IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2015] NZIPT 800693-695**

AT AUCKLAND

Appellants:	**AD (Palestine)**
Before:	B L Burson (Member)
Counsel for the Appellants:	V Walsh
Counsel for the Respondent:	No Appearance
Dates of Hearing:	17, 18 &19 August 2015
Date of Final Submissions:	23 September 2015
Date of Decision:	23 December 2015

DECISION

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INTRODUCTION

[1] [This is an appeal by three Christian Palestinians from the Gaza Strip whose appeals have, by consent, been heard concurrently as they give rise to the same legal issues. Each is represented by the same counsel]. They each claim to have a well-founded fear of being persecuted or otherwise subjected to serious harm in Gaza on account of being Christian. They each appeal from a decision of the Refugee Status Branch declining to recognise them on this basis as either refugees or protected persons within the meaning of the Immigration Act 2009 ("the Act").

[2] Under section 198 of the Act, the Tribunal must determine (in this order) whether to recognise the appellants as:

(a) refugees under the 1951 Convention Relating to the Status of Refugees ("the Refugee Convention") (section 129); and

(b) protected persons under the 1984 Convention Against Torture (section 130); and

(c) protected persons under the 1966 International Covenant on Civil and Political Rights ("the ICCPR") (section 131).

[3] The central issue to be determined by the Tribunal is whether any or all of the appellants are excluded from the Refugee Convention by the operation of Article 1D which excludes, in certain circumstances, persons being protected or assisted by United Nations ("UN") organs and agencies other than the Office of the United Nations High Commissioner for Refugees ("UNHCR"). If so, the appellants concerned will not be entitled to be considered as refugees under section 129 of the Act. However, even if Article 1D were to operate to exclude any of the appellants from recognition as a refugee, this would not exclude that appellant from an entitlement to be recognised as a protected person.

[4] It is therefore necessary to resolve the question of Article 1D's application as a preliminary issue. This raises issues as to the personal scope of Article 1D, a difficult task because, as observed by the Full Court of the Australian Federal Court of Appeal in *Minister for Immigration and Multicultural Affairs v WABQ* [2002] FCAFC 329, "[a]lmost every element of Article 1(D) is pregnant with ambiguity" and Article 1D is "the product of compromise"; see [15], [18]-[19] per Hill J. Perhaps unsurprisingly, a number of interpretations as to the scope of Article 1D have been put forward. It will be necessary to delve in some detail into the drafting history and the historical context in which it was drafted to determine which of these, in the Tribunal's view, is to be preferred.

[5] Before turning to this complicated issue, it is necessary to set out the appellants' case and identify the facts against which the assessment is to be made. This requires consideration of the credibility of the appellants' account. Given that the same claim is relied upon in respect of all limbs of the appeal, it is appropriate to record it first. The account which follows is a summary of that given by the appellants at the appeal hearing and by [the witness] in support of the appeals. It is assessed later.

THE APPELLANTS' CASE

[Summary: Paragraphs [6]-[58] set out the evidence given by the appellants and the other witness in support of the appeals.]

Documents and Submissions

[Summary: Paragraphs [59]-[60] relate to submissions dated 11 August 2015 received from counsel in support of the appeals. These paragraphs also detail corroborating documentation filed by counsel together with updated psychological reports in respect of each of the appellants. Counsel also provided country information relating to the situation in Gaza for Palestinian Christians, as well as country information relating to attacks on Christian communities by Daesh/Islamic State in Syria and Iraq.]

[61] The Tribunal has provided counsel with copies of:

(a) UNRWA *Gaza Situation Report 102* (23 July 2015);

(b) UNHCR *Note on UNHCR's Interpretation of Article 1D of the 1951 Convention relating to the status of refugees and Article 12(1)(a) of the EU Qualification Directive in the Context of Palestinian Refugees Seeking International Protection* UNCHR (May 2013);

(c) Lex Takkenberg *The Status of Palestinian Refugees in International Law* (Clarendon Press, Oxford, 1998) at pp69-83;

(d) Lance Bartholomeusz "The mandate of UNRWA at Sixty" (2009) 28(2-3) *Refugee Survey Quarterly* 452;

(e) UNRWA *Consolidated Eligibility and Registration Instructions (CERI)* (October 2009);

(f) International Crisis Group *Towards a Lasting Ceasefire in Gaza: Update Briefing* (23 October 2014); and

(g) Country information relating to the presence of Daesh in the Gaza Strip.

[62] Counsel made extensive opening and closing oral submissions. Further extensive written submissions dated 23 September 2015 were received from counsel regarding the scope of Article 1D of the Convention.

CREDIBILITY AND FINDINGS

Credibility

[63] [Summary: The Tribunal accepts all three appellants as credible witnesses. Their evidence was consistent with what they said previously and between themselves. Their accounts are corroborated by documentary evidence on the files.]

Findings of Fact

[64] The Tribunal therefore finds that the appellants are three Palestinians from Gaza who are members of the Greek Orthodox Church.

[65] Each has encountered ongoing harassment and discrimination while in Gaza. At school, each of the appellants was subjected to ostracism and regular

low-level beatings. They were forced to undertake classes in Islam despite their Christian beliefs and came under pressure to change their religion. Their teachers were inattentive to them due to their Christian beliefs and the school authorities failed to take any action when their parents complained to the authorities about the treatment they received in school.

[66] While growing up they have been regular attendees at their church. Each of the appellants has suffered ongoing harassment, when seeking to have religious services and festivals, from the Muslim population attending [a mosque situated in close proximity to their church]. In particular, verbal insults have been made, stones thrown and disruption caused to services through noise from loudspeakers attached to the mosque. The church has been bombed on one occasion and its bell ropes have often been cut. The appellants have each refrained, out of concerns for their safety, from publicly sharing their faith with each other or other Christians.

[67] Each of the appellants is concerned about their safety should they return to Gaza and seek to manifest their religion by attending church. They will purposefully confine any religious practice to the privacy of their home in Gaza.

[68] Each of the appellants has faced discrimination in seeking employment on account of their Christian faith; however they have each managed to secure employment. In the course of their employment, [A2] and [A3] have encountered ostracism and discrimination both from work colleagues and from members of the public with whom they were interacting.

[69] [Withheld]

[70] [Summary: The appellants have each attended UNRWA primary and intermediate schools. They have each used, as required, UNRWA medical clinics for minor primary health care services. The relevant household for each appellant has also been receiving a basic food aid package from UNRWA.]

THE REFUGEE CONVENTION

Structure

[71] The Refugee Convention provides for an extensive range of benefits for persons who fall within its scope. A detailed account can be found in

J C Hathaway *The Rights of Refugees Under International Law* (Cambridge University Press, Cambridge, 2005).

[72] In order to regulate who is entitled to this extensive range of benefits, and for how long, the Convention contains a complex definitional clause at Article 1. This provides:

> "**Article 1**
>
> **Definition of the term "Refugee"**
>
> A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:
>
> (1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization:
>
> Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section:
>
> (2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country: or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
>
> In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.
>
> B (1) For the purposes of this Convention, the words "events occurring before 1 January 1951" in Article 1, Section A, shall be understood to mean either:
>
> (a) "events occurring in Europe before 1 January 1951"; or
>
> (b) "events occurring in Europe or elsewhere before 1 January 1951",
>
> and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.
>
> (2) Any Contracting State which has adopted alternative *(a)* may at any time extend its obligations by adopting alternative *(b)* by means of a notification addressed to the Secretary-General of the United Nations."

[73] Article 1 contains not just the inclusion clause Article 1A and B, but also a cessation clause (Article 1C) and three separate exclusion clauses (Articles 1D, 1E and 1F). Article 1D is the relevant exclusion clause for the purpose of these appeals. This relevantly provides (emphasis added):

> "This Convention shall not apply to **persons who are at present receiving** from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.
>
> When such protection or assistance **has ceased for any reason**, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, **these persons shall *ipso facto* be entitled to the benefits of this Convention**."

[74] Article 1D thus has both exclusionary (paragraph one) and inclusionary elements (paragraph two). Paragraph one provides for a mandatory exclusion from the Convention. If applicable, it operates as a complete bar on access to the benefits of the Refugee Convention unless the inclusionary criteria contained in paragraph 2 also applies on the facts. Should Article 1D *apply as a whole*, in such circumstances, the claimant is "*ipso facto*" entitled to "the benefits of the Convention."

[75] Examination of the text and the background material by various courts and academic commentators has not yielded a consensus in understanding the personal scope of Article 1D. As will be seen, the interpretation to be given to the words highlighted in bold in the citation of Article 1D above represent the main areas of contention. Before examining these various interpretations, it is necessary to examine the relevant rules of treaty interpretation.

Principles of Treaty Interpretation

[76] The general rules of treaty interpretation are contained in Article 31 of the 1969 *Vienna Convention on the Law of Treaties* ("the Vienna Convention"). This provides:

> "Article 31 General rule of interpretation
>
> 1. A treaty shall 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.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) Any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended."

[77] Strictly speaking, the Vienna Convention, which entered into force on 27 January 1980, does not apply to the construction of the Refugee Convention which predates it by almost three decades. Nevertheless, the rules of interpretation which it sets out reflect customary international law and are therefore relevant to the interpretation of Article 1D; see *A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 277 per Gummow J; *El Ali and Daraz v Secretary of State for the Home Department* [2002] EWCA Civ 1103 at [18] per Laws LJ and *Refugee Appeal No 74665* at [45]. The rules of treaty interpretation thus necessitate examination of the history and context in which Article 1D was drafted in order to shed light on its object and purpose. The *travaux préparatoires* of the Refugee Convention are plainly relevant to the interpretation of Article 1D. The *travaux* of an international treaty are recognised as a "supplementary means of interpretation" by Article 32 of the Vienna Convention.

[78] Detailed examination of the background material is required as this gives guidance on which of the various approaches taken to the interpretation of Article 1D is, in the Tribunal's view, most in keeping with these principles of treaty interpretation.

BACKGROUND TO ARTICLE 1D

The Historical Context

[79] The following summary is gleaned from various academic commentary, namely, Takkenberg *(op cit)* at pp58-65; Mutaz M Qafisheh and Valentina Azarov "Article 1D" in Andreas Zimmerman (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, Oxford, 2011) at p543; Terje Einarsen "Drafting history of the 1951 Convention and the 1967 Protocol' in Andreas Zimmerman (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: a Commentary* (Oxford University Press, Oxford, 2011) at pp54-56; J C Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1991) at pp206-207; Guy

Goodwin-Gill and Jane McAdam *The Refugee in International Law* (Oxford University Press, Oxford, 2007) at pp153-155; Mutaz M Qafisheh "An Ongoing Anomaly: Pre and Post-Second World War Palestinian Refugees" (2015) 27(1) *International Journal of Refugee Law* at pp61-71.

[80] UN was established under the UN Charter (signed on 26 June 1945) and officially came into existence on 24 October 1945, following ratification of the Charter by the five permanent members of the new UN Security Council and by a majority of other signatories. Within four months, on 12 February 1946, the UN passed its first resolution – Resolution 8(1) – concerning "the question" of refugees. This recommended that the Economic and Social Council (ECOSOC) establish a committee to examine a problem characterised at Resolution 8(1)(c) as being "international in scope and nature". So began a process which would lead, eventually, to the adoption by the UN General Assembly of the Statute of the Office of the United Nations High Commissioner for Refugees (adopted as Annex to Resolution 428(V) on 14 December 1950) ("the UNHCR statute") and, on 28 July 1951, following adoption by a Conference of Plenipotentiaries of the United Nations, the Refugee Convention itself. The Refugee Convention did not, however, come into force until 21 April 1954.

[81] The statement by the General Assembly in Resolution 8(1) of an "immediate urgency" to distinguish between "genuine refugees and displaced persons, on the one hand, and war criminals, quislings and traitors… on the other" reveals, unsurprisingly, that the principal optic through which the General Assembly approached the then contemporary refugee problem was the Second World War.

[82] However, by the time the drafting of what would become the Refugee Convention began in early 1950, conflict had broken out in former British Mandate Palestine. On 29 November 1947, under UN Resolution 181(II), the UN General Assembly had voted in favour of the partition of Palestine into two separate states, Arab and Jewish. The Partition Plan, which awarded the proposed Jewish state some 57 per cent of the former Mandate territory, was rejected by the Palestinians. The British mandate over the territory ended on 14 May 1948. The following day, the Jewish inhabitants of former British Mandate Palestine proclaimed the State of Israel and the first Arab-Israeli war broke out. When the fighting eventually ceased in 1949, Israel was in possession of not only the land allotted to it by the Partition Plan, but also much of the fertile land allotted to the Palestinians. One consequence of the fighting was substantial displacement of

Palestinians from former Mandate territory. By mid-1949, approximately 750,000 Palestinians were living in the Arab countries bordering Israel. The vast majority of Palestinians did not expect to become permanent refugees. On the partition generally and its displacement effects, see: Louis Kriesberg "Negotiating the Partition of Palestine and Evolving Israeli-Palestinian Relations" (2000) 7(1) *Brown Journal of World Affairs* 63 at p65; United Nations *The Question of Palestine and the United Nations* (2008) at pp7-11.

[83] In response to this new refugee flow, on 19 November 1948, the General Assembly established the Special Fund for Relief of Palestinian Refugees to provide humanitarian relief. This fund carried out relief operations, such as the provision of emergency shelters and improvised schooling until August 1949.

[84] On 11 December 1948, under Resolution 194(III) *Palestine – Progress Report of the United Nations Mediator*, the General Assembly established the United Nations Conciliation Commission for Palestine (UNCCP) which was instructed under paragraph 6:

> "to take steps to assist the Governments and authorities concerned to achieve a final settlement of all questions outstanding between them."

Its functions primarily related to the protection of the rights, property and interests of 'refugees' which included, at paragraph 11 to "facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation…".

[85] By Resolution 302(IV) *Assistance to Palestine Refugees* (8 December 1949), the UN General Assembly created UNRWA as a subsidiary organ of the General Assembly as the specific relief agency for Palestinians. Under Article 7, the general Assembly:

> "Establishes the United Nations Relief and Works Agency for Palestine Refugees in the Near East:
>
> (a) To carry out in collaboration with local governments the direct relief and works programmes as recommended by the Economic Survey Mission;
>
> (b) To consult with the interested Near Eastern Governments concerning measures to be taken by them preparatory to the time when international assistance for relief and works projects is no longer available;
> …"

[86] The work of the two agencies was complementary. By paragraph 20 of Resolution 302(IV), UNRWA was directed to consult with UNCCP "in the best interests of their respective tasks".

The drafting history

[87] The treaty-making process leading to the UNHCR statute and the Refugee Convention took place alongside these developments. The drafting of Article 1D as an element of the Refugee Convention thus occurred against both the background of the general concern for refugees expressed in Resolution 8(1), and specific concerns arising following the outbreak of the Israel-Palestine conflict.

[88] By Resolution 248 B(IX) of 8 August 1949, ECOSOC recommended the Ad Hoc Committee on Statelessness and Related Problems prepare a draft agreement on the legal status of stateless persons including the definition of a refugee. In January-February 1950, the Ad Hoc Committee met and drew up a draft Convention Relating to the Status of Refugees, which was submitted to ECOSOC. In August 1950, the draft, together with comments of governments thereon, was referred by ECOSOC back to the Ad Hoc Committee (now called the Ad Hoc Committee on Refugees and Stateless Persons), which undertook further revision of the draft. The revised draft was referred by ECOSOC to the Third Committee of the UN General Assembly for further review. By Resolution 429(V) (14 December 1950), the General Assembly convened the Conference of Plenipotentiaries which would, in due course, adopt the final text of the Refugee Convention in July 1951.

[89] One principal issue confronting the drafters concerned whether the refugee status which would be binding on states parties to the future Refugee Convention should proceed by way of specific categories of refugees, as had been the approach hitherto in refugee instruments adopted under the auspices of the League of Nations, or adopt a more universal refugee definition. In the end, a compromise solution was put forward encompassing both; they are now respectively reflected in Articles 1A(1) and 1A(2) of the Convention.

[90] Another controversy concerned the existence of specific temporal and geographic limitations to the general refugee definition. At the time of its adoption into the final text of the Refugee Convention, the universal definition in Article 1A(2) was circumscribed by the specific geographic and temporal limitations in Article 1B. The purpose was to avoid enlarging the beneficiary class of the new refugee status to what were regarded by some, notably western, states as financially and politically unfeasible levels. While the temporal limitation of 1 July 1951 remained constant, Article 1B left it up to each state to declare whether it would limit the operation of the general definition under Article 1A(2) to events occurring in Europe before that date.

[91] Within the negotiating milieu surrounding the general refugee definition under Article 1A(2) outlined above, Palestinian refugees were seen as occupying a particular place among the refugees of the day. On 14 December 1950, the Third Committee of the General Assembly considered the draft Refugee Convention and draft UNHCR statute, which had been submitted by the ECOSOC and had built on a previous draft prepared by the Ad Hoc committee. Draft Article 1C, the forerunner of Article 1D, provided:

> "The present Convention shall not apply to persons who are at present receiving from other organs or agencies of the United Nations protection or assistance."

[92] During the session, the delegations from Egypt, Lebanon and Saudi Arabia tabled a joint amendment to the draft UNHCR statute expressly excluding from the competence of the High Commissioner for Refugees "categories of refugees at present placed under the competence of other organs or agencies of the United Nations". The record of the *Fifth Session of the Third Committee of the General Assembly* (UNGAOR, Third Committee, 27 November 1950) at [47] notes that, by way of explanation, the Lebanese representative stated:

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

[93] The Saudi representative also made similar observations (*ibid*, at [52]) expressing concern that, if Palestinian refugees were to be included in the general refugee definition, their plight would be relegated to "a position of minor importance" and that the Arab states desired they should be aided "pending their repatriation" which was "the only real solution to the problem". Pending "proper settlement", Palestine refugees should "continue to be granted a separate and special status".

[94] An informal working group was established which took into account the various amendments and prepared two draft definitions, one for the UNHCR statute and the other for the draft Refugee Convention. There was a slight difference in language. The exclusion from the jurisdictional competence of UNHCR was framed in terms of the persons who "continue to receive protection or assistance" from United Nations agencies. The exclusion from the definition of "refugee" in the draft convention was framed in terms of persons "at present in receipt of protection or assistance". Whereas the present Article 7(c) of the

UNHCR statute was adopted in its present form by the Third Committee of the General Assembly, this Committee recommended draft Article 1C be further considered at the Conference of Plenipotentiaries of the United Nations in July 1951.

[95] At this conference, the special status of Palestinian refugees was, again, remarked upon. What would ultimately become the second paragraph of Article 1D was introduced by the Egyptian representative. The purpose was to address a controversy that had arisen among the delegates as to the basis for and duration of the exclusion of Palestinian refugees from the draft Convention. The French representative had described their problems as being "completely different from those of refugees in Europe" and expressed concern that states could be bound to extend obligations to include:

> "a new, large group of refugees, not as a result of a decision freely arrived at, but through the operation of United Nations policy – or, in other words, by the withdrawal of the assistance which various United Nations bodies were at present giving to the Arab refugees in Palestine."

[96] Responding, by way of explanation in the introduction of the amendment, the Egyptian representatives stated, (see *UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons* A/CONF.2/SR.19 (1951)):

> "…[I]t should be noted… that the present situation of those refugees was a temporary one, and that the relevant resolutions of the General Assembly provided that they should return to their homes. If the Egyptian delegation had brought up the question of those refugees, it had done so because the present Conference was an offshoot of the United Nations, and the United Nations was responsible for their tragic fate. It was therefore the duty of members of the Conference to find a solution to the problem of those refugees . By its resolution of 11 December, 1948, the General Assembly had ordered the return to their homes of the Arab refugees who had expressed the desire to return. That resolution had had no practical result, and the situation had gone from bad to worse. Yet the only true solution of the problem was to ensure the return of the Arab refugees to their homes.
>
> Introducing his amendment (A/CONF.2/13), he said that the aim of his delegation at the present juncture was to grant to all refugees the status for which the Convention provided. To withhold the benefits of the Convention from certain categories of refugee would be to create a class of human beings who would enjoy no protection at all. In that connexion, it should be noted that article 6 of Chapter II of the Statute of the High Commissioner's Office for Refugees contained a comprehensive definition covering all categories of refugees. The limiting clause contained in paragraph C of article 1 of the Convention at present covered Arab refugees from Palestine. From the Egyptian Government's point of view it was clear that so long as United Nations institutions and organs cared for such refugees their protection would be a matter for the United Nations alone. However, when that aid came to an end the question would arise of how their continued protection was to be ensured. It would only be natural to extend the benefits of the Convention to them; hence the introduction of the Egyptian amendment.
> …"

[97] Responding to the view expressed by the British representative that draft Article 1C, without the amendment proposed by the Egyptian delegation, would result in the permanent exclusion of Palestine refugees, the Egyptian representative again responded:

> "The provisions of paragraph C would cease to be applicable the moment the aid at present being given by the United Nations to Arab refugees ceased; the latter would then be eligible for the benefits of the Convention."

[98] The Egyptian amendment was approved at this, the 29th meeting, by 14 votes to two, with five abstentions. Article 1D was adopted in its entirety by the Conference of Plenipotentiaries by 16 votes to none, with three abstentions; see *UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons* A/CONF.2/SR.34 (1951) at p12.

Conclusion on background material

[99] From this review, there are a number of conclusions which emerge regarding the drafting history of Article 1D and the historical context in which that drafting process occurred:

(a) The drafting of Article 1 was dominated by concerns as to the proper scope of the refugee definition, and states were split between those who favoured a general, universally applicable definition, and those who favoured a more narrow, class-based approach.

(b) The status of displaced Palestinians as *a group* was firmly in the mind of the drafters of the Refugee Convention.

(c) 'Palestine refugees' displaced as a result of the creation of the state of Israel and subsequent outbreak of conflict were universally regarded as a special class of displaced persons whose refugee character *had already been established* at the time Article 1D was adopted in 1951.

(d) Excluding Palestinian refugees from the beneficiary class eligible for protection under the Refugee Convention and from the jurisdiction of the Office of the High Commissioner for Refugees was necessary to avoid the duplicating and overlapping of competencies with the agencies and organs of the United Nations tasked by the General Assembly to deal specifically with the plight of Palestinian refugees, namely UNRWA and UNCCP.

(e) Consistent with the understanding that 'Palestine refugees' were persons in need of protection and assistance, there was a need to ensure continuity of protection and assistance in the event the aid being provided by those UN agencies tasked by the General Assembly to deal specifically with their plight ceased being provided.

(f) Exclusion of Palestinian refugees from the Refugee Convention by means of Article 1D was intended to be conditional and temporary, not absolute and permanent.

[100] Given the importance of the operations of both the UNCCP and UNRWA to the rationale for the continuing exclusion of Palestinian refugees from both the benefits of the Convention and from the jurisdiction of the Office of the High Commissioner for Refugees, some account of their mandates and operations is required.

UNCCP AND UNRWA'S MANDATES

The General Nature of a Mandate

[101] The general nature of UN agency mandates is set out in a report of the Secretary-General to the General Assembly *Mandating and delivering: analysis and recommendations to facilitate the review of mandates* UN Doc A/60/733 (30 March 2006)

> "9 Legislative mandates express the will of the Member States and are the means through which the membership grants authority and responsibility to the Secretary-General to implement its requests. The resolutions adopted from year to year by each of the principal organs are the primary source of mandates. Mandates are both conceptual and specific; they can articulate newly developed international norms, provide strategic policy direction on substantive and administrative issues, or request specific conferences, activities, operations and reports.
>
> 10. For this reason, mandates are not easily defined or quantifiable; a concrete legal definition of a mandate does not exist. Resolutions often signify directives for action by employing words such as "requests", "calls upon", or "encourages", but an assessment to distinguish the level of legal obligation arising from the use of these different words has yielded no definitive answers. Such ambiguity in resolutions may be deliberate – to make it easier for Member States to reach decisions. But since the membership has indicated a wish to use its review of mandates to examine opportunities for programmatic shifts, it is both necessary and desirable to identify a working definition of the unit of analysis and delineate the scope of the exercise.
>
> 11. Guided by the 2005 World Summit Outcome and subsequent discussions in the plenary, I have defined a mandate as a request or a direction, for action by

> the United Nations Secretariat or other implementing entities, that derives from a resolution of the General Assembly or one of the other relevant organs."

UNCCP's Mandate

[102] As already noted above, the General Assembly established the UNCCP under Resolution 194(III) *Palestine – Progress Report of the United Nations Mediator*. The UNCCP had dual functions. The first was to take steps to assist the Governments and authorities concerned to achieve a final settlement of all questions outstanding between them (paragraph 6). The other function primarily related to the protection of the rights, property and interests of "refugees" including the issue of compensation being paid for the property of those choosing not to return and for loss of or damage to property (paragraph 11).

[103] Protection within the mandate of UNCCP in the specific context of Palestinian refugees was thus multi-dimensional in nature. One dimension concerned finding a durable solution by achieving "a final settlement" between the parties to the conflict. This group-oriented protection dimension sat beside another more individualised dimension relating to issues around securing property rights in particular.

[104] The UNCCP appears to have become inactive by the mid 1960s. However, it continues to exist and reports annually to the General Assembly. For example, the preamble to Resolution 69/86 *Assistance to Palestine Refugees* A/RES/69/86 (16 December 2014) (adopted by the General Assembly on the report of the Special Political and Decolonization Committee (Fourth Committee) A/69/453 (5 December 2014)):

> "*Also notes with regret* that the United Nations Conciliation Commission for Palestine has been unable to find a means of achieving progress in the implementation of paragraph 11 of General Assembly resolution 194 (III), and reiterates its request to the Conciliation Commission to continue exerting efforts towards the implementation of that paragraph and to report to the Assembly on the efforts being exerted in this regard as appropriate, but no later than 1 September 2015;"

UNRWA's Mandate

[105] Citing the 2006 mandate report of the UN Secretary General outlined above, Lance Bartholomeusz "The mandate of UNRWA at Sixty" (2009) 20(2-3) *Refugee Survey Quarterly* 452 argues that the principal source of UNRWA's mandate is UN General Assembly resolutions. Other sources include requests from the Secretary General. Unlike other agencies such as UNHCR, UNRWA

does not have constituent statute. Bartholomeusz notes that UNRWA is also a temporary agency, with its mandate renewed periodically by the General Assembly. See also discussion by Mutaz M Qafisheh "An Ongoing Anomaly: Pre and Post-Second World War Palestinian Refugees" (2015) 27(1) *International Journal of Refugee Law* at pp61-63.

Personal scope: the definition of a 'Palestine refugee'?

[106] In the resolution establishing the UNHCR, the General Assembly instructed ECOSOC to prepare a draft resolution embodying provisions for the functioning of the High Commissioner's office, together with recommendations regarding the definition of the term "refugee" to be applied by the High Commissioner. In contrast, Resolution 302(IV) which established UNRWA was silent on who was to be considered a "Palestine refugee" in terms of its mandate. Indeed, at no time since has the UN in any General Assembly resolution ever formally defined who a 'Palestine refugee' is for the purposes of UNRWA's mandate. What has happened, however, is that the General Assembly has, from time-to-time, tacitly approved the working definitions of who qualifies as a 'Palestine refugee' adopted by UNRWA; see Takkenberg (*op cit*) at p69; Bartholomeusz (*op cit*) at pp454-455; Qafisheh (*op cit)* at p71.

[107] At pp69-83, Takkenberg charts the development of UNRWA's working definition of a Palestinian refugee from 1948 onwards. He notes that, under pressure from donor governments, the primary concern of UNRWA in the first 10 years of its operation was to expunge persons who were not eligible for UNRWA assistance from the relief roles it inherited from its predecessors. Ever more technical working definitions were therefore adopted which, by the mid-1950s, had coalesced around a working definition of a 'Palestine refugee' comprising:

> "A person whose normal residence was Palestine for a minimum period of two years preceding the outbreak of conflict in 1948 and who, as a result of the conflict, has lost both his home and his means of livelihood."

[108] As early as the 1951-1952 annual report, UNRWA's Director had stated that the term 'registered refugee' included infants under one year of age (who received half rations). In the UNRWA *Annual Report 1953-1954* UN Doc 1/2727, IX (1954-1955), UNWRA's Director confirmed that it was registering not only those displaced Palestinians who met the terms of the above working definition, but also that "additions to the rolls have been made to include new births and, under certain conditions, those persons who have suffered loss of income". Takkenberg

at pp72-75, notes the differing view taken by Arab states and major UNRWA donor states such as the United Kingdom and the United Sates over the expansion of UNRWA's rolls. It is, however, unclear from Takkenberg's review whether objections to expansion by the donor states were directed at the children of Palestinian refugees, or primarily towards new claimants such as the Jerusalem or Gaza poor (a person resident in these places who lost their livelihoods but not homes as a result of the 1948 conflict). Bartholomeusz (*op cit*) at pp458-459 is clearer that concern with 'other claimants' was not about descendants of Palestinian refugees, but other groups such as the Jerusalem and Gaza poor.

[109] Over time, UNRWA has amended its working definition. Its latest iteration appears in UNRWA *Consolidated Eligibility and Registration Instructions* (CERI) (October 2009), Part III(A)(1), at p3 :

> "These are 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. Palestine Refugees, and descendants of Palestine refugee males, including legally adopted children, are eligible to register for UNRWA services. The Agency accepts new applications from persons who wish to be registered as Palestine Refugees. Once they are registered with UNRWA, persons in this category are referred to as Registered Refugees or as Registered Palestine Refugees."

[110] While the UNRWA Eligibility Guidelines specify and define other categories of person eligible to receive UNRWA services, the significant point for present purposes is that descendants of persons originally displaced in 1948 are included in the working definition of 'Palestine refugees', which has been reported to and tacitly approved by the UN General Assembly from time-to-time.

[111] The latest General Assembly resolution on UNRWA activities also clearly emphasises the agency's work in relation to Palestinian refugees in terms that can only, logically, encompass descendants of the originally displaced. For example, the preamble to Resolution 69/86 *Assistance to Palestine Refugees* A/RES/69/86 (16 December 2014) (adopted by the General Assembly on the report of the Special Political and Decolonization Committee (Fourth Committee) A/69/453 (5 December 2014)) provides:

> "*Acknowledging* the essential role that the Agency has played for over 60 years since its establishment in ameliorating the plight of the Palestine refugees through the provision of education, health, relief and social services and ongoing work in the areas of camp infrastructure, microfinance, protection and emergency assistance;"

[112] The companion Resolution 69/88 *Operations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East* A/RES/69/88

(16 December 2014) (adopted by the General Assembly on the report of the Special Political and Decolonization Committee (Fourth Committee) A/69/453 (5 December 2014)), similarly contains numerous references to 'Palestine refugees' in terms which can only sensibly relate to children of those originally displaced. Its preambular paragraphs record that the General Assembly:

> "1. *Reaffirms* that the effective functioning of the United Nations Relief and Works Agency for Palestine Refugees in the Near East remains essential in all fields of operation
>
> 2. *Expresses its appreciation* to the Commissioner-General of the Agency, as well as to all the staff of the Agency, for their tireless efforts and valuable work, particularly in the light of the difficult conditions, instability and crises faced during the past year;
>
> 3. *Expresses special commendation* to the Agency for the essential role that it has played for over 60 years since its establishment in providing vital services for the well-being, human development and protection of the Palestine refugees and the amelioration of their plight;"

The material scope of UNRWA's mandate: protection and assistance?

[113] As already noted, at the time of its inception UNRWA was not the first or only agency created by the UN to deal with the predicament of Palestinian refugees. UNCCP was also in existence at the time. The two agencies had different but complementary mandates. The division of function has tended to be seen as UNCCP having mandate responsibility for the 'protection' of Palestinian refugees, with UNRWA having responsibility for their 'assistance'. Whatever may have been the intended position as the time of their creation, there is doubt as to whether such a sharp distinction can presently be maintained.

[114] Drawing on a more nuanced understanding of the multi-dimensional nature of 'protection' in the specific context of Palestinian refugees, Bartholomeusz (*op cit*) at pp466-473 argues that, while UNRWA has limited mandate for engagement in that aspect of protection aimed at achieving a durable solution, mirroring the cessation of UNCCP's operations, UNRWA has over time been given a mandate to become involved in the more individualised protection activity. In support, he refers to explicit reference to and endorsement of UNRWA performing protection-related activities in relevant General Assembly resolutions, often with direct reference to applicable international human rights treaties.

[115] This trend continues. The most recent example is Resolution 69/88 *Operations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East* A/RES/69/88 (16 December 2014) (adopted by the General Assembly on the report of the Special Political and Decolonization Committee

(Fourth Committee) A/69/453 (5 December 2014)). This states that the General Assembly:

> "14. *Encourages* the Agency, in close cooperation with other relevant United Nations entities, to continue making progress in addressing the needs and rights of children, women and persons with disabilities in its operations, including through the provision of necessary psychosocial and humanitarian support, in accordance with the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities, respectively;
>
> 15. *Commends*, in this regard, the Agency's initiatives that provide recreational, cultural and educational activities for children during the summer, including in the Gaza Strip, and, recognizing their positive contribution, calls for full support of such initiatives;"

[116] While it would overstate matters to ascribe to UNRWA a protection function as deep as that provided by UNHCR to the refugees under the Convention's general refugee definition, nevertheless UNRWA's *Medium Term Strategy 2010-2015* (31 March 2010) at pp23, 37-38 is notable for an emphasis on mainstreaming protection throughout its operations. In any event, the humanitarian 'assistance' being provided by UNRWA has an inherent protection element. One of the critical developments in international human rights law over the past two decades has been recognition that the contents of the 1966 *International Covenant on Economic Social and Cultural Rights* (ICESCR) are not merely aspirational in nature, but are fully fledged rights with both duty bearers and beneficiaries; see discussion in *BG (Fiji)* [2012] NZIPT 800091 and Michelle Foster *International Refugee Law and Socio-Economic Rights: Refuge From Deprivation* (Cambridge University Press, Cambridge, 2007). UNRWA's provision of education and health services and activities thus directly and necessarily involves the protection of the right of Palestinian refugees to the highest standard of health and to education under Articles 12 and 13 of the ICESCR.

[117] Having traversed this background material in depth, it is now possible to analyse the various approaches which have been taken by courts and academics to the interpretation of Article 1D of the Refugee Convention.

EXCLUSION UNDER ARTICLE 1D

Four Interpretive Approaches Identified

[118] The complexity of the background material has not led to a common understanding as to the interpretation of exclusionary aspects of Article 1D. As noted, this provides:

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

[119] Although the boundary lines of reasoning are blurred in places, nevertheless, four approaches can be identified in the international jurisprudence as to the personal scope of Article 1D. The boundary lines are largely drawn around the meaning to be given to the words "persons" and "at present receiving" These various approaches will be first described, and then assessed.

[120] The first interpretive approach may be described as an '**historical eligibility' approach**, propounded by the United Kingdom Court of Appeal in *El-Ali and Daraz v Secretary of State for the Home Departmen*t [2002] EWCA Civ 1103. This approach is also supported by J C Hathaway and M Foster (*op cit*) at pp513-514. Under this approach, the personal scope of Article 1D is limited to those Palestinians registered to receive assistance and protection from UN organs or agencies other than UNHCR as at the date the Refugee Convention was adopted – 28 July 1951. The court rejected the submission that the phrase "at present" in Article 1D meant that it included "any Palestinian who is receiving UNRWA assistance at the time when the application of Article 1D falls to be considered in any individual case".

[121] The court's reasoning is provided by Laws LJ at [33]-[34], and Lord Phillips MR at [60]-[61] (May LJ agreeing without analysis). Laws LJ held that, to hold otherwise, would mean that:

> "[33] …the phrase "persons who are at present receiving [assistance]" no longer means what it says; it includes also persons who *later* receive such assistance. Under the suggested interpretation, "at present" does not refer to a specific date (28 July 1951 or otherwise) as setting the time when the membership of the class described in the first sentence is fixed (which is surely the ordinary sense of the words used) but merely to a start-date, a *terminus a quo*, for the identification of the class whose membership may, however, be swelled by new entrants thereafter. I think this is a very considerable distortion of the Article's language. I notice that Professor Goodwin-Gill, at paragraph 15 of his helpful supplemental submissions, acknowledges that if a "continuative" approach (including therefore the approach I am presently considering) is to be accepted the words "persons at present receiving" have to be taken as if they read "persons who were and/or are

> now receiving". I cannot think that is a legitimate exercise. It is to substitute what is really an entirely different provision.
>
> [34] My second reason for rejecting this approach arises from the definition of "refugee" in Article 1A(2): until 1967 a refugee within the meaning of Article 1A(2) was so only by reference to "events occurring before 1 January 1951"; thus until 1967 the Palestinians intended to be excluded from the Convention by the first sentence of Article 1D can only have been persons whose putative claims to refugee status rested on such events. Article 1D was not amended by the 1967 Protocol, and I do not think it can have been amended by implication. …"

[122] Lord Phillips MR similarly stated:

> "[60] The Convention was concluded at a time when the Second World War and the circumstances leading up to it had resulted in the displacement of many refugees from their homelands. The Convention was concerned with securing humanitarian treatment for those who had already become refugees at the time that the Convention was concluded. Thus the general definition of 'refugee' in Article 1(2) was a person who '*as a result of events occurring before 1 January 1951*… is outside the country of his nationality'. Inasmuch as Article 1D was making an exception from the application of the Convention, that exception was only relevant to persons who were outside the country of their nationality as a result of events that had occurred before 1 January 1951.
>
> [61] Although the definition of the 'persons' subject to the application of Article 1D is non-specific, the background facts, as illuminated by the *travaux préparatoires* make it quite clear that there was, in existence in 1951, a category of persons for whom Article 1D was tailor made. These were the Palestinian Arabs who had been displaced from their homeland as a result of the events which immediately followed the termination of the British mandate on 14 May 1948. That group of persons was receiving protection or assistance from 'organisations or agencies of the United Nations other than the UNHCR', namely UNRWA and UNCCP and it has never been suggested that there were any other persons who, at the time, satisfied those criteria."

[123] This interpretation has been expressly rejected by the Court of Justice of the European Union (CJEU) in Case C-31/09 *Bolbol v Bevándorlási és Állampolgársági Hivatal* (CJEU, Grand Chamber, 17 June 2010). Ms Bolbol, also from Gaza, had not directly availed herself of the protection or assistance of UNRWA, but claimed to be entitled to such protection and assistance on the basis of an UNRWA registration card issued to the family of her father's cousins.

[124] The CJEU was asked to give guidance on the correct interpretation of Article 12(1)(a) of the 2004 EU Qualification Directive, which effectively transposes Article 1D into EU asylum law. It advanced an alternative approach which may be categorised as an **'actual receipt' approach**. Relying on both UNRWA eligibility guidelines and the 1967 Protocol to the Refugee Convention, but without providing any significant analysis, the CJEU specifically rejected the submission of the United Kingdom government based on the *El-Ali and Daraz* "historical eligibility" approach; see [47] and [48]. The CJEU therefore held that it could not be ruled out "*a priori*" that Ms Bolbol came within the scope of Article 1D.

[125] However, on the question of her not actually having ever received any protection or assistance, the CJEU held:

> "51. 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.
>
> 52. While registration with UNRWA is sufficient proof of actually receiving assistance from it, it has been explained in paragraph 45 above that such assistance can be provided even in the absence of such registration, in which case the beneficiary must be permitted to adduce evidence of that assistance by other means.
>
> …
>
> 54. 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."

[126] She was held not to be caught by Article 1D.

[127] A third approach is that favoured by UNHCR in *Note on UNHCR's Interpretation of Article 1D of the 1951 Convention relating to the status of refugees and Article 12(1)(a) of the EU Qualification Directive in the Context of Palestinian Refugees Seeking International Protection* UNCHR (May 2013). This may be categorised as a **'continuing eligibility' approach**. Like the CJEU in *Bolbol*, UNHCR also rejects the historical eligibility approach. But under this interpretive approach, Article 1D is interpreted to include not only persons who are actually receiving UNRWA protection and assistance, but also those who continue to be eligible for such protection or assistance. The rationale for adopting this approach is set out at pp3-4. UNCHR argues:

> "By capturing those Palestinians who were eligible as well as those who were receiving protection or assistance, their continuing refugee character is acknowledged. They will not entitled to the benefits of the 1951 Convention only should that protection or assistance cease for any reason in accordance with the second paragraph of Article 1D. However, if that refugee character is not acknowledged in the first place – even if they have not themselves needed protection or assistance previously – they would not have access to the Article 1D regime, specifically designed for their particular circumstances. A narrow interpretation of the first paragraph of Article 1D would actually lead to the denial of protection for many Palestinians in need of the 1951 Convention protection regime provided by Article 1D, and therefore create protection gaps in that regime."

[128] A fourth approach is that of the Federal Court of Australia in *Minister for Immigration and Multicultural Affairs v WABQ* [2002] FCAFC 329, which emphasises the class-based nature of Article 1D and may be described as an

‘eligible class’ approach. This approach emphasises that those Palestinian refugees who were at the date the Refugee Convention entered into force eligible as a class to receive protection and assistance from UN organs or agencies other than UNHCR were, and remain, excluded under Article 1D. In contrast to the reasoning in *El-Ali and Daraz*, under this interpretive approach the words “at present” fix the identity of the class *as a class*, and do not represent the date by which membership of the class was to close. The approach is set out in the judgments of Hill J at [69], Moore J at [92] and Tamberlin J at [161]-[163]. Hill J stated:

> “69 I propose to approach the question by setting out my conclusions in turn on each of the difficult expressions used in the Article.
>
> > 1. "*persons receiving".* There are two possible interpretations. The first is that the Article is referring to individual persons, that is to say the Article looks at each potential person and asks if he or she is actually receiving assistance or protection. The alternative construction is that the Article is looking at a class of persons and that it speaks of the class of persons receiving assistance or protection. In my view the latter is the correct construction. It is not, in applying Article 1(D) relevant to consider whether a particular person is actually receiving assistance or protection. It suffices only to know whether that person is within the class of persons to which the first paragraph of the Article applies, that is to say the class of persons who are at present receiving assistance or protection from an organ or agency of the United Nations.
>
> …
>
> I am of the view, however, that the Article was not intended to fix the class of persons as those who as at the relevant day when the Convention became operative were living . The words do no more than describe a class or community of persons. So long as such a class of persons continued to exist the provisions of Article 1(D) would continue to have operation.”

[129] Similarly, Tamberlin J reasoned (emphasis in original):

> “162 The first question which arises in construing Article 1(D) is what is meant by "persons" in the first paragraph of the Article. This could possibly be a reference to an individual or to a group of persons, namely "Palestinians". Some light is thrown on the meaning of the expression by the reference in the second paragraph to "such persons" in the context of their position being definitively settled in accordance with the relevant resolution adopted by the General Assembly of the United Nations. It is inappropriate to speak of an **individual's** situation being "definitively settled" in the context of a UN resolution. The expression must refer to a **group**. The language strongly supports the view that the reference is to a group of persons, namely "Palestinians" and not to individuals. There is no justification for giving a different meaning to the word "persons" in the two paragraphs.
>
> 163 A second difficulty which arises concerns the expression "at present receiving from organs or agencies". The question is whether this is a reference to the date of the Convention when Article 1(D) began operation (namely 28 July 1951) or whether it is an ambulatory reference to the position from time to time with respect to receiving protection or assistance. The better view, in my opinion, is that the expression is to be interpreted as at 28 July 1951 because the first paragraph proposes to exclude Palestinians who do not need protection or

> assistance because they were then receiving those benefits from UN agencies. However, it was foreseen that those agencies, namely UNWRA and UNCCP, might cease to provide such assistance or protection and if this occurred Palestinians would be entitled to the benefits of the Convention. This explains the wording of the second paragraph: see L Takkenberg, *The Status of Pakistan Refugees in International Law* Clarendon Press, Oxford, 1998 and J Hathaway, *The Law of Refugee Status*, Butterworths, Toronto, 1991."

Assessment of the Approaches to Exclusion Under Article 1D

The historical eligibility approach

[130] There are a number of strands to arguments in favour of the historical eligibility. These are set out generally in *El-Ali and Daraz* at [33]-[42] per Laws LJ and at [58]-[68] per Lord Phillips. First, such an interpretation was contrary to the plain language of the text. For example, at [33], Laws LJ commented that any other interpretation means that the phrase 'at present receiving' "no longer means what it says; it includes also persons who *later* receive such assistance." Second, reliance was placed on the 1967 Protocol. Laws LJ reasoned at [34] (with Lord Phillips agreeing at [67]) that:

> "until 1967 a refugee within the meaning of Article 1A(2) was so only by reference to "events occurring before 1 January 1951"; thus until 1967 the Palestinians intended to be excluded from the Convention by the first sentence of Article 1D can only have been persons whose putative claims to refugee status rested on such events."

[131] Further, it was held that the drafters were "specifically concerned with that generation of Arabs who had been displaced from Palestine" and who were to be given highly preferential and special treatment once the second sentence of Article 1D came into effect. It was thus unlikely that arrangements of that kind were intended to apply to others, including others not yet born, see [36] and [63]-[66].

[132] Additionally, Hathaway and Foster (*op cit*) at pp514-515 refer to the different language used in Article 1D and the relevant clause of the UNHCR statute which, at Article 7(c), excludes from the competence of the High Commissioner a person who "continues to receive from other organs or agencies of the United Nations protection or assistance." Further, drawing on the observations of the court in *El-Ali*, Hathaway and Foster also argue that the drafters were unlikely to have provided for an automatic entitlement to the Convention rights to anything other than a "narrowly defined class of known size".

[133] Counsel urges the Tribunal to adopt the historical eligibility approach. She points out that the interpretation is favoured by Hathaway and Foster. With respect to the learned Court and authors, and to counsel, none of these arguments are persuasive in the Tribunal's view.

[134] First, the textual argument is weak. It is not self-evident that "at present" fixes the personal scope of Article 1D to those alive as at 28 July 1951, as arguments to the contrary by respected refugee scholars demonstrate. This approach is not favoured by leading general refugee law academics such as Goodwin-Gill and McAdam (*op cit*) at pp156-161 (Goodwin-Gill, then acting as counsel *pro bono* for UNHCR as intervener, provided opposing written submissions to the court in *El-Ali and Daraz*) and Grahl-Madsen *The Status of Refugees in International Law* (A W Sijthoff, Leyden, 1966) at p263, nor by specialists in this particular area such as Takkenberg *(op cit)* at 96. Indeed, in favouring a narrow interpretation involving historical eligibility, Hathaway and Foster, take a different view from that contained in the first edition of *The Law of Refugee Status* where Hathaway, then writing alone, accepts the correctness of a broader personal scope; see J C Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1993) at p208.

[135] Further, while he ultimately came to a contrary view, Lord Phillips in *El-Ali* at [63], was similarly not persuaded that an approach which fixed the scope of Article 1D more broadly was necessarily "beyond the bounds of what can be achieved by the type of purposive interpretation that is applied to international conventions."

[136] Second, the argument based on the 1967 *Protocol Relating to the Status of Refugees*, which removes the temporal and geographic limitations relating to Article 1A(2), is misconceived. The purpose of the Article 1A(2) to which the 1967 Protocol effectively related, was to provide a definition of a general beneficiary class in respect of the positive obligations accepted by states parties to the Convention under Articles 2 to 34, outside the separately defined beneficiary class of statutory refugees within the ambit of Article 1A(1). The optional geographical limitation contained in Article 1B represents the compromise reached between those states that favoured a universally applicable general definition and those that did not, at the time of the Convention's adoption. However, Palestinian refugees were seen as *a special class of existing refugees* whose predicament arose from the actions of the UN and wholly outside the "events occurring before 1 January 1951" paradigm upon which the general definition in Article 1A(2) was predicated. It seems clear from the background material that the particular

refugee character of displaced Palestinians, to which Article 1D responded, was always regarded as being of a *sui generis* nature. They were never "at least potential candidates for refuge under 1A(2)", as Laws LJ held them be.

[137] The Preamble to the 1967 Protocol makes clear that the removal of the 1 January 1951 dateline was never intended to relate to the predicament of Palestinian refugees. The Preamble provides: (emphasis added):

> "Considering that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (hereinafter referred to as the Convention) covers only those persons who have become refugees as a result of events occurring before I January 1951,
>
> Considering that **new refugee situations have arisen since the Convention was adopted** and that the refugees concerned may therefore not fall within the scope of the Convention,
>
> Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline I January 1951,
>
> …"

[138] Although a distinct form of Convention-recognised refugeehood from that encapsulated in either Articles 1A(1) or 1A(2), given the outbreak of the Israel-Palestine conflict and resulting displacement in mid-1948 predated the adoption of the Refugee Convention by over three years, the predicament of Palestinian refugees can in no way be described as being a "new refugee situation since the Convention was adopted" to which the 1967 Protocol responded. The removal of the geographic and temporal bar in respect of the general definition was, therefore, never about ensuring "equal status to be enjoyed by all refugees irrespective of the 1 January 1951 dateline" *vis-à-vis* the Palestinians, but refugees from other and new conflict zones.

[139] Third, the argument based on the textual differences between Article 1D and the UNHCR statute is also weak. The drafting of the two instruments did not proceed entirely in tandem, with the draft Refugee Convention being subjected to further review at the Conference of Plenipotentiaries. The difference in language may reflect no more than this, rather than signifying any substantive difference justifying the historical eligibility approach. Indeed, as one of the proponents of this approach, Laws LJ in *El-Ali* also noted difference in language between the UNHCR statute and Article 1D but, at [42], held "it is difficult to see how that difference could be significant."

[140] Fourth, the assertions by the court in *El-Ali* as to the perceived "unlikelihood" of an unconditional guarantee being made to other than a narrowly defined class of those Palestinians actually displaced as at 28 July 1951 is at odds with the picture which emerges from Takkenberg's study. Takkenberg notes *(op cit)* at pp69-70 that, when UNRWA started its operations on 1 May 1950, it inherited from:

> "the chaotic emergency conditions in which the dispensation of relief initially had to be organised in 1948 and 1949, a legacy of inflated registration. Although the Economic Survey Mission, in December 1949, estimated the number of refugees at 726,000, of whom about 652,000 were considered to be in need, by the end of the relief operations of UNRPR, on 30 April 1950, there were some 957,000 people receiving assistance. UNRWA's main preoccupation throughout most of its first two decades of operations was, therefore, to rectify the existing records initially referred to as 'relief roles'. UNRWA itself has never carried out an accurate and comprehensive registration of all 'Palestine refugees' although a census operation was conducted during 1950 and 1951, resulting in a reduction of some 82,000 persons. Later attempts to carry out a census were blocked by the governments of the host countries."

[141] Takkenberg, at pp70-71, notes the various iterations of the criteria applied by UNRWA to delineate the category of relief beneficiaries. While these iterations seek to define with greater clarity the persons to be admitted to the relief rolls, the reality is that Article 1D – including its reference to *"ipso facto"* entitlement to the benefits of the Refugee Convention – was negotiated and introduced into the final text of the Refugee Convention at a time where it was understood that the actual beneficiary class scope of UNRWA assistance was uncertain and in a state of flux.

[142] It may well be correct that it would have been beyond the drafter's contemplation that, some nearly 70 years later, definitive settlement of the parties' positions would remain an elusive goal. But this provides no categorical basis for the correctness of the historical eligibility approach. The Arab sponsors of what became Article 1D, and the representatives at Conference of Plenipotentiaries who adopted it, no doubt sincerely hoped and envisaged that definitive settlement would occur sooner rather than later. Nevertheless, the Arab states which insisted that repatriation of displaced Palestinians to land now under control of the new Jewish state as the only "real solution" to the problem – and in pursuit of which UNCCP was specifically established – realised that, despite their hopes, it was entirely possible that there would be no quick fix. Indeed, during discussion on what would become Article 1D, the Egyptian delegate had observed that despite the General Assembly resolution of 11 December 1948, which had ordered the return to their homes of the Palestinian refugees who had expressed the desire to return:

> "[t]hat resolution had had no practical result, and the situation had gone from bad to worse."

[143] The second paragraph of Article 1D, reflects this understanding. It envisages a situation where the assistance and protection provided by both UNRWA and UNCCP as the specific agencies tasked by the General Assembly to address the predicament of displaced Palestinians ceased operation prior to a definitive settlement of the 'Palestine problem' by the international community. Written into the very language of Article 1D, therefore, is the drafter's realisation that, despite their hopes and understandings, a near-term solution may be difficult to achieve. The drafters hence realised there was a need to ensure the ongoing protection of Palestinian refugees as a *sui generis* class of refugees under the Convention.

[144] Viewed in its historical context, the drafting history to Article 1D establishes that it was the clear intention of the drafters that the special arrangements made in the Refugee Convention for displaced Palestinians as a special and *sui generis* class of refugee was to endure so long as there remained no definitive settlement of their predicament. The opening stanza to paragraph two reads "When such protection or assistance has ceased for any reason…". The use of the word "when" to introduce the inclusionary paragraph indicates that this element of the Article 1D definition looks to a continuing and future state of affairs, not the past.

[145] Fifth, given concerns raised about financial implications of expanded relief rolls and the financial pressures in UNRWA, it is reasonable to have expected some clear statement by the General Assembly in support of a historical eligibility approach had this truly been seen to reflect the drafter's intention. In *El-Ali and Daraz* at [40], Laws LJ placed no reliance on this development on the basis that resolutions of the General Assembly are not legally capable of effecting an amendment to the Convention, nor did such resolutions constitute "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within Article 31(3) of the VCLT such that they may be taken into account in the Refugee Convention's interpretation.

[146] While the Tribunal agrees that the General Assembly resolutions relating to UNRWA's working definition may not strictly constitute subsequent practice "in the application of the Refugee Convention treaty", this does not preclude them from informing the assessment of the object and purpose of Article 1D under Article 31(1). It is beyond doubt that, throughout its drafting history, the personal scope of Article 1D was inherently tied to the existence and conduct of relief operations by

UNRWA and Article 1D thus functions in symbiosis with those operations. It is difficult to understand how, in the absence of a definition of a 'Palestine refugee' being imposed on UNRWA by the General Assembly, the approach of the General Assembly to the working definition adopted by UNRWA could be anything other than relevant to determining the personal scope of Article 1D.

[147] In summary, there is nothing in the background material to suggest that the drafters ever intended that, over time and in the absence of a definitive settlement of the problem, Palestinian refugees should be brought increasingly within the scope of the general refugee definition which the historical eligibility approach implies.

[148] Following the decision in *Bolbol*, the historical eligibility approach is no longer good law in the United Kingdom as the United Kingdom courts are bound to follow the interpretation put forward by the CJEU; see *Said (Article 1D: interpretation) v Secretary of State for the Home Department* [2012] UKUT 00413 (IAC). While the CJEU judgment is not binding on the Tribunal, the Tribunal also rejects the highly reductionist historical eligibility approach as being the correct approach to the interpretation of Article 1D.

[149] Having rejected the historical eligibility approach, the question is whether the personal scope of Article 1D is confined to persons who are at the time of a determination actually receiving assistance and protection from UNRWA, or extends to include those who are eligible.

The actual receipt approach

[150] There are a number of difficulties with the actual receipt approach as set forward by the CJEU in *Bolbol* at [51]-[53].

[151] First, it is unclear whether the approach requires proof of actual receipt. Although at [51] the CJEU purports to require proof of an "actual availing of assistance", the court muddies the conceptual waters at [52] by accepting that "registration with UNRWA is sufficient proof of actually receiving assistance from it". But the two are not the same. It is possible for a person to be registered without actually receiving any assistance.

[152] The facts did not invite any great examination of the issue. The CJEU at [27] noted that, according to the order for reference, Ms Bolbol had not availed herself of the protection or assistance of UNRWA but had claimed to be entitled to

such protection and assistance on the basis of an UNRWA registration card issued to the family of her father's cousins. However, the family connection on which Ms Bolbol relied was disputed and UNRWA was unable to confirm her right to be registered on the basis of her family connections.

[153] A further strand of reasoning in the CJEU judgment is that, as Article 1D is an exclusion clause, it must be construed narrowly; see [51]. While Article 1D contains an exclusionary first paragraph, to approach the interpretation of Article 1D on the basis it constitutes an exclusion clause akin Article 1F is unwarranted. Such an approach ignores Article 1D's inclusionary second paragraph. It is clear from the drafting history that, unlike the mandatory and permanent exclusion which flows from the application of Article 1F, any exclusion under Article 1D was of a temporary and contingent nature – what the French delegate described as a "deferred inclusion". Takkenberg notes at p 67:

> "It may therefore be argued that the position of Article 1D in the Convention is unfortunate. It is illogical to include a whole category of refugees conditionally by way of an exception to an exclusion clause. It should be noted that during the final sessions of the conference several delegates expressed reservations about the proper order of the various parts of Article 1. However, as the conference came under considerable pressure to complete the drafting within the time available, there was no time to address the matter."

The preferred approach: combining the continuing eligibility and eligible class approaches

[154] On balance, the Tribunal believes an approach which recognises both the class-based nature of the intended temporary exclusion of Palestinian refugees as emphasised in the eligible class approach, and exclusion on the basis of continuing eligibility to receive protection and assistance, is the approach which most reflects the intention of the drafters. In this regard, the difference between the eligible class approach in *WABQ* and the continuing eligibility approach favoured by UNHCR may be more of emphasis than operation. The Tribunal is in agreement with the observations of Hill J at [69](3) and Tamberlin J at [165] in *WABQ*. The latter stated in relation to arguments based on entitled to assistance and protection:

> "165 Once the view is taken that the word "persons" refers to Palestinians as a **group** rather than to **individual** Palestinians the distinction sought to be made between receiving and being entitled to receive largely disappears. If the "group" receives protection or assistance then all persons who compromise that group must be taken to be receiving assistance or protection even though an individual member is not actually receiving that assistance."

[155] Further, given the CJEU's acceptance of registration as proof of "actual receipt" it is open to debate as to how the approach of the CJEU departs from a continuing eligibility approach.

[156] Ms Walsh submits that an eligibility-based approach is flawed because, "as matter of logic" and in contrast to the question of an actual receipt approach, it was difficult to see how eligibility could 'cease' for the purposes of the second paragraph of Article 1D. But the point is misconceived. Just as the focus of inquiry under the first paragraph to Article 1D is on protection and assistance, so too is the cessation inquiry under the inclusionary second paragraph. In relation to the first paragraph, conceptually, "eligibility" describes the scope of the class potentially excluded by answering who is to be regarded as "receiving" assistance or protection. Similarly, it is not eligibility for protection and assistance which ceases, but the protection and assistance itself. Eligibility may well, as counsel acknowledges, endure.

[157] That the personal scope of Article 1D includes those Palestinians who fall within the class of Palestinian refugees who were or are entitled to receive UNRWA assistance is supported by the majority of leading commentators; see Goodwin-Gill and McAdam (*op cit*) at pp157-158; Takkenberg (*op cit*) at p98; Atle Grahl Madsen (*op cit*) at p265; and M Qafisheh and V Azarov (*op cit*) at p554.

[158] In the Tribunal's view, the better explanation – being more consistent with the background material – is that the phrase 'at present' reflects the drafters' intention to differentiate between Palestinians as a specific class from other groups of displaced persons who fell within the mandate of other existing UN agencies or organs, such as the United Nations Korean Reconstruction agency (UNKRA) or those established in the future; see here discussion in Takkenberg (*op cit*) at pp95-97. This is also recognised by Hill J in *WABQ* at [69](2):

> "2. *"at present".* Again there are two possible interpretations. The first is that the Article speaks as at the time the Convention was signed or perhaps when it was ratified and came into operation. Nothing turns upon any difference between these two dates. The second is that the Article is intended to be ambulatory so that it speaks at the present time. There are two reasons which suggest that the former construction is correct. First the language of the Article suggests that it is speaking as at the time the Convention comes into operation. But more importantly, any other construction would have the consequence that if, in some other part of the world, the United Nations were to set up agencies providing assistance or protection those persons who then received protection or assistance would be excluded from the Convention. I think the history of the Convention makes it clear that Article 1(D) was intended to apply to a particular situation, namely that of the Palestinian refugee. It was not intended to operate automatically in some other situation not foreseeable where questions of United Nations responsibility and the political dynamic might be quite different."

[159] An interpretation of the personal scope of Article 1D drawing on the continuing eligibility of Palestinian refugees as a class receiving protection and assistance from UN agencies other than UNHCR best coheres with the object and purpose of Article 1D. The Article aims, fundamentally, to ensure continued protection of Palestinians as persons whose *refugee character had already been established*. This interpretation also coheres with the intention of the drafters to avoid overlapping agency competence for the protection of Palestinian refugees. Unless Article 1D is interpreted to include those eligible under the UNRWA's guidelines as tacitly approved by the UN General Assembly, this could lead, at least in countries inside UNRWA's field of operation, to the very duplication of mandates the drafters were keen to avoid.

[160] Insofar as this approach represents a departure from the approach taken in *Refugee Appeal No 1/92 Re SA*, (30 April 1992) the Refugee Status Appeals Authority's ("the Authority") treatment of this question in that decision needs to be considered in context. The Authority was primarily responding to the submission that as a Palestinian outside the area of operation of UNRWA, the appellant in that case was *ipso facto* entitled to recognition as a refugee under the Refugee Convention. In rejecting that plainly untenable submission, the Authority made the point that there was a cohort of Palestinians displaced as a result of the conflict in 1948 who could not bring themselves within the working definition of UNRWA as persons eligible to receive UNRWA assistance. This is a fundamentally different point to that now being advanced, which is that in the scope of Article 1D encompasses persons included in the UNRWA working definition who have not in fact availed themselves of protection and assistance which they are otherwise eligible to receive.

INCLUSION UNDER ARTICLE 1D

[161] The drafting history set out above establishes that the purpose of the Egyptian amendment, which became the second paragraph of Article 1D, was to make certain the status of Palestinian refugees *vis-à-vis* the Refugee Convention. The focus of concern was on the cessation of protection and assistance by organs and agencies established by the United Nations to deal with their specific predicament prior to the definitive settlement of their position in accordance with the relevant General Assembly resolutions. But what does cessation of protection or assistance mean?

[162] An immediate issue arises as to whether, to become operable, the second paragraph requires that UNRWA and/or the UNCCP to have ceased operation *as an agency*. This institutional approach to cessation may be contrasted with the argument that, so long as the Palestinian refugee has left the UNRWA field of operation, UNRWA has by that reason alone ceased to provide them with protection or assistance. Sitting somewhere between these two extremes is the middle position that while the formal *de jure* cessation of UNRWA as an agency would render the second paragraph operable and that a voluntary departure would not, there can be a *de facto* cessation in certain compelling circumstances which also renders the paragraph operable. For the reasons which follow, the Tribunal finds that this last approach is correct.

Cessation of Protection and Assistance – By What Measure?

Institutional (de jure) cessation as the benchmark

[163] Support for the narrow, *de jure* institutional cessation of UNRWA can arguably be found in *Re SA*. Here, the Authority found that having regard to the intention of the drafters to make the United Nations responsible for the displaced Palestinians, cessation in the second paragraph (emphasis in original) "addresses the situation where UNRWA ceases to operate **at all**."

[164] Insofar as the emphasis on "at all" implies that only a formal institutional cessation will suffice, this is not what the second paragraph says. Instead, it reads "when such protection or assistance has ceased for any reason…", not "when these organs or agencies have ceased operation…". The language of the second paragraph clearly focuses on the cessation of the protection and assistance being provided, not the status of UNRWA or UNCCP as the provider.

[165] That the focus is on the continuing provision of protection and assistance and not the formal status of the relevant United Nations agency is also consistent with the statement of the Egyptian representative who, when explaining the amendment that would become Article 1D, made clear that the rationale was that (emphasis added):

> "so long as United Nations institutions and organs cared for such refugees their protection would be a matter for the United Nations alone. However, **when that aid came to an end** the question would arise of how their continued protection was to be ensured. It would only be natural to extend the benefits of the Convention to them…"

[166] To be clear, should UNRWA cease operating or have its mandate terminated, without any other UN organ or agency assuming responsibility in its place, this would undoubtedly constitute a cessation for the purposes of Article 1D. But there is no justification for elevating this unlikely scenario into the necessary condition for qualifying cessation to arise, such as to render the inclusionary second paragraph operative.

De facto cessation: the lack of effective protection and assistance

[167] In both *Re SA* and *WABQ,* there are statements supporting the proposition that events approximating *a de facto* cessation of protection or assistance may suffice. The Tribunal agrees.

Cessation of funding

[168] It seems that the Authority may have had in mind something other than a formal *de jure* institutional cessation as, in discussing further when cessation may arise, it noted:

> "The apparent intention was that if for any reason UNRWA's operation ceased (e.g. for lack of finance) the suspensive effect of Article 1D would terminate and entitlement to the benefits of the Refugee Convention would then come into operation."

[169] As an example of *de facto* cessation, the cessation of funding is a significant issue. Presently, the global humanitarian system is under unprecedented strain, with multiple simultaneously occurring humanitarian crises placing severe financial and operational burdens on UN agencies and organs, and donors.

[170] UNRWA is almost entirely funded by voluntary donations and has been for some time typically short of the money it needs; see Bartholomeusz (*op cit*) at p474. The UNRWA *2015 oPt Emergency Appeal Progress Report* (2015) at p3 provides for stark reading. Describing the funding situation for the period January-June 2015, UNRWA reports that, in order to meet its strategic priorities, it requires US$414,435,436 in total, but has received (pledges aside) only US$182,270,488, leaving a shortfall of US$232,164,948. As regards its 'Strategic Priority 1' category comprising emergency food and cash assistance, together with emergency cash-for-work assistance, it has received only US$76,575,849 from a required US$233,059,562, leaving a shortfall of US$138,933,713. 'Protection' falls in the 'Strategic Priority 2' category and, here, UNRWA has received only US$1,184,450 out of a required US$2,075,783, leaving a shortfall of US$891,333.

[171] The overwhelming majority of the shortfall, both overall and in priority specific terms, falls within budgetary allocations for operations in the Gaza Strip. In overall terms, there is a shortfall of US$211,808,889 in allocation for the Gaza Strip, comprising some 91 per cent of the total. In terms of allocation for protection in the Gaza Strip, UNRWA reports that it has yet to receive any of the US$500,000 it has allocated for this area.

[172] Given the long-standing and continuing reality of funding deficits, should UNRWA continue to exist but in fact be unable to provide effective protection or assistance due to a lack of funding, there is no reason in principle why this should also not qualify as a cessation of activities under Article 1D, which expressly contemplates cessation "for any reason" as activating the inclusion clause. The temporary suspension of Palestine refugees from the Refugee Convention was predicated on the provision of assistance. It is entirely in keeping with the intention of the drafters that the inability of UNRWA to provide assistance due to financial constraints should be regarded as constituting a *de facto* cessation by an absence of effective protection or assistance.

Voluntary departures from UNRWA fields of operation

[173] The argument that cessation may arise simply because the claimant has made a voluntary departure and is at the time of determination outside an UNRWA field of operation is untenable. There is a strong consensus that simple voluntary departure from an area on UNRWA operation by a Palestinian did not constitute a cessation of UNRWA protection for the purposes of the second paragraph; see *Refugee Appeal No 1/92 Re SA* (30 April 1992); *El-Ali* at [44] and [72]; *WABQ* at [69](5); Case C-364/11 *El Kott and Ors v Bevándorlási és Állampolgársági Hivatal* (CJEU, Grand Chamber, 19 December 2012) at [53]-[55]. This is surely right. As noted by the CJEU, to hold otherwise would deprive Article 1D of any practical effect. In *Re SA,* the proposition that voluntary departure from an area comprising an UNRWA field of operations amounted to cessation of assistance for the purposes of the second paragraph of Article 1D was aptly described as "both manifestly absurd and unreasonable". As Hill J explains in *WABQ* at p 25:

> "… [A]s a matter of language an agency cannot properly be said to have ceased providing assistance merely because a person to whom its mandate originally extended voluntarily put himself or herself outside its sphere of operations. To adopt the language of Takkenberg at p 112, the aim of Article 1(D) was clearly not to provide a Palestinian refugee the option either to enjoy the special United Nations assistance referred to or to enjoy the benefits of the Convention."

Involuntary departure from UNRWA fields of operation

[174] Neither *Re SA* nor *WABQ* address the issue of involuntary departure. In *WABQ*, the Federal Court of Australia focussed on the cessation of operations of UNRWA and UNCCP, as the organs or agencies established to provide for protection and assistance of displaced Palestinians as a class; see [69], [110] and [168]. Hill J, at [69](5), regarded as "immaterial" a distinction with those who made a voluntary departure but were subsequently prevented from returning to an UNRWA field of operation.

[175] In *El Ali and Daraz*, Laws LJ left open the question of whether something other than a voluntary departure but falling short of a complete cessation of UNRWA's operations could suffice. He stated at [48]:

> "I have considered the possible plight of a Palestinian within the first sentence of 1D who leaves the territory where he is registered with UNRWA but then finds himself barred from returning to it. Is he still excluded from the Convention's scope by force of the first sentence? Such a potential state of affairs to my mind demonstrates the need, elementary enough, to construe 1D as a whole. If as I would hold the class of persons referred to in the first sentence is limited to those receiving UNRWA assistance on 28 July 1951, this possible scenario is far more apparent than real, and would not, in my judgment, constitute sufficient justification for an interpretation of "such protection or assistance has ceased for any reason" – based on the movements of individuals and not the overall cessation of UNRWA activity – which for reasons I have given cannot be accepted. That said, I would recognise the force of a limited alternative view, though I would not myself adopt it, to the effect that a person who could demonstrate that he was actually *prevented*, by the relevant authorities, from returning to the State where he is UNRWA assisted has in truth passed from the first to the second sentence of Article 1D. That would be an exceptional circumstance. On my approach to "at present" and on the facts of these cases, it is not necessary to decide whether it may be right."

[176] The issue was, however, addressed directly by the CJEU in *El Kott* (*op cit*). The case concerned three different Palestinians living in two different UNRWA camps in Lebanon. Each claimed they had been forced to flee involuntarily due to threats to their lives and safety, in the context of armed clashes between various groups. At [62], the CJEU noted that the purpose of Article 1D was to "ensure that Palestinian refugees continue to receive protection, as Palestinian refugees, until their position has been definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations". It therefore held that the cessation element of Article 1D (as transposed under Article 12(1)(a) of the 2004 EU Qualification Directive):

> "must be interpreted as meaning that the cessation of protection or assistance from organs or agencies of the United Nations other than the HCR 'for any reason' includes the situation in which a person who, after actually availing himself of such protection or assistance, ceases to receive it for a reason beyond his control and independent of his volition. It is for the competent national authorities of the

> Member State responsible for examining the asylum application made by such a person to ascertain, by carrying out an assessment of the application on an individual basis, whether that person was forced to leave the area of operations of such an organ or agency, which will be the case where that person's personal safety was at serious risk and it was impossible for that organ or agency to guarantee that his living conditions in that area would be commensurate with the mission entrusted to that organ or agency."

[177] The Tribunal agrees that the individual circumstances of a claimant giving rise to a lack of effective protection or assistance may also, in principle, constitute a *de facto* cessation under the inclusionary second paragraph to Article 1D in cases of involuntary departures or stay from an UNRWA field of operation. Such an approach is in keeping with the multi-dimensional nature of protection in the specific context of Palestinian refugees. As discussed earlier in relation to the material scope of UNCCP's mandate, 'protection' has always included both class-based and individualised dimensions. Indeed, the second paragraph to Article 1D expressly contemplates a qualifying cessation of protection or assistance as something other than 'definitive settlement' in accordance with the relevant UN General Assembly resolutions – the durable solution limb of protection.

[178] The class-based dimension relates to efforts to secure a durable solution to the predicament of Palestinian refugees which have, with the operational demise of UNCCP, been largely assumed by other UN organs such as the Security Council and the Office of the UN Secretary General. UNRWA's protection function is incidental as best; see Bartholomeusz (*op cit*) at pp471-472. The more individualised protection dimension relates to activities aimed at improving the socio-economic conditions through humanitarian assistance with its underlying rights framework, and the specific protection of vulnerable sections of the wider class of Palestinian refugees such as women and children.

[179] Given protection in the specific context of Palestinian refugees has always had both class and personal dimensions, the cessation referred to in Article 1D of the Refugee Convention must necessarily encompass both. Where, despite the continuing efforts to secure a "final settlement" as a class-based durable solution, the specific circumstances of an individual otherwise falling with the class entitled to receive UNRWA protection or assistance operates so as to prevent him or her from doing so, that protection or assistance may as a matter of principle be regarded as having been effectively ceased.

Establishing a lack of effective protection and assistance

[180] An interpretation of the inclusionary second paragraph that in principle encompasses *de facto* cessation in circumstances where there is a lack of effective protection, raises the question as to the degree of compulsion which must exist in order for the second paragraph of Article 1D to apply, and how this standard relates to the being persecuted standard in the general refugee definition.

Relationship to and comparison with the Article 1A(2) standard

[181] Article 1D was drafted in respect of Palestinian refugees who were, *as a class*, regarded by the drafters of the Convention as persons whose refugee character *had already been established*, just as it had been with regard to persons referred to in Article 1A(1) who had been considered to be refugees under the various international instruments referred to therein.

[182] Article 1A(2) clearly provides *an alternative pathway* to entitlement to the benefits of the Convention to persons outside Articles 1A(1) and Article 1D. Unlike with those persons falling within Article 1A(1), and having regard to the *sui generis* nature of the plight of Palestinian refugees as deriving from acts taken by the UN itself, Article 1D operates to suspend their eligibility to the benefits of the Convention that would attach to persons who fell within either Article 1A(1) or 1A(2) for as long as their plight was being addressed by the UN. There is accordingly no justification for requiring that, upon cessation of UN assistance, Palestinian refugees within the scope of Article 1D must then establish that they fall within the criteria of the alterative pathway under Article 1A(2).

[183] The fundamental purpose of Article 1D is to preserve the *sui generis* nature of the displaced Palestinian as a particular category of refugees to whom the Article 1A(2) definition was never intended to apply. As is discussed in detail below, should protection and assistance cease, Article 1D confers on Palestinian refugees the benefits of the Convention on an *ipso facto* basis – ie without being required to establish a well-founded fear of being persecuted. Thus, if the second paragraph of Article 1D is interpreted to include an element of compulsion or involuntary departure from an area of UNRWA operation, there must be something other than “a well-founded fear of being persecuted” in existence. In this regard, the Tribunal is in agreement with the judgment of the CJEU in *El Kott* at [76]. As is discussed more fully below, there is no justification for treating the Article 1A(2)

general definition as a “benefit of the Convention” and introduce this requirement by the back door.

[184] Relevant in this regard is that it is now widely accepted that a component of the being persecuted element of the general refugee definition under Article 1A(2) is the failure of state protection; see, generally, discussion in J C Hathaway and Michelle Foster Law of Refugee Status (*op cit*) at pp 288-292 and cases referred to therein; G Goodwin-Gill and J McAdam *The Refugee in International Law* (Oxford University Press, Oxford, 2007) at pp98-99, who describe it as “an integral part of the refugee definition”; see also in this context, *Refugee Appeal No. 71427/99* [2000] NZAR 545, [2000] INLR 608; and *AC (Syria)* [2011] NZIPT 800035 at [70]-[86].

[185] But the concept of a failure of ‘state’ protection is an imperfect fit in the specific context of Palestinian refugees, particularly in the context of those Palestinian refugees situated in Gaza and the West Bank. The legal implications of UN General Assembly Resolution 67/19*, Status of Palestine in the United Nations* A/RES/67/19 (29 November 2012) in which the General Assembly decided “to accord to Palestine non-member observer state status in the United Nations” is a matter of controversy. As the debate shows, the existence of an entity with sufficient attributes to be imbued with obligations as a state to provide protection of Palestinian refugees under ordinary principles of public international law is by no means clearly established at the present time; see for example Yaën Ronen “Recognition of the State of Palestine: Still Too Much Too Soon?” in Christine Chinkin and Freya Baetens (eds) *Sovereignty, Statehood and State Responsibility* (Cambridge University Press, Cambridge, 2015) at pp229-247.

[186] But the lack of any requirement to establish a well-founded fear of being persecuted in claims of involuntary departure does not mean that transient and relatively minor problems should suffice. The *“ipso facto”* transferral of responsibility under Article 1D from UNRWA *as an organ or agency of the United Nations*, to a State as *a party to the Refugee Convention* requires that the factors giving rise to an involuntary or forced departure from an UNRWA field of operations must have some enduring quality and be of a sufficiently serious character so as to perpetuate the claimant’s refugee-like character if they are properly to be seen as leading to an effective “cessation” of protection and assistance.

[187] Furthermore, like Article 1A, Article 1D is contained in a Convention, the preamble to which makes clear that one of its basic purposes is to secure “the

widest possible exercise of fundamental rights and freedoms" by refugees. Just as in accordance with general principles of treaty interpretation the preambular reference shapes the contours of the Article 1A(2) general refugee definition, so too does it shape the contours of the cessation of protection and assistance element of Article 1D. Accordingly, the circumstances giving rise to an effective cessation must therefore also have some implication for the continued exercise by the Palestinian refugee claimant of fundamental rights and freedoms in the relevant UNRWA field of operation.

[188] It may well be that in this particular category of cessation of protection or assistance under Article 1D, the predicament of the Palestinian claimant approximates that of the refugee under the general definition without him or her having to quantify their predicament as equivalent to "being persecuted". Certainly there is no case for arguing that they must show a higher level or greater risk of harm beyond that which inheres in the real chance or real risk standard.

Relevance of generalised conditions

[189] In its 2013 note, UNHCR elaborates on the kind of circumstances which might amount to a forced departure and thus lead to cessation of assistance as follows, at p5:

> "**Threats to life, physical security or freedom, or other serious protection-related reasons.**
>
> - Examples would include situations such as armed conflict or other situations of violence, civil unrest and general in security, or events seriously disturbing public order.
>
> - It would also include more individualized threats or protection risks such as sexual and gender-based violence, human trafficking and exploitation, torture, inhuman or degrading treatment or punishment, or arbitrary arrest or detention.
>
> **Practical, legal and safety barriers to return.**
>
> - **Practical barriers** would include being unable to access the territory because of border closures, road blocks or closed transport routes.
>
> - **Legal barriers** would include absence of documentation to travel to, or transit, or to re-enter and reside, or where the authorities in the receiving country refuse his or her re-admission or the renewal of his or her travel documents.
>
> - **Safety barriers** would include dangers en route such as mine fields, factional fighting, shifting war fronts, banditry or the threat of other forms of harassment, violence or exploitation."

[190] As to these matters, the Tribunal agrees that they may broadly be accepted as contexts which might, in principle, compel a Palestinian refugee otherwise eligible for UNRWA protection or assistance to leave or remain outside an UNRWA field of operation. However, whether these conditions exist to the extent that a Palestinian refugee claimant can be properly regarded as a person *for whom UNRWA assistance has effectively ceased* for the purposes of Article 1D is to be determined on a case-by-case basis rather than be constituted by the mere existence of these general conditions.

[191] This individualised assessment will require the claimant to establish that their specific predicament as a Palestinian refugee in the context of the relevant generalised condition constitutes an involuntary departure on the basis that UNRWA protection and assistance has effectively ceased.

***Ipso facto* Entitlement to the Benefits of the Convention**

[192] The Tribunal observes that the consensus of authority and commentary is that the phrase *"ipso facto"* permits the person concerned to benefit 'as of right' to the regime of Convention protection; see *El Kott* at [71] and [75]-[77]. This position is also supported by Goodwin-Gill and McAdam (*op cit*) at p154; Grahl Madsen (*op cit*) at pp140-142; Hathaway and Foster (*op cit*) at pp518-519; and Qafisheh and Azarov (*op cit*) at p566. This is also the position of UNHCR. Although seen as an argument in favour of the historical eligibility approach, this is also accepted by Laws LJ at [49] and Lord Phillips MR at [74] in *El-Ali and Daraz.*

Meaning of 'the benefits of the Convention'

[193] An issue arises as to whether the phrase "ipso facto entitled to the benefits of the Convention" means that the person concerned is automatically entitled to the benefits of the Refugee Convention or simply that such a person falls within the scope *ratione personae* of the Convention and must establish that they meet the Article 1A(2) criteria in order to enjoy those benefits.

[194] In *Re SA,* it was held that:

> "[T]he phrase "the benefits of the Convention" refers to the Convention as a whole and includes each and every one of the articles of the Convention, including Article 1A(2). In the situation envisaged by the second paragraph of Article 1D, therefore, UNRWA Palestinians must qualify for refugee status in the usual way by satisfying the Convention refugee definition."

[195] Similarly, Tamberlin J in *WABQ* at [172] held that

> "[T]he expression "ipso facto" did not require a conclusion that upon cessation of protection or assistance, an applicant becomes automatically entitled to protection as a "refugee" without satisfying the definition of "refugee" under the Convention. Essentially, the protection of the Convention is provided in Article 33 which refers to a "refugee"."

[196] Hill J comes to a similar conclusion in *WABQ* at [69](6).

[197] The Tribunal takes a different view for two reasons.

[198] First and fundamentally, as already noted, such reasoning fails to recognise that Article 1D was drafted in respect of Palestinian refugees who were, *as a class*, regarded by the drafters as persons whose refugee character *had already been established.* The Article 1A(2) general refugee definition was never intended to apply to them.

[199] Second, in rejecting what was described as a "narrow view", exempting Palestinian refugees from the requirement to satisfy the Article 1A(2) definition, the Authority in *Re SA* regarded such an approach raised issues of exemption from other aspects of the Convention such as Article 1C and 1F, and the "obligation" provisions of the Convention such as Article 2 (obligation to conform to the laws and regulations of the country in which a refugee finds himself); Article 32 (expulsion can be justified on the grounds of national security or public order) and Article 33(2) (the obligation of *non-refoulement* cannot be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country).

[200] These concerns are, with respect, misplaced. The phrase "benefits of the Convention" must surely encompass the limitations on the benefits the Convention expressly provides for. Just as the drafters envisaged that upon cessation of assistance Palestinian refugees should stand in the same position as those refugees falling within the general definition, there is nothing in the drafting history to suggest the drafters intended they should have been placed in any better position as regards the benefits that were to accrue as a consequence of their refugee status being no longer in suspended effect.

[201] Further, Article 1D is but a single element to Article 1 which, as a whole, defines not only the various pathways by which the benefits of the Refugee Convention may be enjoyed, but also the circumstances in which a person may cease to benefit, or be excluded, from such enjoyment. Once it is recognised that Article 1D is no more than a context specific alternative pathway, the application of

Article 1D does not preclude the application of Articles 1E (acquisition of nationality) and 1F (exclusion for undeserving acts). These are not "benefits of the Convention", but rather different aspects of the eligibility criteria for enjoyment, of which both Article 1A(2) and Article 1D form only part.

[202] The position as regards Article 1C (cessation) is more complex. The text is clear that it only applies to refugees under Article 1A which, for reasons already explained, Palestinian refugees are not. Article 1C provides:

> "C. This Convention shall cease to apply to any person falling under the terms of section A if:
>
> (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
>
> (2) Having lost his nationality, he has voluntarily re-acquired it; or
>
> (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
>
> (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
>
> (5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
>
> Provided that this paragraph shall not apply to a refugee falling under section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;
>
> (6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;
>
> Provided that this paragraph shall not apply to a refugee falling under section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence."

[203] At a glance it can be seen why Article 1C was not drafted with the specific predicament of Palestinian refugees in mind. For example, in the context of Article 1C(6), the circumstances leading to the recognition of the existing refugee character of displaced Palestinians included territorial and property loss to the state of Israel and its citizens. But this aspect of their predicament, and other aspects of Article 1C relating to the voluntary re-availment of the protection of their country of nationality, are intimately bound to the issue of a right to return. This issue, however, is a critical element of the search for a durable solution and, as such, a matter to which Article 1D was intended to directly relate, not Article 1C.

[204] Article 1D is designed to regulate whether it is the UN itself, or a UN member state and states party to the Refugee Convention, which is to provide protection to a Palestinian refugee. As noted, protection in terms of Article 1D has both class-based and individualised dimensions. It is consistent with this aspect of Article 1D, that in the specific context of involuntary departures, the assumption of member state responsibility on an *ipso facto* basis should, in principle, last only so long as the specific circumstances giving rise to the involuntary departure exist. This is not to say that Article 1C applies to Palestinian refugees under Article 1D. Rather, it is to recognise that a temporary transfer of responsibility for protection and assistance of an individual Palestinian refugee from the UN to a state in instances of involuntary departure it is consistent with the intention of the drafters of the Refugee Convention. Given that in such circumstances cessation has not arisen because of the formal or *de jure* cessation of UN protection, the transfer of responsibility is, appropriately, not open ended, but tied to the duration of those circumstances giving rise to the involuntary departure in the first place.

[205] Given the concern of Arab states to promote and protect the right of return of Palestinian refugees, it may well not have been envisaged at the time of the Convention's adoption that some displaced Palestinians would have acquired a new nationality in the country to which they had been displaced, as has occurred in Jordan. The position here is further complicated by the fact that many displaced Palestinians with Jordanian nationality are registered and continue to receive UNRWA services; see UNRWA Medium Terms Strategy 2010-2015 (*op cit*) at p41. While a complicating factor, this does not alter the underlying approach to be taken in such instances. A Palestinian refugee with Jordanian nationality eligible to receive UNRWA assistance is, like any other member of the class, within the personal scope of Article 1D and potentially excluded. Voluntary departure from Jordan will not suffice to entitle him or her to the benefits of the Convention. Should circumstances arise in Jordan of an enduring and sufficiently serious character related to the restriction of fundamental rights and freedoms, this may, in principle, suffice.

Ipso facto entitlement distinguished from assumed entitlement

[206] The final point which must be stressed is that, as discussed above, *ipso facto* entitlement does not mean that entitlement is assumed. Rather, a claimant asserting that he or she falls within the personal scope of Article 1D as interpreted herein must, consistent with the statutory duty under section 135 of the Act, establish the claim to be entitled to the benefits of the Convention on this basis.

No special rules apply. The Palestinian refugee claimant must still submit to the process mandated under Part V of the Immigration Act 2009 to establish their claim to be a person for whom the protection or assistance to which they are entitled to receive has ceased to be provided.

APPLICATION TO THE FACTS

Exclusion Under Article 1D

[Summary: Paragraphs 207 and 208 discuss the appellants' registration with UNRWA notes that each of the appellants is included on their household registration].

[209] [Summary: The registration card indicates the male members of the family as being "RC01", with female members "RC02"]. Although in his evidence [A1] thought 01 and 02 may simply denote the gender of the individual, he conceded he did not know and it was possible that it referred to the particular registration category. In the Tribunal's view, this can only relate back to the particular categories of registration as provided for in the eligibility and registration instructions document. One column in the registration card is headed "RC". There is no explanation on the face of the document as to what RC stands for. However, it seems likely that this refers to the 'registration category' of the individual as per the eligibility and registration restrictions issued periodically by UNRWA.

[210] Part 3 of the UNRWA Eligibility and Registration instructions prescribes categories of persons eligible for registration and/or UNRWA services. Part 3, Category A1 defines persons who are 'Palestine refugees' as follows:

> "[P]ersons 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. Palestine Refugees, and descendants of Palestine refugee males…"

[211] Category 2 is defined as those who do not meet this definition, and this category is broken into further sub-categories including category 2.5, which includes women who are not themselves Palestine refugees (category 1), but who are or were married to one. [Withheld].

[212] [Withheld]. However, taking these matters into account, the Tribunal is clear that, in terms of UNRWA's registration and eligibility guidelines, the appellants each fall within Part 3, Category A1 as the descendants of 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 in [withheld]. The Tribunal is therefore satisfied that, as persons registered with UNRWA, the appellants are each eligible for UNRWA assistance. This in itself is sufficient for them each to be caught by the exclusion clause in the first paragraph of Article 1D.

[213] Moreover, the Tribunal is satisfied that each appellant actually received UNRWA assistance and protection. [The Tribunal rejects Ms Walsh's submission that although the appellants may well be the beneficiaries of food aid, they did not personally receive it. The food was supplied to all the members of the household in each case].

[214] Furthermore, the appellants also told the Tribunal that although UNRWA's services were of a basic nature in the area of health, they had each used UNRWA services for routine or basic things while growing up. [Withheld].

[215] Therefore, the Tribunal finds that each appellant falls within the scope of the first paragraph of Article 1D of the Refugee Convention as being a Palestinian refugee who is eligible to receive UNRWA assistance (and who in fact has received such assistance).

Inclusion Under Article 1D

De jure (institutional) cessation

[216] UNRWA clearly continues. As noted, UNCCP appears to have become inactive by the mid-1960s, but it too continues to exist, and reports annually to the General Assembly.

[217] The second paragraph to Article 1D cannot apply because these organs and agencies have ceased to exist or otherwise have had their mandates formally terminated by a relevant General Assembly resolution.

De facto cessation

[218] Counsel submits that the appellants have been compelled to leave Gaza due to threats to their personal safety and lack of religious freedoms such as to warrant the application of the second paragraph of Article 1D. The Tribunal agrees.

General humanitarian circumstances in Gaza

[219] Under the April 2014 Hamas-PLO reconciliation agreement, while the Palestinian Authority has formal control of Gaza, Hamas retains effective control over security in Gaza; see International Crisis Group *Towards a Lasting Ceasefire in Gaza* (23 October 2014) at p1. According to a recent Word Bank report, *Economic monitoring report to the ad hoc liaison committee* (27 May 2015) the Gazan economy is on the verge of collapse. The report states, at pp5-6:

> "Unemployment and poverty increased markedly In Gaza, yearly average unemployment increased by as much as 11 percentage points to reach 43 percent in the fourth quarter of 2014 – probably the highest in the world – … In Gaza, the poverty rate reached 39 percent.
>
> …
>
> **Tremendously damaged by repeated armed conflicts, the blockade and internal divide, Gaza's economy has been reduced to a fraction of its estimated potential**.
>
> Gaza's economic performance over this period has been roughly 250 percent worse than that of any relevant comparators, including that of the West Bank, whose growth performance has been close to average despite the restrictions on movement and access imposed by the Government of Israel, which present binding constraints to growth. Real per capita income is 31 percent lower in Gaza than it was 20 years ago and the difference in per capita income with West Bank increased from 14 percent to 141 percent over this period in favour of the West Bank. Its manufacturing sector – once significant – has shrunk by as much as 60 percent in real terms. Gaza's exports virtually disappeared since the imposition of the 2007 blockade. There are no other variables that could explain these developments other than war and the blockade. The impact of the blockade imposed in 2007 was particularly devastating, with GDP losses caused by the blockade estimated at above 50 percent and large welfare losses.
>
> **The human costs of Gaza's economic malaise are enormous**.
>
> As mentioned above, if it were compared to that of other economies, unemployment in Gaza would be the highest in the world. Poverty in Gaza is also very high. This is despite the fact that nearly 80 percent of Gaza's residents receive some aid. These numbers, however, fail to portray the degree of suffering of Gaza's citizens due to poor electricity and water/sewerage availability, war-related psychological trauma, limited movement, and other adverse effects of wars and the blockade."

[220] The July-August 2014 war with Israel had a disastrous impact upon the already battered infrastructure of the Gaza Strip. The International Crisis Group (*op cit*), at p4, report:

> "The result was unprecedented destruction in Gaza. According to the UN, some 80,000 housing units were destroyed or severely damaged, leaving approximately 108,000 people homeless. Seventeen out of the Strip's 32 hospitals were damaged as were 45 of its 97 primary healthcare facilities. Twenty-six schools were destroyed and 122 were damaged. Twenty to 30 per cent of water and sewerage networks were damaged, as were 30 to 50 per cent of household water storage capacity."

[221] The general situation in Gaza following the 2014 hostilities between Hamas with Israel is detailed in a report by the Office of the Coordination of Humanitarian Affairs (OCHA) *Gaza Strip: Internal Displacement in the Context of the 2014 Hostilities* (July 2015) which records that 12,620 housing units were "totally destroyed" with a further 6,455 severely damaged and that 17,670 families or approximately 100,000 persons were displaced. Almost a year later not a single totally destroyed home had been rebuilt. At the height of the conflict an estimated 485,000 people, some 28 per cent of the Gazan population, were displaced.

[222] The UNRWA situation report (July 2015) notes there is chronic regular electricity and water shortages, with Gaza experiencing 12 to 16 hour blackouts per day. Due to fuel shortages, in excess of 70 per cent of Gazan households were being supplied with pipe water for only six to eight hours, every two to four days. The report notes that the blockade on Gaza and related restrictions on movements on goods and persons "continues to severely undermine the living conditions of the population in Gaza". There is a high unemployment rate and widespread poverty and aid dependency. There were reports of inter-familial or inter-communal violence.

[223] UNRWA has warned in this report that it was facing "its most serious financial crisis ever". There was a funding shortfall for core activities and it was expected to run out of funding by September 2015.

The situation for Christians in Gaza

[224] The situation for Christians in Gaza is by any account difficult. In February 2014, a church was attacked and slogans were spray-painted vowing revenge for attacks on Muslims in the Central African Republic. A Molotov cocktail was thrown at a car belonging to pastor, but it failed to ignite: see Daniel Greenfield "Muslims Attack Gaza Church: 'The Days of You O Worshippers of the Cross'" *Front Page Magazine* (27 February 2014) at www.frontpagemag.com. The priest at the centre of the failed attack subsequently fled abroad, where he is now commenting on the situation generally in Gaza. In the article, Paul Jeffrey "Priest Says Situation in Gaza is Deteriorating A Year After War" *Catholic Herald* (19 July 2015), the priest confirmed that things are difficult economically for the Christian community. He states that, when seeking work, the first thing the applicant for employment is asked is whether they are Muslim and, if so, whether they support Hamas or Fatah. If neither, they enquire as to the mosque you attend, as employers wish to understand your loyalties. The priest states that the only way Christians can get

jobs is through a Muslim friend who acts as an intermediary. No store, school or bank will give Christians work. There were "occasional episodes of harassment" of Christians on the street and, for this reason, he kept good contact with the police. The priest remarked, however, that if the policeman to whom he filed a report had a "long beard" then nothing would happen.

[225] As regards the 2014 war with Israel, the priest is recorded as stating:

> "The war generated new activism throughout Gaza. The number of people willing to fight has multiplied, whether on behalf of Hamas or Islamic Jihad or the Salafists, and now even with the Islamic State. Despite that, the great majority of the people of Gaza is not aligned with one party or another. They just want to live a normal life."

[226] The existence and number of Daesh (or Islamic State) militants in the Gaza strip is a matter of controversy. Asmaa al-Ghoul "Gaza Salafists Pledge Allegiance to ISIS" *Al-Monitor* (27 February 2014) reports on the controversy surrounding the posting online of a video purporting to show Salafist jihadis affiliated with Al-Qaeda meeting in the Gaza Strip in mid-February 2014 to offer and pledge allegiance to Daesh. Soon afterwards, posters appeared at a funeral in the Gaza Strip extending condolences to a bereaved family on behalf of the same group. *Al-Monitor* reported that it spoke to members of *Salafist* factions in Gaza who confirmed the video was real. On the other hand, *Al-Monitor* reported that the matter was downplayed by a Hamas official and a deputy prime minister, who dismissed talk of Daesh's existence in the Gaza Strip.

[227] Nevertheless, supporters of Daesh have claimed credit for a number of bombings in Gaza during the first six months of 2015, and a group calling itself 'Supporters of the Islamic State in Jerusalem' fired mortars at a Hamas training base in Khan Younis in Southern Gaza on 8 May 2015. There have been a number of bombings in Gaza, for which credit has been claimed by supporters of Daesh. In response, Hamas conducted a crackdown on *Salafists* in Gaza, which included a number of arrests. For now, the number of people involved in such incidents is small and probably the work of local *Salafists* sympathetic to the group's ideology rather than a formal Daesh cell; see John Reid "Hamas Seeks to Stamp Out ISIS in Gaza" *Financial Times* (1 June 2015). Given the tensions between Hamas and the Palestinian Authority, the declaration by Palestinian Authority President Mahmoud Abbas at a meeting with Jordanian parliamentarians that he was in "no doubt" that Islamic State did have "a presence in the Gaza Strip" must be treated with some circumspection: see "Abbas Warns ISIL Threat Against 'Secularists' in Gaza Strip is for Real" *World Tribune* (31 July 2015) at www.worldtribune.com.

[228] Whatever the truth about the extent of a formal Daesh presence, given Hamas has approximately 35,000 security personnel under its control, it is unlikely that the group will be in any position any time soon to take over Gaza. Nevertheless, it continues to put pressure on Hamas, leading to further instability inside the Gaza strip. In mid-2015, Daesh issued a video from its stronghold in Syria challenging Hamas, the gist of which was that Hamas was, effectively, too 'secular' in its governance of Gaza. See "Islamic State Threatens to Topple Hamas in Gaza Strip in Video Statement" *The Guardian* (30 June 2015); Adam Withnall "New ISIS video threatens to overthrow Hamas in Gaza because group is not extreme enough" *The Independent* (1 July 2015).

[229] The report by Gregg Carlstrom "Is the Islamic State on the Rise in Gaza? *Foreign Policy* (27 June 2015) observes:

> "For roughly six months, extremists have waged a slow but steady campaign of bombings and assassinations in Gaza. Their numbers are small, and casualties have been low, but their recent actions threaten to erode the fragile cease-fire with Israel. Hamas has clamped down hard, arresting dozens of people in frequent raids.
>
> Worryingly, these new radical groups are finding support from within Hamas itself, among rank-and-file members who want to go back to war with Israel.
>
> …
>
> The defections are further fracturing a ruling party that's already divided about whether to head back to war. The group's comparatively moderate political leadership is negotiating a long-term truce with Israel, which could offer five years of quiet in exchange for a major easing of the blockade, even as the military wing busily prepares for another conflict.
>
> "80 percent of the people who are joining these movements are from one of the resistance factions," said Abu Ibrahim, a mid-level member of the Palestinian Islamic Jihad's military wing, the other prominent Gaza faction that has seen defections to the Salafi groups.
>
> …
>
> None of these militants have yet sworn formal allegiance to the Islamic State, and the leaders of the self-proclaimed caliphate have not acknowledged an affiliate in the besieged Palestinian territory. But their statements are peppered with songs produced by the Islamic State's media wing and other imagery associated with the group.
>
> Diplomats worry that these groups might start kidnapping people, either for propaganda value or to use as bargaining chips in exchange for jailed comrades. Abductions are rare in Gaza: The last one happened in 2011, when Salafi militants murdered Italian activist Vittorio Arrigoni. Still, the United Nations raised its threat assessment in Gaza earlier this year. Many aid workers are barred from walking the streets, restricted to offices and hotels.
>
> "Everyone knows we have this sort of ideology in Gaza," said Dunya Ismail, a feminist activist who was among those threatened in December. "But this is the first time it [has] happened with an Islamist movement that was unknown."

Application to the facts

[230] Each of the appellants has felt compelled to leave Gaza, a UNRWA field of operation, because of fears for their safety if they were to practise their religion through attendance at church, or by discussing their religion with other Christians in public, because of an increase in Islamic militancy in Gaza in recent times. The country information before the Tribunal establishes that, at the present time, Hamas, the non-state agent presently with effective administrative control of Gaza, is coming under pressure from Daesh. While it is inconceivable that Hamas would voluntarily cede control to Daesh, and doubtful whether Israel would stand idly by should Daesh look like it was taking control of Gaza by force, there has been a tightening of the social space within which Gazan Christians must exist.

[231] Harassment of Christians does occur, and the level of protection appears dependent to some extent on the identity of the Hamas official to whom any harassment in reported, if at all.

[232] Furthermore, the appellants are at the present time unable to freely practise and manifest their beliefs in breach of their right to religion under Article 18 of the ICCPR. Specifically, in the current situation of heightened activism by Islamic militants inside Gaza, they must each live in a state of continuous self-imposed restraint to avoid the potential for harassment and harm. [Family members of each] have stopped attending church due to fears for their safety. These circumstances represent the types of circumstance capable of bringing the second paragraph of Article 1D into operation. Their situation has had a profound effect of their state of mental health. Individual psychiatric reports dated 10 August 2015 by [withheld], consultant psychiatrist, have been filed in respect of all three appellants. These reports confirm that the appellants each suffer from severe depression and anxiety consistent with post-traumatic stress disorder as a result of both their experiences in Gaza to date and concerns about their future if returned there.

[233] Moreover, the economy in Gaza is in ruins. The ability of the appellants to leverage what minimal employment opportunity exists in Gaza will be hampered by the routine discrimination practised against Christians, and which they have each experienced in the past. This is in breach of the rights under Articles 2(2) and 6 of the 1966 International Covenant on Economic Social and Cultural Rights.

[234] The Tribunal is satisfied that the cumulative effect of these matters on the three appellants is of sufficient seriousness and duration to amount to a *de facto*

cessation of UNRWA protection and assistance. The predicament of these three appellants at the present time perpetuates their refugee like character.

[235] The Tribunal is satisfied that the second paragraph to Article 1D applies to each of the appellants. They are each entitled to the benefits of the Convention.

DISPOSITION OF THE APPEAL

The Statutory Framework

[236] Section 124 sets out the purpose of refugee status determination procedures contained in Part V of the Act. This relevantly provides:

> "The purpose of this Part is to provide a statutory basis for the system by which New Zealand—
>
> determines to whom it has obligations under the United Nations Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees; and
>
> …"

[237] In other words, refugee status determination is not an end in itself, but a means by which states determine to whom they will extend the benefits of Convention-based protection.

[238] Section 127 of the Act sets out the context for decision-making. This provides:

> "(1) Every claim under this Part must be determined by a refugee and protection officer.
>
> (2) In carrying out his or her functions under this Act, a refugee and protection officer must act—
>
> (a) in accordance with this Act; and
>
> (b) to the extent that a matter relating to a refugee or a person claiming recognition as a refugee is not dealt with in this Act, in a way that is consistent with New Zealand's obligations under the Refugee Convention.
>
> (3) The text of the Refugee Convention is set out in Schedule 1."

[239] Section 129(1) of the Act provides that:

> "A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention."

[240] The words “under the Convention” necessarily mean the Convention as a whole and this is reflected in the Act. For example, section 143 domesticates the Article 1C cessation clause and provides for a statutory power to cease to recognise a person as a refugee in appropriate circumstances. Section 137(2) provides for a mandatory duty on a refugee and protection officer to turn his or her mind to the terms of the Article 1F exclusion clause for every claim accepted for consideration.

[241] While no similar express duty arises in relation to Article 1D, nevertheless, the Act clearly contemplates such a decision-making power existing as an aspect of the overarching duty under section 129 to recognise a person as a refugee only if they are a refugee “under the Convention.” Under section 145(b)(iii), one of the grounds under which a refugee and protection officer may cancel a previous grant of refugee status is that:

> “the refugee and protection officer has determined that the matters dealt with in Articles 1D, 1E, and 1F of the Refugee Convention may not have been able to be properly considered by a refugee and protection officer (or a refugee status officer under the former Act) for any reason, including by reason of fraud, forgery, false or misleading representation, or concealment of relevant information; ..”

[242] As the discussion of the drafting history of the Refugee Convention establishes, Article 1A(2) provides but one definition of who is a refugee. While it is the definition typically relied upon in claims for protection in New Zealand, it is not the only one. Article 1D constitutes another pathway by which a claimant can be held to be a refugee “under the Convention”.

Conclusion on Claim to Refugee Status

[243] The Tribunal finds that each of the appellants is entitled to be recognised as a refugee under section 129 of the Act.

The Convention Against Torture

[244] Section 130(1) of the Act provides that:

> “A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand.”

[245] The appellants have each been found to be a Convention refugee. The recognition of the appellants as refugees means that they cannot be deported from New Zealand to Gaza; see Article 33 of the Refugee Convention and sections

129(2) and 164 of the Act. The exception to section 129, which is set out in section 164(3) of the Act, does not apply. Therefore, there are no substantial grounds for believing the appellants would be in danger of being subjected to torture in Gaza.

The ICCPR

[246] Section 131 of the Act provides that:

> "(1) A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.
>
> ...
>
> (6) In this section, cruel treatment means cruel, inhuman, or degrading treatment or punishment."

[247] Again, because the appellants are recognised as refugees, they are each entitled to the protection of New Zealand from *refoulement* to Gaza. For the reasons already given in relation to the claim under section 130 of the Act, there is no prospect of the appellants being deported from this country. Therefore, there are no substantial grounds for believing that the appellants are in danger of being subjected to arbitrary deprivation of life or to cruel, inhuman or degrading treatment or punishment in Gaza. Accordingly, the appellant is not a person who requires recognition as a protected person under section 131 of the Act.

CONCLUSION

[248] For the foregoing reasons, the Tribunal finds that the appellants:

(a) are refugees within the meaning of the Refugee Convention;

(b) are not protected persons within the meaning of the Convention Against Torture;

(c) are not protected persons within the meaning of the Covenant on Civil and Political Rights.

[249] The appeals are allowed.

"B L Burson"
B L Burson
Member

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