

PALESTINIANS AND THE SEARCH FOR PROTECTION AS REFUGEES AND STATELESS PERSONS



Palestinians and the Search for Protection as Refugees and Stateless Persons

June 2022

ISBN: 978-9950-339-63-7

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BADIL Resource Center

for Palestinian Residency and Refugee Rights



European
Network on
Statelessness

Cover Image Source: https://unsplash.com/photos/m8VI9_5oDzI

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This report is based in part on previous publications, including: Cynthia Orchard, Case note: '*Germany v XT* (CJEU, 2021): Palestinian Refugees, UNRWA, and Article 1D of the Refugee Convention,' [Statelessness and Citizenship Review](#) (July 2021); Cynthia Orchard, 'Palestinian Refugees: How Article 1D of the Refugee Convention Applies' (Immigration Law Practitioners' Association, 25 Feb 2016, available to ILPA members [here](#)); and Susan Akram and Nidal Al-Azza (eds), *Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention* (2nd ed) (BADIL, Feb 2015) (with which Cynthia assisted).

Many thanks to Nidal al-Azza and others at BADIL for initiating and guiding this research; and to Susan Akram, Lubnah Shomali, Saif Kassis, Patricia Cabral, Nina Murray, Marjan Claes, and Jesús Tolmo for comments on a draft of this report and other helpful contributions; and to Marlotte van Dael, Marek Linha, S Chelvan, Helena Marambio, Hungarian Helsinki Committee, and others who provided summaries, translations, and information relating to relevant cases and/or government policies. Summaries of most cases referred to in this report, and other related jurisprudence, are available in the European Network on Statelessness' (ENS) Statelessness Case Law Database, available at <https://caselaw.statelessness.eu/>

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The European Network on Statelessness is a registered Charitable Incorporated Organisation in England. Charity Number 1158414.

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***“I feel we are treated worse than animals....
Sometimes I sit down on my own and cry. Life is very hard. It’s unimaginable.
What can I do?”¹***

Introduction

This report considers the legal status of Palestinian refugees and stateless persons,² with particular focus on the jurisprudence of the Court of Justice of the European Union (CJEU) and domestic courts, mainly those in European countries. There has been some progress in recent years in certain jurisdictions towards an increased awareness of refugeehood and statelessness among Palestinians. Despite this limited progress, Palestinians continue to face discriminatory legal frameworks and numerous obstacles to obtaining fair treatment as refugees and/or stateless persons. Although the United Nations and some governments have long recognised that most Palestinians who are or have been within the area of operation of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) *are refugees*, this crucial fact is still too often ignored. In addition, for reasons discussed below, Palestinians who have not acquired a nationality other than Palestinian should be considered stateless under the definition set out in the 1954 Convention relating to the Status of Stateless Persons. They, however, remain unable to access adequate protection in many countries, or face lengthy legal battles to do so.

In the current context, return for Palestinian refugees and IDPs remains elusive due to Israeli policies and practices that perpetuate their displacement and transfer.³ All Palestinian refugees – as well as internally displaced persons (IDPs) – regardless of where they currently reside, are unable to access the right of return to their homeland, parts of which are within what is now Israel and parts of which are under military occupation by Israel.⁴ Until Israel fulfils its international legal obligations and responsibilities towards Palestinians as set out in this report, it is vital that Palestinians can access effective protection in other countries, as refugees and/or stateless people.

1 Mohammed Al-Mustafa (Palestinian man refused recognition as a refugee or stateless person in the UK, who had tried twice to return to Gaza, which he left as a small child). Kate Lyons, ‘Home Office tells stateless man: go home’ (*The Guardian*, 22 Jan 2018) <https://www.theguardian.com/uk-news/2018/jan/22/uk-home-office-tells-stateless-man-go-home> [accessed 30 June 2022]. He was subsequently granted leave to remain in the UK as a stateless person. Room for Refugees, (Facebook post, 18 Oct 2018) https://www.facebook.com/Room4Refugees/photos/a.1662327484007292/2176846415888727/?type=3&eid=ARDgFOiT6LnrJGPHB7bAsdBLDeZc5ihKkvHgVaSEQsxc2Vai52_Pc8Y-rZF4JMvo9kOMrmumkHZTjmA [accessed 30 June 2022].

2 This report refers to ‘Palestinians’ to mean persons who have origins in historic or present-day Palestine; and to ‘Palestinian refugees’ to mean persons who were themselves forced to flee from their homeland due to persecution or armed conflict, or whose ancestors were forced to do so. In some places throughout the report, reference is to ‘Palestine’ refugees, which has a specific meaning as set out by UNRWA and set out herein.

3 See BADIL, *Forced Population Transfer: The Case of Palestine — Denial of Reparations*, Working Paper No. 22 (BADIL, 2018) https://www.badil.org/cached_uploads/view/2021/04/19/wp22-reparations-of-reparations-1618823911.pdf.

4 See BADIL, *Survey of Palestinian Refugees and Internally Displaced Persons 2016 – 2018*, Volume IX (BADIL, 2018) https://www.badil.org/cached_uploads/view/2021/06/04/survey2016-2018-eng-1622811412.pdf, 52-95.

1. Palestinian Refugees, UN Institutions, and Durable Solutions

While the approximately 9.1 million Palestinian refugees constitute the longest persisting and largest refugee population in the world,⁵ only about 5.7 million are considered “Palestine refugees,” eligible for UNRWA services. UNRWA defines “Palestine refugees” as “persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict” (and their descendants in the male line).⁶ UNRWA operates in the West Bank, Gaza, Lebanon, Syria, and Jordan. Other Palestinian refugees live outside UNRWA’s area of operation.⁷

The circumstances leading to the existence of such a large number of refugees with origins in Palestine are documented elsewhere by BADIL and others, and will be discussed below to some extent. In brief, Palestine was occupied by the United Kingdom from 1917 to 1947. Following World War II, in 1947, the United Nations (UN) recommended in Resolution 181 that the Palestinian territory be partitioned into two states, Arab and Jewish. Each state was required to have a constitution providing equal rights to all inhabitants, and there was to be no forcible transfer of populations.⁸ However, what followed, known to Palestinians as the Nakba, was rather different from the situation envisioned in Resolution 181. Israel declared its state in 1948, claiming much more of the former Mandate territory than was allocated to the Jewish state in Resolution 181, and displacing approximately 800,000 Palestinians in the process. Other former Palestinian Mandate areas were occupied by Jordan and Egypt.⁹ In December 1948, the UN adopted Resolution 194, resolving that Palestine “refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return.”¹⁰ This has never been implemented, however, and was followed by successive armed conflicts, occupation by Israel of the remainder of Mandatory Palestine, and further forced displacement of Palestinians.¹¹ Many Palestinians in and outside Palestine have faced and continue to face discrimination, persecution, multiple displacements, and insecurity of various types, including statelessness.¹²

5 BADIL, ‘Nakba Statement: 74 years of the Ongoing Nakba, 74 years of Ongoing Resistance’ <https://badil.org/press-releases/13095.html> [accessed 30 June 2022], citing 9.1 million Palestinian refugees worldwide at the end of 2021. See also BADIL, *Survey of Palestinian Refugees and Internally Displaced Persons 2016–2018*, n 3, Ch. 2, estimating 13.05 Palestinians globally, of whom 8.7 million were forcibly displaced persons (7.94 million refugees and 760,000 internally displaced persons).

6 UNRWA, ‘Palestine Refugees’ <https://www.unrwa.org/palestine-refugees> [accessed 30 June 2022]. Although only the descendants of Palestine refugee *men* are eligible for UNRWA registration, descendants and dependants in the female line can receive UNRWA services (since 2006). See Francesca P Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (2nd Ed) (Oxford Public International Law, 2020), Part One (II), S. 4.2.3. See also UNHCR, *Guidelines on International Protection No. 13: Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees*, (HCR/GIP/17/13) (Dec 2017), <https://www.unhcr.org/uk/publications/legal/5ddfa844/guidelines-international-protection-13-applicability-article-1d-1951-convention.html>, Para 8.

7 BADIL, Launch of BADIL’s Survey of Palestinian Refugees and Internally Displaced Persons 2016-2019, 9th Edition (PR/EN/111219/61), <https://badil.org/press-releases/762.html> [accessed 30 June 2022]; Susan M Akram, ‘UNRWA and Palestine Refugees’ in *The Oxford Handbook of International Refugee Law* (Eds: Cathryn Costello, Michelle Foster, and Jane McAdam, OUP, June 2021); UNRWA, *Letter from UNRWA to UNHCR describing UNRWA’s mandate and services*, 22 September 2021, <https://www.refworld.org/docid/61541acb4.html> [hereinafter, ‘UNRWA Letter 2021’].

8 See *Future Government of Palestine*, GA Res 181(II), UN Doc A/RES/181(II) (29 Nov 1947).

9 See BADIL, *Survey of Palestinian Refugees and Internally Displaced Persons 2016–2018*, n 4.

10 *Palestine: Progress Report of the United Nations Mediator*, GA Res 194(III), UN Doc A/RES/194(III) (27 November 1948), para 11.

11 United Nations, ‘History of the Question of Palestine’, *United Nations: The Question of Palestine* <https://www.un.org/unispal/history/>; and Susan Akram and Nidal al-Azza (eds), *Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention* (2nd ed) (BADIL, 2015) [hereinafter, ‘BADIL, Closing Protection Gaps’]. For maps showing the evolution of the territories of Israel and Palestine, see L Farsakh, *Rethinking Statehood in Palestine: Self-Determination and Decolonization Beyond Partition* (Ed L Farsakh, University of California Press, 2021), pp xiii-xvi of foreword.

12 BADIL, *Palestinian Refugees: Multiple Displacements and the Issue of Protection* (Al Majdal, Issue 59, Mar 2017) <https://www.badil.org/press-releases/837.html> [accessed 30 June 2022]. Throughout this report, ‘nationality’ means the legal bond of citizenship of a person to a particular state, and correlates conversely to the definition of statelessness in Article I(1) of the 1954 Convention relating to the Status of Stateless Persons, which defines a stateless person as someone ‘who is not considered as a national by any State under the operation of its law’.

Three UN agencies have particular roles relating to Palestinian refugees. The UN established a Conciliation Commission for Palestine (UNCCP) in 1948, with a mandate to seek durable solutions for Palestinian refugees, which includes legal protection. The UNCCP continues to exist, but from early in its existence it has been unable to fulfil its core protection mandate.¹³ The UN established UNRWA in 1949, with a mandate to assist Palestine refugees. UNRWA is primarily a humanitarian relief institution, operating with a limited geographical remit. Its mandate has subsequently been extended to include some protection activities; however, as discussed below, these are limited and do not include seeking durable solutions for Palestinians.¹⁴ The UN also established the Office of the High Commissioner for Refugees (UNHCR) in 1950, mandated to provide protection and assistance globally to refugees (and to stateless persons, since 1974), but not including Palestinians in the areas of UNRWA's operation.¹⁵

Although UNRWA's role is mainly humanitarian assistance, the Agency engages in some work it designates as protection work and adopted a protection policy in 2012. UN General Assembly resolutions have re-affirmed the ongoing need for UNRWA's work, including in relation to the "well-being, protection and human development" of Palestine refugees.¹⁶ UNRWA clarified its mandate and the services it provides in a letter to UNHCR in September 2021, stating that UNRWA services consist mainly of education; primary healthcare; relief and social services; infrastructure and camp improvement; microcredit; and emergency assistance, including in situations of armed conflict. This letter further states that UNRWA "contributes to the protection of Palestine refugees both through its service delivery and by advocating for their rights with relevant stakeholders." It further confirms, however, that:

"UNRWA does not have a mandate to seek durable solutions for Palestine refugees.... UNRWA does not manage refugee camps and is not responsible for protecting the physical safety or security of Palestine refugees or maintaining law and order.... [UNRWA] cannot guarantee any individual's physical security. Registration with UNRWA ... does not confer any legal status, nor does it operate as a form of personal identification, proof of nationality or lack thereof."¹⁷

It is clear that UNRWA does not offer protection in the form of a protective legal status under international law, such as refugee status or recognition and protection as a stateless person (including a right of residence). The hosting states and the authorities governing the territories in which UNRWA operates control the legal status of Palestinian refugees within their borders (including their right to enter, remain, and exit), and their permission to work, study or access non-UNRWA healthcare and public welfare benefits. The hosting states and territories are also responsible for security. Whether UNRWA is able to fulfil its mandate in a particular area at a particular time is context-specific (as indicated in some of the jurisprudence below).¹⁸ UNRWA's financial situation is precarious, as it relies on voluntary contributions,

13 See eg UNCCP annual report, saying it had 'nothing new to report', *United Nations Conciliation Commission for Palestine*, UN Doc A/75/305 (11 Aug 2020); See also *Palestine: Progress Report of the United Nations Mediator*, GA Res 194(III), UN Doc A/RES/194(III) (27 November 1948).

14 See *Operations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, GA Res 70/85, UN Doc A/RES/70/85 (15 December 2015). See also BADIL, *Closing Protection Gaps*, n 11; Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007), 436-38; UNRWA, 'What We Do: Protection' <https://www.unrwa.org/what-we-do/protection> [accessed 30 June 2022].

15 UNHCR, 'Note on the Mandate of the High Commissioner for Refugees and his Office' (2013) <https://www.refworld.org/pdfid/5268c9474.pdf>.

16 See UNGA Res A/C.4/68/L.12 (8 Nov 2013) <https://digitallibrary.un.org/record/760509?ln=en>; UNRWA, 'What We Do: Protection', n 14. UNRWA has had a protection division since 2015, working on three main themes: child protection, protection from gender-based violence, and protection for disabled persons. UNRWA, 'Protection Division' <https://www.unrwa.org/protection-division> [accessed 30 June 2022].

17 UNRWA Letter 2021, n 7.

18 See Albanese and Takkenberg, n 6, Part One (II) S. 4.3.4, observing that it is 'not easy to determine what is commensurate' with UNRWA's mission and that it may assist to refer to relevant UNHCR standards.

which fluctuate significantly and which are sometimes made contingent on political factors.¹⁹ The organisation reached an unprecedented funding crisis in late 2020, as a result of increasing poverty and greater need for urgent assistance, the global pandemic, and major funding cuts by donors, including the USA. Although some funders have subsequently resumed or increased funding, as of September 2021, there was a budget shortfall of US \$100 million, and the ability of UNRWA to fulfil its mandate remains uncertain.²⁰

UNHCR's mandate differs significantly from UNRWA's. UNHCR is mandated to provide assistance to and international protection for refugees and stateless persons globally, except in UNRWA's area of operation.²¹ In about 50 countries, UNHCR itself determines refugee status; in other countries, it advises States relating to "persons of concern" to the Agency, particularly on how to comply with the 1951 Refugee Convention and the 1954 Convention relating to the Status of Stateless Persons, and how to ensure effective legal protection to refugees in that territory and implement other durable solutions.²² UNHCR works towards three durable solutions: **voluntary repatriation** to the country of origin, **local integration** of refugees in a host state (usually with legal protection offered by that state), and **resettlement** to a third country which provides refugees with legal protection.²³ Refugees should be able to choose which of the three durable solutions is most appropriate for them; however, in practice, they depend on states' good will in offering a solution. States often make integration difficult through lack of support and hostile policies and practices, and the availability of resettlement places is extremely limited in comparison to need and offered only to those who meet priority criteria. Of the three durable solutions, only voluntary repatriation is a right under international law, but it depends on the political position in the country of origin (based on guarantees of safety for refugees who return there and for stateless people, acquisition of nationality before or immediately upon return).²⁴

For Palestinian displaced persons specifically, most lack access to any of the three durable solution which UNHCR works to provide for refugees globally; this is due to the international regime's structure, the UNCCP's non-operational status, Israel's refusal to permit return of Palestinians, the political positions and practices of the governing authorities in UNRWA's areas of operation, and the lack of availability of resettlement places. Overall, UNRWA's contribution to the protection of Palestinian refugees differs in that UNRWA does not determine refugee status, does not have a mandate to implement any of the three durable solutions, and its mandate extends only to persons residing in UNRWA's area of operation.

19 See eg BADIL, 'Working Paper No. 29: USA-UNRWA Framework Agreement: Assistance or Securitization?' (Jan 2022) https://badil.org/cached_uploads/view/2022/01/12/wp-29-unrwa-eng-1641973001.pdf; Kjersti G. Berg and Jørgen Jensehaugen, 'The Politics of Refugee Relief: UNRWA and the Ongoing Funding Crisis' (Prio Blogs, 2 Feb 2021) <https://blogs.prio.org/2021/02/the-politics-of-refugee-relief-unrwa-and-the-ongoing-funding-crisis/> [accessed 30 June 2022]; and BADIL, *Understanding the Political Underpinning of UNRWA's Chronic Funding Crisis*, Bulletin No. 27, (BADIL 2018) https://www.badil.org/phocadownloadpap/Badil_docs/bulletins-and-briefs/bulletin-no27-unrwa-financial-crisis.pdf.

20 UNRWA Letter 2021, n 7; and Office of the Commissioner General for Refugees and Stateless Persons, 'Lebanon – Palestinian Territories: The UNRWA financial crisis and its impact on programmes' (1 Feb 2021) https://elenaforum.org/wp-content/uploads/wpforo/default_attachments/1615278662-Cedoca-COI-Focus-Palestinian-territories-Lebanon-UNRWA-financial-crisis-01-02-2021.pdf [accessed 30 June 2022]; and The Danish Immigration Service, 'Palestinian Refugees: Access to registration and UNRWA services, documents, and entry to Jordan' (June 2020) <https://www.ecoi.net/en/file/local/2032043/Palestine+Refugees+june+2020.pdf>.

21 UNRWA, 'Frequently Asked Questions' <https://www.unrwa.org/who-we-are/frequently-asked-questions> [accessed 30 June 2022].

22 UNHCR, 'Refugee Status Determination', <https://www.unhcr.org/refugee-status-determination.html> [accessed 30 June 2022].

23 See 'Note on the Mandate of the High Commissioner for Refugees and his Office' (2013), n 15; and UNHCR, 'Chapter One Resettlement within UNHCR's Mandate: International Protection and the Search for Durable Solutions' <https://www.unhcr.org/3d464b239.pdf>, S. 1.3.

24 For a discussion of Palestinians' right of return/repatriation (and other rights), see BADIL, *Trump's so-called Vision/Deal of the Century: A move to end the Palestinian refugee issue through serious breaches of International Law* (Position Paper, May 2020) https://badil.org/cached_uploads/view/2021/04/20/deal-of-the-century-refugee-issue-positionpaper-may2020-1618905452.pdf.

BARRIERS TO DURABLE SOLUTIONS: RESETTLEMENT

As discussed above, UNRWA's mandate does not include resettlement or other durable solutions, and UNHCR's mandate does not apply in UNRWA's area of operation. This has led to a particular problem relating to the resettlement of Palestinian refugees from UNRWA's area of operations to countries such as the UK, which only accepts refugees for resettlement who have been referred by UNHCR. The UK's resettlement scheme for refugees from Syria was challenged through litigation in the UK, in *Turani v SSHD*.²⁵ The applicants were Palestinians who had fled from Syria to UNRWA's area of operations and who had various vulnerabilities which would likely have made them eligible for the UK's resettlement programme had they not been Palestinians in UNRWA's area of operations, where UNHCR could not refer them for resettlement. The applicants argued that the UK's resettlement scheme discriminated on the basis of race or ethnicity, violating domestic law as well as international declarations, treaties, and customary international law.²⁶

The Administrative Court and the Court of Appeal held that the UK's resettlement scheme is not unlawful. The Court of Appeal found that the UK Government was justified in accepting referrals for resettlement exclusively from UNHCR. Although the appellants submitted that other countries (e.g., USA, Canada, and Norway) accept resettlement referrals from NGOs as well as UNHCR, preventing this discriminatory situation from arising, the Court of Appeal observed that evidence relating to this was submitted late in the case and was sparse. The Court of Appeal considered that the Administrative Court "Judge was entitled to conclude that ... referral by an NGO could not have achieved the 'security, reliability, speed and consistency which flow from using UNHCR as a gatekeeper.'" ²⁷ Further, the Court of Appeal held that it was not an error for the Administrative Court Judge to find that UNRWA's existence and the assistance it provides had at least some mitigating impact for Palestinians from Syria, thus justifying some difference in treatment from non-Palestinian refugees.²⁸

This outcome means that a clearly discriminatory impact continues, barring Palestinian refugees in UNRWA's area of operations from the UK's resettlement programme and thus restricting their access to a durable solution that might otherwise be available to them. Further appeal is ongoing.

2. The 1951 Refugee Convention

2.1. The Meaning of Protection Under the 1951 Refugee Convention

Protection, in international refugee law, is inextricably linked to the provision of durable solutions for refugees. Having a protective legal status – refugee status – is vital to the concept of protection under the 1951 Convention, and it must encompass all the rights set out within the Convention such as non-refoulement,

25 *Turani v SSHD* [2021] EWCA Civ 348 <https://www.bailii.org/ew/cases/EWCA/Civ/2021/348.html> and the previous (lower) decision *Turani v SSHD* [2019] EWHC 1586 (Admin) <https://www.bailii.org/ew/cases/EWHC/Admin/2019/1586.html>.

26 See eg: Universal Declaration of Human Rights (1948), Art 2; International Convention on the Elimination of All Forms of Racial Discrimination, 1969; Lord Steyn, in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55; [2005] 2 AC 1, 46 in *In re Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* (second phase) [1970] ICJ Rep 3, at paras 33-34 referred to binding obligations in international law 'including protection from slavery and racial discrimination.'

27 *Turani v SSHD* [2021] EWCA Civ 348, Para 90.

28 *Turani v SSHD* [2021] EWCA Civ 348, Paras 43,72,74, 91.

property rights, freedom of movement, employment rights, access to healthcare and education, provision of identity/travel documents, and the option of facilitated naturalisation.²⁹ The drafters of the 1951 Convention could not foresee the protracted refugeehood of Palestinians, but clearly they intended for Palestinian refugees to be as protected as other refugees. Although the 1951 Convention does not define “protection”, the drafters were aware of the differing mandates of the UNCCP and UNRWA, including the work of the UNCCP in its very early years towards durable solutions for Palestinian refugees.³⁰

While UNRWA’s protective work has evolved over the years, as noted above, UNRWA does not have a mandate to work towards durable solutions nor does it provide a protective legal status (such as refugee status) to the refugees it serves. Thus, UNRWA does not offer protection in the sense in which that term is normally used in international refugee law. This means that Palestinian refugees who are excluded from the benefits of the 1951 Convention under Article 1D are less protected than refugees who fall within UNHCR’s mandate, which includes granting refugee status, advising governments on the correct way to determine refugee status, monitoring cessation, cancellation and revocation of refugee status, referring for resettlement, facilitating local integration, and/or facilitating repatriation.³¹

2.2. Article 1D of the Refugee Convention

Article 1A of the 1951 Refugee Convention affords protection to refugees who face a well-founded fear of persecution for one of the five reasons set out in the Convention (race, religion, nationality, political opinion, or membership of a particular social group). The first clause of Article 1D of the Refugee Convention conditionally *excludes* persons who are receiving protection or assistance from a UN agency other than UNHCR (in practice, this means UNRWA, as it is currently the only relevant and operational UN agency). This is followed by an *inclusion* clause stating that if such protection or assistance ceases, the persons concerned are automatically entitled to the benefits of the Convention.

Article 1D of the 1951 Refugee Convention states:

“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.

29 See BADIL, *Closing Protection Gaps*, n 11, Introduction and Ch 1, S 6 and Ch 2, S 1; see also UNHCR, ‘Introductory Note’ [to the 1951 Convention] (2010) <https://www.unhcr.org/uk/3b66c2aa10> (observing that the emphasis of the 1951 Convention’s definition of a refugee is on ‘protection from political or other forms of persecution’.) Note that the EU Qualification Directive explicitly defines ‘international protection’ as ‘refugee status’ or ‘subsidiary protection status’ and defines the content of international protection in line with the rights set out in the 1951 Convention. *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*, Article 2 and Chapter VII (‘Content of International Protection’). See also UNHCR, *Note on International Protection* A/AC.96/830 (7 Sep1994) <https://www.refworld.org/docid/3f0a935f2.html>, confirming that “International protection thus begins with securing admission, asylum, and respect for basic human rights, including the principle of non-refoulement, without which the safety and even survival of the refugee is in jeopardy; **it ends only with the attainment of a durable solution**, ideally through the restoration of protection by the refugee’s own country”; and see UNHCR, ‘Annex - Report of the Round Table on Solutions to the Problem of Refugees and the Protection of Refugees San Remo, Italy (12 - 14 July 1989)’ in *Solution to the Refugee Problem and the Protection of Refugees*, EC/SCP/55 (23 Aug 1989) <https://digitallibrary.un.org/record/72431?ln=en>, observing that: “the international community was increasingly dealing with protection problems not separately but in the overall context of solutions” (4); and “[t]he entire concept of solution should be linked integrally with the rights of the individual, whether they be in relation to the country of nationality or to the world outside. Essentially, solution should be seen as the preservation or the restoration of the rights of the individual”; and “[t]he principles of non refoulement and asylum would need to be constantly reaffirmed as basic elements of the entire process towards solution” (13); and ‘Tentative Conclusions for Further Study and Consideration’: “**Solution should not be seen as an aspect independent and separate from protection. It should be seen as the final purpose of protection, and protection should be seen as governing the entire process towards solution and as determining what was or what was not a solution**” (1, preamble) (emphasis added).

30 BADIL, *Closing Protection Gaps*, n 11, 32.

31 UNRWA Letter 2021, n 7.

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.”

The drafters of the 1951 Refugee Convention expected that the mass displacement of Palestinians would be resolved relatively quickly after the 1951 Convention was drafted. They included Article 1D to address, in part, the United Nations’ acknowledged responsibilities to Palestinian refugees and in light of the UN agencies set up to assist and protect them. As Professor Guy Goodwin-Gill has observed:

“The travaux préparatoires (“preparatory works”) of paragraph 7(c) of the UNHCR Statute and Article 1D of the 1951 Refugee Convention confirm the intention of participating states not to exclude Palestine refugees. What was important to all participants was continuity of protection, and the non-applicability of the 1951 Convention [to some Palestinian refugees] was intended to be temporary and contingent.”³²

UNHCR Guidelines also confirm that a broad protective interpretation of Article 1D is required:

“In interpreting Article 1D, it is appropriate to have regard to its object and purpose and its context, including through recourse to the travaux préparatoires of the 1951 Convention and to other contemporaneous international instruments intended to address the questions of protection and institutional responsibility for Palestinian refugees. ... The first purpose is to ensure that Palestinian refugees continue to be recognized as a specific class, and that they continue to receive protection and associated rights, until their position has been definitively settled in accordance with the relevant resolutions of the United Nations General Assembly.”³³

The fact that displaced Palestinians were refugees was widely acknowledged by UN delegates at the time the 1951 Refugee Convention was drafted. This is why Article 1D contains an automatic (*‘ipso facto’*) inclusion clause.³⁴

In light of the drafting history and given the purpose this provision was intended to fulfil, BADIL has taken the position that the cessation of “protection or assistance” under Article 1D should be interpreted to mean that the cessation of *either* protection *or* assistance to Palestinian refugees should trigger the inclusion clause of Article 1D on a general scale.³⁵ As such, the inability of the UNCCP to fulfil its protection mandate triggered Article 1D’s inclusion clause, and the exclusion clause should not apply to any Palestinian refugees eligible for inclusion, since neither UNRWA nor UNHCR provides legal protection to Palestinian refugees in UNRWA’s area of operation. However, neither CJEU jurisprudence nor UNHCR guidance adopts this approach. Additionally, government decision-makers and judges around the world have frequently overlooked the pre-existing status of Palestinians as refugees and have misapplied Article 1D, all too often leaving Palestinians unable to access the protection to which they are entitled as refugees.

32 Goodwin-Gill, ‘Preface,’ in BADIL, *Closing Protection Gaps*, n 11, ix.

33 UNHCR, *Guidelines on International Protection No. 13: Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees*, n 6, Paras 6-7.

34 Goodwin-Gill, Preface, in BADIL, *Closing Protection Gaps*, n 11; and see Susan Akram, ‘Palestinian Refugees and their Legal Status: Rights, Politics, and Implications for a Just Solution’, *Journal of Palestine Studies* XXXI, no. 3 (Spring 2002), 36-51, 40.

35 BADIL, *Closing Protection Gaps*, n 11, Introduction and Ch 5, S 2.2. See also Akram, ‘UNRWA and Palestine Refugees’ (2021) n 7; and Katia Bianchini, *Protecting Stateless Persons: The Implementation of the Convention relating to the Status of Stateless Persons across EU States* (Brill Nijhoff, 2018), 90-92.

3. Conditions for Palestinians in UNRWA's Area of Operation and Neighboring States

Conditions in UNRWA's area of operation are dire for many Palestinians and can accurately be described as humanitarian crises in most areas. Events in the region and the policies of some governments, combined with UNRWA's continuing funding crisis and inability to meet the needs of Palestinians, have resulted in extreme hardship for many.³⁶ As discussed in BADIL's 2015 Handbook, the Arab Spring brought increased repression and harsh consequences for many Palestinians in the Arab countries. The Syrian war led to forced displacement and abuse of many Palestinians, and some states in the region closed their borders to Palestinians.³⁷ The Egyptian Government takes the position that "Palestinian refugees [in Egypt] cannot receive UNHCR assistance or protection because they fall under the mandate of UNRWA, despite the fact that Egypt is not one of UNRWA's fields of operation ... [and] the Egyptian government does not allow UNRWA to operate in anything more than a symbolic capacity."³⁸ Palestinians in Gulf countries (e.g., UAE, Saudi Arabia, and Kuwait) are often allowed to reside in the country only if they have a valid work permit, and only for the duration of their employment. They are very vulnerable to losing employment, and with it, their permission to reside.³⁹ Israel, as documented by numerous organisations, including Human Rights Watch and Amnesty International, continues to commit systematic human rights violations and crimes against Palestinians, including through discriminatory treatment, bombings, destruction of homes and other buildings, forced evictions, and border closures.⁴⁰ A snapshot of some of the difficulties Palestinians face in UNRWA's area of operation follows, but is by no means comprehensive.

West Bank: Israel has occupied the West Bank since 1967. The Palestinian Authority has limited governance over parts of the West Bank, but there are restrictions in moving between different areas. There are approximately 775,000 Palestinians registered with UNRWA in the West Bank.⁴¹ They have various types of residence status. Since 1967, Israel has revoked the residence permits of approximately 250,000 Palestinians living in this area.⁴² The conditions are extremely difficult and include routine threats of death, injury, eviction, displacement, house demolition, and other harm by the Israeli military.⁴³ A UN Special Rapporteur has observed that Israel systematically violates international law relating to the duties

36 See eg Patrick Wintour, 'UN Palestine refugee aid agency 'close to collapse' after funding cuts' (The Guardian, 5 Nov 2021) <https://www.theguardian.com/world/2021/nov/05/un-palestine-aid-agency-is-close-to-collapse-after-funding-cuts> [accessed 30 June 2022]; and UNICEF, State of Palestine Humanitarian Situation Report No. 2 - Mid Year 1 January - 31 July 2021 (25 Aug 2021) <https://reliefweb.int/report/occupied-palestinian-territory/unicef-state-palestine-humanitarian-situation-report-no-2-mid>.

37 BADIL, *Closing Protection Gaps*, n 11, xiii-xiv.

38 Tom Rollins, 'Syria's Palestinians: A New Nakba' (March 2021) <https://www.statelessness.eu/updates/blog/syrias-palestinians-new-nakba>, S. 4.

39 See Jo Bezzano and Judith Carter, 'Statelessness in Practice: Implementation of the UK Statelessness Application Procedure', (Electronic Immigration Network, 10 July 2018) <https://www.scribd.com/document/383529481/Statelessness-in-Practice-Implementation-of-the-UK-Statelessness-Application-Procedure>, 21.

40 See Amnesty International, *Israel's apartheid against Palestinians: a cruel system of domination and a crime against humanity* (1 Feb 2022) <https://www.amnesty.org/en/latest/news/2022/02/israels-apartheid-against-palestinians-a-cruel-system-of-domination-and-a-crime-against-humanity/> [accessed 30 June 2022]; Human Rights Watch, *A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution* (27 Apr 2021) <https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution> [accessed 30 June 2022]; and see 'Imminent humanitarian disaster to befall on Gaza as Israel's military attack continues' (Euro-Med Monitor, 17 May 2021) <https://reliefweb.int/report/occupied-palestinian-territory/imminent-humanitarian-disaster-befall-gaza-israel-s-military> [accessed 30 June 2022]; International Crisis Group, 'Beyond Business as Usual in Israel-Palestine' (Report no 225, 10 Aug 2021) <https://www.crisisgroup.org/middle-east-north-africa/east-mediterranean-mena/israel-palestine/225-beyond-business-usual-israel-palestine>; and UNICEF, 'State of Palestine Humanitarian Situation Report No. 2 - Mid Year 1 January - 31 July 2021', n 36.

41 Akram, 'UNRWA and Palestine Refugees' (2021), n 7, 656.

42 Akram, *ibid*, 656, n 7.

43 Akram, *ibid*, 657, n 7; and see European Commission, 'Palestine Factsheet' (2021) https://ec.europa.eu/echo/where/middle-east/palestine_en [accessed 30 June 2022] (noting that '[d]ue to violence, intimidation and the rejection of building permits, the... homes [of Palestinians in West Bank] are increasingly demolished and the inhabitants evicted by force. Violence and demolitions have intensified despite the COVID-19 pandemic. Access by Palestinian children to education is hampered: schools continue to be demolished or damaged, and students are routinely harassed on their way to school').

of occupying powers, has illegally annexed Palestinian territory, and that the situation in the occupied Palestinian territory constitutes apartheid.⁴⁴

Gaza: Approximately 1.4 million Palestinians are registered with UNRWA in Gaza and live mainly in refugee camps.⁴⁵ Hamas (the Islamic Resistance Movement) was elected to govern Gaza in 2006 and 2007.⁴⁶ However, Hamas has very limited governing power. There has been sporadic armed conflict between Hamas and the Israeli military since Hamas' inception in 1988. Israel controls Gaza's borders and has implemented a blockade since 2007, which UN bodies have criticised as unlawful collective punishment.⁴⁷ Active armed conflict continued between Israel and Hamas throughout 2021, with intermittent ceasefires. Humanitarian conditions are at crisis level, with high levels of poverty, unemployment, and food insecurity. Palestinians in Gaza have limited access to healthcare, electricity, and clean water. There are few educational or economic opportunities. The Covid-19 pandemic has compounded existing problems.⁴⁸ UNHCR recommended in March 2022 that states should properly assess Palestinians' need for international protection and should not force them to return to Gaza, in light of the circumstances there.⁴⁹

Syria: Conditions for Palestinians in Syria remain harsh. Before 2011, there were approximately 522,000 Palestinians registered with UNRWA in Syria.⁵⁰ Approximately 120,000 Palestinians have left Syria since 2011, and many of those who remain have been internally displaced multiple times trying to avoid armed conflict, abuses by the government or armed groups, and other harm. Many have been forced to leave certain areas by armed groups. Many have lost their homes and livelihoods, and they live in poverty and at constant risk of human rights abuses. Many fled Syria to Turkey in the early part of the civil war, but it is now generally not possible for Palestinians from Syria to enter Turkey lawfully, after restrictions imposed in 2012 and 2015, even for some who had appointments with embassies in Turkey for family reunification in other countries.⁵¹ Turkish authorities have at times detained and/or forcibly returned Palestinian refugees to Syria, in violation of international law.⁵²

Lebanon: Conditions for the approximately 470,000 Palestinians registered with UNRWA in Lebanon are very difficult, including widespread discrimination, poverty and unemployment, inadequate housing, inadequate healthcare, restrictions on freedom of movement, and other human rights violations.⁵³

44 UN Human Rights Council, 'Report of the Special Rapporteur on the situation of Human Rights in the Palestinian territories occupied since 1967' (21 Mar 2022) A/HRC/49/87, Paras 17, 55 (citing various sources, including former Israeli officials); UNGA 'Situation of Human Rights in the Palestinian Territories Occupied Since 1967' (22 Oct 2018) UN doc A/73/447; and see Akram, 'UNRWA and Palestine Refugees' (2021) n 7, 657.

45 Akram, 'UNRWA and Palestine Refugees' (2021) n 7, 657.

46 'Hamas: The Palestinian militant group that rules Gaza' (BBC, 1 July 2021) <https://www.bbc.co.uk/news/world-middle-east-13331522> [accessed 30 June 2022] (noting that Hamas (or its military wing) is designated as a terrorist group by some governments, including the US, UK, EU, and Israel).

47 The UN considers the blockade of Gaza to constitute unlawful collective punishment, which has harsh consequences for the lives of Palestinians in Gaza, impacting their standard of living, their right to freedom of movement, and economic, social and cultural rights. See UN Human Rights Council, Implementation of Human Rights Council Resolutions S-9/1 and S-12/1, A/HRC/34/36 (25 Jan 2017); and UN General Assembly, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, Human rights situation in Palestine and other occupied Arab territories, 20 Jan 2020, A/HRC/43/70.

48 Akram, 'UNRWA and Palestine Refugees' (2021) n 7, 657-58; European Commission, 'Palestine Factsheet' (2021) n 43; UN Office for the Coordination of Humanitarian Affairs, 'Response to the escalation in the oPt | Situation Report No. 9' (August 2021) <https://www.ochaopt.org/content/response-escalation-opt-situation-report-no-9-august-2021>; Dan Bilefsky, 'What Drove the Israel-Gaza Conflict? Here's What You Need to Know' (New York Times, 17 Nov 2021) <https://www.nytimes.com/article/israel-gaza-what-we-know.html> [accessed 30 June 2022].

49 UNHCR, *UNHCR Position on Returns to Gaza* (March 2022) <https://www.refworld.org/docid/6239805f4.html>.

50 Akram, 'UNRWA and Palestine Refugees' (2021), n 7, 656.

51 Rollins, n 38, S. 2.

52 Rollins, n 38, S. 4.

53 See Rollins, n 38, Ss. 1-3; and 'MAP highlights plight of Palestinian refugees in Lebanon to UN Special Rapporteur on Extreme Poverty' (Medical Aid for Palestinians' [MAP], 12 Oct 2021) <https://www.map.org.uk/news/archive/post/1301-as-lebanonas-economic-crisis-deepens-map-highlights-plight-of-palestinian-refugees-to-un-special-rapporteur-on-extreme-poverty>. [accessed 30 June 2022]. See also UNHCR, *The Situation of Palestinian Refugees in Lebanon* (February 2016) <http://www.refworld.org/docid/56cc95484.html>.

Professor Are Knudsen has observed that discrimination is not just societal, but imposed by the Lebanese Government to prevent integration of Palestinian refugees.⁵⁴ The Lebanese Government does not allow construction of new refugee camps, which has led to serious overcrowding and poor conditions in existing camps.⁵⁵ Palestinians previously living in Syria face even more difficulties than other Palestinians trying to enter and/or live in Lebanon. Palestinians have faced changeable conditions at Lebanese borders in recent years. Researcher Tom Rollins confirmed in a March 2021 report that the Lebanese borders have been mostly closed to Palestinians from Syria since 2014, unless they had proof of an appointment at an embassy (for family reunion in a third country) or a visa and flight booked for travel to a third country. Few Palestinians from Syria are currently permitted to enter Lebanon lawfully, and only if they can pay a US \$200 fee, which many cannot afford. Even some Palestinians coming from Syria with confirmation of a refugee family reunion appointment at an embassy in Lebanon have been denied entry into Lebanon. Palestinians from Syria who do enter Lebanon also face even more difficulties in daily life than those faced by Palestinians who are long-term residents in Lebanon. Palestinians from Syria who are unlawfully present in Lebanon experience harsh living conditions and are sometimes forcibly expelled to Syria.⁵⁶

Jordan: Approximately 3 million Palestinians live in Jordan, of which about 2.2 million are registered with UNRWA in Jordan.⁵⁷ Most Palestinians in Jordan have been permitted to acquire Jordanian nationality, but thousands have been subsequently stripped of Jordanian nationality at various times, and approximately 150,000 Palestinians in Jordan, most from Gaza, have been denied Jordanian nationality.⁵⁸ It was difficult for Palestinian refugees from Syria and Lebanon to get permission to enter Jordan prior to 2011 and is even more difficult now. As a result of the conflict in Syria, Jordan has largely closed its borders to Palestinians from Syria, and some who managed to enter have been returned to Syria.⁵⁹ Within Jordan, many Palestinians face discrimination and serious hardships. There are poor living and working standards in the refugee camps, which worsened during the pandemic, when many people lost jobs.⁶⁰ Palestinians from Gaza face particular challenges in Jordan. They are not permitted to work in many professions, vote, or own property, and many are granted only temporary residence permits. The costs of residence permits, work permits, and other necessary documentation has increased exponentially in recent years and are unaffordable for many. Those without the necessary documents are not permitted to access education and other key services.⁶¹

UNRWA records the presence of Palestine refugees from Syria in Jordan and Lebanon as “Palrefs-Syria” but does not *register* them in the country in the way other Palestinians are registered. Since UNRWA’s budget allocation is based on the number of registered refugees in each country, registration determines their access to services and assistance. In both Lebanon and Jordan, Palestinians may have varying statuses, including “unregistered” and “non-ID” depending on when and from which country/territory they arrived, and their status determines what benefits and provisions they may receive.⁶²

54 Are Knudsen, ‘Widening the Protection Gap: The ‘Politics of Citizenship’ for Palestinian Refugees in Lebanon, 1948–2008’ *Journal of Refugee Studies* (Vol. 22, No. 1, 2009) 68 (‘In Lebanon, domestic legal discrimination against the refugees was instituted in the 1960s and refined after 1990, robbing them of basic civic rights.’)

55 Akram, ‘UNRWA and Palestine Refugees’ (2021), n 7, 655.

56 See Rollins, n 38, Ss. 1-3.

57 Minority Rights Group (MRG), Jordan: Palestinians, <https://minorityrights.org/minorities/palestinians-2/#:~:text=There%20are%20around%20three%20million,is%20thought%20to%20be%20higher> [accessed 30 June 2022].

58 MRG, *ibid*.

59 Rollins, n 38, S. 2.

60 Cevdet Acu, ‘Forgotten Palestinian Refugees in Jordan during the COVID-19 Crisis’ (University of Oxford Centre on Migration, Policy and Society, 11 Nov 2020) <https://www.compas.ox.ac.uk/2020/forgotten-palestinian-refugees-in-jordan-during-the-covid19-crisis/> [accessed 30 June 2022].

61 Mohammad Ayeshe, ‘Palestinians from the Gaza Strip are suffering in Jordan’ (Middle East Monitor, 21 Feb 21, 2017) <https://www.middleeastmonitor.com/20170221-palestinians-from-the-gaza-strip-are-suffering-in-jordan/> [accessed 30 June 2022].

62 Note from Professor Susan Akram to Cynthia Orchard, 18 Dec 2021.

4. Nationality vs Statelessness: Are Palestinians Stateless?

This section considers the definitions of nationality and statelessness and whether Palestinians should be considered stateless under the 1954 Convention.

4.1. Nationality vs Statelessness

The words “national” and “nationality” have various meanings. In some contexts, they have a general meaning, referring to a shared identity, sometimes based on race or ethnicity, language, religion, or affinity and connection to a particular place, people, or political identity.

Nationality also has a legal meaning under international law and is often considered equivalent to the meaning of “citizenship” in domestic law. In this report, except where otherwise specified, references to nationality mean nationality solely in the legal sense: that is, the formal bond of a person to a particular state, with the rights and duties inherent in belonging to that state.

Article I(1) of the 1954 Convention relating to the Status of Stateless Persons provides the internationally accepted definition of a stateless person as someone “who is not considered as a national by any State under the operation of its law.” This definition also forms part of customary international law.⁶³ However, neither the 1954 Convention nor most other international treaties define the terms “national” or “nationality”. The 1997 European Convention on Nationality states that “[f]or the purpose of this Convention: ‘nationality’ means the legal bond between a person and a State and does not indicate the person’s ethnic origin.”⁶⁴ The International Court of Justice, in the 1955 *Nottebohm Case*, defined nationality as “a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”⁶⁵

UNHCR observes that:

“The 1954 Convention is concerned with ameliorating the negative effect, in terms of dignity and security, of an individual not satisfying a fundamental aspect of the system for human rights protection; the existence of a national-State relationship. As such, the definition of stateless person in Article 1(1) incorporates a concept of national which reflects a formal link, of a political and legal character, between the individual and a particular State. This is distinct from the concept of nationality which is concerned with membership of a religious, linguistic or ethnic group. As such, the treaty’s concept of national is consistent with the traditional understanding of this term under international law; that is persons over whom a State considers it has jurisdiction on the basis of nationality, including the right to bring claims against other States for their ill-treatment.”⁶⁶

Although there is a general understanding that nationality in international law refers to a legal bond between a person and a state, there is no agreed “minimum content” of what defines nationality in international law – it is in part dependent on context.⁶⁷ The rights to reside in the territory without restrictions on exit or entry and to have access to diplomatic protection and consular services when abroad are core aspects

63 United Nations, *Draft Articles on Diplomatic Protection with commentaries* (2006) <https://www.refworld.org/docid/525e7929d.html>, Commentary, S 3

64 The 1997 European Convention on Nationality, Art 2(a).

65 *Nottebohm Case*, Judgement of 6 April 1955, ICJ Reports 1955, 23.

66 UNHCR, *Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons* (2014), https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf, para 52.

67 See Alice Edwards, ‘The Meaning of Nationality’ in A Edwards and L Van Waas, *Nationality and Statelessness under International Law* (Cambridge University Press, 2014), S. 1.5.

of nationality.⁶⁸ However, other aspects are also important, such as: the rights to vote, hold political office, work (including employment with the government) without needing a work permit, be eligible to own property, and be entitled to access education and welfare benefits on a non-discriminatory basis.⁶⁹ In some contexts, two other aspects of nationality are particularly important: state sovereignty/independence; and the existence of a nationality law that establishes which persons are considered nationals of that state.⁷⁰

As a general rule, a country's own nationality laws determine which people should be considered its nationals. However, international law and human rights principles establish important limits on how states define and implement their nationality laws. One of the exceptions to the general rule is that it is a principle of customary international law that the "inhabitants of a territory undergoing a change of sovereignty automatically acquire nationality in the new state" unless there is a treaty arranging some other nationality for such persons.⁷¹ Further, under international law, states are not permitted to arbitrarily withdraw nationality from persons who should be considered nationals of that state.⁷² When these principles are not applied, and particularly where nationality is explicitly denied by a successor or occupying state, the people affected are left stateless, even though they have a right under international law to be considered nationals.

4.2. Are Palestinians Stateless?

Palestinian Identity

Many Palestinians consider themselves to be Palestinian nationals in view of their long-standing ties to the areas currently known as Israel, Gaza, the West Bank, and Palestine, as well as their ethnicity, shared political and cultural affinity. It is important to acknowledge and respect Palestinians' connection to Palestine and right to self-identify as Palestinian nationals. In addition, Palestinian nationality – in the legal sense – was established by an international treaty in 1923 and continues to be protected by international law.

The displacement of Palestinians initiated by the creation of Israel in 1948 (and continuing subsequently), combined with the denial of nationality by Israel, negation of Palestinians' right to self-determination, and the lack of Palestinian sovereignty and a Palestinian nationality law has resulted in the effective denationalization of most Palestinians. As such, most Palestinians should be considered not only refugees but also stateless persons.

International Law, Palestinian Nationality, and Self-Determination

Palestinians are recognised internationally as a national people – a legal classification under international law that entitles them to the right of self-determination and other rights. This recognition dates to the 1919 Covenant of the League of Nations, which acknowledges that Palestinians were one of the communities

68 The International Law Commission describes diplomatic protection as: 'the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.' United Nations, *Draft Articles on Diplomatic Protection with commentaries* (2006) <https://www.refworld.org/docid/525e7929d.html>, Pt 1, Art I.

69 See Edwards, n 67, Ss. 1.1-1.4.

70 See Albanese and Takkenberg, n 6, Part One (III), S. 3.2.2.

71 Susan M Akram, 'Palestinian Nationality and "Jewish" Nationality: From the Lausanne Treaty to Today' in Farsakh, Leila (ed) *Rethinking Statehood in Palestine: Self-Determination and Decolonization Beyond Partition* (University of California Press, 2021) <https://www.ucpress.edu/book/9780520385627/rethinking-statehood-in-palestine>, 194 [hereinafter, Akram, 'Palestinian Nationality' (2021)].

72 Akram, 'Palestinian Nationality' (2021), *ibid*, 194. See also Edwards, n 67, 1.3.3.

formerly part of the Turkish/Ottoman Empire whose “existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.”⁷³ This recognition of Palestinians as a national people has been affirmed numerous times by the United Nations.⁷⁴

The 1923 Treaty of Lausanne ending World War I established the nationality of persons who had previously been subjects of the Turkish/Ottoman Empire, setting out that those who resided in territories that would become the territory of another state upon the treaty coming into effect would become “nationals of the State to which such territory is transferred.”⁷⁵ The territory then-constituting Palestine was allocated to the British Government, which had occupied it since 1917, to govern as “Mandate Palestine”. However, under the League of Nations framework in existence at the time, people of a Mandate territory were not considered nationals of the Mandatory state, but became nationals of the newly recognised Mandate territory.⁷⁶ Thus, under the terms of the Treaty of Lausanne, Palestinian nationality was established in international law, comprising persons who had been subjects of the Turkish/Ottoman Empire who then resided in the British Mandate territory of Palestine.⁷⁷ This nationality was codified – but with some variations – in the British Mandate’s “Palestine Citizenship Order” of 1925.⁷⁸ As discussed above, other international law also protects Palestinians’ entitlement to be granted the nationality of a “successor state” and does not permit arbitrary deprivation of nationality. Thus, Israel’s subsequent creation and its laws and actions cannot unilaterally undo an international treaty’s prior establishment of nationality. Palestinian nationality continues as an entitlement under principles of international law, and carries with it the rights of self-determination and return.⁷⁹

Denial of Israeli Nationality

Palestinians are not considered nationals of Israel by operation of Israeli law, even though many have a right under international law to Israeli nationality. Some (relatively few) Palestinians have acquired Israeli “citizenship”, but Israeli law reserves “nationality” to Jewish people, who have superior property and other rights compared to Palestinian “citizens” of Israel. In 2018, Israel passed its Nation State Basic Law, which expands on previous discriminatory laws and very clearly defines Israel as a state of and for Jewish people, and explicitly declares that the right of national self-determination in Israel is “unique to the Jewish people”.⁸⁰ Further, the Israeli Government does not recognise Palestine as a state and considers Palestinians living in the occupied Palestinian territory to be non-citizen residents.⁸¹ Israel’s position violates international legal principles enshrined in treaties such as the International Covenant on Civil and Political Rights, the International Convention on the Elimination of all Forms of Racial Discrimination, the 1961 Convention on

73 Article 22 of the Covenant of the League of Nations (28 April 1919), available at: https://avalon.law.yale.edu/20th_century/leagcov.asp#art22; and see BADIL, *Palestinian Self-Determination: Land People, and Practicality* (Working Paper No 28, 2021) https://badil.org/cached_uploads/view/2021/11/15/wp-28-self-determination-1636973309.pdf (‘BADIL, *Palestinian Self-Determination*’).

74 BADIL, *Palestinian Self-Determination*, *ibid* (citing UNGA, The Right of the Palestinian People to Self-Determination, A/RES/75/172 (28 Dec 2020) <https://www.un.org/unispal/document/the-right-of-the-palestinian-people-to-self-determination-ga-resolution-a-res-75-172/> and UN Resolution 2672(XXV) of 1970, Resolution 3236 (XXIX) of 1974, Resolution 66/146 of 2012, and Resolution 67/158 of 2013).

75 Treaty of Peace with Turkey Signed at Lausanne, 24 July 1923, entry into force 6 Aug 1924, available at: https://www.lib.byu.edu/index.php/Treaty_of_Lausanne, Article 30.

76 Akram, ‘Palestinian Nationality’ (2021), n 71, 196.

77 *Ibid*, 195-96.

78 *Ibid*, 196.

79 *Ibid*, 209.

80 *Basic Law: Israel - The Nation State of the Jewish People* (2018), available at <https://main.knesset.gov.il/EN/activity/Documents/BasicLawsPDF/BasicLawNationState.pdf> [accessed 30 June 2022]; see also Akram, ‘Palestinian Nationality’ (2021), n 71, 203-04; Adalah, *The Discriminatory Laws Database* (2017) <https://www.adalah.org/en/content/view/7771>; and BADIL, *Israel’s Discriminatory Laws: Summary Version* (Occasional Bulletin No 26, 2012) https://badil.org/cached_uploads/view/2021/04/19/bulletinno-26-1618827592.pdf. Israel de-nationalised most Palestinians early in its history, under its nationality law of 1952. *Ibid*. 200-201

81 *Ibid*, 203-04.

the Reduction of Statelessness, and customary international law. The 2018 law also continues to deny the right of return of Palestinians expelled from Israel or the occupied territory, a right enshrined in these treaties, UN resolutions, and customary international law relating to the right of an individual to return to his place of origin or nationality.⁸²

Although not an option at present, should Israel offer Israeli nationality to Palestinians in the future, Palestinians have good grounds for rejecting Israeli nationality, in accordance with principles of self-determination.⁸³

Lack of Palestinian Sovereignty and Nationality Law

As noted above, Palestinians have been considered nationals of Palestine under previous Palestine laws, for example during the British Mandate period. This report does not provide a full history of Palestine and previous nationality laws, but focuses on whether Palestinians should *currently* be considered stateless and entitled to the protections that the recognition of statelessness provides, in particular with respect to statelessness determination and protection under the 1954 Convention. For a detailed consideration of the relevant history, see Professor Susan Akram's "Palestinian Nationality and 'Jewish' Nationality: From the Lausanne Treaty to Today."⁸⁴

Palestine declared its independence in 1988 and is recognised in 2012 as a state by the UN and 139 countries;⁸⁵ however, it continues to be a state under military occupation by Israel. Issuance of Palestinian identity and travel documents requires permission from Israel, and Palestine "is far from being independent or sovereign."⁸⁶ The Palestine Liberation Organization (PLO) was formed in 1964 and was recognised over subsequent years as the representative of the Palestinian people, including by Israel in 1993, through the Oslo Peace Accords. The Palestinian Authority was created in 1994 to govern Palestine, to a limited extent. Pursuant to the Oslo Accords, the Palestinian Authority (PA) can grant *permanent resident status* to existing residents and certain persons of Palestinian origin returning from abroad, and it can issue identity cards and passports for residents of the West Bank and Gaza. However, these acts require permission from the Israeli authorities;⁸⁷ and, of course, permanent residence is *not* nationality. As noted above, nationality entails a right to reside in one's own country, and to return to it if abroad. Many Palestinians are in fact unable to exercise their right of return to any part of Palestine (or Israel).

82 The International Covenant on Civil and Political Rights (1966), Article 12(4) states that "no one shall be arbitrarily deprived of the right to enter his own country." The Convention on the Elimination of All Forms of Racial Discrimination (1969), Article 5(d)(ii), obligates states to eliminate racial discrimination "in all its forms," and to "guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of . . . the right to leave any country, including one's own and to return to one's country." This provision also prohibits a state from discriminating on these grounds in determining eligibility for nationality. The 1961 Convention on the Reduction of Statelessness, Article 9, also prohibits deprivation of nationality on the basis of race or ethnicity, religion, or political opinion. See also Akram, 'Palestinian Nationality' (2021), n 71, 204-206.

83 Palestinians' lack of nationality is in some ways analogous to that of some Sahrawi people, who are stateless but have an entitlement under international law to be considered nationals of the State of Western Sahara. Western Sahara is recognised as a state by some countries, but Morocco claims it as part of Morocco and occupies part of the territory. Western Sahara has no nationality law. Dr Bronwen Manby concludes that certain categories of Sahrawis should be considered stateless. Some Sahrawis could claim Moroccan nationality -- but even where this would be recognised by Morocco, based on principles of self-determination, if they object on political grounds to being Moroccan nationals, they should still be considered stateless in statelessness determination procedures, vis a vis Morocco and based on the lack of an effective Sahrawi nationality. Bronwen Manby, 'Nationality and Statelessness Among Persons of Western Saharan Origin', *Journal of Immigration, Asylum and Nationality Law*, Vol.34, No. 1 (Feb 2020) 9-29.

84 Akram, 'Palestinian Nationality' (2021), 194.

85 The UN formally recognised Palestine as a state in 2012. As of Nov 2021, 139 countries recognise Palestine as a state. Permanent Observer Mission of the State of Palestine to the United Nations, 'Diplomatic Relations' <https://palestineun.org/about-palestine/diplomatic-relations/> [accessed 30 June 2022].

86 Farsakh, n 11.

87 See Wout van Doren and others, 'The Broadening Protection Gap for Stateless Palestinian Refugees in Belgium' (Statelessness and Citizenship Review 2(2), 2020) <https://statelessnessandcitizenshipreview.com/index.php/journal/article/view/123/99>, 307-08.

Palestine does not currently have a nationality law. The 1968 Palestine National Charter defines who is considered Palestinian, but this is not a nationality law.⁸⁸ There have been two later efforts by the PLO and the PA, in 1995 and 2012, to establish a Palestinian nationality law, both of which failed.⁸⁹ In addition, the Palestinian Basic Law of 1997 (amended 2003)⁹⁰ – meant to be a temporary constitution until a permanent constitution could be drafted and adopted in an independent Palestinian state – discusses Palestinian nationality in broad terms but does not clearly define who is a Palestinian national. It states that “citizenship shall be regulated by law” and thus anticipates a subsequent nationality law, which does not yet exist.⁹¹ The details of any future Palestinian nationality law remain unknown: for example, we do not know with certainty if such a law will confer Palestinian nationality to people of Palestinian origin whose families have lived outside Palestine since before 1947; to children born to Palestinian mothers and non-Palestinian fathers; or what proof of Palestinian ancestry might be required for people to register as Palestinian nationals, if registration will be required.

Palestine has a limited ability to offer diplomatic protection or consular assistance to Palestinians outside Palestine. Certain governmental functions, including the issuance of travel and identity documents and entry to the West Bank and Gaza are restricted by Israel. There are Palestinian missions in many countries, but, as noted, Palestine is not a sovereign, independent state;⁹² and it is not recognised as a state by all countries.

Thus, in summary, efforts to enact a Palestinian nationality law have failed; and Palestine currently does not have an independent, sovereign ability to issue identity and travel documents, allow persons to enter its territory, or offer full diplomatic protection to Palestinians. In these circumstances, Palestinians cannot be considered nationals of Palestine for the purposes of statelessness determination under the 1954 Convention, which defines a person as stateless if they are “not considered as a national **by any State under the operation of its law**” (emphasis added). Therefore, Palestinians should be considered stateless for the purposes of the 1954 Convention unless and/or until they can be considered nationals of an independent, sovereign state which has a nationality law. If Palestine does adopt a nationality law, then persons who are considered nationals under the new law *might* no longer be stateless. However, it will be important to consider other circumstances, including Palestine’s sovereignty and ability to independently issue documentary proof of nationality and/or passports to all persons considered nationals under its laws, to offer them an unrestricted right to enter and reside in the territory, and to provide them diplomatic protection when abroad, as well as other criteria that commonly adhere to nationality.

Potential problems relating to prohibitions of dual nationality: The future Palestinian nationality of Palestinians who have acquired a different nationality remains unknown. Many countries permit dual nationality, but some do not. The ability to hold dual nationality will depend on the nationality laws

88 Article 5 of the Charter defines Palestinians as: ‘those Arab nationals who, until 1947, normally resided in Palestine regardless of whether they were evicted from it or have stayed there. Anyone born, after that date, of a Palestinian father - whether inside Palestine or outside it - is also a Palestinian.’ The Palestinian National Charter: Resolution of the Palestine National Council (1968). Available at: https://www.files.ethz.ch/isn/125413/2123_Palestinian_National_Charter.pdf

89 Akram, ‘Palestinian Nationality’ (2021), n 71, 207-208. BADIL has seen drafts of the PA’s proposed nationality legislation, in which the definition of nationality is more exclusive than the Palestine National Charter.

90 Passed by the Palestinian Legislative Council in 1997; ratified by then-President Yasser Arafat in 2002.

91 Akram, ‘Palestinian Nationality’ (2021), n 71, 207-208. The Oslo Accords also define who is eligible to vote in the West Bank and Gaza, but this does not constitute a nationality law. Akram, *ibid*, 206-207. Palestine also has an electoral law, introduced by decree in 2007, which establishes eligibility for voting and sets out who is considered Palestinian for purposes of the electoral law. However, eligibility to vote does not necessarily equate with nationality. This is not a nationality law and does not establish definitively who is considered a national of Palestine. See ‘A decree issued by a law number () of 2007, pertaining the general elections’, Chairman of the PLO Executive Committee, President of the Palestinian National Authority (2007) https://www.elections.ps/Portals/0/pdf/Election_Law_%282007-Sept_02%29-EN.pdf [accessed 30 June 2022], Article 27.

92 See List of Diplomatic Missions in Palestine & Palestinian Diplomatic Missions abroad at: <https://www.embassy-worldwide.com/country/palestine/>.

of Palestine and the other countries concerned. Where dual nationality is not permitted by the other country, it may be possible for Palestinians who have acquired a different nationality to renounce it in order to be considered Palestinian nationals, should they choose to do so.⁹³

Current practices by other states: In current practice, whether Palestinians are considered stateless by a particular government may depend on the political position of that government, and whether it recognises Palestine as a state. The UK Government, for example, does not recognise Palestine as a state and officially considers persons of Palestinian origin to be stateless (unless they have acquired the nationality of a state recognised by the UK Government).⁹⁴ Spain, as discussed in a case below, does not recognise Palestine as a state but considers (at least some) Palestinians to be nationals of Palestine rather than stateless. Other countries that do recognise Palestine as a state consider persons residing in Palestine, and sometimes originating from Palestine, as having Palestinian nationality; and others recognise Palestine as a state but consider Palestinians to be stateless. Most Arab states do recognise Palestine as a state and generally do not permit Palestinians to acquire the nationality of the host state for political reasons.⁹⁵

Acquisition of nationality does not resolve refugeehood: Even if a Palestinian acquires a nationality in accordance with national law – of Palestine or another state – those who fled areas which are now part of Israeli territory (and their descendants) will remain refugees with respect to Israel. Acquisition of a nationality under domestic law does not resolve the issue of their continuing refugeehood nor negate their right to return to their place of origin, or other rights under international law (except with respect to protection as stateless persons).

Consequences of failure of recognition: For Palestinians who seek international protection, the consequences of governments failing to recognise them as refugees or stateless persons can be devastating. Some Palestinians are granted refugee status in other countries, and this provides important protection for them – and often a route to naturalisation of the host state. But if they are not eligible for (or are not granted) refugee status or other protection, failure to recognise statelessness often relegates Palestinians who have no other legal status to a life of instability and destitution, without recognition or fulfilment of their basic human rights, including the right to a nationality. It also means that their children may be born into serious hardship and unacknowledged statelessness.

5. Article 1D Jurisprudence

As discussed, many Palestinians are refugees to whom Article 1D of the 1951 Convention applies, either to exclude or include them. UNHCR has confirmed that Article 1D potentially applies to Palestine refugees and displaced persons, and their descendants, and defines these groups as:

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

⁹³ For a brief discussion of dual nationality, see Edwards, n 67, S. 1.3.1.

⁹⁴ See Home Office, ‘Stateless Leave’ (Version 3, 30 Oct 2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/843704/stateless-leave-guidance-v3.0ext.pdf, 18. This does not mean stateless Palestinians will be granted permission to stay in the UK, however – under the UK’s statelessness determination procedure, that depends on whether they meet other criteria, including whether they are ‘admissible’ to another country or territory with residency and other rights. This ‘admissibility’ requirement does not appear in international law.

⁹⁵ See Abbas Shibliak, ‘Stateless Palestinians,’ *Forced Migration Review No. 26 - Palestinian Displacement: A Case Apart?* (Refugee Studies Centre, University of Oxford, 1 Aug 2006) <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/palestine/shibliak.pdf>, 8.

“Displaced persons: Persons who are ‘displaced persons’ within the sense of UN General Assembly Resolution 2252 (ES-V) of 4 July 1967 and subsequent UN General Assembly resolutions, and who, as a result of the 1967 conflict, have been displaced from the Palestinian territory occupied by Israel since 1967 and have been unable to return there. It also includes those persons displaced by ‘subsequent hostilities’”.⁹⁶

Other Palestinians may qualify as refugees under Article 1A of the Refugee Convention, based on a well-founded fear of persecution for a Convention reason, or have a right to protection under other human rights law (e.g., complementary protection or protection of family or private life).⁹⁷ And, as noted, some Palestinians are entitled to protection pursuant to the 1954 Convention relating to the Status of Stateless Persons. However, even in the relatively few countries that have adopted statelessness determination procedures, there are sometimes significant barriers to stateless Palestinians accessing adequate protection.⁹⁸

5.1. CJEU Jurisprudence

The Court of Justice of the European Union (CJEU) has considered Article 1D in several cases, which show a trajectory of offering some protection but also imposing some unwarranted restrictions on the rights of Palestinian refugees.

Bolbol: The CJEU first considered Article 1D in 2010 in *Bolbol v Hungary*.⁹⁹ The key holdings were that:

- 1) To establish whether a person is receiving protection from a UN agency other than UNHCR, the words “at present” in Article 1D mean the present day (date of consideration by a government authority or court), rather than the date the *1951 Refugee Convention* was signed (see Paras 47-48).
- 2) “It follows from the clear wording of Article 1D of the Geneva Convention that only those persons who have actually availed themselves of the assistance provided by UNRWA come within the clause excluding refugee status set out therein, which must, as such, be construed narrowly and cannot therefore also cover persons who are or have been eligible to receive protection or assistance from that agency” (Para 51).
- 3) “While registration with UNRWA is sufficient proof of actually receiving assistance from it, ... such assistance can be provided even in the absence of such registration...” (Para 52).
- 4) For the purposes of the first sentence of Article 12(1)(a) of Directive 2004/83,¹⁰⁰ the parallel of Article 1D of the Refugee Convention, “a person receives protection or assistance from an agency of the United Nations other than UNHCR, when that person has actually availed himself of that protection or assistance” (Para 53).
- 5) “It should be added that persons who have not actually availed themselves of protection or assistance from UNRWA, prior to their application for refugee status, may, in any event, have that application examined pursuant to Article 2(c) of the Directive”, the parallel of Article 1A(2) of the Refugee Convention (Para 54).¹⁰¹

⁹⁶ UNHCR, *Guidelines on International Protection*, No. 13, n 6, Para 8.

⁹⁷ E.g., ‘a Palestinian [or their descendant] originally from the West Bank, who was never displaced.’ UNHCR, *Guidelines on International Protection*, No. 13, n 6, Para 10, fn 24.

⁹⁸ For examples from the UK, see Bezzano and Carter, n 39. For other European examples, see generally the Statelessness Index of the European Network on Statelessness (<https://index.statelessness.eu/>).

⁹⁹ *Bolbol v Bevándorlási És Állampolgársági Hivatal* (Court of Justice of the European Union, C-31-09, ECLI:EU:C:2010:351, 17 June 2010). <https://caselaw.statelessness.eu/caselaw/cjeu-bolbol-case-c-3109>

¹⁰⁰ Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L 304/12 [the parallel of Article 1D of the Refugee Convention].

¹⁰¹ Ibid, Article 2(c) of the 2004 Qualification Directive is the parallel of Article 1A(2) of the Refugee Convention.

El Kott: Two years later, in *El Kott v Hungary*,¹⁰² the CJEU considered Article 1D again, confirming its holdings in *Bolbol*, and this time focusing on the circumstances in which protection or assistance from another UN agency has ceased “for any reason,” interpreting this phrase in a narrower sense than the plain meaning of the 1951 Convention. The Court made the following key findings:

- 1) Persons who have registered with UNRWA or received UNRWA’s assistance will not be excluded from refugee status if that assistance has ceased for reasons “beyond [their] control” and “independent of [their] volition” (Paras 59-61); however, “mere absence from [UNRWA’s area of operations] or a voluntary decision to leave it cannot be regarded as cessation of assistance” (Para 59).¹⁰³
- 2) A person will be considered to have been forced to leave UNRWA’s area of operation where that person’s personal safety was at serious risk and it was impossible for UNRWA to guarantee that their “living conditions in that area will be commensurate with the mission entrusted to that agency” (Para 63). With respect to the geographical area of possible return, the Court’s reference point is the UNRWA field of operation in which the applicant previously lived (this becomes a point of dispute in subsequent jurisprudence, as set out below).
- 3) Where UNRWA’s assistance has ceased for reasons beyond the control of the applicant, and other exclusion clauses are not applicable, the applicant is *automatically (ipso facto)* entitled to *refugee status* -but they are required to have made an application for refugee status (Para 81).¹⁰⁴

An earlier opinion of the Advocate General Sharpston in this case observed that it was “common ground that UNRWA was not set up to provide, nor has it ever provided, ‘protection’ to Palestinian refugees. It is not in a position to provide anything other than ‘assistance’.”¹⁰⁵

Serin Alheto: In a 2018 case interpreting Article 1D, *Serin Alheto v Bulgaria*,¹⁰⁶ the CJEU found that:

- 1) Article 1D, as *lex specialis*, must be considered prior to Article 1A of the 1951 Convention;
- 2) Prior registration with UNRWA does not necessarily mean that the applicant could access sufficient protection in an UNRWA area; and
- 3) Palestinians are not *included* under the second paragraph of Article 1D and automatically entitled to protection under the 1951 Convention if they could be admitted to any area where they could access effective assistance or protection from UNRWA and could live there in safe and dignified conditions for as long as necessary.

XT: The CJEU decided *Germany v XT*¹⁰⁷ in 2021, expanding on previous jurisprudence. The key issue before the CJEU was whether UNRWA’s area(s) of operation should be considered as five separate “fields” or as a whole, in relation to Article 1D. The CJEU makes two key holdings:

¹⁰² *El Kott, A Radi and Ismail v Bevándorlási És Állampolgársági Hivatal* (Court of Justice of the European Union, C-364/11, ECLI:EU:C:2012:826, 19 December 2012). <https://caselaw.statelessness.eu/caselaw/cjeu-el-kott-and-others-case-c-36411>

¹⁰³ Ibid, Para 59-61. See also Para 51: “to accept that voluntary departure from UNRWA’s area of operations and, therefore, voluntary renunciation of the assistance provided by that agency would trigger the application of the second sentence of Article 12(1)(a) of Directive 2004/83 would run counter to the objective pursued by the first subparagraph of Article 1D of the Geneva Convention, which is intended to exclude from the benefits of the convention all persons who receive such assistance.” However, further consideration is needed where a person who voluntarily left UNRWA’s area of operation cannot return for reasons beyond their control. See further discussion at p 21 of this report.

¹⁰⁴ Ibid, Para 81. See also UNHCR, *Guidelines on International Protection*, No. 13, n 6.

¹⁰⁵ Opinion of Advocate General Sharpston, delivered on 13 September 2012, Case C-364/11 Mostafa Abed El Karem El Kott Chadi Amin A Radi Hazem Kamel Ismail, <https://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CELEX:62011CC0364&from=EN>, fn 6.

¹⁰⁶ *Serin Alheto v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite* (Court of Justice of the European Union, C-585/16, ECLI:EU:C:2018:584, 25 July 2018). <https://caselaw.statelessness.eu/caselaw/cjeu-alheto-case-c-58516>

¹⁰⁷ *Federal Republic of Germany v XT* (Court of Justice of the European Union, C507/19, ECLI:EU:C:2021:3, 13 January 2021). <https://caselaw.statelessness.eu/caselaw/cjeu-bundesrepublik-deutschland-v-xt-case-c-50719>

- 1) In order to determine whether a person is no longer receiving protection or assistance from UNRWA, national authorities should consider “all the fields of UNRWA’s area of operations which a stateless person of Palestinian origin who has left that area has a concrete possibility of accessing and safely remaining therein”;¹⁰⁸
- 2) UNRWA’s assistance cannot be considered to have ceased where the applicant departed from a field of UNRWA operation in which their safety was at risk and UNRWA was unable to provide assistance (field A), but they had previously travelled to that field from another field of UNRWA operation where their safety was not at risk and they could have received assistance from UNRWA (field B), in circumstances where they could not have reasonably expected to receive UNRWA assistance in the first field (field A), nor to have been able to return at short notice to the second field (field B).¹⁰⁹

GERMANY v XT (2021)

This case concerns a stateless Palestinian born in Syria. He is registered with UNRWA and grew up in Yarmouk Refugee Camp in Damascus. He lived in Lebanon from 2013 to 2015 and worked in casual jobs. He returned to Syria as he could not get a residence permit in Lebanon and feared expulsion. He left Syria after a few days, due to the harsh situation there, including the then-ongoing civil war. At that time, Palestinians were banned from entering Jordan and Lebanon.¹¹⁰ XT applied for international protection in Germany in December 2015. After initially being granted subsidiary protection rather than refugee status, XT appealed. Two appeal courts found that XT was entitled to refugee status, and the German Federal Administrative Court referred the case to the CJEU for a preliminary ruling, which was issued in January 2021.

The CJEU holds that the possibility of return to an UNRWA area should be considered with respect to any part of UNRWA’s area of operation. It clarifies that when assessing possible entry to an UNRWA field of operations, asylum authorities should consider relevant factors such as: whether the applicant has a residence permit; family ties; former residence; why they left a particular area; and pertinent declarations or practices of authorities in the areas concerned. However, none of these are necessarily definitive on their own.¹¹¹ The Court observed that it is for the authorities of the country of asylum to determine whether an applicant meets the requisite criteria, but noted that XT could not obtain a residence permit in Lebanon and left Lebanon in the context of increased deportations of Palestinians from Lebanon to Syria. The Court concludes that “his departure from UNRWA’s area of operations taken as a whole was not voluntary.”¹¹²

In April 2021, the German Federal Administrative Court remitted this case for reconsideration of the relevant facts and to make necessary findings in the light of the CJEU decision of 13 January 2021.¹¹³

NB and AB: The most recent CJEU decision relating to Article 1D is *NB and AB v UK*.¹¹⁴ The case concerns a mother and child, NB and AB, stateless Palestinians formerly residing in Lebanon. They are registered

¹⁰⁸ Ibid, Para 82(1), 67.

¹⁰⁹ Ibid, Para 82(2).

¹¹⁰ Ibid, Paras 19–21.

¹¹¹ Ibid, Paras 58–62.

¹¹² Ibid, Para 79, 78-89, 74.

¹¹³ See Federal Administrative Court [Bundesverwaltungsgericht], *Applicant (Palestine) v BAMF*, ECLI:EN:BVerw G:2021:270421U1C2.21.0, 27 April 2021 (available in German at: <https://www.bverwg.de/de/270421U1C2.21.0> (English translation provided by Helena Marambio to Cynthia Orchard, 5 Dec 2021). The final outcome was not known to us at the time of writing this report.

¹¹⁴ *NB and AB (C-349/20) v SSHD (UK)*, ECLI:EU:C:2022:151 (CJEU, 3 March 2022). <https://caselaw.statelessness.eu/caselaw/cjeu-nb-ab-case-c-34920>

with UNRWA. AB is severely disabled and has complex medical issues and other needs, and he, his parents, and siblings all suffered in Lebanon as a result of his disability. In its judgment of March 2022, the CJEU held that:

- 1) To properly assess whether UNRWA assistance had ceased for reasons beyond the control of the applicant, the deciding authority of the country of asylum must consider both the situation at the date the applicant departed from UNRWA's area of operation and the situation at the date of decision. Even if UNRWA assistance had not been available in the past, the applicant should be excluded from protection under Article 1D (and its EU law equivalent) if, by the date of decision, it had "become possible for UNRWA to guarantee him or her living conditions commensurate with its mission."¹¹⁵ However, the burden of proof shifts to the deciding authority with respect to proving a resumption of UNRWA services, as set out below.
- 2) The burden of proof is shared between the applicant and the government and shifts to the deciding authority in certain circumstances. The applicant must submit information and documents needed to substantiate the application, and the deciding authority "must, if necessary, cooperate actively with him or her in order to determine and supplement the relevant elements of the application, those authorities indeed often being better placed than an applicant to gain access to certain types of documents."¹¹⁶ The Court goes on to find that: "the burden of proof lies with the applicants to prove that they have actually had recourse to UNRWA's protection or assistance and that that protection or assistance has ceased." If they demonstrate this, but the deciding authority considers that the applicant could now return and access adequate protection or assistance from UNRWA, it is for that authority "to demonstrate, as the case may be, that the circumstances have in the meantime changed in the area of operations concerned, so that those persons may once again receive protection or assistance from UNRWA."¹¹⁷
- 3) The applicant does not need to prove that there was any *intentional* infliction of harm or *intentional* failure of assistance or protection by UNRWA or the government of a state or territory in which UNRWA operates. "[I]t is sufficient to establish that UNRWA's assistance or protection has in fact ceased for any reason, so that that body [UNRWA] is no longer in a position, for objective reasons or reasons relating to the person's individual situation, to guarantee him or her living conditions commensurate with its mission."¹¹⁸
- 4) With respect to possible assistance from civil society or governments actors, "there can be no question of treating ... [UNRWA] in the same way as civil society actors such as NGOs, which are quite different entities from UNRWA and ... cannot provide 'assistance' or 'protection' for the purposes of the [1951 Refugee] Geneva Convention."¹¹⁹ However, if UNRWA cooperates with a civil society or host government agency or actor to fulfil its mission, and there is a **stable** and **formal** relationship between the organisations, and the applicant has a **durable right** to such services, then their services are relevant to considerations of whether UNRWA can provide adequate assistance or protection.

The Court also observes, as indicated by the Advocate General in his 2021 Opinion in this case, that UNRWA must be able "to fulfil its mandate *effectively* and ensure that the persons concerned live in dignified conditions" (with reference to *Germany v XT*).¹²⁰

¹¹⁵ NB and AB (2022), 7.

¹¹⁶ NB and AB (2022), 8.

¹¹⁷ NB and AB (2022), 8.

¹¹⁸ NB and AB (2022), 8.

¹¹⁹ NB and AB (2022), 9.

¹²⁰ NB and AB (2022), 9 (emphasis added); and see *NB and AB v Secretary of State for the Home Department* (United Kingdom), Case C349/20 (AG Opinion, 6 Oct 2021) <https://bit.ly/3sV8uwB>

5.2. Analysis of CJEU Jurisprudence

The first holding in *Bolbol* (that “at present” means the present day rather than the date the 1951 Convention was signed) is a helpful clarification that now seems obvious, but was not at the time *Bolbol* was decided. The holding in *Bolbol* that only persons who have actually registered with UNRWA or accessed UNRWA’s services come within the scope of Article 1D creates a gap for some Palestinians who were at least in theory eligible to register with UNRWA, who also should be eligible for inclusion under Article 1D. The CJEU’s holding fails to acknowledge that UNRWA registration is voluntary, and that originally, eligibility for registration with UNRWA was based on need for assistance, and that now, eligibility for assistance is still based on severe need.¹²¹ Registration with UNRWA, or having accessed UNRWA services, should not be the key factor in determining whether 1D applies to include a Palestinian within the scope of the 1951 Convention. Rather, to fulfil the object and purpose of the 1951 Convention to provide continuing protection to Palestinians, the application of Article 1D should be based on Palestinian origin and displacement. UNHCR rejects this *Bolbol* holding as being “incompatible with the object and purpose of Article 1D” and urges decision-makers to take a more favourable approach in line with the protective purpose of Article 1D.¹²²

PALESTINIAN BORN IN GULF COUNTRY

Consider, for example, a person whose Palestine refugee parents lived for many years in Lebanon and registered with UNRWA there, but who left because the father got a job in a Gulf country shortly before the child’s birth. The parents and child have permission to reside in the Gulf country based only on the father’s employment. The child, born in the Gulf country, has never lived in an UNRWA area, is not registered with UNRWA, nor ever received UNRWA services. But, as a descendant of a Palestine refugee father, she is also already a refugee, in accordance with international legal principles. She is also stateless. She has no permission to reside in Lebanon nor any country other than the country in which she was born, and her residence there is linked to her father’s employment. When she reaches adulthood, if her father loses his job or if the daughter no longer qualifies as a dependent of her father, she faces a serious gap in the protection available to her.

Assume the father loses his job. The daughter, now in her 20s, travels to a country that is a signatory to the 1951 Convention and seeks asylum. She has difficulty succeeding with a claim for asylum based on fear of persecution, and in fact, she cannot return to her country of former habitual residence because she has no right to reside there. Whether she is actually registered with UNRWA or received UNRWA assistance should not determine her status. Rather, she should be considered to come within the scope of Article 1D as a person of Palestine origin who would have been eligible for registration with UNRWA had her parents not left UNRWA’s area of operation before her birth. No UNRWA assistance is available to her, for reasons beyond her control. She should be *included* under Article 1D and be considered a refugee under the 1951 Convention, *ipso facto*.¹²³ If she is in a country with a functional statelessness determination procedure, she could seek protection as a stateless person – but this option does not negate the fact that she is also a refugee who should be entitled to protection under Article 1D.

As argued by BADIL, *El Kott* is flawed in holding that the phrase “for any reason” means a reason “beyond the control” and “independent of the volition” of the applicant. The key consideration should be whether a Palestinian refugee is able to access effective protection.¹²⁴ The language of the Convention does not

121 For more information about UNRWA registration, see UNRWA, ‘What We Do’: <https://www.unrwa.org/what-we-do/eligibility-registration#:~:text=Since%202006%2C%20husbands%20and%20descendants,registered%20to%20receive%20UNRWA%20services> (accessed 15 Apr 2022).

122 UNHCR, *Guidelines on International Protection*, No. 13, n 6, Para 14.

123 See also van Doren and ors, 310-313, n 87 for an illustration of Belgian jurisprudence on this point.

124 BADIL, *Closing Protection Gaps*, Ch 5, S 1.3, n 11..

include a qualifier on the phrase “for any reason”. Adding restrictive language such as “beyond the control” is not in line with the plain meaning of the treaty. In accordance with the Vienna Convention on the Law of Treaties, the Convention should be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹²⁵ If the plain language of the Convention were followed, Palestinian refugees whose protection ceased “for any reason” would be able to apply for refugee status in countries that are signatories to the 1951 Convention, and it should be granted automatically. This would comply with the object and purpose of the Convention to ensure continuing protection for Palestinian refugees and would be in line with the UN recognition that Palestinians *are already* refugees. The observation in *El Kott* and *XT* that interpreting Article 1D to permit inclusion in cases of “mere absence” or “voluntary departure” from UNRWA’s area of operation would mean the exclusion clause would have no practical effect is incorrect. The Court in *XT* cites the fact that neither Article 1D nor its parallel EU Directive refer to a specific place of residence as being relevant, only whether UNRWA assistance has ceased.¹²⁶ However, even if an applicant who departed completely voluntarily from UNRWA’s area of operation is *included* under Article 1D, the exclusion clause would still have the very significant practical effect of continuing to exclude any Palestinians registered with UNRWA or accessing its services who are still in UNRWA’s area of operation (unless there is acknowledgement that the UNCCP’s inability to fulfil its protection mandate triggered the inclusion clause on a broad scale). This would likely continue to affect millions of Palestinians who remained within UNRWA’s area of operation.

Governments and courts have generally applied the *El Kott* judgment by interpreting “for any reason” to mean departure from UNRWA’s area of operation for a reason beyond the applicant’s control and independent of their volition. UNHCR interprets the CJEU’s approach in *El Kott* and *XT* as an assessment of whether protection or assistance has ceased against objective factors for leaving the UNRWA area of operations that is “equally applicable in circumstances whereby the person is prevented from (re)availing [themselves] of UNRWA’s protection or assistance”,¹²⁷ meaning that a Palestinian who departed voluntarily from UNRWA’s area of operations and later is unable to return for reasons beyond their control may fall within the scope of the inclusion clause. It would be helpful if the CJEU and other courts were to clearly confirm that Palestinians who depart voluntarily from UNRWA’s area of operation can be included under Article 1D, and UNRWA assistance deemed to have ceased, because they are no longer present in UNRWA’s area of operations.

The holdings in *Serin Alheto* that Article 1D must be considered prior to Article 1A of the 1951 Convention and that registration with UNRWA does not necessarily mean that the applicant could access sufficient protection in UNRWA’s area of operation are helpful and appropriate.

The approach in *Serin Alheto* and *XT* that the relevant area of consideration for potential return is the entirety of UNRWA’s area of operation is flawed in its apparent assumption that Palestinian refugees are likely to have the ability to enter and have permission to reside in more than one UNRWA field of operations. This decision creates additional and unnecessary evidentiary challenges for applicants who are already refugees. It should instead be assumed that Palestinians only have permission to reside in the UNRWA field in which they previously lived (and sometimes not even there). Palestinian refugees should not have the burden to

125 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31. See also Bianchini, 88-93, n 35, discussing the correct interpretation of Article 1D of the 1951 Convention and Article 1(2) (i) of the 1954 Convention in accordance with the VCLT

126 See *El Kott*, Paras 49-50; and *XT*, Paras 70-71.

127 See *El Kott*, Paras 49-51; *XT*, Paras 69-71; and UNHCR, *Statement on the Interpretation and Application of Article 1D of the 1951 Convention and Article 12(1)(a) of the EU Qualification Directive Issued in the context of the preliminary ruling reference to the Court of Justice of the European Union from the Bundesverwaltungsgericht (Germany) lodged on 3 July 2019 – Federal Republic of Germany v XT (C-507/19)* (18 Aug 2020), Para 18, <https://www.refworld.org/docid/5f3bdd234.html>. See also UNHCR, *Additional Submission of the United Nations High Commissioner for Refugees in CASE C-349/20 NB & AB v Secretary of State for the Home Department before the Court of Justice of the European Union* (21 June 2021) <https://www.refworld.org/docid/60d5ecfa4.html>; and UNHCR, *Written observations of the United Nations High Commissioner for Refugees in case C-349/20 NB & AB v Secretary of State for the Home Department before the Court of Justice of the European Union* (30 Nov 2020) <https://www.refworld.org/docid/5fc8a22c4.html>.

prove anything with respect to other UNRWA areas, unless there is evidence in a particular case that the applicant has a continuing right of residence in more than one of UNRWA's five fields of operation. In any other cases, if a government alleges that a Palestinian is able to access effective assistance or protection in an UNRWA area other than one in which they have previously resided, the burden of proof should be on the government to prove this. Despite the flawed approach taken on this issue in *Serin Alheto* and *XT*, in theory at least, there remains the possibility of an applicant showing that UNRWA assistance has ceased for reasons beyond their control and that they do not have permission to enter or reside, nor could they live in safety and dignity, in any UNRWA field of operation.¹²⁸ However, Palestinian refugees generally are unlikely to be aware of the intricacies of judicial interpretations of Article 1D, and they often struggle to find competent legal assistance in countries of asylum. Further, as is illustrated in some of the cases discussed below, national authorities may lack training and up to date information about the assistance offered by UNRWA in each of its fields of operation and the conditions of entry to and residence in those territories. In practice, the approach of considering return to any part of UNRWA's area of operation may mean that some Palestinian refugees will not present the evidence that would be required in relation to all of UNRWA's fields of operation to sufficiently prove their eligibility for inclusion under Article 1D. The subsequent confirmation in *NB and AB* that governments have a duty to cooperate with applicants to assemble the relevant evidence is helpful, but it is likely to remain difficult for many stateless persons to access and submit all the documents needed to prove all elements of their claim. Although individual cases can still succeed under the *XT* approach (with good legal representation, solid evidence, and a decision-maker who has an adequate understanding of Article 1D and the circumstances in UNRWA's area of operation), more broadly, this approach is problematic as it does not properly take into account the pre-existing refugeehood of Palestinians, the protective purpose of the inclusion clause of Article 1D, nor the restrictions on Palestinians' entry and residence in UNRWA areas.

XT's holding that a Palestinian's previous travel from one UNRWA field of operation to another is relevant to whether they should be excluded under Article 1D is also flawed. This approach means that some Palestinians may be denied refugee status but be unable to leave the country in which they have sought asylum, if circumstances at the time of status determination are such that they are excluded under Article 1D but cannot return to any part of UNRWA's area of operation. However, the opinion of the Advocate General in *NB and AB* indicates that the more relevant consideration is whether the applicant could, at the time of refugee status determination, return to an UNRWA area of operation.¹²⁹ UNHCR's 2017 Guidelines also confirm that the reasons for leaving an UNRWA area (and by analogy, previous movement between UNRWA fields) are not determinative – it is the situation (and ability to return to UNRWA's area of operation) at the time of refugee status determination that matters.¹³⁰

The holdings in *NB and AB* that the burden of proof is shared and shifts to government decision-makers in certain circumstances is helpful, and the recognition that governments are sometimes better placed to obtain certain information or documents is particularly relevant in some cases. This judgment also makes appropriate holdings relating to intentionality of harm. The holding that potential assistance or protection by civil society or government actors must be **formal, durable**, and based on a **right** to access that assistance or protection may assist some applicants. The observation in *NB and AB* that UNRWA must be able to fulfil its mandate *effectively* is also helpful, and it is to be hoped that future jurisprudence will take this approach and recognise that UNRWA does not provide a protective legal status such as refugee status or statelessness status (meaning that any protection provided by UNRWA is not effective in terms of international protection for refugees and stateless persons).

¹²⁸ See also UNHCR, *Statement on the Interpretation and Application of Article 1D of the 1951 Convention and Article 12(1) (a) of the EU Qualification Directive Issued in the Context of the Preliminary Ruling Reference to the Court of Justice of the European Union from the Bundesverwaltungsgericht (Germany) lodged on 3 July 2019 – Federal Republic of Germany v XT (C-507/19)* (18 Aug 2020) <https://www.refworld.org/docid/5f3bdd234.html>, Para 24. The statement asserts that applicants should be assessed with respect to UNRWA fields of operation in which they had previously lived, rather than all five fields.

¹²⁹ *NB and AB v Secretary of State for the Home Department* (United Kingdom), Case C 349/20 (AG Opinion, 6 Oct 2021) <https://bit.ly/3LOPsP4>

¹³⁰ UNHCR, *Guidelines on International Protection*, No. 13, Para 19, n 6..

It would also be beneficial if future decisions elucidate the concept of dignity, and what it means to be able to live in an UNRWA area in safe and dignified conditions for as long as necessary, as per *Serin Alheto* and *XT*. Palestinians often have no right of permanent residence — only “tolerated stay” or temporary residence permits based on employment — in UNRWA’s area of operation and throughout the Middle East and North Africa. They face significant discrimination, long-term forced poverty, restrictions on their activities, movement, and access to official procedures. In general, they lack the ability to naturalise or access other durable solutions that are at least theoretically available to non-Palestinian refugees in these areas. In such situations, their status remains temporary and precarious, and they should not be considered to be living in safety and dignity for as long as is necessary.¹³¹

A key question arising in CJEU and other jurisprudence is whether UNRWA is able to provide services commensurate with its mission. UNRWA’s mission is “to help Palestine refugees achieve their full potential in human development under the difficult circumstances in which they live, consistent with internationally agreed goals and standards.”¹³² UNRWA services include health, education, welfare relief and social services, as well as other assistance.¹³³ At a very basic minimum, UNRWA should be expected to be able to ensure that Palestine refugees have sufficient food to meet dietary minimums; adequate clean water for drinking, cooking, personal hygiene, and other household use; adequate sanitation facilities; access to adequate healthcare; a decent education; and safe housing. Given its funding crisis and conditions in its area of operation, whether UNRWA is able to meet these objectives to an adequate standard is debatable.

Given that UNRWA does not provide a protective legal status and many Palestinians in UNRWA’s area of operation have only a temporary and precarious legal status and face a lack of safety and dignity, it should be acknowledged that many Palestinians who could (at least in theory) return to an UNRWA field of operation *cannot* access effective protection there; thus, they should be granted refugee status under the inclusion clause of Article 1D.

5.3. Article 1D’s Application in Domestic Jurisdictions

The application of Article 1D has varied considerably at the domestic level but has often been based on misunderstandings of international law and/or relevant facts. In some countries, recent jurisprudence has generally followed the *El Kott* approach, but with varying results. In addition to jurisprudence, there is also variation in government policies. This report is not a mapping study and does not purport to cover all relevant cases, but rather provides some examples showing varying interpretations of Article 1D. Additional summaries of Palestinian cases are available in the European Network on Statelessness’ (ENS) Statelessness Case Law Database.¹³⁴

Belgium

Belgium’s Council for Aliens Law Litigation (CALL – an asylum appeals body) has made several decisions relating to Article 1D in recent years. In several judgments in early 2021, the CALL concluded that because of the financial difficulties faced by UNRWA, the agency, in general, was no longer able to provide adequate assistance to Palestinians in Gaza and Lebanon, and it considered that UNRWA assistance had therefore ceased for the purposes of Article 1D. Consequently, Palestinian refugees from Gaza and Lebanon who are registered with UNRWA should be automatically recognised as refugees

¹³¹ See section above, ‘Conditions for Palestinians in UNRWA’s Area of Operation and Neighboring States’.

¹³² UNRWA, ‘About UNRWA’, https://www.unrwa.org/sites/default/files/about_unrwa.pdf (accessed 30 Jan 2022), 4.

¹³³ Ibid, UNRWA, 14.

¹³⁴ <https://caselaw.statelessness.eu>.

in accordance with the inclusion clause of Article 1D (unless circumstances change).¹³⁵ In addition, the CALL has held in several judgments, with reference to CJEU jurisprudence, that registration with UNRWA is sufficient proof of receiving UNRWA assistance, and therefore, Article 1D applies where an applicant is registered with UNRWA, with final outcomes depending on whether they could no longer access UNRWA assistance for reasons beyond their control.¹³⁶ The CALL has also held that Article 1D does not apply to Palestinian refugees if they have not registered with UNRWA or accessed its services, even if they are eligible to be registered or receive assistance.¹³⁷

The Netherlands

In 2020, in case number NL20.6600,¹³⁸ an Amsterdam District Court found that UNRWA could not meet the needs of the applicant and his family in Gaza as he was in a position of serious insecurity, and UNRWA assistance had ceased for reasons beyond the applicant's control. Therefore, the Court found that he should be granted refugee status. In a subsequent judgment on this case in July 2021, the Dutch Council of State found that the District Court had improperly issued a final judgment; it should have permitted the Secretary of State to properly justify its decision.¹³⁹ The Council of State also concluded that:

“...the Secretary of State did not provide any insight into the standard he uses to answer the question of the extent to which UNRWA is able to carry out its assignment. He should have done so, all the more so because the applicant has contributed country information from which both the Secretary of State and the applicant infer that there is a worrying situation in the Gaza Strip from a humanitarian point of view.”¹⁴⁰

The Council of State remanded the case, apparently mainly for procedural reasons (to give the Secretary of State an opportunity to justify its refusal). The Secretary of State was required to make a new decision within 16 weeks, taking into account the applicant's grounds of appeal and the issues raised by the Council of State. However, as of 2 December 2021, the Secretary of State had not yet made a new decision. The applicant's lawyer had filed an appeal for failure to make a new decision within the deadline.¹⁴¹

In another case decided in 2021, NL20.17797, the Court of the Hague examined the situation of Palestinians in Lebanon and their potential ability to regain access to the country after departing.¹⁴² The

135 See CALL, nr. 249 784, 24 February 2021, available in French at <https://www.rvv-cce.be/sites/default/files/arr/a249784.an.pdf>; CALL, nr. 249 930, 25 Feb 2021, available in French at <https://www.rvv-cce.be/sites/default/files/arr/a249930.an.pdf>; CALL, nr. 250 868, 11 Mar 2021, available in Dutch at <https://www.rvv-cce.be/sites/default/files/arr/a250868.an.pdf>. Summary provided in English by Marjan Claes, Legal Officer, Nansen (the Belgian Refugee Council), by email to Cynthia Orchard, 2 Nov 2021 and 5 Nov 2021.

136 See CALL nr. 245 352, 1 Dec 2020, <https://www.rvv-cce.be/sites/default/files/arr/a245352.an.pdf>; CALL nr. 246 355, 17 Dec 2020, <https://www.rvv-cce.be/sites/default/files/arr/a246355.an.pdf>; CALL nr. 246 361, 17 Dec 2020, <https://www.rvv-cce.be/sites/default/files/arr/a246361.an.pdf>; CALL nr. 242 766, 22 Oct 2020, <https://www.rvv-cce.be/sites/default/files/arr/a242766.an.pdf>; CALL, nr. 244 775, 25 Nov 2020, <https://www.rvv-cce.be/sites/default/files/arr/a244775.an.pdf>. Summary provided by Marjan Claes, Legal Officer, Nansen (the Belgian Refugee Council), by email to Cynthia Orchard, 2 Nov 2021 and 5 Nov 2021.

137 CALL No. 246 289, 17/12/2020 (Palestine refugee – UAE – not UNRWA registered but eligible) (concerning a descendant of 1948 Palestinian refugee who was born and lived all his life prior to travelling to Belgium in the UAE; his father and grandfather were registered with UNRWA in Syria. The CALL held that his asylum claim should be examined under Article 1A of the Refugee Convention). Decision available in French at: <https://www.rvv-cce.be/sites/default/files/arr/a246289.an.pdf>. Summary provided by Marjan Claes, Legal Officer, Nansen (the Belgian Refugee Council), to Cynthia Orchard, 13 Dec 2021. For further explanation of recent jurisprudence in Belgium, see van Doren and others, n 87.

138 *Rechtbank Den Haag*, 24-08-2020 / NL20.6600, ECLI:NL:RBDHA:2020:7999 (The Netherlands), 24 August 2020, https://www.refworld.org/cases,NTL_ADC,5f8960b64.html.

139 202004766/1/V1, Judgment of 14 July 2021; available in Dutch at: <https://www.raadvanstate.nl/uitspraken/@126105/202004766-1-v1/>. Summary provided by Marlotte van Dael, ASKV Refugee Support, 1 Dec 2021.

140 Ibid, Case 202004766/1/V1, Judgment of 14 July 2021.

141 Correspondence from Marlotte van Dael to Cynthia Orchard, 2 Dec 2021.

142 Court of the Hague, 4 June 2021, Ref no. ECLI:EN:RBDHA:2021:5664; available in Dutch at: https://www.refworld.org/cases,NTL_HDC,60fae7804.html; summary and translations provided by Marlotte van Dael, ASKV Refugee Support, 1 Dec 2021.

applicant grew up in a refugee camp in Lebanon. The Netherlands Secretary of State rejected his first application for asylum, in part because he found aspects of the applicant's claim not credible and considered that the applicant had failed to establish that he could not, for a reason beyond his control, access the protection or assistance of UNRWA; thus, he was excluded under Article 1D. The applicant subsequently made a new application, which the Secretary of State rejected on the basis that it did not present new information. On appeal, the Court of the Hague observed that the later application provided information showing a deterioration of the conditions in Ein El-Hilweh camp and for Palestinians in Lebanon more generally, in part due to COVID-19 and a major explosion in Lebanon in August 2020. The Court observed that Palestinians in Lebanon were increasingly reliant on UNRWA as their sole source of support and that UNRWA's precarious funding situation was relevant to the applicant's case. The Court also observed that pursuant to the decision in *Germany v XT*, both UNRWA's ability to provide protection or assistance commensurate with its mission and the applicant's ability to actually enter an UNRWA field of operation were relevant considerations. There was evidence indicating that return might be impossible:

"Since the Lebanese elections in May 2018, [Palestinian refugees from Lebanon] living abroad without a [Lebanese] residence permit cannot obtain travel documents from the Lebanese authorities. Their return to Lebanon is stalled."¹⁴³

The Court found that the Secretary of State's decision was flawed and that it must reconsider the application considering relevant factors, including whether UNRWA's support met minimum requirements. The Secretary of State appealed the decision relating to the necessity to assess the applicant's ability to gain access to Lebanon. As of 2 December 2021, this appeal was still pending at the Council of State.¹⁴⁴

New Zealand

A 2019 judgment of the New Zealand Immigration and Protection Tribunal, *AE (Lebanon)*,¹⁴⁵ found that the appellant was a refugee under Article 1D. The Tribunal considered the appellant's medical conditions and UNRWA's inability to fund required medical treatment or provide adequate financial support to prevent "object poverty".¹⁴⁶ The Tribunal found that UNRWA's assistance had ceased, and the inclusion clause of Article 1D was triggered, so that the appellant was eligible for refugee status.

The Tribunal's key findings include:

- 1) The appellant had been dependent on his brother for several years to provide him with financial support, as he was unable to find adequate employment in Lebanon (and had been exploited by previous employers with impunity because he was Palestinian). However, the brother's financial situation was precarious, and it could not be assumed he would be able to continue supporting the appellant.
- 2) The appellant required treatment for high blood pressure, a heart condition, and depression. Insufficient medical care would potentially be life-threatening.
- 3) UNRWA was, at the time of decision, experiencing a "dire funding shortfall such that it could not fund secondary or tertiary medical treatment" or cover basic needs.

¹⁴³ Ibid, para 9.3, citing Dutch Ministry of Foreign Affairs Thematic Official Report Palestinians in Lebanon (January 2021), available in Dutch at: [https://www.rijksoverheid.nl/documenten/ambtsberichten/2021/01/31/thematisch-ambtsbericht-palestijnen-in-libanon-januari-2021#:~:text=Dit%20Thematisch%20Ambtsbericht%20beschrijft%20de,ToR\)%20een%20overzicht%20met%20aandachtspunten](https://www.rijksoverheid.nl/documenten/ambtsberichten/2021/01/31/thematisch-ambtsbericht-palestijnen-in-libanon-januari-2021#:~:text=Dit%20Thematisch%20Ambtsbericht%20beschrijft%20de,ToR)%20een%20overzicht%20met%20aandachtspunten). [accessed 30 June 2022].

¹⁴⁴ Correspondence from Marlotte van Dael to Cynthia Orchard, 2 Dec 2021.

¹⁴⁵ [2019] NZIPT 801588, https://www.refworld.org/cases,NZ_IPT,5d7a3bb04.html.

¹⁴⁶ *AE (Lebanon)*, Para 81.

Norway

The Norwegian Government issued a Ministerial Instruction in 2021 which confirms an improved approach to Article 1D. In the past, the Norwegian government took the position that if it was determined that a Palestinian was not excluded from protection under Article 1D, that person would then be on an equal footing with other refugees and would need to prove well-founded fear of persecution under Article 1A. In the new Ministerial Instruction, there is recognition that if not excluded under Article 1D (or any other exclusion clause), then the Palestinian applicant should automatically be granted refugee status, in line with the inclusion clause of Article 1D.¹⁴⁷

The United Kingdom

The UK has guidance relating to Article 1D, which generally follows the *El Kott* approach.¹⁴⁸ Anecdotal evidence indicates that there are still problematic approaches to Article 1D in some Palestinian refugee cases in the UK. Article 1D is not always considered when or how it should be by Home Office decision-makers, judges, and sometimes an applicant's legal representative.¹⁴⁹

In *HA v UK* (2020),¹⁵⁰ the European Court of Human Rights considered the case of a stateless Palestinian, formerly a resident in Lebanon. HA was born and raised in the Ein El-Hilweh refugee camp in Lebanon. In 2015 he was injured during armed conflict in the camp and was approached by rival armed factions seeking to recruit him. He left the camp in 2017 and travelled to the UK, where he claimed asylum based on a fear of forced recruitment or other persecution by paramilitary groups or indiscriminate harm due to frequent violence in the camp, from which there was no effective protection. In 2018, the UK Home Office refused HA's application for asylum. The UK Government did not accept that HA had faced forced recruitment, based on alleged inconsistencies in his account, and concluded that he did not have a well-founded fear of persecution under the 1951 Refugee Convention. The Government also considered that HA could access UNRWA services upon return to Lebanon and that the exclusion clause of Article 1D therefore applied. In addition, the Government concluded that HA had not faced breaches of Article 2 or 3 of the European Convention on Human Rights (ECHR). On appeal, HA relied on an email from UNRWA dated 18 May 2018 which confirmed insecurity and violence in the Ein El-Hilweh camp and resulting intermittent cessation of UNRWA services in the camp. The judge in the First-Tier Tribunal found HA's account of events to be generally credible but held that he was excluded under Article 1D because he could return to Lebanon and access UNRWA services. The Tribunal further held that any risk to HA from either particular targeting or indiscriminate violence did not meet the threshold required for refugee status or subsidiary

147 The instruction mentions CJEU judgements *Bolbol* (C-31/09), *El Kott* (C-364/11) and *XT* (C507/19) and states:

1. Asylum seekers who received UNRWA's protection or assistance shortly before the application for asylum was submitted shall be excluded from refugee status pursuant to Immigration Act section 31 first paragraph first alternative, cf. Refugee Convention Art. 1D(1), unless UNRWA's protection or assistance has ceased, cf. Refugee Convention Art. 1D(1)(2).
2. In order for UNRWA's protection or assistance to be considered ceased, there must be circumstances beyond the asylum seeker's control with the effect that the applicant can no longer use UNRWA's protection or assistance.
3. If UNRWA's protection or assistance has ceased, the asylum seeker shall automatically be granted refugee status pursuant to section 28 first paragraph letter a, unless the applicant is covered by one of the other grounds for exclusion in the Immigration Act section 31. GI-03/2021 – 'Instruks om praktisering av utlendingsloven § 31 første ledd, jf. flyktningkonvensjonen art. 1 D' ('Instructions on the practice of the Immigration Act § 31, first paragraph, cf. the Refugee Convention' (26 May 2021) https://www.regjeringen.no/no/dokumenter/gi-032021-instruks-om-praktisering-av-utlendingsloven-31-forste-ledd-jf-flyktningkonvensjonen-art.-1-d/id2851094/?fbclid=IwAR03a4V880hTA00U-uvD03d7xURg2xd2iz1mpq3S11MVfnuPa9B_hBZcsCI, final para [summary and translation provided by Marek Linha, Senior Legal Adviser, Norwegian Organisation for Asylum Seekers, 29 Nov 2021].

148 Home Office, Asylum Policy Instruction: 'Article 1D of the Refugee Convention: Palestinian refugees assisted by the United Nations Relief and Works Agency (UNRWA)' (v 2.0, 9 May 2016) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/524502/A-on-Article-1D-and-Palestinians-v2_0.pdf.

149 A query by Cynthia Orchard to an online forum for legal practitioners in the UK in January 2021 resulted in responses from legal practitioners relating to several then ongoing or recent Palestinian asylum cases where a problematic approach had been taken by the Home Office, judges, or a previous legal representative.

150 *HA v UK*, European Court of Human Rights, Application no. 30919/20 (16 Nov 2020) <http://hudoc.echr.coe.int/eng?i=001-206293> (Statement of Facts and Questions to the Parties).

protection (called Humanitarian Protection in the UK). The Upper Tribunal upheld this decision and refused permission to appeal further. The Court of Appeal also refused permission for further appeal. HA applied to the European Court on Human Rights, claiming that the UK courts had failed to properly consider the future risk of serious harm by armed groups in the camp in terms of violations of his rights under ECHR Article 3. The European Court of Human Rights posed two questions to the parties, for future consideration:

- “1. Has there been a violation of Article 3, taken alone or in conjunction with Article 13, on account of the failure of the domestic courts to examine whether the applicant’s risk of forcible recruitment by extremist groups in the Ein El-Hilweh camp gave rise to a real risk that he would be subjected to treatment contrary to Article 3 of the Convention upon return to Lebanon?
2. Would the applicant face a real risk of being subjected to treatment contrary to Article 3 of the Convention upon return to Lebanon?”¹⁵¹

The parties were required to respond to these questions, and the case was not yet decided as of November 2021.¹⁵² It seems evident that if the risk of harm violating ECHR Article 3 is established, then HA’s status as a refugee in accordance with Article 1D should also be established, as it should be considered that he cannot return to Lebanon and access UNRWA assistance or protection, for reasons beyond his control, if he would face Article 3 violations there. He may also benefit from arguments relating to inability to live a life of dignity and safety in Lebanon, as per recent CJEU jurisprudence (*Serin Alheto*, XT).

A 2019 UK case, *Nader*,¹⁵³ concerned a Palestinian born and raised in Saudi Arabia, who moved to Lebanon to study for a year, then returned to Saudi Arabia but was abused and deported back to Lebanon. The applicant was registered with UNRWA in Lebanon and stayed with his grandmother in a refugee camp during part of his time in Lebanon. The UK’s Upper Tribunal generally followed the *El Kott* approach in the factors it considered material, observing that it appeared the applicant had twice departed from Lebanon voluntarily, and that there was no evidence that the applicant would be refused entry into Lebanon or face human rights violations there. The applicant had not demonstrated that UNRWA assistance or protection had ceased for reasons beyond his control. From the decision, it appears that no evidence had been submitted showing that the applicant’s rights would be violated or that he could not live in dignity in Lebanon. Thus, the applicant’s case failed, possibly due to insufficient evidence of the conditions in Lebanon.¹⁵⁴

In another 2019 case of a Palestinian from Gaza, *OJ*,¹⁵⁵ the UK’s Upper Tribunal took a flawed approach with respect to Article 1D. The Upper Tribunal held that there was a risk of serious harm in Gaza, documented in an expert report, but allowed the appeal only on humanitarian protection grounds. The judge incorrectly states that Article 1D applies to exclude the applicant as he was “presently receiving protection from UNRWA”¹⁵⁶ – factually incorrect as the applicant was in the UK at the time, could not return to Gaza for reasons beyond his control, and even if that was possible, as demonstrated previously, UNRWA does not provide protection but assistance. This approach is not consistent with the inclusion clause of Article 1D, CJEU jurisprudence, UNHCR’s guidance, nor the UK Home Office’s guidance on Article 1D.¹⁵⁷

¹⁵¹ Ibid, *HA v UK*.

¹⁵² S Chelvan, ‘Insight Note’ (33 Bedford Row Chambers, 22 March 2021) <https://33bedfordrow.co.uk/insights/news/who-is-my-father-strasbourg-court-uk-government> [accessed 30 June 2022]; and correspondence between S Chelvan and Cynthia Orchard in November 2021.

¹⁵³ *Nader v SSHD* [2019] UKAITURPA113132018, <http://www.bailii.org/uk/cases/UKAITUR/2019/PA113132018.html>.

¹⁵⁴ See in particular paras 33-35, stating that there was no evidence of risk of human rights violations or that Lebanon would refuse entry or renewal of the applicant’s travel document.

¹⁵⁵ *OJ v SSHD* [2019] UKAITUR PA093312018, <http://www.bailii.org/uk/cases/UKAITUR/2019/PA093312018.html>.

¹⁵⁶ *OJ*, Para 19.

¹⁵⁷ Home Office, Asylum Policy Instruction, ‘Article 1D of the Refugee Convention: Palestinian Refugees Assisted by the United Nations Relief and Works Agency (UNRWA)’ n 148..

6. 1954 Convention Jurisprudence and Case Studies

As observed above, the 1954 Convention relating to the Status of Stateless Persons, Article I(1) provides the internationally accepted definition of a stateless person as someone who “is not considered as a national by any State under the operation of its law.” The 1954 Convention requires states to provide protection to stateless persons, and many of the rights are parallel to the 1951 Refugee Convention. The 1954 Convention also contains an exclusion clause in Article I(2)(i), which states that:

“This Convention shall not apply: (i) 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 so long as they are receiving such protection or assistance.”

It is noted that the wording “so long as they are receiving” differs from Article 1D; nor is there an automatic inclusion clause in Article I(2)(i) of the 1954 Convention, as there is in Article 1D of the Refugee Convention. However, persons who are stateless and who are not *excluded* must be *included* within the protection of the 1954 Convention, and the two conventions should be interpreted in a similar way in this respect.¹⁵⁸ In principle, for a claim under the 1954 Convention, there is no need to prove facts other than that the applicant is stateless and that they are not excluded under any of the exclusion grounds. The decision of France’s highest court (discussed below) interprets the grounds for exclusion (and the reason for not being able to access UNRWA assistance needing to be beyond the control of the applicant) along the lines of Article 1D jurisprudence.

There is limited jurisprudence and international guidance relating to potential exclusion or inclusion under the 1954 Convention. The CJEU has not yet made decisions relating to the 1954 Convention. UNHCR’s 2014 Handbook on Protection of Stateless Persons explicitly states that it does not address exclusion under the 1954 Convention.¹⁵⁹ Jurisprudence from France, Spain, and Hungary, as well as a case study from the UK, demonstrate some of the challenges arising in applications under the 1954 Convention.

France: Case 427017 [AB] (Council of State, 24 December 2019)

In 2019, the Conseil d’Etat (France’s highest court) issued its judgment in case 427017,¹⁶⁰ involving a Palestinian woman who had lived in a refugee camp in Lebanon before travelling to France. The Court set out the criteria that French authorities must consider in relation to Palestinians who had previously lived in an UNRWA area to be eligible for recognition as stateless persons under the 1954 Convention. The Court considered that there are three situations in which a Palestinian refugee who is outside UNRWA’s area of operation must be considered as no longer effectively benefiting from the protection or assistance of UNRWA and therefore should be granted statelessness status:

- 1) A grave threat to his or her security forced the applicant to leave the UNRWA area of operation in which he or she had previously habitually resided and prevents return; or
- 2) Such a threat arose after the departure of the person concerned (even if departure was voluntary) and prevents return; or
- 3) The applicant is, for reasons beyond his or her control, and unrelated to the existence of a threat to his or her security, unable to return to the state or territory of prior habitual residence.

¹⁵⁸ See Bianchini, 87-88, n 35 and BADIL, *Closing Protection Gaps*, 23, n 11.

¹⁵⁹ UNHCR, *Handbook on Protection of Stateless Persons*, Para 13, n 66.

¹⁶⁰ Case 427017, issued 24 Dec 2019, available at: <https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2019-12-24/427017> (in French). [translation/summary: Jesús Tolmo and Cynthia Orchard] For a related blog article in English, see: Giulia Bittoni, ‘Can a Palestinian refugee enjoy the status of a stateless person? A French perspective’ (European Network on Statelessness, 13 MAR 2020), available at: <https://www.statelessness.eu/updates/blog/can-palestinian-refugee-enjoy-status-stateless-person-french-perspective> [accessed 30 June 2022].

In addition, in accordance with the ECHR Article 8 right to private and family life, a Palestinian who lives in France and has family or personal ties in France must also be considered as no longer effectively benefiting from the assistance or protection provided by UNRWA in its area of operation. As a result, the Council of State held that the prior decision of the Administrative Court of Appeal of Paris was unlawful, and the case was remitted to the lower court for reconsideration.¹⁶¹

Hungary: Judgment Kfv.II.38.067/2018/6 (Hungarian Supreme Court, 13 November 2019)

The Hungarian National Directorate-General for Aliens Policing (NDGAP) rejected claims for protection of Palestinians as stateless persons, in light of the recognition of the State of Palestine by the United Nations.¹⁶² The Supreme Court held that the question of whether or not Palestine is recognised as a state is exclusively the competency of the Hungarian Minister of Foreign Affairs and Trade. Thereby, the acting state authority, in determining statelessness, is obliged to make an inquiry to the Ministry of Foreign Affairs and Trade to decide whether or not Palestine is recognised as a state. As a result of this Supreme Court judgment, the Ministry of Foreign Affairs and Trade declared that, although Hungary recognised the right of self-determination of Palestinian people in 1998, this did not mean that it recognised Palestine as a state. The main reason for that, according to the Ministry, is that the Palestinian Authority's sovereignty over the territories under control is questionable. The Ministry also points out that despite the Palestinian passport having been recognised as a valid passport in the EU, the issuance of that document is dependent on approval from Israel (indicating a lack of state sovereignty for Palestine). The same applies to Palestinian ID cards. The statement highlights that although in some cases these documents are issued without Israel's approval, they cannot guarantee the right to entry into Palestine. The NDGAP indicates that persons in possession of a Palestinian passport issued with Israeli permission can be regarded as Palestinian nationals; however, those not possessing this type of travel document should be recognised as stateless persons, since they cannot exercise their right to return to and enter Palestine.¹⁶³

Spain: Case 994/2017 (Spanish Supreme Court, 21 March 2017)

In case 994/2017,¹⁶⁴ the Spanish Supreme Court considered the case of a Palestinian woman who had applied for statelessness status in accordance with the 1954 Convention, on the basis that Spain does not recognise Palestine as a state and that she was therefore stateless. The Supreme Court rejected the application, observing that many countries (approximately 130 countries at the time, including nine in the European Union, plus the United Nations), recognised Palestine as a state. The court held that this recognition of Palestine as a state by other countries, plus the fact that the applicant held a passport issued by the Palestinian Authority, implied that the applicant was not stateless and that she could return to Palestine. The Court observes that the aim of the 1954 Convention is to provide protection to "any person who does not have the protection and assistance of any state"¹⁶⁵ and observes that where "the state of origin provides its protection to its national, this fact excludes statelessness."¹⁶⁶

However, we note that according to the 1954 Convention definition, statelessness occurs when a person

¹⁶¹ On remittal, the Paris Court of Appeal considered that the person concerned did indeed benefit from the effective protection of UNRWA and had not been forced to leave the UNRWA area of operation, nor was she unable to return there for reasons beyond her control. In addition, with respect to family and private life, the applicant had lived in France for less than two years and was single and without children. Consequently, the Court of Appeal upheld the original decision denying any protective status in France. Information provided by Cécile Queval, Forum Réfugiés, by email to Patricia Cabral and Cynthia Orchard, 24 Dec 2021.

¹⁶² Hungarian Supreme Court judgment Kfv.II.38.067/2018/6 of 13 Nov 2019 available in Hungarian at: <https://eakta.birosag.hu/anonimizalt-hatarozatok>. Summary provided by Hungarian Helsinki Committee.

¹⁶³ Statement nr. KKM/12827-3-2020Adm of 25 Mar 2020; NDGAP decision 106-1-4229/19/2020-Ho. of 27 May 2020 (not available online). Information provided by email from Hungarian Helsinki Committee by email to Patricia Cabral and Cynthia Orchard, 28 January 2022.

¹⁶⁴ [Supreme Court, decision 994/2017 \(appeal no. 2610/2016\)](#) (21 Mar 2017).

¹⁶⁵ *ibid*, ... 'a cualquier persona que no tenga el amparo y apoyo de un Estado' (p 4).

¹⁶⁶ *ibid*, ... 'el Estado de procedencia otorga su protección a su nacional, y ese dato excluye la apatridia' (p 3).

is “not considered as a *national* by any State under the operation of its law” (our emphasis).¹⁶⁷ Palestine, as discussed above, does not currently have a nationality law, despite past efforts to enact one, nor full sovereignty. “Law” generally should be interpreted to include jurisprudence and government policies as well as legislation,¹⁶⁸ and there are people who are considered as “belonging” to Palestine who might in some situations benefit, to a limited extent, from its protection. However, Palestine’s lack of sovereignty (particularly control over entry and exit to its territory) and repeated failure to enact a nationality law makes it very problematic for decision-makers in other countries to decide that Palestinians are not stateless in the context of international legal protection for stateless persons.

THE UK (A CASE STUDY)

A Palestinian man, Mr Z,¹⁶⁹ was born stateless and resided in the UAE. He travelled to and applied for asylum in the UK in 2015, with his wife and children as dependents. At his asylum screening interview, he did not state any fear of persecution in the UAE, and the Home Office interviewing officer informed him that he did not have a valid basis for claiming asylum, so he withdrew his application. Later, Mr Z re-applied for asylum. He subsequently attempted to return voluntarily to the UAE, but this was impossible, and he made yet another asylum application. At one point, a solicitor drafted inadequate submissions for him, which did not constitute an asylum claim and did not refer to Mr Z being stateless. In 2016, about a year after his first asylum claim, assisted by a solicitor at the University of Liverpool Law Clinic, Mr Z applied to remain in the UK as a stateless person.¹⁷⁰ Home Office documents obtained by the Law Clinic showed that Home Office officials were aware for some time that Mr Z was stateless, but the Home Office did not inform Mr Z of the possibility of making an application to remain in the UK on this basis. Mr Z’s statelessness application was granted in mid-2017, with his family members as dependants, and they were all granted residence permits (which entail permission to work for adults).

Mr Z and his family received financial support from the UK Government for approximately 18 months while trying to resolve their status. They were required to move during this time, disrupting the children’s education. The welfare of all family members was negatively affected by the delays in resolving their situation. If Mr Z had been informed of the UK’s statelessness determination procedure in 2015 and accessed adequate legal assistance, the family could have avoided unnecessary hardship, and Mr Z and his wife could have been granted permission to work sooner.¹⁷¹

7. 1961 Convention on the Reduction of Statelessness

The 1961 Convention’s primary aim is to prevent statelessness, ensure that it decreases over time, and place limits on the circumstances in which nationality can be withdrawn. It is particularly important in ensuring that children have an entitlement to the nationality of their country of birth if they would otherwise be stateless. Detailed consideration of the 1961 Convention is beyond the scope of this report, but it is a vital part of the international framework to resolve statelessness, and it is relevant to the lives of some Palestinians, particularly children born to stateless Palestinian parents.

167 In Spanish, the wording of Article 1(1) does not include reference to ‘the operation of law’, but rather to ‘legislation’. (‘A los efectos de la presente Convención, el término «apátrida» designará a toda persona que no sea considerada como nacional suyo por ningún Estado, conforme a su legislación.’)

168 UNHCR, *Handbook on Protection of Stateless Persons*, Para 22, n 66.

169 Mr Z is a pseudonym added for convenience.

170 The UK’s statelessness determination procedure is set out in Part 14 of the UK’s Immigration Rules, based on but departing in some aspects from the 1954 Convention (see n 94).

171 Bezzano and Carter, 12, n 39..

8. European Convention on Human Rights (ECHR)

Statelessness and legal identity have been the focus of several cases brought to the European Court of Human Rights (ECtHR). However, there are few decided ECtHR cases relating to Palestinians.¹⁷² This report does not address this jurisprudence in any detail; but, as discussed above in relation to the cases of *AB (France)* (Case 427017) and *HA v UK*, there is potential for the ECHR to be used to increase the protection available to some Palestinians in Europe.¹⁷³

Furthermore, in many countries, the ‘nationality’ and place of origin of Palestinians is recorded in divergent ways, which is problematic for accurate data collection and disrespectful of the rights of Palestinians in some cases. In the Netherlands, a Palestinian born in East Jerusalem brought a case to the ECtHR seeking to change the designation of his place of birth in the government’s Personal Records Database from “Israel” to “Palestine”. As a result of this litigation, the Dutch Government added Gaza and the occupied West Bank, but not Palestine, as birthplaces in its official records database.¹⁷⁴

¹⁷² See eg *Al-Nashif v. Bulgaria*, Application No: 50963/99, European Court of Human Rights (finding violations of ECHR Articles 5(4), 8, and 13 in the case of a Palestinian man born in Kuwait who had held a Bulgarian permanent residence permit and had Bulgarian citizen children, where his residence permit was revoked and he was detained and then deported to Syria); and *Auad v Bulgaria*, Application no. 46390/10, European Court of Human Rights (finding violations of Articles 5(1) and 13 and that Article 3 would be violated if the applicant was expelled). Summaries of both cases are available in ENS’s Statelessness Case Law Database. See also eg *L.M. and others v. Russia*, Applications Nos. 40081/14 et al (5 Oct 2015) (Stateless Palestinian from Syria and two Syrian nationals detained in Russia were kept in a detention centre before expulsion to Syria. The Court held that the Government’s actions breached the applicant’s rights provided under Articles 2 and 3, 5(4) and 5(1)(f), and Article 34 of the Convention); and *A and Others v the United Kingdom*, Application no. 3455/05 (19 Feb 2009 (deprivation of liberty violated Article 5(1) ECHR with regard to one of the applicants, who was a stateless person of Palestinian origin, because the government had failed to produce any evidence that another State was willing to accept the applicant).

¹⁷³ See also eg *Hélène Lambert*, ‘Nationality and statelessness before the European Court of Human Rights: a landmark judgment but what about Article 3 ECHR?’ (Strasbourg Observers, 16 May 2018); and Caia Vlieks, *An Obligation for Statelessness Determination under the European Convention on Human Rights?* (Discussion Paper 09/14, European Network on Statelessness 2014) <https://www.refworld.org/pdfid/582326c34.pdf> [accessed 30 June 2022].

¹⁷⁴ See Lennard Swolfs, ‘Dutch Palestinians remain disappointed after birthplace ruling’ (Al Jazeera, 17 Feb 2019) <https://www.aljazeera.com/news/2019/2/17/dutch-palestinians-remain-disappointed-after-birthplace-ruling>; and see ‘ECtHR-complaint against the Netherlands for denial of Palestinian identity’ (Prakken d’Oliveira, 4 Dec 2018) <https://www.prakkendoliveira.nl/en/news/2018/ecthr-claim-against-the-netherlands-for-denial-of-palestinian-identity>; ‘Intention of State Secretary does not amount to an acknowledgement of Palestinian identity’ (Prakken d’Oliveira, 13 Feb 2019) <https://www.prakkendoliveira.nl/en/news/2019/intention-of-state-secretary-does-not-amount-to-an-acknowledgement-of-palestinian-identity> [accessed 30 June 2022].

Conclusion

This report started by referring to a question asked by a Palestinian man who struggled for many years to be granted protection as a stateless person: “What can I do?” The report has sought to address this question in examining how Palestinians’ legal status is interpreted under international treaties and in international and domestic courts. Decisions on Palestinian refugee and statelessness claims should be driven by an acknowledgement of Palestinian statelessness and refugeehood and the need to ensure that Palestinians can access effective protection and have the opportunity to live their lives in dignity, wherever they are.

The cases and policies discussed show variation in approaches to refugee and statelessness law as applied to Palestinians in recent years. There is an improving approach, to some extent, in some of the Article 1D jurisprudence, including an acknowledgement by the CJEU that Palestinians have a right to live in safe and dignified conditions. There are also acknowledgements by some national courts that the inclusion clause of Article 1D is triggered when UNRWA is unable to fulfil its mandate, and that Palestinians who have left UNRWA’s area of operation may not be able to return due to lack of residence permits or other barriers. This progress, however, is tempered by approaches that fail to adequately recognise the protective purpose of Article 1D, the pre-existing refugeehood of many Palestinians, and the harsh conditions in which many Palestinians have lived for many years.

It also seems there is increased awareness of statelessness generally, and, more specifically, increased awareness that many Palestinians are stateless and in need of international protection on this basis. However, there are unfortunately policies and decisions that take a contrary approach and a step backwards in the journey towards protection for stateless Palestinians. Although entitled to Palestinian (or Israeli) nationality under international law, unless and until Palestine becomes an independent sovereign state with a nationality law, Palestinians should be considered stateless with respect to the 1954 Convention. Recognition as stateless persons permits those who are able to take up residence in countries that have a statelessness determination procedure to regularise their status and eventually to naturalise. This recognition of statelessness should not be perceived as negating the aspiration of many Palestinians to have a fully independent and sovereign State of Palestine. Nor should it be construed as a negation of Palestinian identity (in terms of national identity and rights under international law); nor a contradiction of stateless Palestinian refugees’ right to return to their homes of origin. It is, rather, an essential recognition of Palestinians’ current need for international protection as stateless persons or refugees in the context of ongoing occupation of Palestine and lack of full sovereignty.

No one can say if or when a just and peaceful solution between Israel and Palestine may be achieved. Nonetheless, in the context of international protection, government decision-makers, lawyers, and judges in countries in which Palestinians seek protection have the power to make a real difference in the lives of Palestinian refugees and stateless persons. To do so, they must ensure that they are familiar with the relevant history of Palestine and the current conditions in UNRWA’s area of operation, the pre-existing refugeehood of most Palestinians, the statelessness of most Palestinians under the 1954 Convention, and the protective purpose of both the 1951 Refugee Convention and the 1954 Statelessness Convention, as well as other relevant law. Drawing on the evidence and analysis provided in this report, decision-makers have the opportunity to decide on asylum and statelessness applications based on the realities that UNRWA registration does not confer protection in terms of a protective legal status or nationality, nor does it confer a right to reside in any area (as set out in UNRWA’s letter of September 2021); that UNRWA may not have the ability to provide adequate assistance (as found in some of the cases cited herein); and that there are severe restrictions on movement within and between UNRWA’s fields of operation (as discussed above). Existing evidence enables decision-makers to take into account the fact that Palestinians living in UNRWA’s area of operation continue to suffer serious discrimination and abuse by governments, armed groups, or society. Decision-makers should consider carefully whether a Palestinian has the opportunity to live a life of dignity in UNRWA’s area of operation, and they should make decisions that give effect to Palestinians’ pre-existing refugee status, statelessness under the 1954 Convention, and need for international protection.



This report considers the legal status of Palestinian refugees and stateless persons, with particular focus on the jurisprudence of the Court of Justice of the European Union (CJEU) and domestic courts, mainly those in European countries. There has been some progress in recent years in certain jurisdictions towards an increased awareness of refugeehood and statelessness among Palestinians. Despite this limited progress, Palestinians continue to face discriminatory legal frameworks and numerous obstacles to obtaining fair treatment as refugees and/or stateless persons.



ISBN 978-9950-339-63-7



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