

From Historical Displacement to Legal Challenges: The Case of Palestinian Refugees in International and European Law

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List of abbreviations

Abbreviation

BAH

CJEU

CEAS

DAB

EASO

EUAA

UN GA Res

OJ

TFEU

UN

UNCCP

UCLJLJ

UNGA

UNHCR

UNRWA

WWII

Definition

Bevándorlási és Állampolgársági Hivatal

Court of Justice of the European Union

Common European Asylum System

Darzhavna agentsia za bezhantsite

European Asylum Support Office

European Union Agency for Asylum

United Nations General Assembly Resolution

Official Journal

Treaty of the Functioning of the European Union

United Nations

United Nations Conciliation Commission for
Palestine

UCL Journal of Law and Jurisprudence

United Nations General Assembly

United Nations High Commissioner for Refugees

the United Nations Relief and Works Agency for
Palestinians in the Near East

World War II

Chapter 1 Introduction

1.1 Problem Analysis

Following the Second World War, a conflict emerged between Palestine and Israel, leading to an extensive Palestinian refugee crisis.¹ This crisis resulted in the mass displacement of Palestinian Refugees. The ongoing crisis compelled the international community to establish various United Nations (UN) bodies aimed at providing assistance and protection to refugees of Palestinian origin. However, it can be stated that the legal framework governing their protection remains fragmented, as different United Nations bodies hold overlapping but incomplete mandates,² as outlined below.

There is a patchwork of bodies and legal instruments governing the protection of Palestinian refugees. In brief, this patchwork looks as follows: In response to the refugee crisis, the UN General Assembly established the United Nations Conciliation Commission for Palestine (UNCCP) to provide ‘durable solutions and protection’ for Palestinian refugees. These solutions included absorption, repatriation, and resettlement,³ based on the principle of refugee choice, which is outlined in Resolution 194 (III).⁴ Additionally, the United Nations Relief and Works Agency for Palestinians in the Near East (UNRWA) was created to implement direct relief and works programs.⁵ Unlike the UNCCP, UNRWA does not offer durable solutions such as repatriation, resettlement, and economic and social rehabilitation⁶ for refugees because it is not mandated to execute any of these three durable solutions.⁷ The UNCCP used to provide these solutions, and concentrated solely on documenting and recording Palestinian property interests,⁸ but became largely inactive in 1965.⁹ The United

¹ Susan Akram, 'UNRWA and Palestine Refugees,' in The Oxford Handbook of International Refugee Law (Cathryn Costello et al ed, 9 June 2021) chapter 35, p 644.

² European Network on Statelessness, *Palestinians and the Search for Protection as Refugees and Stateless Persons in Europe* (Advocacy Briefing, July 2022) < https://www.statelessness.eu/sites/default/files/2022-07/ENS_Advocacy_Briefing-Palestinians_Protection_Europe-July_2022.pdf > accessed 24 March 2025

³ Terry M. Rempel, "The United Nations Conciliation Commission for Palestine, Protection, and a Durable Solution for Palestinian Refugees," *BADIL - Information & Discussion Brief Issue No. 5* (June 2000) p 1..

⁴ Terry M. Rempel, "The United Nations Conciliation Commission for Palestine, Protection, and a Durable Solution for Palestinian Refugees," *BADIL - Information & Discussion Brief Issue No. 5* (June 2000) p 7

⁵ 'Who we are' (United Nations Relief and Works Agency for Palestinian Refugees in the Near East). < > accessed 4 January 2024.

⁶ Susan Akram, 'UNRWA and Palestine Refugees,' in The Oxford Handbook of International Refugee Law (Cathryn Costello et al ed, 9 June 2021) chapter 35, p 644.

⁷ Susan Akram, 'UNRWA and Palestine Refugees,' in The Oxford Handbook of International Refugee Law (Cathryn Costello et al ed, 9 June 2021) chapter 35, p 652.

⁸ Susan Akram, 'UNRWA and Palestine Refugees,' in The Oxford Handbook of International Refugee Law (Cathryn Costello et al ed, 9 June 2021) chapter 35, p 649.

⁹ Terry Rempel, The United Nations Conciliation Commission for Palestine: Negotiating Palestine after the Nakba (PalQuest, no date) < <https://www.palquest.org/en/highlight/24260/united-nations-conciliation-commission-palestine> > accessed 12 March 2025

Nations High Commissioner for Refugees (UNHCR), which provides international refugee protection, generally excludes those receiving assistance from other UN bodies, according to Article 7c of its Statute, from its protection activities.¹⁰

The Refugee Convention,¹¹ the cornerstone of international refugee protection, also contains a specific exclusion clause for Palestinian refugees. Article 1D of the Refugee Convention specifically excludes individuals who are already receiving protection or assistance from other UN agencies,¹² such as UNRWA. Because many Palestinian refugees receive humanitarian assistance from UNRWA, they are excluded from the broader protection provided by the Refugee Convention. This exclusion is incorporated in Article 12(1)(A) of the Qualification Directive, a key legal instrument within the Common European Asylum System (CEAS).¹³ As a result, Palestinian refugees seeking asylum in the European Union (EU) must demonstrate that UNRWA's assistance has ceased in order to qualify for refugee status. However, the legal interpretation of this requirement has been subject to debate.

The Court of Justice of the European Union (CJEU) has interpreted Article 12(1)(a) of the Qualification Directive¹⁴ in a restrictive manner. The UNHCR has advised a broader interpretation that is more inclusive towards Palestinian refugees and would expand the scope of protection.¹⁵ The difference between these interpretations has significant consequences for Palestinian asylum seekers in the EU, affecting both their access to protection and the consistency of asylum decisions across member states.

This thesis explores the law that lies at the heart of the central question: “To what extent is it desirable to adopt the broader interpretation of the UNHCR in the application of the exclusion clause in Article 12(1)(a) of the Qualification Directive, as opposed to the more restrictive interpretation of the Court of Justice of the European Union?”

¹⁰ Statute of the Office of the United Nations High Commissioner for Refugees, 189 UNTS 137, art 7c.

¹¹ UN Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954), further Refugee Convention, 189 UNTS 137, art 1D.

¹² Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, Art 1D.

¹³ European Commission, ‘Common European Asylum System’ < https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en > accessed 29 November 2024.

¹⁴ 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), further Qualification Directive, *OJ EU* 20 December 2011, L 337/9.

¹⁵ UNHCR, Note on UNHCR's Interpretation of Article 1D of the 1951 Convention Relating to the Status of Refugees and Article 12(1)(a) of the EU Qualification Directive in the Context of Palestinian Refugees Seeking International Protection (May 2013) p 4.

In this thesis, 'desirable' is understood as ensuring legal certainty, upholding fundamental refugee protection principles, and addressing the protection gap for Palestinian refugees.

'The protection gap' will be examined in detail throughout this thesis. In short, it refers to the situation in which a group of Palestinian refugees are excluded from the protection of the Refugee Convention but may also face barriers to asylum in the EU due to the restrictive application of Article 12(1)(a) of the Qualification Directive, resulting in inconsistent treatment of Palestinian refugees whose level of protection depends on the EU member state where they receive international protection, thereby contributing towards legal uncertainty for many Palestinian asylum seekers in the EU.

Overall, this thesis argues that the protection of Palestinian refugees results in a different and often unequal treatment compared to that received by other, non-Palestinian, refugees. Until today, and probably for a considerable period to come, Palestinians have been and will be seeking asylum in the European Union (EU). This thesis aims to address aforementioned issues related to the protection of refugees of Palestinian origin under EU asylum law, emphasizing gaps concerning the legal framework.

1.2 Research questions

This thesis aims to investigate and answer the following research question:

To what extent is it desirable to adopt the broader interpretation of the United Nations High Commissioner for Refugees in the application of the exclusion clause in Article 12(1)(a) of the Qualification Directive to Palestinian refugees, as opposed to the more restrictive interpretation of the Court of Justice of the European Union?

The answer to the research question formulated above follows from the answers to the following sub-questions:

1. Why do Palestinians constitute a specific group within the context of refugee protection, and how does international law, particularly the 1951 Convention Relating to the Status of Refugees, categorize and frame them as a specific group?
2. To what extent has Article 1D of the Refugee Convention been incorporated into EU asylum law?

- How does the exclusionary aspect in both legal frameworks (the Qualification Directive and the 1951 Convention Relating to the Status of Refugees) compare for Palestinians seeking refugee protection?
3. How has case law of the Court of Justice of the European Union influenced the protection of Palestinian refugees under EU Asylum Law?

1.3 Methodology and Structure

This study employs a legal doctrinal research methodology to analyze the protection of Palestinian refugees within the framework of EU asylum law. The research aims to critically assess the legal principles and frameworks governing refugee protection, with a particular focus on Palestinian refugees. The research is qualitative, primarily based on doctrinal analysis. This approach was chosen because it allows for an in-depth examination of legal texts, case law, and academic commentary, which are crucial for understanding the complex legal landscape affecting Palestinian refugees.

The sub-questions will be answered in Chapters 2-4. The answers to these questions will inform the answer to the research question that will be given in Chapter 5. Data was collected from various sources, including legal texts such as the 1951 Refugee Convention Relating to the Status of Refugees (hereinafter referred to as the Refugee Convention) the 1967 Protocol, and the EU Qualification Directive. Key cases of the Court of Justice (CJ EU), such as *Bolbol*, *El Kott* and *SN, LN*, were of great importance to this study, and academic articles from peer-reviewed journals and books on international refugee law and EU asylum law provided additional context and analysis. Furthermore, UN documents, including resolutions and reports from UNHCR and UNRWA, were examined to gather comprehensive data. The collected data were analyzed using a doctrinal approach, which involves a detailed examination of legal principles, case law, and statutory provisions. The analysis focused on interpreting the exclusion clauses in Article 1D of the 1951 Refugee Convention and Article 12(1)(a) of the Qualification Directive. It also evaluates how the Court of Justice of the European Union has interpreted and applied these clauses in key legal cases.

The legal doctrinal methodology is appropriate for this study because it allows for a thorough analysis of legal texts and principles. This approach helps to uncover the nuances and complexities of the legal protections available to Palestinian refugees and how these are

applied in practice. By conducting this in-depth analysis, the study aims to help clarify the gaps in the protection of Palestinian as refugees under international and EU asylum law and contribute to a more cohesive and effective legal framework for addressing the needs and rights of Palestinian refugees within the European Union.

Chapter 2. Palestinians in Refugee Protection: Categorization and framework under International Law

2.1 Introduction

This chapter explores the complexities of international refugee law, focusing on how it addresses the unique challenges faced by Palestinian refugees. By examining the historical events that led to the displacement of Palestinians and the subsequent creation of specialized UN agencies, we can better understand their distinct status in international law. In doing so, this chapter seeks to answer the question: Why do Palestinians constitute a specific group within the context of refugee protection, and how does international law, particularly the 1951 Convention Relating to the Status of Refugees, categorize and frame them as a specific group? This chapter will also explore how the Refugee Convention incorporates exclusionary clauses that specifically impact Palestinian refugees.

2.2 Historical Context of Palestinian Displacement

In order to be able to understand the full scope of the subject matter on Palestinian refugees a review of their history is required. The Palestinian people have experienced several declarations of war over the course of the last hundred years. Palestine was part of the Ottoman Empire from 1517 until 1917. James Balfour, the British Secretary of State for Foreign Affairs, issued the Balfour Declaration on November 2, 1917, which expressed support for the establishment of a national home for the Jewish people in Palestine. During World War I, British forces took control of Palestine from the Ottoman Empire, resulting in the formal establishment of the British Mandate for Palestine in 1920.

The League of Nations Mandate and the Balfour Declaration did not recognize the presence of the Arab community within the Palestinian population, instead recognizing national and political rights in Palestine exclusively for Jews.¹⁶ The League of Nations Mandate for Palestine further solidified this bias, aiming to establish a Jewish national home while ignoring Palestinian interests. This approach, supported by British military force, led to the suppression of Palestinian resistance. Zionist leader Vladimir Jabotinsky (who organized and led a Jewish self-defense movement against the Arabs in Palestine) even acknowledged the

¹⁶ Rashid I. Khalidi, 100 years since the Balfour Declaration special issue: The Practice of Commemoration, (2017), Vol. 47, No. 1 (185), Journal of Palestine Studies, p 8.

necessity of an “iron wall” of British bayonets to ensure Zionist success. Ultimately, Great Britain handed over the Palestine question to the United Nations in 1947, marking a crucial moment in the international handling of the issue.¹⁷

After World War II, the United States and the Soviet Union orchestrated a significant move that greatly impacted Palestine. This was the UN General Assembly (UN GA) Resolution 181 in 1947, also known as the Partition Plan, which allocated a majority of Arab-populated Palestine to a Jewish state without the consent of the Arab majority and divided Palestine into an ‘Arab’ state and a ‘Jewish state’.¹⁸ This led to a war that lasted from 1947 until 1949 and with this, the expulsion of over half of Palestine’s Arab population, known as the Nakba, or Catastrophe.¹⁹ The displacement and expulsion of hundreds of thousand Palestinians from their homeland was the result of the violent formation of the Israeli state on May 14th 1948. The Palestinians were either driven out by Israeli forces before May 14th 1948, or by the Israeli forces after the formation of the Israeli state.²⁰ Palestinians were then forced to stay in the eastern part of the region – the West Bank, in East Jerusalem and Gaza, as well as in Lebanon, Syria, Jordan, Egypt and Iraq. An estimated amount of 700.000 Palestinians fled their homes or were expelled by the Israeli army.²¹

In 1967, Israel seized the remaining territory of historic Palestine, leading to the flight of Palestinian refugees. This event prompted approximately 400,000 Palestinians to flee to neighboring countries such as Jordan, Syria, Lebanon, and Egypt.²² Since then, Israel has persisted in forcibly displacing Palestinian residents from both its own territory and the Occupied Territories through acts of violence and oppression.²³

¹⁷ Rashid I.Khalidi, 100 years since the Balfour Declaration special issue: The Practice of Commemoration, (2017), Vol. 47, No. 1 (185), Journal of Palestine Studies, p 9.

¹⁸ Rashid I.Khalidi, 100 years since the Balfour Declaration special issue: The Practice of Commemoration, (2017), Vol. 47, No. 1 (185), Journal of Palestine Studies, p 10.

¹⁹ Rashid I.Khalidi, 100 years since the Balfour Declaration special issue: The Practice of Commemoration, (2017), Vol. 47, No. 1 (185), Journal of Palestine Studies, p 11.

²⁰ William Foxwell Albright et al, Palestine and the Palestinians (1948-67), (Britannica), <<https://www.britannica.com/place/Palestine/Palestine-and-the-Palestinians-1948-67>>, accessed 24 March 2024.

²¹ Causes of the 1948 Palestinian expulsion and flight, (Wikipedia) <https://en.wikipedia.org/wiki/Causes_of_the_1948_Palestinian_expulsion_and_flight#:~:text=During%20the%201948%20Palestine%20war,their%20homes%20by%20Israeli%20forces>, accessed 25 March 2024.

²² The Six-Day War lasted from June 5 to June 10, 1967; see Benny Morris, *Righteous Victims: a History of the Zionist-Arab Conflict 1881-1999* (New York: Alfred A. Knopf, 1999) 340-343.

²³ Susan M. Akram and Terry Rempel, ‘Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees’ (2004) 22 Boston University International Law Journal 1, p 4.

2.3 UN Agencies Established for Palestinian Refugee Protection

Following the Palestinian refugee crisis due to the events in 1948, the United Nations established two agencies: The United Nations Conciliation Commission for Palestine (UNCCP) and the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). A third organization that operates independently of these two agencies and was established for the protection of refugees worldwide is the United Nations High Commissioner for Refugees.

The UNCCP was established in 1948 under UN GA Resolution 194 (III) with a mandate to protect Palestinian refugees and provide them with durable solutions. Resolution 194 (III) specifically distinguished the Palestinian refugee issue from other global refugee issues by addressing the unique circumstances and needs of Palestinian refugees. The durable solutions which UNCCP is mandated to provide are based on the principle of ‘refugee choice’ which includes repatriation, compensation and resettlement.²⁴ The UNCCP also had the task of mediating in the Arab-Israeli conflict. The protection mandate, in combination with the legal framework of the UN GA Res 194 (III), was in line with the mandate of the United Nations High Commissioner for Refugees, which is the organization that was established to protect refugees worldwide. However, the UNCCP has been unable to afford Palestinian refugees the same level of protection as refugees elsewhere in the world receive.²⁵ The UNCCP faced a significant challenge due to its dual mandate, which required addressing both political conciliation between Israel and Palestine and providing durable solutions for refugees. This dual mandate made it difficult for the UNCCP to fulfill both aspects effectively. The struggle to balance these conflicting objectives—resolving all outstanding political issues while also implementing repatriation and compensation—resulted in a focus on topics with the least disagreement between the parties.²⁶ Consequently, the UNCCP concentrated primarily on documenting and evaluating refugee properties for compensation purposes. This narrow focus had severe consequences for Palestinian refugees, as it left their broader and more critical needs unaddressed.²⁷

²⁴ Terry M. Rempel, "The United Nations Conciliation Commission for Palestine, Protection, and a Durable Solution for Palestinian Refugees," BADIL - Information & Discussion Brief Issue No. 5 (June 2000) p 1.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

The UNRWA was founded in the aftermath of the 1948 war, on the 8th of December in 1949, with a mandate that was specified in United Nations General Assembly Resolution 302(IV).²⁸ This mandate included carrying out, in collaboration with local governments, the direct relief and works programs as recommended by the Economic Survey Mission and to consult with interested Near Eastern Governments concerning measures to be taken in preparation for the cessation of international assistance for relief and works projects.²⁹ UNRWA primarily focusses on providing humanitarian assistance, which includes education, social services, healthcare, infrastructure and camp improvement.³⁰ UNRWA has evolved into the first international organization dedicated to addressing a particular refugee crisis within defined geographic boundaries (including Gaza, Syria, the West Bank, Jordan, and Lebanon).³¹ By concentrating on these specific areas, UNRWA has been able to develop specialized programs tailored to the unique needs of Palestinian refugees within these regions.³²

It is important to note that, among the UN agencies, aside from the UNHCR, UNRWA stands as the sole entity currently providing assistance to a specific group of individuals.³³ This highlights the unique treatment of Palestinian refugees under the international refugee regime, unlike other refugees who fall under UNHCR's general mandate. Consequently, Palestinian refugees find themselves outside the scope of the international refugee protection regime and, instead, rely exclusively on the mandate of UNRWA, which primarily offers relief and employment programs. Within UNRWA's mandate, fundamental human rights are not encompassed.³⁴

The UNCCP was still operational when UNRWA was established in 1949. The UNCCP had a mandate that included providing protection and seeking durable solutions for Palestinian refugees. Because of this protection mandate, UNRWA's role was specifically limited to offering humanitarian assistance.³⁵ This division of responsibilities was intended to ensure

²⁸ United Nations General Assembly Resolution 302 A/RES/302 (IV.)

²⁹ United Nations General Assembly Resolution 302 A/RES/302 (IV), para. 7.

³⁰ Cynthia Orchard, *Palestinians and the Search for Protection as Refugees and Stateless Persons* (BADIL Resource Center for Palestinian Residency and Refugee Rights and European Network on Statelessness, June 2022), p 3.

³¹ Ricardo Bocco, "UNRWA and the Palestinian refugees: a history within history," (2009), 28(2-3) 229, *Refugee Survey Quarterly*, 229, p 231.

³² United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), *What We Do* (UNRWA, 2023) < <https://www.unrwa.org/what-we-do> > accessed 20 March 2025

³³ Mais Qandeel & Sarah Progin-Theuerkauf, 'Legal Implications of Dismantling UNRWA: A European Perspective' (2021) 14 *J Pol & L* 84, p 90.

³⁴ *Ibid.*

³⁵ Ricardo Bocco, "UNRWA and the Palestinian refugees: a history within history," (2009), 28(2-3) 229, *Refugee Survey Quarterly*, p 229, 232.

that both protection and humanitarian needs were addressed, but it also meant that UNRWA did not have the authority to engage in political mediation or seek permanent solutions for the Palestinian refugees' plight. Consequently, while UNRWA focused on immediate relief and welfare, the broader political and protection issues were left to the UNCCP, which ultimately faced significant challenges in fulfilling its mandate.

UNRWA's role in providing humanitarian assistance required a clear definition of who qualifies for its services. The Agency's definition of the term 'refugee' is as follows:

*“a Palestine refugee shall mean any person whose normal place of residence was Palestine during the period June 1, 1946 to May 15, 1948, and who lost both home and means of livelihood as a result of the 1948 conflict”.*³⁶

UNRWA's services are accessible solely to individuals meeting specific criteria. The agency's services are available to people who meet the definition as given above, who reside within UNRWA's operational jurisdiction and who are officially registered with the agency and need assistance.³⁷

On July 4, 1967, in the aftermath of the 1967 war, the United Nations General Assembly (UN GA) passed Resolution 2252 (ES-V). This resolution endorsed UNRWA's immediate assistance as a temporary measure to individuals in the region who were displaced and in urgent need of aid due to the recent hostilities.³⁸ Consequently, those displaced in 1967 were also encompassed within UNRWA's mandate. Initially, UNRWA's scope was limited to the descendants of Palestine refugee males, including legally adopted children.³⁹ However, in 2006, UNRWA broadened its eligibility criteria to include family members, husbands, and descendants of registered refugee women married to non-refugees, allowing them to receive UNRWA services.⁴⁰

2.4 International Refugee Law

³⁶ UNRWA, 'Who We Are: Who Is UNRWA Mandated to Serve?' (UNRWA) <<https://www.unrwa.org/who-unrwa-mandated-serve>> accessed 12 March 2025

³⁷ Mais Qandeel & Sarah Progin-Theuerkauf, 'Legal Implications of Dismantling UNRWA: A European Perspective' (2021) 14 J Pol & L 84, p 88.

³⁸ UNGA Res 2252 (ES-V) (4 July 1967) UN Doc A/RES/2252 (ES-V).

³⁹ UNRWA (n 21).

⁴⁰ UNRWA, 'Eligibility Registration' <<https://www.unrwa.org/what-we-do/eligibility-registration>> accessed 2 May 2024.

The international legal framework for refugee protection, primarily established through the Refugee Convention, the 1967 Protocol and the Statute of the UHNCR, aims to safeguard the rights of individuals fleeing persecution. The Refugee Convention provides the internationally recognized definition of a refugee and outlines the legal protection, rights, and assistance a refugee is entitled to receive. Additionally, it ensures that refugees are not returned to a country where they face serious threats to their life or freedom. UNHCR serves as the ‘guardian’ of these instruments, helping governments translate them into national laws to ensure refugees are protected and can exercise their rights.⁴¹ However, this framework has gaps when it comes to the protection of Palestinian refugees. Below, I provide an explanation for each legal source, highlighting how each of them contributes to the lack of protection enjoyed by Palestinian refugees.

The Refugee Convention emerged as a significant milestone in the international establishment of basic legal standards for the treatment of refugees. It marked the result of historical efforts to define and protect the rights of refugees around the world. Over the course of the years, the Refugee Convention has served as a crucial legal framework for the protection of refugees in various regions across the world.⁴²

The Refugee Convention was a landmark in international human rights law, establishing fundamental principles such as non-refoulement, which prohibits the return of refugees to places where they face serious threats to their life or freedom and is incorporated in Article 33.1 of the Refugee Convention.⁴³ This Convention aimed to provide universal protection to refugees. However, its definition of “refugee” and the scope of its protection were initially limited to European refugees displaced by events occurring before January 1, 1951. The conceptual definition of the term ‘refugee’ is laid down in Article 1(A)(2) of the Refugee Convention and refers to a person who, ‘as a result of events occurring before 1 January 1951, is outside his or her former home country because of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion’.⁴⁴ The limitations resulting from the 1951 timeline refer to the constraints imposed by the Refugee Convention’s initial scope, which was primarily focused on European

⁴¹ UNHCR, 'The 1951 Refugee Convention: 70 Years of Life-Saving Protection' (UNHCR, 28 July 2021) <https://www.unhcr.org/news/news-releases/1951-refugee-convention-70-years-life-saving-protection> accessed 28 June 2024.

⁴² Ivor C. Jackson, 'The 1951 Convention Relating to the Status of Refugees: A Universal Basis for Protection' (1991) 3 Int'l J Refugee L 403, p 403.

⁴³ Article 33(1) – Prohibition of expulsion or return (refoulement), 1951 Convention Relating to the Status of Refugees.

⁴⁴ Article 1(a)(2) - Definition of the term "refugee", 1951 Convention Relating to the Status of Refugees.

refugees at the time of its drafting; effectively those resulting from World War II. Some governments were hesitant to commit to future obligations beyond their control, leading to the establishment of the 1951 dateline and the possibility of introducing geographical limitations.⁴⁵ This dateline acted as a constraint on the Refugee Convention's scope, even though its conceptual reach was viewed as universal.

Efforts were undertaken to overcome these constraints, leading to the adoption of the 1967 United Nations Refugee Protocol.⁴⁶ The records from this period reflect a recognition of the Convention's importance as an international instrument for protecting refugees worldwide.⁴⁷ Initially, the Refugee Convention only applied to individuals displaced by events in Europe prior to January 1, 1951, as stated in Article 1(B) Section 1(a) and (b). Article 1B, Section 1(a) limited the Convention's applicability to "events occurring in Europe before 1 January 1951,"⁴⁸ while Section 1(b) extended this to "events occurring in Europe or elsewhere before 1 January 1951,"⁴⁹ allowing states to choose the scope of their obligations at the time of ratification. The 1967 Protocol removes these limitations, ensuring that the protection offered by the Convention extends to refugees worldwide, regardless of their location or the timing of their displacement⁵⁰: it removed the original dateline and expanded the Convention's applicability to new refugee situations worldwide. While this broadened the scope of international refugee protection, making it universally applicable, it did not effectively resolve the specific exclusion faced by Palestinian refugees under Article 1D of the Refugee Convention, that reads:

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

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the

⁴⁵ Ivor C. Jackson, 'The 1951 Convention Relating to the Status of Refugees: A Universal Basis for Protection' (1991) 3 Int'l J Refugee L 403, p 406.

⁴⁶ Protocol Relating to the Status of Refugees (1967), 606 UNTS 267.

⁴⁷ Ibid.

⁴⁸ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, Art 1B, s1(a).

⁴⁹ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, Art 1B, s1(b).

⁵⁰ United Nations High Commissioner for Refugees, António Guterres, "A personal appeal from the United Nations High Commissioner for refugees," (September 2011), 'The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol', p 4.

General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.”

The exclusion of Palestinian refugees from the scope of the Refugee Convention was not addressed by the 1967 Protocol and the legal and political framework established for Palestinian refugees under UNRWA continued to exist separately. Thus, despite the Protocol’s intentions, Palestinian refugees continue to encounter legal and political barriers to full inclusion within the international refugee protection regime.

2.4.1 Article 1D of the Refugee Convention

The Palestinian refugee crisis, unlike other refugee situations in which the general principles of the UN were violated, emerged directly from the UN’s Partition Plan. During the negotiations, several Arab states, including Egypt, Lebanon and Saudi Arabia, expressed their perspective on the situation, stating that “the Palestine refugees were therefore a direct responsibility on the part of the UN and could not be placed in the general category of refugees without betrayal of that responsibility.”⁵¹ To address this unique situation, these Arab states proposed an amendment to the UNHCR Statute. They stated that the mandate of the High Commissioner should not extend to refugees currently under the mandate of other UN organs.⁵² This amendment, as proposed by these Arab states, was approved by the drafters and included in paragraph 7I of the UNHCR Statute.⁵³ Specifically, this paragraph 7I, which they had amended, was discussed at the Conference of Plenipotentiaries and this text eventually shaped the wording of Article 1D of the Refugee Convention.⁵⁴ The Arab states were concerned that without a dedicated United Nations regime for Palestinian refugees, the international support for their return to their homes and properties, as outlined in UN GA 194(III) would diminish.⁵⁵ This would result in Palestinians falling into the general refugee resettlement framework of the Refugee Convention.⁵⁶ They then would be subject to the general resettlement practices being used for other refugees at the time. This could

⁵¹ Statement of Mr Azkoul (Lebanon) (27 November 1950) 5 UNGAOR 358.

⁵² UNHCR, ‘Egypt, Lebanon, Saudi Arabia Amendments to Draft Statute’, UN doc A/C.3/L.128 (27 November 1950)

⁵³ Maja Janmyr and Charlotte Lysa, ‘Saudi Arabia and the International Refugee Regime’ (2023) 35 International Journal of Refugee Law, p 256.

⁵⁴ Ibid.

⁵⁵ Guy S. Goodwin-Gill, *Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatory to the 1951 Convention* (Susan Akram, Nidal Al-Azza ed, 2nd edn, February 2015), p 43.

⁵⁶ Ibid.

undermine the refugees' right to return to their homeland, so it was felt, and lead to their permanent displacement.

European signatory states, on the other hand, were concerned about the potential arrival of large numbers of Palestinian refugees at their borders, claiming international protection in those states.⁵⁷ This concern was evident in their reluctance, as reflected in their statements during the drafting process, to "bind themselves to a text under which their obligations would be extended to include a new, large group of refugees."⁵⁸ This indicates their support for measures that would limit their responsibilities toward this particular refugee group.

Therefore, the Refugee Convention established a unique framework for Palestinian refugees, incorporating an exclusion provision which is known as Article 1D. Careful reading of the exclusion clause reveals the following key elements that need to be satisfied to put it into operation:

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

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

This provision establishes that the Refugee Convention's protection does not extend to individuals currently receiving aid from UN organs or agencies other than the UNHCR. The second sentence of Article 1D specifies that should such assistance cease without the definitive resolution of these individuals' status according to UN General Assembly resolutions, they automatically become eligible for the Convention's benefits. Article 1D also contains an inclusionary aspect: in the event of UNRWA's cessation, Palestinian refugees would be entitled to so-called full Convention protection.⁵⁹ Thus, Article 1D has both exclusionary and inclusionary elements in it.

⁵⁷ Marguerite Perin, 'European and International Law and Palestinian Refugees: Bolbol, el Kott and the Application of Article 1D of the Geneva Convention' (2014) 3 UCLJLJ, p 89.

⁵⁸ Statement of Mr Rochefort (France) (26 November 1951) UN Doc A/CONF.2/SR.19 11.

⁵⁹ Mais Qandeel & Sarah Progin-Theuerkauf, 'Legal Implications of Dismantling UNRWA: A European Perspective' (2021) 14 J Pol & L 84, p 90.

At the time this provision was drafted, the UNCCP and UNRWA were established to form a protection system for Palestinians. The committee responsible for drafting the Refugee Convention believed it was unnecessary and inadvisable to include Palestinians under the Convention's regime as long as these two agencies were providing protection and assistance.⁶⁰ Additionally, the drafters thought that, due to the unique circumstances of the Palestinians, including them in the general protection system of the Refugee Convention would result in them receiving less protection than they deserved.⁶¹ Scholars have, however, argued that this provision effectively isolates Palestinian refugees, excluding them from the protection granted by the Refugee Convention, thus creating a notable protection gap.⁶²

Article 1D of the Refugee Convention adds to the lack of protection for Palestinian refugees by creating an exclusion clause that relies on the UNCCP and UNRWA providing them protection and assistance. This has resulted in significant protection gaps as many Palestinian refugees do not receive adequate protection, assistance or recognized legal status. This protection gap will be addressed in depth in Chapter 3. However, to already provide some guidance as to what the protection gap is about, the following can be said:

The practical side of the protection gap manifests itself as follows: Palestinian refugees receiving UNRWA assistance are excluded from the broader protection regime established under the Refugee Convention. This exclusion, based on Article 1D of the Refugee Convention, means they cannot access the full rights and legal statuses provided to other refugees under the UNHCR's jurisdiction. While UNRWA addresses immediate humanitarian needs, its mandate is limited to providing temporary assistance rather than durable solutions like legal status or resettlement, which leaves Palestinians without access to long-term protection options.⁶³

This exclusion creates a practical problem for Palestinian refugees, who, despite their need for stability and protection, do not receive the same support as other refugees. Besides the practical side, as explained above, there is an extensive legal side to this situation. The legal root lies in the narrow interpretation by the CJEU of Article 12(1)(A) of the Qualification

⁶⁰ Susan M. Akram & Terry Rempel, 'Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees', 22 Boston University International Law Journal 1 (2004) p 55.

⁶¹ Ibid.

⁶² Susan M Akram, 'Palestinian Refugees and Their Legal Status: Rights, Politics, and Implications for a Just Solution' (2002) 31 Journal of Palestine Studies, p 36, 36-51.

⁶³ Cynthia Orchard, *Palestinians and the Search for Protection as Refugees and Stateless Persons* (BADIL Resource Center for Palestinian Residency and Refugee Rights and European Network on Statelessness, June 2022), p 3.

Directive that replicates Art. 1D of the Refugee Convention, which will be explained later in this thesis.

Thus, while the exclusion clause is practically problematic due to UNRWA's limited mandate, the legal framework of Article 1D of the Refugee Convention and Article 12(1)(A) of the Qualification Directive, in particular the interpretation by the CJEU of the latter provision are ultimately the origin of this protection gap.

2.4.2 United Nations High Commissioner for Refugees

In the aftermath of World War II, the United Nations acknowledged the pressing need to confront the challenges posed by global refugee crises. Rather than resolving issues of nationhood and territorial boundaries, the post-war era saw a surge in Cold War tensions and an increasing number of displaced people.⁶⁴ In response to this, the International Refugee Organization assumed some responsibility for addressing refugee issues worldwide starting in 1947. When its mandate ended in 1951, it was recognized that a new international framework to assist refugees was necessary.⁶⁵ Against this backdrop, the United States and other Western nations in the General Assembly decided to establish a specialized agency capable of independently addressing refugee issues within the administrative and financial framework of the United Nations. Thus, the Office of the United Nations High Commissioner for Refugees (UNHCR) was established by the General Assembly on December 14, 1950 with the dual goal to find long-term solutions to the global refugee crisis and to offer international protection to refugees.⁶⁶ The UNHCR officially began its operations on January 1, 1951, with a non-political nature.⁶⁷ In addition to supervising the implementation of the Refugee Convention by states parties, UNHCR collaborates closely with these states, requiring their cooperation and provision of essential information and data.⁶⁸

⁶⁴ Alex Cunliff, "The Refugee Crises: a Study of the United Nations High Commission for Refugees" (1995) 43(2) Political Studies 278, p 280.

⁶⁵ Ibid.

⁶⁶ UNHCR Statute, para. 1 and para. 8.

⁶⁷ Alex Cunliff, "The Refugee Crises: a Study of the United Nations High Commission for Refugees" (1995) 43(2) Political Studies 278, p 281.

⁶⁸ United Nations High Commissioner for Refugees, António Guterres, "A personal appeal from the United Nations High Commissioner for refugees," (September 2011), 'The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol', p 6.

The establishment of the UNCCP and the UNRWA influenced the drafting of the statute of the UNHCR and the Refugee Convention. There are clauses in each of these documents that state that Palestinians are not protected by these instruments as long as they are being protected by, or are receiving assistance from other UN organizations, such as UNRWA: see Article 7I of the Statute of the UNHCR.⁶⁹ According to UNHCR's interpretation of Article 1D of the Refugee Convention, Palestinian refugees who are covered by this provision and who reside in UNRWA's operational area do not fall under UNHCR's protection mandate and are also not eligible for protection under the Refugee Convention.⁷⁰

According to UNHCR's *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*,⁷¹ the following categories of Palestinians are considered to be receiving protection or assistance from UNRWA:

- 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, and who, as a result of the 1948 Arab-Israeli conflict, were displaced from that part of Mandate Palestine which became Israel;⁷² and
- 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, and who, as a result of the 1967 Arab-Israeli conflict, have been displaced from the Palestinian territory occupied by Israel since 1967.⁷³

Additionally, this interpretation includes the descendants of these individuals.⁷⁴

⁶⁹ Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR Statute), UNGA res. 428 (V), 14 Dec. 1950, art 7(c).

⁷⁰ Brenda Goddard, *UNHCR and the international protection of Palestinian refugees*, Refugee Survey Quarterly (2009) 28(2-3), 475, p 476.

⁷¹ UNHCR, *Note on UNHCR's Interpretation of Article 1D of the 1951 Convention Relating to the Status of Refugees and Article 12(1)(a) of the EU Qualification Directive in the Context of Palestinian Refugees Seeking International Protection* (May 2013), <https://www.refworld.org/policy/legalguidance/unhcr/2013/en/41179?prevDestination=search&prevPath=/search?keywords=article+1D&order=desc&sort=score&result=result-41179-en>, last accessed 29 October 2024.

⁷² Ibid., p 2.

⁷³ Ibid., p 3.

⁷⁴ Ibid., p 3.

In understanding the protection gap, it is very important to note that the UNHCR interprets the phrase “receiving protection or assistance,” as stated in the first paragraph of Article 1D of the Refugee Convention, to include both those who are *actually* receiving and those who are *eligible* to receive protection or assistance.⁷⁵ This position is based on the dual purpose of Article 1D of the Refugee Convention, which consists of avoiding overlapping mandates of different UN agencies and ensuring continuity of protection for Palestinian refugees.⁷⁶

2.5 Conclusion

This chapter aimed to answer the sub-question: *Why do Palestinians constitute a specific group within the context of refugee protection, and how does international law, particularly the 1951 Convention Relating to the Status of Refugees, categorize and frame them as a specific group?*

Palestinians constitute a specific group within the context of refugee protection due to their unique historical and political circumstances, rooted in the displacement caused by the 1947 UN Partition Plan and subsequent conflicts. This displacement led to the creation of specialized UN agencies like the UNCCP and UNRWA to address their needs. The Refugee Convention, through Article 1D, excludes Palestinians receiving assistance from these agencies, thus establishing a distinct legal status. Furthermore, the UNHCR’s mandate does not cover Palestinian refugees within UNRWA’s operational areas, reinforcing their unique and often precarious position. It is this legal exclusion which was designed to prevent overlapping mandates, has actually resulted in a protection gap, as many Palestinian refugees do not receive adequate legal protection or a recognized status. A key aspect of the ‘protection gap’ lies in the interpretation of ‘receiving protection or assistance’ under Article 1D of the Refugee Convention as UNHCR takes a broad approach, namely one that includes both those actually receiving and those eligible to receive UNRWA assistance.

⁷⁵ Ibid., p 2.

⁷⁶ UNHCR, Note on UNHCR’s Interpretation of Article 1D of the 1951 Convention Relating to the Status of Refugees and Article 12(1)(a) of the EU Qualification Directive in the Context of Palestinian Refugees Seeking International Protection (May 2013).
<https://www.refworld.org/policy/legalguidance/unhcr/2013/en/41179?prevDestination=search&prevPath=/search?keywords=article+1D&order=desc&sort=score&result=result-41179-en>, accessed 29 October 2024, p 2.

Chapter 3. European Asylum Law and Framework

3.1 Introduction

This chapter examines the Qualification Directive⁷⁷ and its positioning of Palestinian refugees in the European Union's (EU) asylum system. It aims to answer two key questions: To what extent has Article 1D of the Refugee Convention been incorporated into EU asylum law? And how does the exclusionary aspect in both legal frameworks (the Qualification Directive and the 1951 Convention Relating to the Status of Refugees) compare for Palestinian refugees seeking refugee protection in the European Union? The chapter begins with an overview of the Qualification Directive. A legal analysis of EU Asylum law and its connection to Article 1D of the Refugee Convention follows. Next, a general summary of the protection gap highlights inconsistencies in the treatment of Palestinian refugees. The chapter then explores options for Palestinian refugees seeking asylum in the EU, contrasting the Court of Justice EU (further Court of Justice or CJEU)'s restrictive approach with the UNHCR's broader interpretation. Finally, it analyzes key case law provisions of relevant case law.

3.2 Asylum Qualification Directive 2011/95/EU

The Common European Asylum System (CEAS) was established to harmonize asylum policies across EU member states,⁷⁸ ensuring that applications for international protection are assessed under common standards. The competence to harmonize asylum policies is set out in Article 78(2)(a) and (b) on the Treaty of the Functioning of the European Union (TFEU).⁷⁹ Under the authority granted by this provision, the European Parliament and the Council are empowered to adopt measures for a common European asylum system consisting of: (a) a uniform status of asylum for nationals of third countries and (b) a uniform status of subsidiary protection for nationals who, without obtaining European asylum, need international protection. A key component of this system is Directive 2011/95/EU, commonly known as the Qualification Directive, which defines the criteria for international protection and is

⁷⁷ 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) [2011] OJ L337/9

⁷⁸ European Commission, 'Common European Asylum System' < https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en > accessed 8 May

⁷⁹ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 78(2)(a) and (b)

central to the legal debate on Palestinian refugees. The Qualification Directive is a recast of Directive 2004/83/EC and reflects the evolution of EU asylum policy in response to the emerging challenges and development in the field of refugee protection.

The Qualification Directive, plays a vital role in establishing standards for the qualification of third-country nationals or stateless persons seeking international protection within the European Union. Its primary objective, as outlined in Article 1 of the recast Qualification Directive, is to define the criteria and procedures for determining eligibility for international protection, meaning refugee status and subsidiary protection. One of the key distinctions of the recast Qualification Directive is its departure from the previous approach of setting only ‘minimum standards’. Instead, the recast Qualification Directive sets harmonized standards for both refugee status and subsidiary protection. These standards aim to create a consistent framework for recognizing and protecting refugees and beneficiaries of subsidiary protection throughout the European Union.⁸⁰ By providing clear and comprehensive guidelines for the qualification process and the content of the protection granted, this Qualification Directive seeks to enhance the effectiveness and fairness of asylum procedures within the EU. It contributes to the overarching goal of promoting human rights, dignity and solidarity in the treatment of asylum seekers and refugees across member states, as reaffirmed in the Recast Qualification Directive.⁸¹

The Refugee Convention and its accompanying agencies and protocols establish a distinct framework tailored for Palestine refugees, featuring an exclusionary provision – Article 1D of this Convention. This provision functions as one of the grounds for exclusion from the refugee definition. Similarly, Article 12(1)(a) of the recast Qualification Directive⁸² also incorporates a comparable exclusion clause. Article 12(1)(a) states:

‘A third country national or a stateless person is excluded from being a refugee if he or she falls within the scope of Article 1D of the Refugee Convention, relating to protection

⁸⁰ Daniel Thym, Kay Hailbronner (eds.), ‘EU immigration and Asylum law’, (C.H. Beck/Hart/Nomos), Published online february 27, 2023, p. 3144

⁸¹ 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) [2011] OJ L337/9, recitals 16–17.

⁸² Directive 2011/95/EU (Recast) 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 [2011] OJ L337/9, art 12(1)(A).

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. ”

3.3 Legal analysis of EU Asylum law and its connection to Article 1D of the Refugee Convention

Article 78(1) of the Treaty on the Functioning of the European Union (TFEU)⁸³ establishes the EU’s commitment to harmonizing its asylum policies with international standards. The article states:

“The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy 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. ”

This provision forms the foundation for the EU’s alignment of its asylum laws with international law, specifically requiring compliance with the Refugee Convention and the 1967 Protocol. By mandating compliance with these key international agreements, as well as the principle of non-refoulement, Article 78(1) TFEU underscores the EU's obligation to ensure that individuals who seek refuge within its borders receive protection consistent with internationally recognized standards.

The 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* presented by the Commission of European Communities (further the Commission) in 2001⁸⁴ is part of the foundation for a Common European Asylum System

⁸³ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 78(1).

⁸⁴ Commission of the European Communities, ‘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, 2001/0207 (CNS), 12 September 2001.

(CEAS), which is intended to be "based on the full and inclusive application of the 1951 Refugee Convention."⁸⁵

In the proposal under *Commentary on Articles* in Chapter 1, Article 14, the Commission outlines the grounds for exclusion from refugee status. The Qualification Directive adopts the exclusion clause from Article 1D of the Refugee Convention. It acknowledges the EU's intent to align its asylum policies with the principles outlined in Article 1D of the Refugee Convention, especially concerning Palestinian refugees receiving protection from UNRWA.

Article 12(1)(a) of the Qualification Directive largely repeats the text of Article 1D of the Refugee Convention and does not offer further clarification or additional criteria. Both articles are nearly identical in their wording, stating that individuals who previously received protection or assistance from other UN agencies (such as UNRWA) are excluded from refugee status under this legislation, unless that protection has ended and their position has not been definitively settled.

In essence, Article 12(1)(A) of the Qualification Directive mirrors Article 1D of the Refugee Convention without providing any added explanation. They both state that if protection from a UN agency (other than UNHCR) ceases without the individual's status being definitively resolved, those individuals are "ipso facto" entitled to the benefits of the Qualification Directive or the Refugee Convention. There are no additional criteria or extra clarifications in Article 12(1)(A) of the Qualification Directive about the circumstances under which protection ceases or what exactly is meant by the "definitive settlement" of these individuals' position. It simply adopts the exclusion and inclusion clause as established in Article 1D Refugee Convention.

Thus, Article 12(1)(A) Qualification Directive does not offer explicit clarification or further interpretation. It makes it effectively a copy without additional legal interpretation or criteria, with EU legislation fully conforming to the conditions set forth in the original Refugee Convention.

⁸⁵ Ibid, p 4.

3.4 Core provisions of the Qualification Directive addressed in subsequent case law: the *Bolbol* case⁸⁶, the *El Kott* case⁸⁷ and Case C-563/22⁸⁸

This section provides an overview of the core provisions of the Qualification Directive that are important in shaping EU asylum law and are addressed in the case law. These provisions, which establish the criteria and procedures for granting international protection, are crucial for understanding how the courts in the EU member states interpret and apply refugee law. Chapter 4, on case law, will delve deeper into the specific cases.

Article 12(1)(a)⁸⁹ of the Qualification Directive is central to the findings of the Court of Justice in the *Bolbol* and *El Kott* cases and Case C-563/22 as it clarifies the scope of the exclusion clause for those receiving protection or assistance from UN agencies other than the UNHCR. It explicitly refers to Article 1D of the Refugee Convention in these cases. Articles 2(c) to (i)⁹⁰ of the Qualification Directive provide critical definitions for understanding who qualifies as a refugee or a person eligible for subsidiary protection under EU law. These definitions align with the Refugee Convention, but also expand on the criteria for subsidiary protection, which is relevant in cases where individuals do not meet the strict criteria for refugee status but still need protection. Article 13 of the Qualification Directive⁹¹ mandates that member states grant refugee status to those who qualify under the criteria in Article 6-10 of the Qualification Directive. This provision underscores the importance of standardized recognition across EU member states, ensuring that qualifying individuals receive the necessary protection irrespective of which member state has assessed the application. Article 21(1) of the Qualification Directive⁹² reinforces the principle of non-refoulement, ensuring that individuals who qualify for protection are not returned to places where they face serious threats to their life or freedom. This principle is crucial in the context of the *Bolbol* case because it addresses the safety and protection needs of Palestinian refugees who might otherwise be excluded under Article 12(1)(a) of the Qualification Directive. Ensuring non-

⁸⁶ CJ EU 17 June 2010, Case C-31/09, *Bolbol v Bevéndorlási és Állampolgársági Hivatal*, ECLI:EU:C:2010:351.

⁸⁷ CJ EU 19 December 2012, Case C-364/11, *Abed El Karim El Kott e.a v Bevéndorlási és Állampolgársági Hivatal*, ECLI:EU:C:2012:826.

⁸⁸ CJ EU 13 June 2024, Case C-563/22, *SN LN v Zamestnik-predsedaťel na Darzhavna agentsia za bezhantsite*, ECLI:EU:C:2024:494.

⁸⁹ Council Directive 2011/95/EU 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) [2011] OJ L 337/9, art 12(1)(a).

⁹⁰ *Ibid*, arts 2(c)-(e).

⁹¹ *Ibid*, art 13.

⁹² *Ibid*, art 21(1).

refoulement is a fundamental aspect of international refugee law, which guarantees that individuals are not forced to return to situations where they risk persecution.

In the CJEU's decision in the *Bolbol* case, some key legal principles are formulated that are relevant in understanding what the legal protection gap is for Palestinian refugees. In this section those principles will be covered, but the content and implications of this decision will be examined further in Chapter 4.

Distinctly different from the above view of UNHCR, in *Bolbol*, the CJEU provided a foundational interpretation of Article 12(1)(A) of the Qualification Directive by concluding that only those Palestinians actively receiving UNRWA assistance are covered by the exclusion clause (so, not those who are merely eligible). The Court of Justice stated that Palestinians who have actually availed themselves of UNRWA assistance or protection are considered to fall under the exclusion of Article 1D of the Refugee Convention.⁹³ This reading is more restrictive than that of the UNHCR, as it excludes individuals who are merely eligible for assistance but did not actually avail themselves thereof, as this reading narrows the scope of Article 1D of the Refugee Convention within the context of the EU. Fewer Palestinian refugees qualify under the protection regime, meaning that if assistance ceases for 'any reason' they will not automatically fall under the protection of the inclusion clause of Article 1D and thus the protection of the Refugee Convention. Including both Palestinians who are eligible and those who are actually receiving protection or assistance from UNRWA ensures that their status as refugee remains recognized. If their status as refugee is not recognized, it is not possible to receive the protection offered by Article 1D of the Refugee Convention. This creates a protection gap for Palestinians fleeing to an EU member state, who have not been able to get, or needed protection of UNRWA, as the CJEU interprets Article 12(1)(a) of the Qualification Directive in a narrow and restrictive way.

The second paragraph of Article 1D of the Refugee Convention and the second sentence of Article 12(1)(a) of the Qualification Directive contain an inclusion clause: "if protection has ceased 'for any reason', these persons shall ipso facto be entitled to the benefits of the Convention" and, in the case of Article 12(1)(a), that the Qualification Directive. According to the UNHCR, this phrase should be interpreted broadly. UNHCR states that this includes instances in which UNRWA ceases to function as an agency, if UNRWA's operations are

⁹³ CJ EU, 17 June 2010, Case C-31/09 *Bolbol v Bevándorlási és Állampolgársági Hivatal*, ECLI:EU:C:2010:351 [53].

halted or an individual is unable to access UNRWA's protection or assistance due to circumstances beyond their control.⁹⁴ The CJEU has adopted a similar interpretation of the inclusion clause,⁹⁵ which will be explained in Chapter 4.

3.5 The protection gap: a general summary

The protection gap for Palestinian refugees stems from a unique exclusion in the international refugee protection system. Under Article 1D of the Refugee Convention, Palestinians receiving aid or who are eligible for aid from UNRWA are not granted the same protection and rights afforded to other refugees under the Refugee Convention as the exclusion clause effectively prevents Palestinian refugees from accessing the full scope of rights and the legal status that are typically available to refugees under that Convention.

UNRWA's mandate is limited to providing temporary humanitarian assistance, not durable solutions like resettlement or integration, which would grant Palestinian refugees stability and legal protection. This limited mandate leaves Palestinians without long-term options for protection, creating a practical problem of insufficient support. In the context of the EU, the roots of this issue are legal: a more restrictive interpretation of Article 12(1)(a) of the Qualification Directive (which mirrors Article 1D of the Refugee Convention) by the CJEU which narrows the scope of protection for Palestinian refugees.

According to the UNHCR, the exclusion clause in Article 1D of the Refugee Convention should be interpreted broadly to include both those actively receiving UNRWA assistance and those eligible to receive it, with the intent of ensuring continuity of protection. This interpretation aligns with the dual purpose that provision: (i) to prevent overlapping mandates between UN agencies and (ii) to secure protection for Palestinian refugees. However, the CJEU's interpretation of Article 12(1)(a) of the Qualification Directive is more restrictive; applying the exclusion clause only to Palestinians who are actively receiving assistance.

⁹⁴ UNHCR, Note on UNHCR's Interpretation of Article 1D of the 1951 Convention Relating to the Status of Refugees and Article 12(1)(a) of the EU Qualification Directive in the Context of Palestinian Refugees Seeking International Protection (May 2013).
<https://www.refworld.org/policy/legalguidance/unhcr/2013/en/41179?prevDestination=search&prevPath=/search?keywords=article+1D&order=desc&sort=score&result=result-41179-en>, accessed 1 November 2024, p 4.

⁹⁵ Ibid, p 5.

It is well documented that it is often challenging and, in some cases, impossible for Palestinian refugees to fully access the assistance and protection provided by UNRWA. Several factors contribute to these difficulties. First, accessing UNRWA services can be particularly challenging in conflict zones like Gaza, where safety concerns and destroyed infrastructure hinder the ability of refugees to reach UNRWA facilities. Second, Palestinian refugees often face systemic discrimination in host countries. For example, in Lebanon, they are required to obtain permits to leave their refugee camps,⁹⁶ severely restricting their mobility and access to essential services. Third, UNRWA frequently struggles with financial shortages,⁹⁷ which directly impact the agency's ability to provide adequate assistance and protection. For instance, the agency relies heavily on voluntary contributions from UN member states, which can fluctuate due to political priorities, economic crises, or donor fatigue. This inconsistent funding can lead to the reduction or suspension of key services, even for registered refugees. Fourth and very important, recent developments in UNRWA's area of assistance greatly reduced UNRWA's capability to provide any meaningful assistance and/or protection at all. For example, funding suspensions have constrained UNRWA's capacity to fulfill its mandate. Allegations linking UNRWA staff to militant groups have led several donor countries to suspend financial contributions, substantially weakening the agency's ability to provide vital services to Palestinian refugees.⁹⁸

Restricting eligibility for assistance under the Refugee Convention only to those who can actively make use of UNRWA's services excludes many Palestinian refugees who may have valid reasons for not doing so, as outlined above. When Palestinians who are otherwise 'eligible' are excluded from the Refugee Convention under Article 1D of the Refugee Convention or Article 12(1)(a) of the Qualification Directive, they can regain inclusion through the inclusion clause found in the second part of both provisions. This applies if UNRWA assistance has ceased, making them *ipso facto* entitled to the benefits of the Refugee Convention and, in the EU context the Qualification Directive.

The inclusion clause in the second paragraph of Article 1D of the Refugee Convention and the corresponding phrase in Article 12(1)(a) of the Qualification Directive state that if

⁹⁶ Human Rights in Lebanon <https://en.wikipedia.org/wiki/Human_rights_in_Lebanon> accessed 10 November 2024

⁹⁷ UN News, 'UNRWA Faces Worst Financial Crisis in History, Spokesperson Warns' (30 June 2023)

<<https://news.un.org/en/story/2023/06/1137297>> accessed 10 December 2024.

⁹⁸ UNRWA Chief Philippe Lazzarini on the U.N. Agency's Future in Gaza

(Time) <<https://time.com/7178297/philippe-lazzarini-unwra-interview/>> accessed 13 March 2025

UNRWA's protection ceases "for any reason," Palestinians should automatically be entitled to the Refugee Convention's benefits, which are also found in the Qualification Directive. The UNHCR interprets this phrase broadly to include situations where UNRWA halts operations, ceases functioning as an agency, or when an individual cannot access its assistance due to external factors. Although the CJEU has generally aligned with this broader interpretation, a gap continues to exist due to its restrictive view on who qualifies under the exclusion clause.

In essence, the protection gap for Palestinian refugees results from a combination of UNRWA's limited mandate and a narrow legal framework that restricts the protection available to Palestinians under Article 1D of the Refugee Convention and, in the context of the EU, Article 12(1)(a) of the Qualification Directive. This legal and practical gap leaves many Palestinian refugees without a durable and effective means of protection under international and EU law.

While the CJEU's narrow interpretation of the exclusion clause in Article 12(1)(a) of the Qualification Directive may limit protection for many Palestinian refugees, it is important to note that these individuals can still pursue protection under Article 1A of the Refugee Convention or through subsidiary protection, if they meet the criteria. However, this route is not a comprehensive solution to the protection gap, as it still leaves Palestinian refugees without full recognition and protection under the exclusion clause provisions.

In conclusion, the two sub-questions presented in the introduction to this chapter, *to what extent has Article 1D of the Refugee Convention been incorporated into EU asylum law? And how does the exclusionary aspect in both legal frameworks (the Qualification Directive and the 1951 Convention Relating to the Status of Refugees) compare for Palestinian refugees seeking refugee protection?* need to be answered. The answer to the first question is that the incorporation of international law into EU asylum law is extensive, primarily by recognizing that the Refugee Convention and its 1967 Protocol are the cornerstones of the CEAS. The CEAS and its legislative instruments, including the Qualification Directive, reflect the EU's commitment to upholding international standards in refugee protection. This alignment ensures that EU asylum law adheres to the principles and protection established by international law, thereby providing a cohesive and comprehensive legal framework. Both the Qualification Directive and the Refugee Convention include an exclusion clause that impact Palestinian refugees. Article 12(1)(a) of the Qualification Directive and Article 1D of the

Refugee Convention both exclude individuals receiving assistance from UN agencies other than the UNHCR, specifically targeting those under the mandate of UNRWA. However, the interpretation by the UNHCR of these clauses differs from that of the CJEU. The UNHCR's interpretation of Article 1D of the Refugee Convention and in its slipstream Article 12(1)(a) of the Qualification Directive is broader than that of the CJEU as it includes not only those Palestinians who are actively receiving assistance but also those eligible for protection or aid from UNRWA. This broad interpretation aims to ensure the continuity of protection for Palestinian refugees by preventing a gap in their legal status if they are eligible for assistance but are not receiving it. In contrast, the CJEU's interpretation is narrower, as seen in the *Bolbol* case, as that Court ruled that only those actively receiving assistance from UNRWA are excluded from refugee status under Article 12(1)(a) of the Qualification Directive. This restrictive interpretation effectively narrows the scope of protection available under EU law, excluding Palestinian refugees who are eligible for assistance but not currently receiving it.

Chapter 4. Key Case Law and Legal Precedents

4.1 Introduction

Case law is highly relevant in understanding the application of the exclusion clause in the 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 (further Qualification Directive) and, in its slip stream, the 1951 United Nations Convention Relating to the Status of Refugees (further Refugee Convention) for several reasons. Authoritative interpretations by the Court of Justice of the European Union (further Court of Justice or CJ EU) on the Qualification Directive and the exclusion (and inclusion) clause help clarify the scope and the intent of the legislation, ensuring consistent and uniform application across the member states of the European Union (EU). Moreover, case law elucidates how the exclusion clause in the Qualification Directive is applied in practice. In the context of EU law, national courts are asked to assess whether individuals receiving protection from agencies like UNRWA should be excluded from refugee status under the Qualification Directive. Additionally, case law can highlight gaps or ambiguities in the (interpretation of) provisions in the Qualification Directive.

The adoption of the Qualification Directive requires the Court of Justice to indirectly interpret provisions in the Refugee Convention, as this Convention is the backbone of the Qualification Directive.⁹⁹ One notable provision that the Court of Justice has had the chance to clarify is Article 1D of the Refugee Convention, which pertains to the status of Palestinian refugees.¹⁰⁰ Through landmark cases such as *Bolbol*¹⁰¹ and *El Kott*,¹⁰² that Court has refined the interpretation of Article 1D of the Refugee Convention. Although the Court of Justice's rulings potentially lead to a consistent interpretation and application of Article 1D of the Refugee Convention among member states, there is a concern that national courts may apply these decisions in a manner that restricts refugee flows, leading to the development of more restrictive criteria.¹⁰³ If national courts interpret Court of Justice rulings restrictively, this can

⁹⁹ Marguerite Perin, 'European and International Law and Palestinian Refugees: Bolbol, El Kott and the Application of Article 1D of the Geneva Convention' (2014) 3 UCLJLJ, p 87.

¹⁰⁰ Ibid.

¹⁰¹ CJ EU 17 June 2010, Case C-31/09 *Bolbol v Bevándorlási és Állampolgársági Hivatal* ECLI:EU:C:2010:351.

¹⁰² CJ EU Case C-364/11 *Abed El Karim El Kott e.a v Bevándorlási és Állampolgársági Hivatal* ECLI:EU:C:2012:826.

¹⁰³ Marguerite Perin, 'European and International Law and Palestinian Refugees: Bolbol, El Kott and the Application of Article 1D of the Geneva Convention' (2014) 3 UCLJLJ, p 87.

lead to fewer instances where Palestinian individuals, who are typically excluded under international law, receive protection in an EU member state.

This chapter directly addresses the question: *how has case law influenced the protection of Palestinian refugees under EU asylum law?* This chapter outlines three key cases that illustrate the application of legal provisions related to the status of Palestinian refugees in the Qualification Directive and the Refugee Convention. The cases I will be elaborating on and which were introduced briefly in Chapter 3, are the *Bolbol* case, the *El Kott* case and Case C-563/22. Each of these cases provides significant insights into how the Court of Justice of the European Union interprets and applies Article 1D of the Refugee Convention or Article 12(1)(a) of the Qualification Directive. By examining these cases, a comprehensive understanding can be gained of how the CJEU has shaped the application of the Qualification Directive and Article 1D of the Refugee Convention. The aforementioned *Bolbol* and *El Kott* cases and the *SN & LN* (C-563/22) case¹⁰⁴ provide a framework for analyzing how Palestinian refugees can navigate the legal landscape of EU asylum law. These cases show that, despite the potential exclusion under Article 1D of the Refugee Convention or Article 12(1)(a) of the Qualification Directive, there are circumstances under which Palestinian refugees can be granted not only protection but also other rights and benefits typically afforded to refugees provided for in these legal acts.

4.2 The *Bolbol* Case

4.2.1 The Facts

In the case of Ms Bolbol, it was the first time that the Court of Justice considered and interpreted Article 12(1)(a) of the Qualification Directive. In this case, Ms. Bolbol, a stateless person of Palestinian origin, challenged the decision of the Hungarian Office for Immigration and Citizenship (Bevándorlási és Állampolgársági Hivatal; ‘BAH’) to deny her application for refugee status. Ms Bolbol left the Gaza Strip and arrived in Hungary with a visa on 10 January 2007, where she received a residence permit from the immigration authority.¹⁰⁵ On 21 June 2007, she applied for asylum to BAH, invoking the unsafe situation in the Gaza Strip caused by daily clashes between Fatah and Hamas. She based her application on the second

¹⁰⁴ CL EU 13 June 2024, Case C-564/22, *SN, LN v Zamestnik-predsedaťel na Darzhavna agentsia za bezhantsite*, ECLI:EU:C:2024:494.

¹⁰⁵ CJ EU 17 June 2010, Case C-31/09 *Bolbol v Bevándorlási és Állampolgársági Hivatal* ECLI:EU:C:2010:351 [25].

subparagraph of Article 1D of the Refugee Convention. She argued that she was a Palestinian living outside UNRWA's area of operations. The only family member residing in the Gaza Strip was her father. Her application was denied because Ms Bolbol did not leave her country of origin owing to persecution for reasons of race, religion, nationality or because of political persecution as defined in Article 1A of the Refugee Convention.¹⁰⁶ BAH argued that Article 1D of the Refugee Convention does not automatically confer refugee status but merely outlines the scope of that Convention.¹⁰⁷

Ms. Bolbol challenged the BAH's decision because she believed she was entitled to refugee protection under the second subparagraph of Article 1D of the Refugee Convention, as she was a Palestinian residing outside UNRWA's area of operations and claimed to be entitled to protection and assistance under the Refugee Convention.¹⁰⁸ Ms. Bolbol argued that her specific circumstances, as a displaced Palestinian, warranted special protection under Article 1D of the Refugee Convention and that the BAH's decision failed to properly consider this provision. The Budapest Municipal Court stayed the proceedings and referred the case to the Court of Justice, requesting a clarification of the interpretation of Article 12(1)(a) of the Qualification Directive.

Although the national court had referred three questions to the Court of Justice, in its judgment, that Court only answered the first question, which stated: 'Must someone be regarded as a person receiving the protection and assistance of a United Nations agency merely by virtue of the fact that he is entitled to assistance or protection or is it also necessary for him to actually avail himself of that protection or assistance?''¹⁰⁹ The Court of Justice clarified that the interpretation of Article 12(1)(a) of the Qualification Directive relies on the context provided by Article 1D of the Refugee Convention, which applies only to those who have actually availed themselves of UNRWA's protection or assistance, and it does not cover individuals merely entitled to such assistance.¹¹⁰ Since Ms Bolbol had not availed herself of UNRWA's assistance, she did not fall under the exclusion clause of Article 12(1)(a) of the Qualification Directive. Her application for refugee status therefore needed to be examined based on the general criteria for refugee status under Article 1A of the Refugee Convention.

4.2.3 Analysis of the Bolbol Case

¹⁰⁶ Ibid., cons 29.

¹⁰⁷ Ibid., cons 32.

¹⁰⁸ Ibid., cons 31.

¹⁰⁹ Ibid., cons 35.

¹¹⁰ Ibid., cons 51.

The Court of Justice clarified that the interpretation of Article 12(1)(a) of the Qualification Directive relies on the context provided by Article 1D of the Refugee Convention, which applies only to those who have actually availed themselves of UNRWA's protection or assistance. This interpretation is based on the clear wording of that provision, which excludes from the Convention's protection those who are "at present receiving" protection or assistance from UNRWA. The Court of Justice emphasized that this exclusion must be construed narrowly, thereby excluding only those who are actively receiving assistance. The Court of Justice further explained that persons who are merely entitled to assistance from UNRWA but have not actually received it are not covered by the exclusion clause. Therefore, applications made by these individuals need to be assessed by the member states with a view to establishing whether they are eligible for refugee status under the general criteria of the Refugee Convention as incorporated into the Qualification Directive.

This interpretation ensures that individuals who have not received adequate protection or assistance from UNRWA can seek international protection under the EU asylum system. The Court of Justice's ruling in the *Bolbol* case has significantly shaped the understanding of effective protection or assistance and the circumstances under which Palestinian refugees can claim protection under the Qualification Directive. By establishing that the exclusion clause in Article 12(1)(a) of the Qualification Directive, as informed by Article 1D of the Refugee Convention, applies only to those who have actually availed themselves of UNRWA's assistance, the Court of Justice has provided a clearer framework for assessing the eligibility of Palestinian refugees for international protection in the EU. This ruling ensures that Palestinian refugees who have not received UNRWA assistance are not automatically excluded from seeking protection under the EU asylum system. It recognizes that the mere entitlement to UNRWA assistance is insufficient for exclusion; actual receipt of such assistance is required.

According to the Opinion of Advocate General Sharpston, presented on 4 March 2010,¹¹¹ there are two scenarios for the cessation of UNRWA's protection or assistance. Firstly, persons who remove themselves voluntarily from the UNRWA zone and thereby from UNRWA's assistance.¹¹² These persons are not ipso facto entitled to the benefits of the Refugee Convention because they have chosen to place themselves in a situation in which

¹¹¹, Opinion AG Sharpston, 4 March 2010, Case C-31/09 *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal* ECLI:EI:C:2010: 119.

¹¹² *Ibid.*, para 82.

UNRWA cannot provide protection or assistance.¹¹³ They are, according to her, at liberty to ask for an individual assessment based on Article 1A of the Refugee Convention.¹¹⁴ This scenario aligns with the exclusion clauses in Article 1D of the Refugee Convention and Article 12(1)(a) of the Qualification Directive. However, these individuals can still request an individual assessment based on Article 1A of the Refugee Convention, which opens a potential pathway for asylum but does not guarantee it.

The second scenario concerns persons who involuntarily lose UNRWA's assistance due to circumstances beyond their control.¹¹⁵ These persons are ipso facto entitled to the benefits of the Refugee Convention. This interpretation directly impacts the application of the exclusion clauses, as it provides a clear criterium to determine when these clauses no longer apply, thus allowing such individuals to qualify for refugee status under the Qualification Directive.

4.3 *The El Kott Case*

4.3.1 *The Facts*

The *El Kott* case¹¹⁶ concerns the interpretation of Article 12(1)(a) of the Qualification Directive, specifically how it applies to three stateless men of Palestinian origin: Mr. Abed El Karem El Kott, Mr. A Radi, and Mr. Kamel Ismail. These men sought asylum in Hungary after fleeing violent and life-threatening conditions in UNRWA refugee camps in Lebanon. The Office for Immigration and Citizenship (BAH) in Hungary refused to grant them refugee status, leading them to seek judicial review of this decision.

The situation for Mr. Abed El Karem El Kott when he lived at the Ein El-Hilweh UNRWA refugee camp in Lebanon was difficult. His house was burned down, and he received threats from a terrorist group called Jund El-Sham.¹¹⁷ Because of this, he fled Lebanon and applied for asylum in Hungary. The BAH did not recognize him as a refugee but ordered that he should not be returned to Lebanon according to the principle of non-refoulement.¹¹⁸ The home of Mr. A Radi in the Nahr el-Bared UNRWA refugee camp was destroyed during fights between the Lebanese army and Fatah. He and his family then fled to a contact person in

¹¹³ Ibid., para 83.

¹¹⁴ Ibid.

¹¹⁵ Ibid., para 82.

¹¹⁶ CJ EU Case C-364/11 *Abed El Karim El Kott e.a v Bevándorlási és Állampolgársági Hivatal* ECLI:EU:C:2012:826.

¹¹⁷ CJ EU Case C-364/11 *Abed El Karim El Kott e.a v Bevándorlási és Állampolgársági Hivatal* ECLI:EU:C:2012:826, cons 27.

¹¹⁸ Ibid., cons 28.

Tripoli (Lebanon), where they were tortured and humiliated by Lebanese soldiers.¹¹⁹ Mr A Radi left Lebanon with his father and fled to Hungary, seeking asylum. The BAH did not recognize as him a refugee but also ordered for him not to be returned.¹²⁰ In the case of Mr Kamel Ismail, he lived in the Ein El-Hilweh camp where extremists threatened him, suspecting him of being an ‘enemy agent’ during armed clashes between Fatah and Jund el-Sham. As a result, he fled to Beirut and then to Hungary, seeking asylum in that country.¹²¹ The BAH did not recognize him as a refugee but granted him and his family subsidiary protection.¹²² All three men filed an appeal with the referring court challenging the refusal to recognize them as refugees within the meaning of the Refugee Convention.

The applicants argue that, in their situation, since UNRWA protection has ceased, as defined in the second subparagraph of Article 1D of the Refugee Convention (and the second sentence of Article 12(1)(a) of the Qualification Directive), they are automatically entitled to be recognized as refugees under that provision. The Metropolitan Court of Budapest joined the three cases and referred two questions to the Court of Justice. The first question is: ‘Do the benefits of the Directive mean recognition as a refugee, or either of the two forms of protection covered by the Directive (recognition as a refugee and the grant of subsidiary protection), according to the choice made by the member state, or, possibly, neither automatically but merely inclusion within the scope *ratione personae* of the Directive?’¹²³

The second question referred to the Court of Justice is: ‘Does cessation of the agency’s protection or assistance mean residence outside the agency’s area of operations, cessation of the agency and cessation of the possibility of receiving the agency’s protection or assistance or, possibly, an involuntary obstacle caused by legitimate or objective reasons such that the person entitled thereto is unable to avail himself of that protection or assistance?’¹²⁴

The Court of Justice in its ruling clarified that a correct interpretation of Article 12(1)(a) of the Qualification Directive is that the cessation of UNRWA’s assistance includes situations where the person is forced to leave the area of operations due to circumstances beyond his or her control.¹²⁵ This means that if a Palestinian refugee is forced to leave UNRWA’s area of operations because their personal safety is at serious risk and UNRWA cannot guarantee adequate living conditions, the assistance is considered to have ceased.¹²⁶ Mere voluntary

¹¹⁹ Ibid., cons 30.

¹²⁰ Ibid., cons 31.

¹²¹ Ibid., cons 32.

¹²² Ibid., cons 33.

¹²³ Ibid., cons 41.

¹²⁴ Ibid., cons 41.

¹²⁵ Ibid., cons 58.

¹²⁶ Ibid., cons 63.

departure from UNRWA's area of operations does not constitute cessation of assistance.¹²⁷ The person must have left due to reasons beyond his or her control for the cessation clause to apply. The Court of Justice ruled that if UNRWA's assistance has ceased involuntarily, the individuals concerned are entitled to the benefits of the Qualification Directive and member states must recognize them as refugees, provided they meet the conditions as set out in the Qualification Directive to qualify for refugee status.¹²⁸

4.3.2 Analysis of the *El Kott* Case

The Court of Justice's interpretation of Article 12(1)(a) of the Qualification Directive in the *El Kott* case clarifies that involuntary cessation of UNRWA assistance entitles Palestinians to the benefits of the Qualification Directive, including refugee status, if they meet all the criteria. The ruling ensures that Palestinian refugees who are forced to leave UNRWA areas due to serious risks to their personal safety are not left without protection. They can seek asylum under the Qualification Directive and receive the same protections as other refugees under the Refugee Convention. The decision underscores that the exclusion from refugee status under Article 12(1)(a) of the Qualification Directive does not apply to those who involuntarily cease receiving UNRWA assistance, thereby ensuring that they are not denied protection under the Qualification Directive.

4.4 Case C-563/22

4.4.1 The Facts

In *SN, LN v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite* (Case C-563/22)¹²⁹ the Court of Justice clarified the application of Article 12(1)(a) of the Qualification Directive. In this case, SN and her minor child, LN, both stateless persons of Palestinian origin, left Gaza in July 2018. They first stayed in Egypt for 45 days before traveling to Türkiye, where they remained for seven months. Subsequently, they entered Bulgaria illegally by passing through Greece, accompanied by KN, SN's husband and LN's father.¹³⁰ Their initial application for international protection, filed in March 2019 with the Bulgarian authorities,

¹²⁷ Ibid., cons 49.

¹²⁸ Ibid., cons 76.

¹²⁹ CJ EU Case C-563/22 *SN LN v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite* [2024] ECLI:EU:C:2024:494.

¹³⁰ Ibid., cons 22.

was based on the instability and poor living conditions in Gaza, including armed conflicts, rocket fire from Israel, and internal tensions between Fatah and Hamas. They also cited specific threats to KN's life and damage to their home.¹³¹ In this application, they did not mention they were registered with UNRWA.¹³² Their application was rejected on July 5, 2019 by the *Darzhavna agentsia za bezhantsite* (DAB), on the grounds that SN and LN had not been forced to leave the Gaza Strip by reason of a real risk of torture, inhuman or degrading treatment, death penalty or execution or other serious threats, and that they were not at risk of facing such threats if they were to return. The DAB also stated that SN and LN had voluntarily left Gaza, and that they could have sought protection in Egypt or Türkiye.¹³³

On August 21, 2020, SN and LN filed a second application for protection, this time presenting new evidence, including proof of registration with UNRWA and details of the deteriorating humanitarian situation in Gaza. They argued that UNRWA's inability to provide adequate assistance constituted a cessation of protection under the second sentence of Article 12(1)(a) of the Qualification Directive (considerations 27–29). Despite this, the Bulgarian State Agency for Refugees rejected their application on May 14, 2021, stating that their departure from UNRWA's operational area had been voluntary and that assistance could resume if they returned to Gaza. It also stated that the general situation in Gaza did not constitute grounds for granting refugee status, as no personal persecution was evident from the facts, as presented.¹³⁴ SN and LN appealed the decision, bringing the case to the Administrative Court in Sofia, which made a preliminary reference to the Court of Justice. The questions which were sent to the Court of Justice asked it to provide clarity on:

- (1) The interpretation of Article 40 of the Procedures Directive regarding the admissibility of subsequent applications based on new evidence;
- (2) The scope of the phrase “when such protection or assistance has ceased for any reason” in Article 12(1)(a) of the Qualification Directive; and
- (3) The applicability of non-refoulement principles under the Charter of Fundamental Rights, particularly concerning extreme material poverty and the best interests of the child.¹³⁵

¹³¹ Ibid., cons 23.

¹³² Ibid., cons 24.

¹³³ Ibid., cons 25.

¹³⁴ Ibid., cons 31.

¹³⁵ Ibid., cons 41.

Of particular relevance to this thesis is the Court of Justice's answer to question (2). According to the Court of Justice, UNRWA's protection or assistance must be considered to have ceased under the second sentence of Article 12(1)(a) of the Qualification Directive when

- (i) UNRWA is unable to ensure dignified living conditions without the applicant being required to be specifically targeted by the general situation; and
- (ii) the stateless Palestinian would find himself or herself in a state of serious insecurity upon return.

According to the Court of Justice, the determination whether UNRWA's protection or assistance has ceased must be made at multiple stages: when the applicant left UNRWA's area of operations, when administrative authorities rule on their application for international protection, and when a court rules on any appeal against the rejection of an application for international protection.¹³⁶

4.2.2 Analysis of Case C-563/22

The *SN and LN* case builds on the *El Kott* case, reaffirming that Palestinian stateless persons under UNRWA's protection are ipso facto entitled to refugee status if that protection or assistance ceases. It clarifies that cessation occurs not only on an individual basis but also collectively, if UNRWA is generally unable to provide dignified living conditions. The ruling emphasizes that assessments must be current and dynamic, considering the deteriorating humanitarian situation in Gaza.

4.5 Options for Palestinian Refugees Seeking Protection in the EU: CJ EU vs. UNHCR Approach

The legal status of Palestinian refugees in the EU asylum system depends significantly on the interpretation of Article 12(1)(a) of the Qualification Directive, which incorporates Article 1D of the Refugee Convention into the EU legal framework. As explained, the Court of Justice and the UNHCR have taken diverging approaches in interpreting the exclusion clauses, leading to different levels of protection available to Palestinian asylum seekers, depending on which legal framework applies.

¹³⁶ Ibid., cons 90.

Protection under the Court of Justice's approach: The Court of Justice has adopted a restrictive interpretation of Article 12(1)(a) of the Qualification Directive, limiting the application of the exclusion clause only to Palestinian refugees actively receiving assistance from UNWRA. This approach was adopted in the *Bolbol* case and further clarified in *El Kott*. The Court of Justice's interpretation has the following implications: Palestinians who are merely "eligible" for UNWRA assistance but are not actively receiving this are not to be excluded from refugee status under Article 1D of the Refugee Convention or Article 12(1)(a) of the Qualification Directive.¹³⁷ Palestinian refugees who are merely "eligible" may apply for refugee protection under Article 1A of the Refugee Convention. This approach places a higher burden of proof on the applicant, requiring him/her to demonstrate a well-founded fear of persecution under Article 1A of the Refugee Convention. This process is often lengthy, complex and uncertain.

Protection under the UNHCR's approach: the interpretation by the UNHCR has two key effects: (1) Palestinians are not required to prove that they are actively receiving UNRWA aid to be excluded under Article 1D of the Refugee Convention. Instead, eligibility alone is sufficient to place them under UNRWA's mandate. (2) Cessation of UNRWA assistance is to be interpreted broadly, covering situations where UNRWA is unable to fulfill its mandate due to funding shortfalls, conflict, or operational limitations. This ensures automatic entitlement to protection when UNRWA's assistance ceases to exist, reducing the risk of inconsistent asylum decisions across EU member states. In practice, this would mean that Palestinian refugees seeking protection in the EU would not need to undergo an individualized risk assessment under Article 1A of the Refugee Convention, thereby closing the protection gap more effectively.

4.6 Conclusion

It is time to answer the following sub-question: *how has case law influenced the protection of Palestinian refugees under EU asylum law?* The analysis of the Court of Justice's case law in this chapter demonstrates that the Court of Justice's case law has influenced the protection of Palestinian refugees under EU asylum law as follows. The Court of Justice's rulings in, in particular, the *Bolbol*, *El Kott*, and *SN, LN* cases, has significantly shaped the legal framework governing the asylum rights of Palestinian refugees in the EU. While these rulings

¹³⁷ CJ EU Case C-31/09 *Bolbol v Bevándorlási és Állampolgársági Hivatal* [2010] ECLI:EU:C:2010:351, cons 50.

have provided clarity on the application of Article 12(1)(a) of the Qualification Directive, they have also underscored a protection gap for certain Palestinian asylum seekers.

The *Bolbol* case establishes that only Palestinian refugees who have actually availed themselves of UNRWA's assistance fall under the exclusion clause of Article 1D of the Refugee Convention and Article 12(1)(a) of the Qualification Directive. This interpretation has narrowed the scope of exclusion and left those merely eligible for UNRWA's aid without a clear entitlement to international protection. In the *El Kott* case the Court of Justice builds on this reading by ruling that Palestinian refugees whose protection or assistance by UNRWA has ceased for reasons beyond their control are *ipso facto* entitled to refugee status. This decision reinforced that forced departure from UNRWA's areas of operation due to insecurity or operational failures should lead to automatic recognition as a refugee under the Refugee Convention and the Qualification Directive. The *SN, LN* case (Case C-563/22) clarifies that UNRWA's protection ceases not only when an individual faces targeted persecution but also when general conditions prevent them from enjoying dignified living conditions. The ruling confirms that cessation assessments must be dynamic and consider changing humanitarian conditions. This strengthens access to protection for Palestinian refugees but still leaves gaps for those who voluntarily leave UNRWA's areas of operation or have not actively availed themselves of UNRWA assistance prior to their flight to the EU.

Despite these legal clarifications, a protection gap remains, primarily for Palestinian refugees who are only *eligible* for UNRWA assistance but have never formally availed themselves of it. Under the Court of Justice's approach, these individuals are not automatically excluded from protection under Article 1D of the Refugee Convention but must, instead, seek asylum under Article 1A of that Convention. By contrast, the UNHCR's approach advocates for a broader interpretation of the exclusion clause, where eligibility for UNRWA assistance should be sufficient to trigger the exclusion clause, ensuring greater access to protection when UNRWA's assistance ceases. This would prevent inconsistent asylum decisions across EU member states and align more closely with the spirit of Article 1D of the Refugee Convention, which was intended to provide uninterrupted protection to Palestinian refugees.

So, while Court of Justice's case law has provided essential legal clarity, it has not fully resolved the protection gap for Palestinian refugees who have made their way to the EU.

Chapter 5. Conclusion

5.1 Introduction

In this thesis, I sought to address the main research problem concerning the legal protection gap faced by Palestinian refugees due to the differing interpretations of Article 12(1)(a) of the Qualification Directive, as opposed to the more restrictive interpretation of the CJEU.

The key objectives were to investigate the specific group categorization of Palestinian refugees, compare the exclusionary aspects in both international and EU legal frameworks, and analyze case law to understand the practical application of these laws.

The main research question of this thesis is: *To what extent is it desirable to adopt the broader interpretation of the United Nations High Commissioner for Refugees in the application of the exclusion clause in Article 12(1)(a) of the Qualification Directive to Palestinian refugees, as opposed to the more restrictive interpretation of the Court of Justice of the European Union?*

The sub-questions used to answer the main research question are:

1. Why do Palestinians constitute a specific group within the context of refugee protection, and how does international law, particularly the 1951 Convention Relating to the Status of Refugees, categorize and frame them as a specific group?
2. To what extent has Article 1D of the Refugee Convention been incorporated into EU asylum law?
 - How does the exclusionary aspect in both legal frameworks (the Qualification Directive and the 1951 Convention Relating to the Status of Refugees) compare for Palestinians seeking refugee protection?
3. How has case law of the Court of Justice of the European Union influenced the protection of Palestinian refugees under EU Asylum Law?

5.2 Findings and conclusions

5.2.1 Specific group categorization

Palestinian refugees constitute a specific group due to their unique historical and geopolitical circumstances, rooted in the conflict and displacement events of the 20th century. The displacement caused by the 1947 United Nations (UN) Partition Plan and subsequent conflicts led to the establishment of specialized UN agencies like the UNCCP and UNRWA to address their needs. During the negotiations of the Refugee Convention, several Arab states emphasized that Palestinian refugees were a unique group, who fall directly under the responsibility of the United Nations, and should not be classified according to the conditions which apply to other refugees, as doing so would undermine this special responsibility. In contrast, European signatory states were worried about the possibility of a large influx of Palestinian refugees coming to their country. Consequently, international law, particularly the Refugee Convention, categorizes them separately through Article 1D of the Refugee Convention, which excludes them from its protections for as long as they receive aid from UN agencies like UNRWA. A key aspect of this categorization is the way that the UNHCR interprets Article 1D of the Refugee Convention. Rather than limiting the exclusion clause to those who are actively receiving assistance, UNHCR also includes individuals who are merely eligible for UNRWA's assistance within the scope of this provision.

5.2.2 Incorporation of International Law into EU Asylum Law

International law has been extensively incorporated into EU asylum law, primarily by making the Refugee Convention, the corner stone of the Common European Asylum System (CEAS). The CEAS and its legislative instruments, including the Qualification Directive, reflect the EU's commitment to uphold international standards in international protection. Both the Qualification Directive and the Refugee Convention include exclusionary clauses that impact Palestinian refugees' right to protection. Article 12(1)(a) of the Qualification Directive and Article 1D of the Refugee Convention both exclude individuals receiving assistance from UN agencies other than the UNHCR from the status of refugee within the meaning of the Refugee Convention. This alignment ensures consistency but also highlights the complexities and challenges Palestinian refugees face in accessing asylum in the EU. Article 12(1)(a) of the Qualification Directive largely mirrors Article 1D of the Refugee Convention without providing additional clarification. The Court of Justice has played a crucial role in defining how this provision is to be applied – through cases such as *Bolbol* and *El Kott*.

5.2.3 Case Law analysis

There are cases in which individuals of Palestinian origin have been granted protection under EU asylum law despite their potential exclusion under international law. Analyzing key cases, specifically the *Bolbol* and *El Kott* cases, provided interesting insights into how this exclusion provision is to be applied. In the *Bolbol* case, the Court of Justice clarified that Article 12 of the Qualification Directive applies only to those who have actually availed themselves of UNRWA's protection or assistance, ensuring that applications made by those who have not done this can still be assessed under the general criteria for refugee status.

The *El Kott* case extended this understanding by ruling that involuntary cessation of UNRWA's assistance entitles Palestinian refugees to the benefits of the Qualification Directive, including refugee status, if they meet the eligibility criteria in this Directive. This ruling ensures that Palestinian refugees forced to leave UNRWA areas due to serious risks to their personal safety are not left without protection and can seek protection under the Qualification Directive.

The more recent case of *SN, LN* clarifies that UNRWA's protection can cease not only on an individual basis but also collectively, which is the case when general conditions prevent dignified living conditions. The Court of Justice ruled that assessments must consider the ongoing humanitarian situation in UNRWA areas, meaning that even if an individual is not personally targeted, they may still qualify for protection under the Qualification Directive if returning to an UNRWA area would place them in a state of serious insecurity. If Palestinians voluntarily leave the UNRWA area of operations, they do not automatically have the right to the benefits of the Refugee Convention. However, they are at liberty to apply for protection under the Qualification Directive if they satisfy the conditions in that Directive which are taken directly from Article 1A of the Refugee Convention.

These findings contribute to the existing body of knowledge by clarifying the conditions under which Palestinian refugees are entitled to protection in the EU. Overall, the Court of Justice's interpretation of the exclusion clause in the *El Kott*, *Bolbol* and *SN, LN* cases helps bridge the protection gap and ensures that Palestinian refugees are not left without international protection when UNRWA's assistance has not started or ceases to exist. However, the restrictive interpretation of the exclusion clause still creates uncertainty for those who are merely eligible for protection but have never accessed UNRWA's services.

5.4 Conclusion

This research enhances the understanding of the legal framework and protection mechanisms for refugees within the EU, particularly for Palestinian refugees who face unique challenges due to their exclusion from the protection offered by the Refugee Convention. It underscores the importance of aligning EU asylum policies with international obligations to ensure fair treatment of all refugee groups. This brings us to the answer to the research question:

To what extent is it desirable to adopt the broader interpretation of the United Nations High Commissioner for Refugees in the application of the exclusion clause in Article 12(1)(a) of the Qualification Directive to Palestinian refugees, as opposed to the more restrictive interpretation of the Court of Justice of the European Union?

This thesis has demonstrated that the protection gap for Palestinian refugees manifests itself in multiple ways. The legal protection gap manifests itself for Palestinian refugees who are eligible for UNRWA's assistance but have not actually received it. The Court of Justice's restrictive approach in *Bolbol* and *El Kott* mean that only those who have actively availed themselves of UNRWA's assistance fall under the exclusion clause in Article 12(1)(a) of the Qualification Directive. As a result, Palestinians who are merely eligible for UNRWA's assistance but have been unable to access it due to external factors are excluded from automatic protection under the Qualification Directive. Instead of benefiting from the ipso facto recognition that follows from the cessation of UNRWA assistance, these individuals must apply for asylum and their applications will be assessed according to the Qualification Directive that mirrors the conditions in Article 1A of the Refugee Convention. While this route technically works, it introduces several problems. The process to qualify as a refugee is long and uncertain. It requires an individualized assessment, placing a higher burden of proof on Palestinian refugees and there is an inherent risk that EU member states apply different standards. This can lead to inconsistencies in asylum decisions. The UNHCR's broader interpretation ensures greater legal continuity for Palestinian refugees by considering both those who are actively receiving and those eligible for UNRWA assistance under the exclusion clause. It also advocates for a more expansive reading of the inclusion clause, ensuring that when individuals who are eligible but are unable to access UNRWA's assistance

are automatically entitled to protection under the Refugee Convention and in its slipstream the Qualification Directive when that assistance ceases to exist.

While Article 1D of the Refugee Convention was originally intended to ensure continuous protection for Palestinian refugees, the way it has been interpreted and applied – particularly by the Court of Justice- has resulted in disparities between its intended function and its effects. Article 1D of the Refugee Convention was designed to guarantee that Palestinian refugees under UNRWA's mandate would not be left without protection. However, the restrictive interpretation of Article 12(1)(a) of the Qualification Directive, which mirrors Article 1D of the Refugee Convention, by the Court of Justice has led to a disconnect between the original intent of this provision and its practical application. Instead of ensuring automatic protection, it has introduced new exclusionary barriers for a certain group of Palestinian refugees, particularly those who are eligible for UNRWA's assistance but have not actively received it.

Beyond the legal inconsistencies, there is also a practical protection gap for Palestinian refugees under UNRWA's mandate. Even those who actively receive UNRWA assistance often do not benefit from the same durable solutions as other refugees under UNHCR protection. UNRWA's mandate is limited to humanitarian aid, meaning that it does not provide legal protection, resettlement options or long-term solutions. Palestinian refugees under UNRWA continue to be excluded from international refugee protection, leaving them without meaningful alternatives when UNRWA assistance fails to meet their needs. Therefore, Palestinian refugees are subjected to an unjust and inconsistent protection framework, as evidenced by legal exclusions, procedural obstacles, practical limitations on UNRWA's assistance and the overall inequality in their access to international refugee protection compared to other refugee groups.

The analysis in this thesis reveals the desirability of adopting the broader interpretation of the UNHCR in the application of the exclusion clause in Article 12(1)(a) of the Qualification Directive. From a legal and humanitarian perspective, adopting the UNHCR's broader interpretation is highly desirable. It will ensure legal certainty and continuous protection of Palestinians. A broader interpretation will also reduce the risk of inconsistent asylum decisions in the EU, thus it will enhance legal certainty for Palestinian asylum seekers, and prevent situations where individuals are left without effective protection.

5.5 Recommendation: adoption of the UNHCR approach

To effectively address the legal protection gap for a certain group of Palestinian refugees, it is recommended that the Court of Justice adopts a broader interpretation of the exclusion and inclusion clauses in Article 12(1)(a) of the Qualification Directive, aligning with the UNHCR's approach. The UNHCR's interpretation ensures continuity of protection by including both those who are actively receiving and those who are merely eligible for UNRWA assistance under the exclusion clause.

This broader approach prevents the risk of certain groups of Palestinian refugees falling through the cracks of the protection system. Specifically, it avoids scenarios where Palestinians lose access to ipso facto protection under the Refugee Convention when UNRWA assistance ceases, leaving them reliant on individual assessments under Article 1A of the Refugee Convention or, in the EU context, the Qualification Directive. By ensuring automatic entitlement to protection when UNRWA assistance ceases "for any reason", this interpretation strengthens legal recognition and ensures consistent treatment for Palestinian refugees across EU member states.

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