 34, provide a comprehensive list of rights, entitlements and standards of treatment to be granted to refugees by States Parties. The ordinary meaning of the phrase “benefits of this Convention” in Article 1D is protection as a refugee and to have access to the rights and standards of treatment accorded to them under the 1951 Convention.

4.2.3 Further, construing the phrase “benefits” to mean only access to asylum procedures to further determine refugee status under Article 1A(2) would contradict the object and purpose of Article 1D. That purpose is based on already established individual protection needs of Palestinian refugees. It is also intended to ensure the continuity of their protection and assistance should the protection of other agencies or organs cease,⁴¹

Moreover, many Palestinians have acquired the nationality of a third country and any claim they make for recognition as refugees should, therefore, be examined under Article 1A(2) of the 1951 Convention in relation to the country of their new nationality. In certain cases, the Palestinian origins of such persons may, nevertheless, be a relevant factor in the assessment of whether they are outside the country of their new nationality “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”.

³⁹ See above footnote 17.

⁴⁰ See paragraph 9 of the Revised Note.

⁴¹ The *Travaux Préparatoires* of paragraph 7(c) of the UNHCR Statute and Article 1D reflect the intention of the drafters and other States to maintain the special and separate status of Palestinian refugees, and

and until their situation is definitively settled in accordance with the relevant UN General Assembly Resolutions.⁴² It is UNHCR's position that restrictive State practices recognising only the entitlement of Palestinian refugees to have access to an asylum procedure in order to submit a claim under Article 1A(2) would be at variance with Article 1D of the 1951 Convention. This position is also supported by highly qualified publicists.⁴³

4.2.4 Given that the wording of Article 12(1)(a) of the Qualification Directive essentially replicates the language of Article 1D of the 1951 Convention, it is UNHCR's position that the same meaning must be attributed to the term "benefits" used in Article 12(1)(a) of the Qualification Directive. As such, "the benefits of this Directive" refers to the rights and standards of treatment of refugees that are included in Chapters IV "Refugee Status" and VII "Content of International Protection" of the Qualification Directive, and that constitute refugee status under EU law.

4.2.5 This interpretation of "benefits" as meaning the rights and the standards of treatment to be accorded to the persons concerned is confirmed with reference to the

confirm the agreement of participating States that Palestinian refugees were in need of international protection, and that there was no intention to exclude them from the regime of international protection. See the statements of various delegates of the Third Committee of the UN General Assembly: GAOR, Fifth Session, 344th Meeting, 11 December 1950, paras. 24-5 (Mr Baroody, Saudi Arabia); GAOR, Fifth Session, 344th Meeting, 11 December 1950, para. 28 (Mr Lesage, Canada); GAOR, Fifth Session, 344th Meeting, 11 December 1950, para. 29-30 (Mr Davin, New Zealand); GAOR, Fifth Session, 344th Meeting, 11 December 1950, para. 39 (Mr Noriega, Mexico); GAOR, Fifth Session, 344th Meeting, 11 December 1950, para. 42 (Mr Raafat, Egypt). See also the statements of the Egyptian, the British and the Iraqi representatives during the Conference of Plenipotentiaries regarding the Egyptian proposal to insert an inclusion clause in Art. 1D (1951 Conference of Plenipotentiaries, Summary Record of the 19th Meeting: UN doc. A/CONF.2/SR.19, pp. 16-17 (Egyptian delegate), p.18 (British delegate) and pp. 17 (Iraqi delegate). The 1951 Convention is therefore meant not only to provide protection to those who, having applied, are found to be in need of it, but also to ensure continuing protection for those who are already recognised as refugees. In addition to Article 1D, Article 1A(1) provides another relevant example of this logic. Article 1A(1) provides that the term "refugee" shall apply to any person who has been considered a refugee under previous international arrangements and instruments predating 1951.

⁴² UNHCR, *Skeleton Argument on Behalf of the Intervener (United Nations High Commissioner for Refugees), in the Court of Appeal (C/2002/0751) on Appeal from the Immigration Appeal Tribunal, between Amer Mohammed El-Ali (Appellant) v. Secretary of State for the Home Department (Respondent)*, 26 June 2002, paragraph 26, available at: <http://www.unhcr.org/refworld/docid/3d1c73c04.html>.

⁴³ The wording "highly qualified publicists" is taken from Article 38(1)(d) of the Statute of the International Court of Justice. Mutaz M. Qafisheh and Valentina Azarov, "Article 1D", in: Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, A Commentary* (Oxford: Oxford University Press, 2011), pp. 568-569: "The 'benefits' would necessarily include the rights and services granted to any other person who is afforded the benefits that make up the protection scheme of the 1951 Convention. The object and spirit of the 1951 Convention's provisions are expressed by its preamble as being, inter alia, the 'enjoyment of fundamental rights and freedoms without discrimination' and their 'widest possible exercise'". Guy Goodwin Gill and Susan M. Akram, "Brief Amicus Curiae", *The Palestine Yearbook of International Law*, 2000/2001, Vol. XI, p. 230: "The plain language of the Palestinian clause reveals that Palestinian refugees are to be ensured heightened protection". The "Brief Amicus Curiae" reproduced in the Palestine Yearbook of International Law was submitted to a number of Board of Immigration appeal-cases in the USA and has been updated to reflect additional case law.

other provisions of the Qualification Directive, in particular Recital 6, which uses that term in the same general fashion as in Article 12(1)(a).

4.2.6 The benefits in question can only refer to those attached to refugee status since Article 12(1)(a) appears in Chapter III on “Qualification for Being a Refugee”, and no similar provision on exclusion is included in Chapter V on “Qualification for Subsidiary Protection”. This is the only interpretation that is in keeping with the 1951 Convention.

4.2.7 Furthermore, expanding the phrase “benefits of this Directive” to mean the granting of subsidiary protection status in addition to refugee status would contradict the wording and the spirit of the Qualification Directive which is intended to distinguish the two statuses in terms of eligibility criteria and in terms of the rights attached to each status.

4.2.8 Moreover, construing the term “benefits of this Directive” to mean access only to the asylum procedures for a determination of refugee status in accordance with Chapters II and III of the Qualification Directive would not be in keeping with the ordinary meaning of Article 12(1)(a), and would render the Qualification Directive inconsistent with the 1951 Convention on this point. Requiring Palestinian refugees to establish that they are refugees within the meaning of Article 2(c) of the Qualification Directive would deprive the second sentence of Article 12(1)(a) of the Qualification Directive⁴⁴ of its utility.

4.2.9 Finally, any other interpretation of the term “benefits” under the Qualification Directive would be difficult to reconcile with the meaning of the term “benefits” under Article 1D of the 1951 Convention⁴⁵ and may even prejudice the rights of the refugees laid down in that Convention contrary to Article 20(1) of the Qualification Directive.

4.3 The meaning of the term “*ipso facto*” in paragraph 2 of Article 1D of the 1951 Convention and in Article 12(1)(a) of the Qualification Directive

4.3.1 In UNHCR’s view, when protection or assistance has ceased for any reason, persons falling within the scope of Article 1D are automatically entitled to the benefits of the 1951 Convention, provided that Articles 1C, 1E or 1F of the 1951 Convention do not apply.⁴⁶ This is clear from the wording of paragraph 2 of Article 1D, which provides for an *ipso facto* entitlement. This is evident as well in the equally authentic French version, which uses the expression “de plein droit”. It is also in line with the object and purpose of Article 1D, which is to ensure continuous jurisdiction for an already established and clearly identified refugee group.

⁴⁴ The second sentence of Article 12(1)(a) of the Qualification Directive replicates the language of paragraph 2 of Article 1D of the 1951 Convention, and provides that: “When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Directive [.]”

⁴⁵ See above paragraph 4.2.2.

⁴⁶ See paragraphs 8 and 9 of the Revised Note.

4.3.2 Therefore, it is UNHCR’s position that no separate determination of well-founded fear in the sense of Article 1A(2) of the Convention is required. This is further confirmed by the *Travaux Préparatoires*, in which the refugee character of Palestinians falling under Article 1D is clearly acknowledged.⁴⁷ This interpretation is shared by many of the highly qualified publicists writing in this field.⁴⁸

4.3.3 Article 12(1)(a) reproduces the expression “ipso facto” in most of the language versions of the Qualification Directive.⁴⁹ This indicates that the persons covered by this provision should automatically be entitled to the benefits of refugee status as enshrined in the Qualification Directive, i.e. without any need to further examine or determine their eligibility under Article 1A(2) of the 1951 Convention. In light of the reference made in Article 12(1)(a) of the Qualification Directive to persons falling “within the scope of Article 1D of the Geneva Convention” to define its own scope of application, such persons have already been recognised as refugees within the sense of the 1951 Convention. Thus, no additional assessment of their well-founded fear of persecution is required under the Qualification Directive.⁵⁰

Question 2 - *Does the fact that protection or assistance from the agency ceases refer to residence outside the operating area of the agency, the termination of the agency itself or the termination of the opportunities for protection and assistance by the agency, or does it refer to an obstacle beyond the intention of the person concerned, occurring for an equitable or objective reason, as a result of which the person entitled to such protection and assistance is unable to use the same?*

4.4 The meaning of the phrase “when such protection or assistance has ceased for any reason” in Article 1D of the 1951 Convention and Article 12(1)(a) of the Qualification Directive

4.4.1 It is UNHCR’s position that the clear wording of Article 1D of the 1951 Convention, which makes use of the expression “for any reason”, indicates that reasons other than the cessation of UNRWA’s activities are valid.⁵¹ A restrictive interpretation

⁴⁷ The drafting history of the 1951 Convention indicates that the representatives of Egypt, Saudi Arabia and Lebanon who were behind the introduction of Article 1D wanted Palestinian refugees, whose status was not challenged by members of the drafting committee (namely the Ad hoc Committee on Statelessness and related problems), to remain under UNRWA’s responsibility and to only move under the 1951 Convention regime once they could no longer receive UNRWA’s protection or assistance. See Mutaz M. Qafisheh and Valentina Azarov, ‘Article 1D’, see above footnote 43, pp. 542-545.

⁴⁸ Atle Grahl-Madsen, *The Status of Refugees in International Law. Vol. 1. Refugee Character* (Leyden: Sijthoff 1966), p. 264; Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 153-159; Mutaz M. Qafisheh and Valentina Azarov, “Article 1D”, see above footnote 43, pp. 565-568.

⁴⁹ The few language versions of the Qualification Directive that do not use the expression “*ipso facto*” reflect the ordinary meaning of the term, i.e. by the very fact that the protection or assistance have ceased.

⁵⁰ See Mutaz M. Qafisheh and Valentina Azarov, “Article 1D”, see above footnote 43, pp. 548-549.

⁵¹ This position has been supported by Goodwin-Gill and Akram in: Guy Goodwin Gill and Susan M. Akram, “Brief Amicus Curiae”, see above footnote 43, pp. 240-242. See also Mutaz M. Qafisheh and Valentina Azarov, “Article 1D”, suggesting further reasons for adopting an inclusive interpretation, see above footnote 43, pp. 561-562.

of “for any reason” would not be in accordance with the object and purpose of Article 1D, which is to ensure a continuation of protection for, in this case, Palestinian refugees. Furthermore, while the drafters of the 1951 Convention envisaged at the time primarily the application of paragraph 2 of Article 1D in the event of the cessation of UNRWA’s activities the *travaux préparatoires* confirm that other interpretations were not explicitly excluded.⁵²

4.4.2 UNHCR submits that the expression “for any reason” includes not only the cessation of UNRWA’s activities. Limiting the interpretation of “for any reason” to the cessation of UNRWA activities would contradict the construction of paragraph 2 of Article 1D which in UNHCR’s view refers to the actual protection or assistance and not to the existence of organs or agencies providing such protection or assistance. Moreover, it should be noted that where the drafters of the 1951 Convention intended to limit the scope of provisions in other parts of the instrument, they did so explicitly and quoted the possible exceptions.⁵³ In not doing so in Article 1D, it is implied that the formulation in this article is not restricted to one scenario but extends to possible other eventualities, and would therefore include those reasons specifically included in the question referred by the MCB.⁵⁴

4.4.3 It may be argued, with reference to the term “persons”, that the cessation of UNRWA’s protection or assistance cannot be triggered or applied individually as a result of the decision of one Palestinian refugee to remove him/herself from UNRWA’s areas of operation. The use of the plural does not prevent an individual application of the provision. For example, the plural is also used in Article 31 of the 1951 Convention and this provision is interpreted to apply to individuals. This interpretation of Article 1D is also in keeping with the intention of the drafters of Article 1D, notably to ensure the continuity of their protection and assistance, including on an individual level,⁵⁵ until their situation is definitively settled in accordance with relevant UN General Assembly

⁵² See for example the statement of the Egyptian delegate at the Third Committee of the General Assembly (Fifth Session, 344th Meeting, 11 December 1950, paragraph 13) and at the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (20th meeting: UN doc. A/CONF.2/ SR.20, pp. 8-9). See also the views of the French delegate at the Conference (Summary of the 2nd Meeting: UN doc. A/CONF.2/SR.2, p. 27). A detailed analysis of the *Travaux préparatoires* is included in the Amicus Brief prepared by Goodwin-Gill and Susan M. Akram, see above footnote 43, pp. 245-250.

⁵³ 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.

⁵⁴ The reasons suggested by the MCB in its question include: (i) residence outside the operating area of the agency; (ii) the termination of the agency itself; (iii) the termination of the opportunities for protection and assistance by the agency; and (iv) an obstacle beyond the intention of the person concerned, occurring for an equitable or objective reason.

⁵⁵ Observations of the Lebanese representative at the Fifth Session of the Third Committee of the General Assembly on 27 November 1950:

“[...] the Palestinian refugees [...] differed from all other refugees. In all other cases, persons had become refugees as a result of action taken contrary to the principles of the United Nations, and the obligation of the Organization toward them was a moral one only. The existence of the Palestine refugees, on the other hand, was the direct result of a decision taken by the United Nations itself, with full knowledge of the consequences. The Palestine refugees were therefore a direct responsibility on the part of the United Nations and could not be placed in the general category of refugees without betrayal of that responsibility.”

Resolutions. This view is widely supported by the teachings of highly qualified publicists.⁵⁶

4.4.4 Article 12(1)(a) of the Qualification Directive replicates the same all-encompassing expression “for any reason” used in Article 1D of the 1951 Convention, demonstrating that Member States did not intend to restrict the scope of this provision in the context of the EU asylum *acquis*. Moreover, by contrast, in the same vein as the drafters of the 1951 Convention,⁵⁷ the drafters of the Qualification Directive set out, in a clearly limited fashion, the list of grounds based on which the status of refugee may be considered to have ceased under Article 11 of the Qualification Directive. It is therefore UNHCR’s position that the phrase “for any reason” in Article 12(1)(a) should be interpreted in the same broad manner as in Article 1D.

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⁵⁶ Atle Grahl-Madsen, *The Status of Refugees in International Law. Volume 1. Refugee Character* (Leyden: Sijthoff 1966), p. 265, where he suggests that “in spite of the fact that it is as a member of a group that a person falls under Article 1D (1), he may probably as an individual be freed from the suspensive effect of the said provision, if he moves from the area where UNRWA operates and settles down elsewhere... He may then be able to claim that for him the UNRWA ‘protection and assistance has ceased’... and it may be justly be argued that in such case there is no danger of overlapping competence between UNRWA and UNHCR”. Guy Goodwin Gill and Susan M. Akram, “Brief Amicus Curiae” are of the opinion that “If the language was intended to be limited to the sole eventuality of the end of UNRWA’s mandate, the language ‘for any reason’ would not have been included at all [...] There is thus, no reason to conclude that the ‘for any reason’ language does not encompass an individual’s own actions in removing himself or herself from the UNRWA area of operations, or the winding up of UNRWA, or interference by the State with the provision of protection or assistance by UNRWA”. See above footnote 43, p. 237. Mutaz M. Qafisheh and Valentina Azarov, “Article 1D”, indicate in the same vein that “there is no reasonable ground to conclude that those words do not encompass an individual’s own actions in removing himself or herself from the UNRWA’s areas of operation.” See above footnote 43, p. 561. Their views are also in line with UNHCR’s position reiterated in the Revised Note (paragraph 8) as well as in the Revised Statement (pages 7 and 8) issued in 2009.

⁵⁷ See above paragraph 4.4.2.