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***Amicus curiae* submissions by the Office of the United Nations High Commissioner for Refugees, addressing the applicability of Article 1D and 1E of the Convention relating to the Status of Refugees, in case number UM 8384-16**

I. Mandate and supervisory responsibility

1. The Office of the United Nations High Commissioner for Refugees, (hereafter "UNHCR"), submits this intervention to the Administrative Court of Appeal in Stockholm, the Migration Court of Appeal, in case number UM 8384-16. UNHCR has a direct interest in ensuring a proper and consistent interpretation of the 1951 Convention in Sweden, as part of its supervisory responsibility and makes this submission as an *amicus curiae* in order to assist the Migration Court of Appeal in its interpretation and application of refugee law concepts in the context of applications for international protection.

2. UNHCR has been entrusted by the United Nations General Assembly with a mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problems of refugees.[1] 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[…]" [2] 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 (hereafter collectively referred to as "1951 Convention").[3]

3. 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 and complementary Guidelines on International Protection.[4] UNHCR also provides information on a regular basis to decision makers and courts of law concerning the proper interpretation and application of provisions of the 1951 Convention.

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1 UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950 A/RES/428(V), (hereafter "UNHCR Statute"), http://www.unhcr.org/cgibin/texis/vtx/refworld/rwmain?docid=3ae6b3628.

2 *Ibid* para. 8(a).

3 UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189, http://www.unhcr.org/refworld/docid/3be01b964.html. According to Article 35 (1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of the Convention".

4 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.unhcr.org/refworld/docid/4f33c8d92.html (hereafter "UNHCR Handbook").

4. UNHCR has a history of third party interventions in many national and regional jurisdictions. The Office is often approached directly by courts or other interested parties to obtain UNHCR's views on particular legal issues. UNHCR has, for example, been granted intervener status by various circuit courts of the United States as well as the US Supreme Court, the Supreme Court of the United Kingdom (as well as the former House of Lords), the German Federal Constitutional Court, the Supreme Court of Canada, the Court of Final Appeal of the Hong Kong Special Administrative Region, the High Court of Kenya, the European Court of Human Rights and the Court of Justice of the European Union.

5. UNHCR's supervisory responsibility has also 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"),[5] 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".[6] Secondary EU legislation also emphasizes the role of UNHCR. For instance, Recital 15 of the Council Directive 2004/83/EC 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, states that consultations with UNHCR "may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention".[7] The supervisory responsibility of UNHCR is specifically articulated in Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status as well as the 2013 Directive 2013/32/EU (Recast).[8] Article 21(c) of the Asylum Procedures Directive and Article 29(c) of the APD Recast, obligates 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."

6. This *amicus curiae* 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 recognized principles of international law.[9]

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5 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, http://www.unhcr.org/refworld/docid/4b17a07e2.html.

6 European Union, *Declaration on Article 73k of the Treaty establishing the European Community*, OJ C 340/134, 10 November 1997, http://eur- lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/17:EN:HTML.

7 *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, OJ L 304/12, 30 September 2004, (hereafter "Qualification Directive") http://eur- lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:304:0012:0023: EN:PDF.

8 *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, 13 December 2005, (hereafter "Asylum Procedures Directive"), http://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013L0032, and 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, http://www.refworld.org/docid/51d29b224.html.

9 UN General Assembly, Convention on the Privileges and Immunities of the United Nations, 13 February 1946, http://www.refworld.org/docid/3ae6b3902.html.

7. In making its amicus curiae submission, UNHCR only seeks to address issues of legal principle arising from the concerned case, in an effort to support consistent interpretation of refugee law in line with international standards. As such, UNHCR does not address nor comment on the applicant's eligibility for international protection.

II. UNHCR's interest in the case

8. When granting the present case leave to appeal, the Migration Court of Appeal indicated that the legal precedent to be established through the adjudication of the case to be one which addresses the: "Question [of] where an applicant shall be considered to have had his/her habitual residence, when said person has been resident in more than one country".[10]

9. UNHCR finds the present case of interest because it concerns an applicant who is a Palestinian refugee registered with the United Nations Relief and Work Agency for Palestine Refugees in the Near East, ('UNRWA'), but has left UNRWA's area of operation, having passed through Algeria, and has claimed that he is unable to re-avail himself of the protection of UNRWA for reasons outside of his control. In assessing this application for asylum, the Swedish authorities considered Article 1 A (2) of the 1951 Convention and found that the applicant had a closer link to a third country, namely Algeria, on the basis of which his claim for international protection was rejected.

10. In UNHCR's view, applications from Palestinian refugees, in circumstances such as those of the applicant necessitates at the outset an examination of whether the applicant would fall within the personal scope of Article 1 D of the 1951 Convention.

11. UNHCR considers that if it is established that the applicant benefits from *ipso facto* refugee status, the relevant exclusion clause to consider in such cases is Article 1 E of the 1951 Convention, which states that the 1951 Convention shall not apply to persons who have taken up residence in a country where the authorities recognize that he or she has "the rights and obligations which are attached to the possession of the nationality of that country."

III. Application of Article 1 D of the 1951 Refugee Convention

12. Article 1 D 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

10 As per the Migration Court of Appeal's list of cases granted leave to appeal, http://www.kammarrattenistockholm.domstol.se/Om-kammarratten-/Provningstillstand/Migrationsmal/.

relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.

13. Article 1D of the 1951 Convention is often characterised as an "exclusion clause", whereas it has both exclusionary and inclusionary aspects.[11]

14. In Swedish practice, Palestinian asylum-seekers who do not originate from the State of Palestine are considered to be stateless.[12] However, as UNHCR noted in its response to questions posed by the Swedish Migration Agency in connection to Sweden's recognition of the State of Palestine in 2014, "whether an individual is considered a national of the State of Palestine or stateless, is not determinative to the applicability of Article 1 D of the 1951 Convention to their individual case. What is determinative is whether the protection or assistance of UNRWA has ceased such that they cannot be protected against the particular risk they face."[13]

15. Article 1 D has two related purposes which guide its interpretation and application. The first purpose is to ensure the continuity of the protection and associated rights and status of Palestinian refugees as refugees until their position has been definitively settled in accordance with the relevant resolutions of the United Nations General Assembly; the second is to avoid overlapping competencies between UNHCR and UNRWA. In this latter regard, it should be noted that UNRWA's areas of operation are limited to Jordan, Lebanon, the Syrian Arab Republic, the West Bank (including East Jerusalem) and Gaza.[14]

16. Article 1 D of the 1951 Refugee Convention has been replicated in EU legislation, namely, in Article 12(1)(a) of the Qualification Directive. The Court of Justice of the European Union, (hereafter "CJEU"), has interpreted Article 12(1)(a) in two judgments, *Bolbol*[15] and *El Kott*.[16] This approach was followed in the precedent

11 "As the French representative put it, the proposed text provided for 'deferred inclusion' rather than exclusion of these refugees." 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, 3rd edn., 2007), 153; and Atle Grahl-Madsen, who refers to it as a 'suspensive clause', *The Status of Refugee in International Law*, Volume I Refugee Character, A.W. Sijthoff-Leyden, 1966, p. 263.

12 Until Sweden recognized the State of Palestine on 30 October 2014, all Palestinians who could not show that they were nationals of a State were registered as stateless. Since the recognition of the State of Palestine, Sweden considers persons originating from the West Bank, Gaza and East Jerusalem to be nationals of the State of Palestine. Statelessness is not defined in Swedish legislation; the assignment of the status of stateless to Palestinians is established in practice.

13 UNHCR, *Responses to questions posed by the Swedish Migration Board*, Protection Policy and Legal Advice Section, Statelessness Section, Division of International Protection, 25 November 2014, http://lifos.migrationsverket.se/dokument?documentSummaryId=33608.

14 UNHCR, *Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees*, October 2009, (hereafter "UNHCR's Revised Note on Art 1D"), paras 6 - 7, http://www.refworld.org/docid/4add77d42.html.

15 *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, C-31/09, CJEU, 17 June 2010, http://www.refworld.org/docid/4c1f62d42.html ("*Bolbol*").

16 *Mostafa Abed El Karim El Kott and Others v. Bevándorlási és Állampolgársági Hivatal*, C-364/11, CJEU, 19 December 2012, ("El Kott"), http://www.refworld.org/cases,ECJ,50d2d7b42.html. In the judgment, the Court concluded, inter alia, that "a Palestinian refugee must be regarded as having been forced to leave UNRWA's area of operations if his personal safety is at serious risk and if it is impossible for that agency to guarantee that his living conditions in that area will be commensurate with the mission entrusted to that agency", and that where UNRWA's protection or assistance has ceased, the person is *ipso facto* entitled to the benefits of the directive.

setting judgment of the Migration Court of Appeal on 26 November 2013 in case number UM 1590 – 13,[17] which established the manner under which Article 12(1)(a) of the Qualification Directive, and consequently Article 1 D of the 1951 Convention, shall be interpreted and applied in Sweden, aligning Swedish jurisprudence with the *El Kott* judgment of the Court of Justice of the EU.[18]

17. UNHCR submits that read in light of its ordinary meaning, considered in context and with due regard to the object and purpose of the 1951 Convention,[19] the phrase "ceased for any reason" should not be construed restrictively. Thus, Palestinians who fall within the scope of Article 1 D, and for whom the protection or assistance of UNRWA has ceased owing to a reason beyond their control and independent of their volition which forces them to leave the UNRWA area, fall within the inclusion clause, and are refugees within the meaning of Article 1 D of the 1951 Convention and Article 12(1)(a) of the Qualification Directive. The person is consequently "*ipso facto* entitled to the benefits of the [1951] Convention", provided that Articles 1 C, 1 E and 1 F of the 1951 Convention do not apply.

18. Article 1D refers to an "ipso facto" entitlement, meaning that persons meeting the criteria of the second paragraph of Article 1D are automatically entitled to the benefits of the Convention. 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.[20] Therefore, no separate determination of well-founded fear under Article 1 A (2) of the 1951 Convention is required.[21]

19. UNHCR thus submits that when assessing a Palestinian applicant's eligibility for protection, States should first examine if an asylum-seeking Palestinian falls within the scope of Article 1 D, and whether they fall within the first paragraph, followed by an assessment of whether such an applicant is nonetheless included under the second paragraph owing to the cessation of that protection or assistance.[22] Only if it is established that the Palestinian applicant does not fall

17 Case UM 1590 – 13, http://lifos.migrationsverket.se/dokument?documentSummaryId=31434.

18 *El Kott, supra*.

19 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.

20 UNHCR, *Oral intervention before the Court of Justice of the European Union in the case of El Kott*, 15 May 2012, C-364/11, http://www.refworld.org/docid/4fbd1e112.html, para. 13.

21 UNHCR's Revised Note on Art 1D, para. 8, and *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, (hereafter "UNHCR's Note on Article 1D and the Qualification Directive"), page 3.

22 See UNHCR's Note on Article 1D and the Qualification Directive, which states that "Objective reasons why the applicant is unable to return or re-avail himself or herself of the protection or assistance of UNRWA would include, but are not limited to:
Threats to life, physical security or freedom, or other serious protection-related reasons
• Examples would include situations such as armed conflict or other situations of violence, civil unrest and general insecurity, or events seriously disturbing public order.
• It would also include more individualized threats or protection risks such as sexual and gender-based violence, human trafficking and exploitation, torture, inhuman or degrading treatment or punishment, or arbitrary arrest or detention.
Practical, legal and safety barriers to return

within the scope of Article 1 D, should the applicant be assessed against the criteria of Article 1 A (2) of the 1951 Convention.[23]

IV. Application of Article 1 E of the 1951 Convention

20. As noted above, Palestinians falling within the inclusion clause of Article 1 D, are entitled *ipso facto* to the benefits of the 1951 Convention, unless Article 1 C, E or F of the 1951 Convention apply. The CJEU similarly confirmed in *El Kott* , that "the exclusion clauses contained in Article 12(1)(b) or (2) and (3) and the cessation clauses contained in Article 11(f), read in conjunction with Article 14(1) of the Qualification Directive, apply to Palestinians falling within the scope of the second sentence of Article 12(1)(a) of the Qualification Directive."[24]

21. Article 1 E of the 1951 Convention states:

> "[t]he (1951) 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."

22. The object and purpose of Article 1 E is to "exclude from refugee status those persons who do not require refugee protection, because they already enjoy a status which, possibly with limited exceptions, corresponds to that of nationals."[25]

23. UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status defines Article 1 E as concerning "persons who might otherwise qualify for refugee status and who have been received in a country where they have been granted most of the rights normally enjoyed by nationals, but not formal citizenship".[26]

24. Exclusion from refugee status under Article 1 E is only permissible in cases where the person concerned is currently recognized by the country concerned as having the rights and obligations which are normally afforded to its nationals. It is thus not sufficient that the persons concerned used to have such rights in the past.[27]

25. Further, the wording of Article 1 E limits its application to persons who have "taken up residence" in another country. This means that the person concerned must currently benefit from a residency status that is secure, and have the right in practice to return to, re-enter and remain in the country concerned; thus it is not

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• Practical barriers would include being unable to access the territory because of border closures, road blocks or closed transport routes.
• Legal barriers would include absence of documentation to travel to, or transit, or to re-enter and reside, or where the authorities in the receiving country refuse his or her re-admission or the renewal of his or her travel documents.
• Safety barriers would include dangers en route such as mine fields, factional fighting, shifting war fronts, banditry or the threat of other forms of harassment, violence or exploitation."

23 UNHCR, Revised Note on Art 1D, para. 5, and UNHCR's Note on Article 1D and the Qualification Directive, page 3.

24 Ibid., page. 6, and *El Kott, supra*, paras 76, 77 and 82(2).

25 UNHCR, *Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees*, March 2009, (hereafter "UNHCR's Note on Article 1E"), para. 2, http://www.refworld.org/docid/49c3a3d12.html.

26 UNHCR Handbook, para. 144.

27 UNHCR's Note on Article 1E, para. 7.

sufficient that the person concerned could take up residence in the country concerned but has not done so.[28] In this regard, it is to be noted that the explanatory memorandum of the European Commission's (EC) proposal for the Qualification Directive notes in respect of what subsequently became Article 12 of the Directive that "[m]ere transit or purely temporary presence in such a state is not a basis for exclusion".[29]

26. UNHCR's Note on Article 1 E further states that "[p]ersons to whom the application of Article 1 E is considered must like nationals be protected against deportation and expulsion,"[30] Likewise, the EC Explanatory Memorandum on the Qualification Directive similarly states that "[a]n applicant shall be excluded only if there is guaranteed full protection against deportation or expulsion"[31]

27. UNHCR's Note on the interpretation of Article 1 E concludes that for Article 1 E to apply, it would be necessary *inter alia* to examine in the individual case:

    a) Whether the person has been granted secure residence in the country concerned including the right to return to and re-enter that country;
    b) Whether, with the exception of minor divergences, the person basically has the same civil, political, economic, social and cultural rights as well as obligations as nationals;
    c) Whether in particular the person is fully protected against deportation and expulsion;
    d) The current and future availability and effectiveness of this status in practice;[32]

V. Conclusion

28. UNHCR submits that for such cases, the relevant examination is to first consider if the applicant, who being a Palestinian who lived in an UNRWA area of operation and had availed himself of the protection and assistance of UNRWA, falls within the inclusion clause of Article 1 D of the 1951 Convention by virtue of that protection and assistance having ceased, in which case, the applicant would *ipso facto* be entitled to the benefits of the 1951 Convention.[33]

29. UNHCR further submits that, if it is established that such cases fall within the inclusion clause of Article 1 D, and there are questions as to whether such applicants have been a resident of a third country, the second step should be to examine if they would be excluded pursuant to Article 1 E of the 1951 Convention.

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28 UNHCR's Note on Article 1E, paras 9-10.
29 *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 September 2001, Explanatory Memorandum, http://www.unhcr.org/refworld/docid/47fdfb1ad.html, Article 14 (which became Article 12 in the final version of the QD, (hereafter "Explanatory Memorandum").
30 UNHCR's Note on Article 1E, para.14. See also, UNHCR Handbook, para. 145.
31 Explanatory Memorandum, *supra.*
32 UNHCR's Note on Article 1E, para. 20.
33 This would equally be in line with the related provision in the Qualification Directive, and as established by the Migration Court of Law in the case UM 1590-13, to refugee status under Swedish law.