6

Persons no longer needing protection

The Convention conceives of refugee status as a transitory phenomenon that comes to an end if and when a refugee can reclaim the protection of her own state or has secured an alternative form of enduring national protection.[1] Because the purpose of refugee law is to afford surrogate protection pending the resumption or establishment of meaningful national protection,[2] the cessation clauses in Art. 1(C) of the Convention define various situations in which refugee status may come to an end.[3]

The first sub-chapter therefore considers the applicability of cessation where there is evidence of a refugee's decision to reclaim the protection of her own country;[4] where an objective assessment by the host country determines that the country of origin has undergone such a fundamental change of circumstances that it can be relied upon to resume its duty of protection;[5] or where the refugee has acquired the nationality of another state that will

[1] This passage from J. C. Hathaway, *The Law of Refugee Status* (1991) ("*Refugee Status*"), at 189, was approved in *Refugee Appeal No. 75574/09*, [2009] NZAR 355 (NZ RSAA, Apr. 29, 2009), at [127]; and adopted in substance in United Nations High Commissioner for Refugees ("UNHCR"), "The Cessation Clauses: Guidelines on their Application" (Apr. 1999) ("Cessation Guidelines"), at [1].

[2] "It is the return of refugees to their own community or their integration in a new one which constitutes a permanent or durable solution . . . [I]nternational protection is of an essentially temporary nature and is the sum of all action which seeks to achieve the admission of a refugee into, and his secure stay in, a country where he or she is not in danger of *refoulement* and can enjoy basic rights and humane treatment until the above objective is achieved – that of renewed belonging in a community": UNHCR, "Note on International Protection (submitted by the High Commissioner)," UN Doc. A/AC.96/680 (Jul. 5, 1986), at [4], [5].

[3] Convention relating to the Status of Refugees, adopted Jul. 28, 1951, entered into force Apr. 22, 1954, 189 UNTS 137 ("Refugee Convention" or "Convention"), at Art. 1(C). It is sometimes suggested that these clauses may only be invoked in "situations where a person has already been accorded the status of a refugee" (R. Germov and F. Motta, *Refugee Law in Australia* (2003), at 403; see also S. Kneebone and M. O'Sullivan, "Article 1C," in A. Zimmermann (ed.), *The 1951 Convention relating to the Status of Refugees and its Protocol: A Commentary* (2011) 481, at 485–86). But because refugee status assessment is merely a declaratory, not a constitutive, process (see text *supra*, Introduction, Ch. 1.1.1), and given that cessation is an integral part of the "basic definition of who is (and who is not) a refugee" (UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/IP/4/Eng/REV.3 (2011) ("*Handbook*"), at [12(i)]), such formalism is unwarranted. To the contrary, the clear text of Art. 1(C) ("This Convention shall cease to apply to any person falling under the terms of section A if . . . ": Convention, at Art. 1(C)) contemplates the general applicability of the cessation rules, whether or not a formal assessment of status has taken place. The exceptions are paragraphs (5) and (6) of Art. 1(C), which set the test for cessation due to change of circumstances in relation to a person who "has been recognized as a refugee," wording that does not appear in the other four cessation clauses.

[4] Refugee Convention, at Arts. 1(C)(1), 1(C)(2), and 1(C)(4).

[5] *Ibid.*, at Arts. 1(C)(5) and 1(C)(6).

protect her.[6] In each of these situations,[7] cessation "takes effect naturally,"[8] since the rationale for imposing a duty of substitute national protection on an asylum state will have come to an end.[9]

Somewhat more controversially, the Convention also withholds protection from persons who are adjudged already to benefit from surrogate protection[10] – even when this protection falls short of restoring the refugee to the Convention's paradigm of protection by a state of nationality.[11] The second sub-chapter considers the rules under which persons found to be *de facto* nationals of a safe state, as well as some persons in receipt of the protection or assistance of an international agency, may be excluded from refugee status on the grounds that they – unlike others at risk of being persecuted – already have a protection option. These clauses reflect a belief that it is unnecessary to offer the surrogate protection of refugee status to an individual who already has access to surrogate protection that approximates that which refugee status would provide.

6.1 Persons who have secured national protection

The Refugee Convention's central purpose is to restore at-risk individuals to membership of a national community – thereby both enfranchising them in the traditional interstate system and, most importantly, providing them with the most durable form of legal status.[12] Where an individual is a citizen (or in the case of a stateless person, a habitual resident) of a state in which there is a real chance of being persecuted, refugee law intervenes to afford surrogate or substitute national protection for the duration of the risk. But it follows that if and when the refugee's own country – or indeed, some other state – provides the refugee with the rights attached to citizenship, the rationale for the surrogate or substitute national protection of refugee law comes to an end. This reality is recognized by the Convention's cessation clauses, which provide that access to national protection results in the termination of refugee status.

[6] *Ibid.*, at Art. 1(C)(3).

[7] "The cessation clauses are negative in character and are exhaustively enumerated. They should therefore be interpreted restrictively, and no other reasons may be adduced by way of analogy to justify the withdrawal of refugee status": UNHCR, *Handbook*, *supra* n. 3, at [116]. *Accord* A. Grahl-Madsen, *The Status of Refugees in International Law* (Vol. I, 1966), at 369. State parties may not therefore add to the Convention's list of cessation grounds. ("If it were accepted that *recognition* as a 'refugee' under the Convention could lapse in accordance with the lapse of national *protection*, all of the instances in the [domestic] Act in which protection visas may lapse or be cancelled would, of necessity, effectively become additional cessation grounds. By the text of the Convention, this is not the case and it may not be so. The introduction by individual State parties of additional cessation grounds into the exhaustive list contained in Art 1C of the Convention is a legally impermissible course": *Minister for Immigration and Multicultural and Indigenous Affairs v. QAAH of 2004*, (2006) 231 CLR 1 (Aus. HC, Nov. 15, 2006), at [106] (per Kirby J., in dissent) (emphasis in original).)

[8] *R (Hoxha) v. Special Adjudicator*, [2005] 1 WLR 1063 (UKHL, Mar. 10, 2005), at 1067 [13] (referring specifically to Art. 1(C)(5) of the Refugee Convention).

[9] The exception to this principle is where a new or independent basis for refugee status has arisen since the original recognition of status that is not obviated by a fundamental change of circumstances in the state of origin. See *infra* Ch. 6.1.4.

[10] While Arts. 1(D) and 1(E) of the Convention are phrased in the language of exclusion, substantively they speak to the fact of surrogate protection and are thus more comparable to Art. 1(C)(3) than to the primary exclusion clause, Art. 1(F).

[11] See *supra* Ch. 1.3.

[12] *Ibid.*

Under the terms of the Convention, access to national protection may be manifested in any one of five ways. The refugee may elect to entrust her safety to the state of origin by way of re-availment of its formal protection, by re-acquisition of its nationality, or by re-establishment in its territory.[13] Behavior of any of these three sorts is understood to reflect a determination by the refugee to entrust her well-being to her country of origin, an exercise of individuated self-determination in which international law can but acquiesce.[14] Alternatively, assessment by the authorities of the asylum state may show that conditions in the country of asylum have improved to such an extent that not only is there no longer a real chance of being persecuted there, but meaningful, affirmative protection by the refugee's own country is once again dependably on offer.[15] Where there is clear evidence of such a fundamental transformation, refugee status comes to an end given the manifest absence of a need for surrogate national protection when actual national protection is once again available. Finally, even if the national protection of the refugee's own country cannot be resumed, a refugee may secure the nationality of a new country that is both able and willing to protect her.[16] While perhaps less satisfactory than restoration of the refugee to the effective protection of her own country, it remains that the need for the substitute national protection of refugee law evaporates in such circumstances since the refugee is enfranchised by a national community in which protection is afforded.

Though the basic ideas that underlie the cessation of refugee status by reason of having access to national protection are relatively straightforward, difficult conceptual issues can nonetheless arise. For example, what types of action amount to formal "re-availment" of the protection of the country of origin or re-acquisition of its citizenship? Is every return to the country of origin by a refugee tantamount to "re-establishment" there, and hence to cessation of status? What magnitude of change of circumstances and what standard of affirmative protection must be shown to justify the involuntary cessation of status? Precisely what standards apply to substantiate the required test that a refugee "enjoys the protection" of a new country of nationality? Recalling the fundamental goal of preserving the surrogate national protection of refugee law until and unless it is no longer required, each of the five cessation clauses predicated on access to national protection must therefore be scrupulously assessed in a non-technocratic, purposive way.

6.1.1 Voluntary re-availment of national protection

The Refugee Convention "shall cease to apply to any person falling under the terms of section A if . . . [h]e has voluntarily re-availed himself of the protection of the country of his nationality."[17] Application of this rule is normally considered when a refugee makes a formal request for intervention or representation[18] by the authorities of her

[13] Refugee Convention, at Art. 1(C)(1), (2), and (4).

[14] "Needless to say, if a refugee, for whatever reasons, no longer wishes to be considered a refugee, there will be no call for continuing to grant him refugee status and international protection": UNHCR, *Handbook*, *supra* n. 3, at [116].

[15] Refugee Convention, at Art. 1(C)(5), (6). [16] *Ibid.*, at Art. 1(C)(3). [17] *Ibid.*, at Art. 1(C)(1).

[18] "The notion of diplomatic protection principally relates to the actions that a State is entitled to undertake vis-à-vis another State in order to obtain redress, in case the rights of one of its nationals have been violated or have been threatened by the latter State. If a refugee re-avails him or herself of such form of protection, his or her refugee status should come to an end": UNHCR, "Cessation Guidelines," *supra* n. 1, at [6].

state of citizenship,[19] for example the issuance or renewal of a passport or other identity document.

This cessation clause derives from a highly formalistic and outmoded understanding of the notion of "protection."[20] In essence, the underlying logic is that having secured the "protection" of the country of origin by obtaining its passport or other identity document, the refugee has by her actions signaled an intention to be protected by that country and hence to renounce the surrogate national protection afforded by refugee status. Yet as Grahl-Madsen observed, "a person may seldom have well-founded fear of being persecuted by the members of the foreign service of his home country; the pertinent fact is therefore that he fears persecution in the case of his return to his country of origin."[21] Moreover, when most persons approach consular or diplomatic authorities to secure the documentation needed for such purposes as travel, enrollment in school, or professional accreditation, they do so simply as a matter of routine, with no thought to the legal ramifications of their act.

The real risks arising from the disparity between the formalistic understanding of "protection" and the notion as understood by most people are, however, significantly mitigated by several principles that require the strict construction of this clause in order to avoid undercutting the protective mandate of refugee law.

First, the request for formal protection must be made voluntarily.[22] As noted by the French delegate who introduced the clause, "a person lost his status of refugee only if he expressly wished to do so and, for that purpose, performed a number of voluntary acts."[23] The request is not voluntary, for example, if the refugee approaches diplomatic authorities in order to comply with an administrative directive issued by the country of reception.[24]

Second and most important, the request for diplomatic assistance must be made as an act of re-availment of protection, indicative of a specific intention to have one's interests defended by the issuing state. Thus, "[i]f the person still fears persecution and does not understand that obtaining a passport normally means availing oneself of the protection of the issuing state, it would obviously be difficult to withdraw refugee status on the basis of

[19] By virtue of its plain language – referring to protection "of the country of his nationality" – this clause has no application to refugees who are stateless. *Accord* Refugee Review Tribunal of Australia, *Guide to Refugee Law in Australia* (2012) ("*Refugee Law in Australia*"), at 7–8.

[20] This highly technical approach to "protection" continues to influence Australian courts: see *supra* Ch. 4.3.1. Similar formalism exists in some publications of the UNHCR (see e.g. UNHCR, *Handbook*, *supra* n. 3, at [99]), and in the work of some scholars ("Protection comprises all . . . actions by the refugee as indicate the establishment of normal relations with the authorities of the country of origin, such as registration at consulates or application for and renewal of passports or certificates of nationality": G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3rd edn., 2007), at 136). But the dominant contemporary and more contextually sound approach is to interpret "protection" as meaning substantive protection: see *supra* Ch. 4.3.1.

[21] Grahl-Madsen, *supra* n. 7, at 379.

[22] P. Weis, "The Concept of the Refugee in International Law," (1960) 87 J. du droit international 928, at 974–76.

[23] Statement of Mr. Rochefort of France, UN Doc. E/AC.7/SR.160 (Aug. 18, 1950), at 9.

[24] UNHCR, "Note on Cessation Clauses," UN Doc. EC/47/SC/CRP.30 (May 30, 1997) ("Note on Cessation Clauses"), at [12]. "If the refugee is compelled to act by circumstances beyond his/her control, such as at the instructions of the authorities of the country of asylum or in order to avert illegalities in regard to his/her stay there, such an act should not be considered as voluntary": UNHCR, "Cessation Guidelines," *supra* n. 1, at [9]. See also Refugee Review Tribunal of Australia, *Refugee Law in Australia*, *supra* n. 19, at 7–8, observing that "applying to a Consulate for a national passport on the instruction of the country of refuge" does not engage Art. 1(C)(1).

such a confused act."[25] There would be no specific intent where, for example, a refugee is under the mistaken impression that the maintenance of a valid passport or other status is expected of him and proceeds to have it renewed without consideration of the formal ramifications of that act.[26] Similarly, most ordinary forms of diplomatic contact are dictated by practical necessity,[27] rather than by a desire for protection.[28] They do not therefore evince the required intention to avail oneself of the home state's protection.[29]

Third, as is clear from its express language ("has re-availed himself"), the clause does not apply unless the solicited diplomatic or consular protection is actually forthcoming.[30] As originally introduced by the French delegate, the clause provided that any person who attempted to secure diplomatic or consular protection from her state of origin would lose her refugee status,[31] whether or not protection was actually granted.[32] This strict approach was forcefully rejected by the British,[33] American,[34] and

[25] A. Grahl-Madsen, "Protection of Refugees by Their Country of Origin," (1986) 11(2) Yale J. Intl. L. 362, at 393.

[26] The Canadian Federal Court thus sensibly refused to impugn the decision of a Salvadoran refugee who had his national passport renewed at the Los Angeles consulate en route to claiming refugee status in Canada, finding that the decision-maker "should have, in the interest of fairness . . . reopened the hearing to provide an opportunity for the applicants to present evidence as to their motivation in applying for passports from outside El Salvador and from the safety of the United States of America": *Benitez v. Solicitor General*, (1993) 66 FTR 224 (Can. FCTD, Aug. 6, 1993), at [12].

[27] See text *supra*, at note 24. "The emphasis on intention means that some purely practical forms of contact with the diplomatic mission of the refugee's country will not usually come within the scope of Article 1C(1)": Refugee Review Tribunal of Australia, *Refugee Law in Australia*, *supra* n. 19, at 7–8 (footnote omitted).

[28] Thus, the German Federal Administrative Court determined that Art. 1(C)(1) did not apply to a Turkish refugee who sought documentation from the Turkish consulate necessary for him to marry and who was in fact married at a Turkish consulate because these contacts were for "administrative" or "technical" purposes: *9 C 126.90* (Ger. BverwG, Dec. 2, 1991), reported at (1992) 4 Intl. J. Ref. L. 389. See also *Paramanathan, 247916* (Fr. CRR [French Refugee Appeals Commission], Jun. 18, 1995), finding that Art. 1(C)(1) did not apply to a Sri Lankan refugee who went to that country's consulate in Singapore for the purpose of marriage.

[29] But see UNHCR, "Cessation Guidelines," *supra* n. 1, at [7]: "Where consular authorities provide documents and certificates that the nationals of the country may need while being abroad, including renewal of passports, birth and marriage certificates, authentication of diplomas, etc., this may also constitute re-availment of national protection."

[30] *Accord* UNHCR, "Cessation Guidelines," *supra* n. 1, at [11].

[31] "Cette Convention ne s'appliquera pas à tout réfugié qui jouit de la protection d'un gouvernement parce que: (1) il s'est volontairement réclamé à nouveau de la protection du gouvernement du pays dont il avait la nationalité": UN Doc. E/L.82 (Jul. 29, 1950).

[32] "The French delegation considered that it was for a refugee to make up his mind. He could not run with the fox and hunt with the hounds by seeking to retain his refugee status and yet at the same time claim the protection of the government of his nationality. The very fact that a refugee asked his Consul for protection was proof that he could return to his own country without fear, and such a step should suffice to deprive him of the status of refugee, even if it did not meet with a favourable reception": Statement of Mr. Rochefort of France, UN Doc. E/AC.7/SR.160 (Aug. 18, 1950), at 22.

[33] "[T]he provision did not mean that the mere fact that a refugee sought the protection of his government should be sufficient to deprive him of the status of refugee. It would no doubt be necessary, in addition, for his request to have met with a favourable reception": Statement of Mr. Fearnley of the United Kingdom, UN Doc. E/AC.7/SR.160 (Aug. 18, 1950), at 22.

[34] "A person should not automatically lose his status as a refugee just because he had made a claim which might not be granted": Statement of Mr. Henkin of the United States, UN Doc. E/AC.7/SR.165 (Aug. 19, 1950), at 18.

Peruvian[35] delegates, leading to intervention by the Chairman in favor of an interpretation that would limit cessation to circumstances in which formal protection was in fact forthcoming:

> [T]he opening words . . . namely "this Convention shall not apply to any refugee enjoying the protection of a government," made it clear that whatever claims he had made, such claims had been successful, otherwise he would not be enjoying the protection of a government.[36]

An American amendment substituting the final language, "has voluntarily re-availed himself of," in place of the original French version, "he voluntarily claims anew," was then adopted to give effect to the Chairman's ruling that the receipt of protection is key.[37]

The three requirements of volition, specific intent, and consummation constrain the frequency with which cessation based on voluntary re-availment of protection is likely to occur. This cautious confinement of the clause's application is appropriate in view of the risk that purely formal or practical contact with foreign diplomatic personnel might otherwise strip a refugee of the surrogate protection of refugee status on the basis of a fallacious assumption that she has chosen to renounce the asylum country's protection in favor of that of her home country.

Despite general acceptance of these three constraints on the application of Art. 1(C)(1),[38] two concerns have nonetheless arisen in practice.

First, it is sometimes suggested that application for, or renewal of, a *passport* from the country of origin – as contrasted with seeking other forms of diplomatic or consular assistance – ought to be *presumed* to demonstrate the required specific intent.[39] Thus, the UNHCR's *Handbook* opines: "If a refugee applies for and obtains a national passport or its renewal, it will, in the absence of proof to the contrary, be presumed that he intends to avail

[35] "He thought that the words 'he voluntarily claims anew the protection' should be replaced by the words 'he has once more secured the protection', since the important point was, not the application for protection, but the fact of obtaining it": Statement of Mr. Cabada of Peru, UN Doc. E/AC.7/SR.165 (Aug. 19, 1950), at 19.

[36] Statement of the Chairman, UN Doc. E/AC.7/SR.165 (Aug. 19, 1950), at 20.

[37] UN Doc. E/AC.7/SR.165 (Aug. 19, 1950), at 22. Some degree of ambiguity on this point remains, however, for two reasons. First, while there was agreement to change the French text from "se reclamer" to "se prevaloir" to reflect the amendment to the English text (UN Doc. E/AC.7/SR.165 (Aug. 19, 1950), at 22), the final version approved at the Conference of Plenipotentiaries maintained the original language. Second, the opening words upon which the Chairman relied to formulate his ruling were ironically deleted prior to adoption of the Convention at the Conference of Plenipotentiaries (see the report of an informal working party, UN Doc. A/C.3/L.131 (Nov. 30, 1950)). Nonetheless, there was no further discussion of disfranchising refugees who were not in fact successful in securing the protection of their state of nationality.

[38] See e.g. UNHCR, "Cessation Guidelines," *supra* n. 1, at [8].

[39] Thus, the Australian Administrative Appeals Tribunal determined that evidence of receipt of the passport of the country of origin was sufficient to declare cessation under Art. 1(C)(1) with no need to examine the underlying reasons for having applied for same: *Re Bengescu and Minister for Immigration and Ethnic Affairs*, [1994] AAT 9250 (AAT, Jan. 17, 1994), approved on other grounds at *Bengescu v. Minister for Immigration and Ethnic Affairs*, (1994) 35 ALD 429 (Aus. FC, Nov. 23, 1994). The presumption approach is endorsed by Goodwin-Gill and McAdam, *supra* n. 20, at 136. Indeed, these authors go so far as to assert that "[p]ossession of a national passport and a visit to the country of origin would seem conclusive as to cessation of refugee status": *ibid.*

himself of the protection of the country of his nationality."[40] As elaborated more recently by the agency,

> This implication may, however, be rebutted by the refugee. There may be cases where obtaining or renewing a national passport should not be considered as indicative of an intention to re-avail of the protection of the country of nationality. The key issue is the purpose or reason for which the passport was obtained or renewed.[41]

This approach is problematic,[42] as it shifts the burden to the refugee to disprove a presumed – but factually highly unlikely – premise that securing or renewing a passport evinced the refugee's intention to renounce refugee status in favor of the country of origin's protection.[43] The unnecessary insertion of this presumption is ironically at odds with the UNHCR's own insistence that "[w]hile it may be difficult to determine the intention or motive of the refugee, every case has to be assessed on its own merits and on the basis of the particular act of the refugee."[44] In truth, as helpfully framed by the Australian refugee tribunal, "[f]or there to be a re-availment under this provision there needs *to be shown* the voluntary and conscious choice of subjection to the government of the relevant country."[45] While there will undoubtedly be cases in which the specific intent to entrust one's protection to the country of origin by the act of securing a passport can be demonstrated, a presumption (even if rebuttable) that such an intention exists is manifestly artificial and at odds with the duty to interpret the text of Art. 1(C)(1) in light of the Refugee Convention's object and purpose.[46]

[40] UNHCR, *Handbook*, *supra* n. 3, at [121]; endorsed in Department of Immigration and Multicultural and Indigenous Affairs (Cth), *Interpreting the Refugees Convention – An Australian Contribution* (2002) ("*An Australian Contribution*"), at 11.

[41] UNHCR, "Cessation Guidelines," *supra* n. 1, at [10]. Despite agreeing with this basic premise, the UK tribunal has suggested it is a presumption that is difficult to dislodge, noting that "[p]assports are not ornamental adornments or collector's items": *RD (Algeria) v. Secretary of State for the Home Department*, [2007] UKAIT 00066 (UKAIT, Jun. 26, 2007), at [30].

[42] Concern about the use of a presumption in this context was expressed in *Rezaei v. Minister for Immigration and Multicultural Affairs*, [2001] FCA 1294 (Aus. FC, Sept. 14, 2001), at [50]; and in *Thevarayan, 78055* (Fr. CE [French Council of State], Jan. 13, 1989).

[43] Indeed, an early Canadian decision determined that "it seems high time to dispel an idea that is all too prevalent – and, what is more, false – of exactly what a passport is. A passport is no more, in fact and in law, than a travel document issued by a country's proper authorities to allow one of its nationals to travel abroad and, if necessary, to call upon the services of its consular authorities in the foreign countries visited to provide the holder of the document with proper protection. The fact of holding a passport, even if it is valid and issued legally, in no way constitutes a guarantee that protection will be provided": *Nuñez Veloso*, CLIC Notes 11.15 (Can. IAB, Aug. 24, 1979), at 4–5.

[44] UNHCR, "Cessation Guidelines," *supra* n. 1, at [10].

[45] Refugee Review Tribunal of Australia, *Refugee Law in Australia*, *supra* n. 19, at 7-7 (emphasis added). Similarly, the Canadian Federal Court rejected the proposition that "the simple action of renewing the passport, without more, [is] sufficient to establish re-availment of the protection of [the home state]": *Chandrakumar v. Canada (Minister of Employment and Immigration)*, 1997FCT LEXIS 410 (Can. FCTD, May 16, 1997), at [5], relying on the analysis in Hathaway, *Refugee Status*, at 193–95; affirmed in *Nsende v. Canada (Minister of Citizenship and Immigration)*, [2008] FC 531 (Can. FC, Apr. 23, 2008), at [18]–[19].

[46] There is in any event reason to question the underlying premise that possession of a state's passport is tantamount to having secured its protection. To the contrary, "there is no duty on the part of a State to exercise protection over its citizens abroad; whether or not to exercise protection remains in the absolute discretion of the state . . . The municipal law of the issuing state may provide that the issuance

The second problematic aspect of contemporary practice is the conflation of voluntary re-availment of the home country's protection with physical return to its territory. As described later in this chapter,[47] the drafters of the Convention considered, but rejected, a proposal that refugee status would cease upon return by a refugee to her country of origin. Because the mere fact of return was understood to be an insufficient indicator of intention to claim the protection of that state, the decision was taken to condition cessation under Art. 1(C)(4) on evidence not simply of return, but rather of *voluntary re-establishment* in the country of origin. Despite this clear consensus that the mere fact of return is insufficient to bring refugee status to an end, some commentary and jurisprudence suggest that this decision can in at least some cases be effectively subverted by deeming simple "return" to be a form of "re-availment of protection" under Art. 1(C)(1).[48]

This approach is not only at odds with the *exclusio unius* rule[49] given the scope and clear purport of Art. 1(C)(4), but more fundamentally makes no sense.[50] The purpose of Art. 1(C)(1) is to withdraw refugee status where there is evidence of diplomatic or consular protection,[51] a matter not in play when a refugee returns to her own country. As such, there is no reason to canvass the relevance of a return trip under this conceptual rubric.[52] In some situations, return will be the prelude to re-establishment, and hence to cessation under the terms of Art. 1(C)(4).[53] But unless that is the case, the simple fact of return

of a passport to one of its nationals will be a guarantee that the state will protect the bearer while abroad. Nevertheless, the state can breach that guarantee without violating international law": D. Turack, *The Passport in International Law* (1972), at 232.

47 See text *infra*, at n. 77.

48 See e.g. UK Border Agency, "Cancellation, Cessation and Revocation of Refugee Status" (Dec. 18, 2008) ("Cancellation, Cessation and Revocation"), at 17, observing that cessation under Art. 1(C)(1) "will occur in cases where the refugee chooses to return to his own country and/or to obtain or use a passport issued by that country"; *T, 608347* (Fr. CNDA [French National Court of Asylum], Apr. 8, 2008), relying on use of a national passport to return to his home country "for several weeks" (unofficial translation) was sufficient to deem refugee status to have ceased under Art. 1(C)(1); and *A v. Minister of Immigration and Multicultural Affairs*, [1999] FCA 227 (Aus. FC, Mar. 16, 1999), at [39], determining that the return of a refugee to his native Vietnam to undertake business there justified cessation under Art. 1(C)(1).

49 Recalling the value of recourse to supplementary means of interpretation under Art. 32 of the Vienna Convention on the Law of Treaties, adopted May 23, 1969, entered into force Jan. 27, 1980, 1155 UNTS 331 ("Vienna Convention"), Aust cites the principle of "*expressio unius est exclusio alterius*" as one of seven cardinal supplementary modes of construction, summarized by him as meaning that "[e]xpress mention of a circumstance or condition excludes others": A. Aust, *Modern Treaty Law and Practice* (2nd edn., 2007), at 249.

50 See also UNHCR, "Note on Cessation Clauses," *supra* n. 24, at [12] (discussing the relevance of resumption of protection via return in the language of re-establishment).

51 "The protection intended here is the diplomatic protection by the country of nationality of the refugee": UNHCR, "Cessation Guidelines," *supra* n. 1, at [6].

52 "The term re-availment is sometimes used loosely to refer to situations where a person has returned to the country of origin or former habitual residence. However, clause (1) properly refers to a refugee who is still outside the home country, but whose actions indicate an intention and ability to take advantage of the protection of that country": Department of Immigration and Multicultural and Indigenous Affairs (Cth), *An Australian Contribution*, *supra* n. 40, at 10.

53 Thus, despite affirming a finding of cessation under Art. 1(C)(1) in the case of an Iranian couple who returned to Iran with new Iranian passports, adopted a child and remained there for approximately two years, Allsop J. observed that if the Art. 1(C)(1) finding was in error, cessation under the re-establishment provisions of Art. 1(C)(4) would nonetheless be warranted: *Rezaei* (Aus. FC, 2001), at [60].

to the country of origin is not the basis for the withdrawal or withholding of refugee status.[54]

Art. 1(C)(1) is thus a cessation clause that will rarely be applicable. Where a request for diplomatic or consular assistance from the refugee's country of nationality can be shown to meet the three requirements of volition, specific intent, and consummation, there may be a reasonable basis to see the refugee's actions as indicative of a decision to renounce refugee status and to entrust her interests to her home country. But this is not a matter that can simply be presumed from any act, including from the application for, or renewal of, a passport. Nor does this cessation clause speak to the legally distinct question of cessation that may arise after a refugee returns to her country of origin. The issue is rather whether careful consideration of all the circumstances shows that the refugee's relations with the diplomatic or consular authorities of the home state bespeak a conscious choice by the refugee to rely on that country for protection in preference to the surrogate protection afforded by refugee status.

6.1.2 Voluntary re-acquisition of nationality

Cessation under Art. 1(C)(2) occurs if a refugee "[h]aving lost his nationality . . . has voluntarily re-acquired it."[55] This clause, like Art. 1(C)(1) just examined,[56] is predicated on the view that refugee status comes to an end if a refugee declines the surrogate protection of refugee status in favor of the national protection of her country of origin.[57] The main difference between the two cessation clauses is that the precipitating act under Art. 1(C)(2) – the voluntary re-acquisition of the home country's nationality – is a more straightforward indicator of the refugee's decision to relinquish her entitlement to protection as a refugee. Whereas a showing of specific intent is required under Art. 1(C)(1),[58] this is not so under Art. 1(C)(2) since a decision to secure the citizenship of a state is not comparably ambiguous.[59] Because the refugee who chooses affirmatively to seek out and to resume the nationality of her state of origin is generally understood to be signaling her intention to entrust her welfare to that country, she may reasonably be expected to rebut a presumption that by that act she has elected to end her refugee status.[60] This is, however, simply an evidentiary rule based

[54] See also the analysis in *supra* Ch. 2.2.1, explaining why the mere fact of return to one's home country cannot be assumed to negate the existence of a well-founded fear.

[55] Refugee Convention, at Art. 1(C)(2).

[56] See *supra* Ch. 6.1.1.

[57] UNHCR, *Handbook*, *supra* n. 3, at [126]. "Like the provision of Article 1 C (1), the provision presently considered has its principal *raison d'être* as a means to bring about the termination of refugee status for those persons who wilfully or for no good reason take a positive step in order to normalize their relations with the authorities of their country of origin or in order to reap the benefits due to nationals of that country under international law or comity": Grahl-Madsen, *supra* n. 7, at 395.

[58] This is because the legal significance of availing oneself of diplomatic or consular services is too vague to be the basis for assuming that the refugee has chosen to resume the protection of the country of origin: see *supra* Ch. 6.1.1.

[59] "Unlike the previous cessation clause [Art. 1(C)(1)], this particular cessation clause does normally not (*sic*) require an examination of the intent or motive of the refugee": UNHCR, "Cessation Guidelines," *supra* n. 1, at [13].

[60] Describing the re-acquisition of nationality as "the supreme manifestation" of securing the protection of the home country, Goodwin-Gill and McAdam observe that "[t]here is less scope for explanation of extenuating circumstances: the intention of the individual and the effectiveness of the act will suffice in most cases": Goodwin-Gill and McAdam, *supra* n. 20, at 138.

on the empirical likelihood that securing citizenship normally suggests a preparedness to opt for the protection of the country granting that citizenship. In the exceptional case where there is evidence that the securing of citizenship did not evince an intention "to reap the benefits due to nationals of that country under international law or comity,"[61] cessation under Art. 1(C)(2) is not warranted.

The scope of Art. 1(C)(2) is moreover textually limited to a narrow subset of refugees. Because most refugees do not lose the formal citizenship of their country of origin despite securing refugee protection, they are clearly not in a position to *acquire* the nationality of that country. Because Art. 1(C)(2) speaks to *re*-acquisition of nationality, this cessation clause does not apply to stateless persons who secure the citizenship of their country of former habitual residence, assuming they were not previously nationals of that country. And because it is Art. 1(C)(3) that addresses the question of loss of status upon acquisition of a "new nationality,"[62] Art. 1(C)(2) interpreted in context addresses only the acquisition of the nationality of the country in relation to which refugee status was established.[63]

Cessation under Art. 1(C)(2) is otherwise subject to many of the same constraints elaborated in relation to Art. 1(C)(1).[64]

First, the plain language of this clause ("has voluntarily re-acquired") makes clear that it is not enough to show that the refugee could have re-acquired her former citizenship but failed to do so, since there is no consummation of the act of protection.[65]

Second, cessation is established only where the re-acquisition of nationality is truly a voluntary act ("has voluntarily"). Issues of volition might arise in an individuated context – for example, where the home country's nationality is automatically re-acquired by marriage to one of its citizens.[66] Alternatively, a refugee who is part of a group once stripped of citizenship might be granted that nationality anew by decree or operation of law of the

[61] Grahl-Madsen, *supra* n. 7, at 395. [62] See *infra* Ch. 6.1.5.

[63] A recent analysis of this clause misstates the position of Grahl-Madsen in this regard: Kneebone and O'Sullivan, *supra* n. 3, at 498 n. 118 (suggesting that the nationality referred to in Art. 1(C)(2) is that of a country in relation to which the refugee does *not* fear persecution). To the contrary, Grahl-Madsen sensibly opined that "it is clearly implied that the nationality referred to in Article 1 C (2) is the nationality of a country from which the person concerned is a refugee. If a person has at any time, before becoming a refugee, possessed and lost the nationality of a country where he does not fear persecution, and he re-acquires it, it is Article 1 C (3), and not Article 1 C (2), which is deemed to apply": Grahl-Madsen, *supra* n. 7, at 392. See also UNHCR, "Cessation Guidelines," *supra* n. 1, at [12]; and UNHCR, "Note on Cessation Clauses," *supra* n. 24, at [13] ("It is clearly implied by the cessation clause covering this situation that the nationality referred to is the nationality of the country from which the person concerned is a refugee").

[64] See text *supra*, at nn. 22–24, 30–37.

[65] "A person does not cease to be a refugee merely because he could have reacquired his former nationality by option, unless this option has actually been exercised": UNHCR, *Handbook*, *supra* n. 3, at [128].

[66] This analysis in Hathaway, *Refugee Status*, at 196–97, was cited in Department of Immigration and Multicultural and Indigenous Affairs (Cth), *An Australian Contribution*, *supra* n. 40, at 12. *Accord* Grahl-Madsen, *supra* n. 7, at 393–94: "It would be a strange provision indeed, that required denationalized women refugees from a country where nationality is acquired automatically by marriage to remain single, or to marry persons either stateless or of any other nationality than their own, under pain of losing their refugee status. Moreover, cessation of refugee status in such cases would hardly be warranted from a rational point of view, as there would not be any evidence of normalization of relations between the individuals concerned and the authorities of their country of origin."

country of origin, for example consequent to an amnesty or political transition.[67] In neither of these cases is there a "voluntary" re-acquisition of nationality: the refugee has taken no action that can be said to amount to a decision to entrust her protection to that country, in consequence of which there is no basis for cessation under Art. 1(C)(2).[68] While an offer of reinstated nationality might well be good evidence of the legally distinct question of whether there has been such a fundamental change of circumstances that refugee status has ceased due to the clear availability of protection at home, such matters are addressed under the framework of Art. 1(C)(5)–(6).[69] Under Art. 1(C)(2), in contrast, the only question is whether the refugee's voluntary decision to re-acquire the nationality of her country of origin is truly indicative of an intention to entrust her well-being to that state, and hence inconsistent with an intention to retain the surrogate protection of refugee status.

6.1.3 Voluntary re-establishment in the country of origin

Voluntary reintegration in the state of origin is perhaps the clearest indication that a refugee has chosen to rely on the protection of her home state and hence no longer wishes protection abroad as a refugee. In voluntarily resuming residence in the country that once posed a risk to her, the refugee is in the most direct way possible signaling a renewed willingness to entrust her welfare to that state. As such, Art. 1(C)(4) provides that "[t]his Convention shall cease to apply to any person falling under the terms of section A if . . . [h]e has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution."[70]

There is, of course, no exercise of volition where a return home is the product of coercion – a concern that arises not only in the context of direct forced repatriation,[71] but also where

[67] "The granting of nationality by operation of law or by decree does not imply voluntary reacquisition, unless the nationality has been expressly or impliedly accepted": UNHCR, *Handbook*, *supra* n. 3, at [128].

[68] The UNHCR has regrettably suggested that "[i]f such former nationality is granted by operation of law, subject to an option to reject, it will be regarded as a voluntary re-acquisition if the refugee, with full knowledge, has not exercised this option; unless he is able to invoke special reasons showing that it was not in fact his intention to re-acquire his former nationality": UNHCR, *Handbook*, *supra* n. 3, at [128]; see also Department of Immigration and Multicultural and Indigenous Affairs (Cth), *An Australian Contribution*, *supra* n. 40, at 12–13, suggesting that, based on the UNHCR position, there is "a burden on refugees to signal their rejection of an offer of restored nationality, if they have knowledge that it will operate automatically unless they opt out." While the UNHCR has more recently partly recanted this view (now saying that failure to exercise the option "could" amount to voluntary re-acquisition, and allowing for an "explanation of extenuating circumstances": UNHCR, "Cessation Guidelines," *supra* n. 1, at [14]), the imposition of this reverse onus is not sound, as the refugee's failure to respond to an offer of citizenship is not tantamount to a voluntary expression of her desire to renounce the surrogate protection of refugee status in favor of the national protection of her country of origin.

[69] See *infra* Ch. 6.1.4.

[70] Refugee Convention, at Art. 1(C)(4).

[71] The UNHCR equivocates on this issue, suggesting that "[w]here the return is involuntary, this cessation clause is not applicable. However, should the refugee have returned to his or her country of origin involuntarily, but nonetheless settled down without problems and resumed a normal life for a prolonged period before leaving again, the cessation clause may still apply": UNHCR, "Cessation Guidelines," *supra* n. 1, at [20]. This approach suggests that cessation may still occur despite the illegality of the involuntary return of a person who is a refugee, a view at odds not only with a good faith application of the duty of *non-refoulement*, but also with the express intentions of the drafters of the Convention who selected the "voluntary re-establishment" language in part to guard against the prospect of forcible repatriation: see text *infra*, at nn. 77–81. Two years earlier, the agency had stated that "[a] *refoulement* will not warrant the application of the cessation clause": UNHCR, "Note on Cessation Clauses," *supra* n. 24, at [12].

return is induced by actions in violation of international law, such as limiting the refugee's access to subsistence rights or restricting her freedom of internal movement. A somewhat more difficult question arises when a host government offers financial incentives to refugees who agree to go home. Such initiatives can be sensible investments in human capital, as when Britain provided an "installation grant" of £210 and a modest salary top-up to Afghans living in the United Kingdom who agreed to return home and to contribute to the re-building of their home country.[72] But Britain later promoted a more assertive repatriation plan, under which Afghan families agreeing to go home would receive a grant of up to £2,500, leading to concern that despite the optional nature of the initiative it could in practice prove too strong a motivation for refugees to opt for return at a time when conditions in Afghanistan were still far from secure.[73] A comparable Australian plan was even more aggressive, offering Afghan refugee families their cost of travel and a grant of up to $A10,000 to go home – a sum amounting to five years' income for the average Afghan. In announcing the program, the Immigration Minister gave refugees only twenty-eight days to accept the offer, with the warning that any Afghans not ultimately recognized as refugees would be subject to mandatory return without compensation.[74]

While such plans have often been encouraged by the UNHCR,[75] they raise the specter of an infringement of the cardinal requirement of volition. There may in practice be very little real space for self-determination when a poor refugee is offered a sum of money significantly beyond her financial dreams. Particularly when such an offer must be accepted within a short time frame, and is made when conditions in the home country are not objectively safe,[76] there is reason to be concerned that a generous financial offer may unfairly skew what should be a genuinely voluntary decision by the refugee to give up her protected status.

Refugee status does not, however, come to an end simply because a refugee chooses, even with complete freedom, to return to her country of origin. The second requirement for valid cessation of refugee status under Art. 1(C)(4) is that the refugee not just be physically inside the country of origin, but rather that she be *re-established* there. The original draft of this provision, which would have revoked the refugee status of any person who "returns to his country of former nationality,"[77] was rejected by the drafters on the grounds that it might deny protection to persons who had been forcibly repatriated to their state of origin, as well as to those who had chosen to return to their country of origin only temporarily.[78]

[72] J. Steele, "Afghan exile puts his mind at his country's service," *Guardian* (Jun. 19, 2002), at 13.

[73] A. Travis, "Afghans offered £2500 to go home," *Guardian* (Aug. 21, 2002), at 1.

[74] K. Lawson, "Afghan detainees to be offered $2000 each to go home," *Canberra Times* (May 24, 2002), at A-3. A maximum of five persons per family were entitled to receive the payment, for a total grant of up to $10,000.

[75] Human Rights Watch, "Afghanistan Unsafe for Refugee Returns – UN Refugee Agency Sending 'Misleading' Message" (Jul. 24, 2002).

[76] Even as the British and Australian plans to promote Afghan repatriation were being promoted, observers determined that the risk of armed attacks and persecution for certain groups continued: *ibid.*

[77] UN Ad Hoc Committee on Statelessness and Related Problems, *Ad Hoc Committee on Statelessness and Related Problems, United States of America: Memorandum on the Definition Article of the Preliminary Draft Convention relating to the Status of Refugees (and Stateless Persons) (E/AC.32.2)*, UN Doc. E/AC.32/L.4 (Jan. 18, 1950), at [C(2)].

[78] See UN Ad Hoc Committee on Statelessness and Related Problems, *Ad Hoc Committee on Statelessness and Related Problems, Memorandum From the Secretariat of the International Refugee Organization*, UN Doc. E/AC.32/L.16 (Jan. 30, 1950), at 2. In the result, the decision of the Swiss Federal Council in the *Romanian Refugee Case*, 72 ILR 580 (Sw. CS/SE [Swiss Federal Council], Mar. 3, 1969), at 581, holding

The substitute language, which sets the cessation threshold at voluntary re-establishment in the country of origin,[79] was thus intended to ensure that only persons who have willingly resettled[80] in their state of origin are subject to cessation of refugee status. As Weis observed,

> [i]f a person returns to his country of origin for a temporary stay without re-establishing himself, and then returns to the country where he was recognized as a refugee, this should not lead to *ipso facto* loss of refugee status.[81]

Not only does re-establishment require more than mere physical presence,[82] but it also requires a greater commitment to remain in the country of origin than is evinced, for example, by a temporary return to visit an ailing parent or to bring out relatives, friends, or property.[83] The Canadian tribunal thus sensibly determined that the return of a Salvadoran refugee for two and a half months in order to attempt to save her marriage did not amount to re-establishment there. In particular, there was evidence that she had never stayed more than three nights in the same place, had avoided public transportation, had identified herself as a foreigner, and had prepared answers to questions which might have exposed her real identity.[84] A similarly exceptional and transient presence was found to exist in the case of a Sri Lankan refugee who had returned home briefly to care for his ill mother.[85]

In contrast, cessation under Art. 1(C)(4) is plausible where there is evidence of a durable residence having been re-established.[86] Indeed, a pattern of prolonged and frequent visits

that "[w]here a refugee returns, even temporarily, to the State from which he fled and thereby submits himself to its power, he expresses his conviction that the essential ground for obtaining the status of refugee – a well-founded fear of being persecuted – has disappeared" (unofficial translation), should be viewed as bad law. While it is legally doubtful that there is truly a subjective element to refugee status at all (see *supra* Ch. 2.3), whatever implications might arguably be drawn from a "subjective element" should in any event not be allowed to contradict the clear language and history of Art. 1(C)(4) of the Refugee Convention.

79 Statement of Mr. Henkin of the United States, UN Doc. E/AC.7/SR.165 (Aug. 19, 1950), at 16. The amendment was adopted on a vote of 13–0–2: UN Doc. E/AC.7/SR.165 (Aug. 19, 1950), at 18, and was addressed to the situations of both persons with formal nationality and those who are stateless.

80 "The term 're-established' denotes not only return to the country of origin but also re-settlement there": UNHCR, "Cessation Guidelines," *supra* n. 1, at [19].

81 Weis, *supra* n. 22, at 978.

82 "A lengthy stay would normally be involved. A short visit to the country in question is not likely to constitute 're-establishment'": UK Border Agency, "Cancellation, Cessation and Revocation," *supra* n. 48, at 15.

83 "It is probably correct to define 're-establishment' . . . as residence with the explicit or implicit intention of remaining in the country, and to infer that a prolonged stay (a couple of years or more) implies such an intention": Grahl-Madsen, *supra* n. 7, at 372.

84 *C89-00332* (Can. IRB, Aug. 27, 1991), reported at (1991) 5 RefLex 41, 962. In the High Court of Australia, Gummow A.C.J. and Kiefel J. similarly insisted that a low-profile, short-term visit to one's home country cannot be assumed to obviate the need for international protection: *Minister for Immigration and Citizenship v. SZMDS*, (2010) 240 CLR 611 (Aus. HC, May 26, 2010), at 627 [50]–[51].

85 *Shanmugarajah v. Canada (Minister of Employment and Immigration)*, [1992] FCJ 583 (Can. FCA, Jun. 22, 1992). See also *Liviu-Mitroi v. Canada*, [1995] FCJ 216 (Can. FC, Feb. 8, 1995), where it was held that no adverse inference regarding the need for protection should be drawn from the decision of a refugee from Romania briefly to travel to that country as a tourist.

86 It should, of course, be remembered that "[t]he application of this cessation clause does not preclude the person from having a new refugee claim based on circumstances in the country of origin which [have] occurred after he or she re-established himself or herself": UNHCR, "Cessation Guidelines," *supra* n. 1, at [22].

for such purposes as holidays or business may also show that presence was ongoing rather than transient, and hence bespeak re-establishment.[87]

Where there is evidence either of durable residence or of prolonged and frequent visits to the country of origin, the remaining inquiry is qualitative:[88] does the nature of the refugee's presence in the home state show "an ability and an intention to enjoy a normal relationship with that country"?[89] For example, the Australian Federal Court sensibly determined that Iranian refugees who had not only returned to their country and lived there for more than two years, but also availed themselves of the Iranian domestic legal system to adopt a child, had met the threshold for cessation.[90] The Canadian tribunal similarly did not content itself with evidence that a Russian refugee had returned to his country for five years, but emphasized the fact that while there he "was able to obtain a variety of services from the Russian state . . . [including] a driving permit . . . medical benefits . . . [and] an internal passport to do business in Moscow"[91] before determining that cessation under Art. 1(C)(4) was warranted. As these decisions make clear, while evidence of ongoing presence in the country of origin makes cessation due to re-establishment an arguable proposition, re-establishment is not just a question of the duration of physical presence.[92] Rather, it also requires evidence that while in the home country the refugee has "carried on a normal livelihood without problems . . . indicative of a normalization of relations with the country."[93]

The need to show evidence of substantive re-establishment, rather than simply of return, moreover aligns neatly with the much-vaunted commitment to encourage refugees to consider repatriation as a solution to their refugeehood.[94] Because cessation under Art. 1(C)(4) follows not just from the fact of return with a hope of re-establishment, but rather from evidence that re-establishment has in fact occurred, refugees who return home to "test the

[87] This view expressed in Hathaway, *Refugee Status*, at 198, was approved in *C89-00332* (Can. IRB, 1991), at 7–8; Department of Immigration and Multicultural and Indigenous Affairs (Cth), *An Australian Contribution*, *supra* n. 40, at 15; and Refugee Review Tribunal of Australia, *Refugee Law in Australia*, *supra* n. 19, at 7–10.

[88] In rare cases, even a prolonged stay may not suggest re-establishment if it "occurs for reasons beyond the refugee's control," such as "confiscation of travel documents by authorities or an outbreak of civil war": Department of Immigration and Multicultural and Indigenous Affairs (Cth), *An Australian Contribution*, *supra* n. 40, at 15 n. 43.

[89] *Ibid.*, at 15. As the UNHCR observes, "[w]here . . . a refugee visits the country of origin frequently and avails himself or herself of the benefits and facilities in the country normally enjoyed by the citizens of the country, the cessation clause may be invoked": UNHCR, "Note on Cessation Clauses," *supra* n. 24, at [12].

[90] *Rezaei* (Aus. FC, 2001), at [60].

[91] *VA3-01194* (Can. IRB, Oct. 18, 2004), at 7.

[92] In contrast, the Swiss Federal Administrative Court effectively assimilated the need to show re-availment of protection with the simple fact of presence in a state in which conditions had "changed considerably" since the time of the refugee's departure: *A, B, and C (Kosovo) v. Office fédéral des migrations, E-6770/2008* (Sw. BverwG, Feb. 22, 2011), at [3.3]. In so doing, the court partially conflated cessation under Art. 1(C)(4) with that following from a fundamental change of circumstances (Art. 1(C)(5)), resulting in cessation without full consideration of the criteria applicable to cessation under either clause.

[93] UNHCR, "Cessation Guidelines," *supra* n. 1, at [21].

[94] The UNHCR Executive Committee has "[*r*]*eaffirm*[*ed*] that refugees have the right to return to their own country and that States have the obligation to receive back their own nationals and should facilitate such return": UNHCR Executive Committee Conclusion No. 101 (LV), "Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees," UN Doc. A/AC.96/1003 (Oct. 8, 2004), at [(b)]; and endorsed the right of refugees "to return home freely in safety and dignity": UNHCR Executive Committee Conclusion No. 109 (LXI), "Conclusion on Protracted Refugee Situations" (Dec. 8, 2009), at [(e)].

waters" in their country of origin are not inadvertently penalized. They can instead attempt to resume life in their own country, confident that their refugee status is not forfeited in the event that true protection is not forthcoming there.

In sum, Art. 1(C)(4) recognizes that a refugee may opt for the protection of her home country by the act of voluntarily returning to, and reintegrating in, that state. If the refugee's decision to go home is truly voluntary, her presence there either prolonged or ongoing, and the nature of the stay (including in particular, access to state services and facilities) indicative of a true normalization of relations with the country of origin, there is no longer a case to be made for the surrogate protection of refugee status.

6.1.4 Change of circumstances

Unlike cessation initiated by the voluntary act of a refugee, cessation due to change of circumstances is the prerogative of an asylum state which has applied international legal standards to find that the facts upon which refugee status was recognized no longer exist and that protection is once more viable in the refugee's state of origin.[95] Unless there are grounds for recognition of refugee status distinct from those that justified the original recognition of status – in which case, continuing refugee status is of course required[96] – a fundamental change of circumstances that restores the refugee to national protection is sensibly understood to bring the need for surrogate protection to an end.

Critically, however, the focus of attention under Art. 1(C)(5)–(6) is not simply whether the circumstances justifying the original recognition of refugee status have ceased to exist, but rather whether the refugee

> 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.[97]

That is, while the change of circumstance is a condition precedent to contemplating cessation under Art. 1(C)(5)–(6), it is the consequential restoration of *protection* (or in the case of a stateless refugee, the ability to return)[98] that must be established in order to justify the cessation of refugee status. Thus, if and when a triggering event – the relevant change of circumstances – is shown to exist, refugee status may be ended if (but only if) it is established that protection is in consequence now available to the refugee in her country of origin.

This two-part inquiry for cessation under Art. 1(C)(5)–(6) ensures a healthy balance between the legitimate interests of asylum states and those of refugees who have been admitted to protection. On the one hand, the Convention's provision for cessation due

[95] "Cessation under Article 1(C)(5) and 1(C)(6) does not require the consent of or a voluntary act by the refugee": UNHCR, *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, UN Doc. HCR/GIP/03/03 (Feb. 10, 2003) ("*Guidelines on International Protection No. 3*"), at [7].

[96] "Even where circumstances have generally changed . . . there may always be specific circumstances of individual cases that may warrant continued international protection . . . [R]efugees affected by general cessation must have the possibility, upon request, to have such application in their cases reconsidered on international protection grounds relevant to their individual case": *ibid.*, at [19].

[97] Refugee Convention, at Art. 1(C)(5) (emphasis added).

[98] In the case of a stateless refugee, however, the question is whether the relevant change means that the refugee is "able to return to the country of his former habitual residence": at Art. 1(C)(6).

to change of circumstances is intended to meet the insistence of states that their duties of surrogate or substitute protection end if the refugee's country of origin makes its own national protection available to the refugee.[99] The drafters understandably took the view that where there is reliable evidence[100] of a fundamental transition in the refugee's own state that renders it willing and able to ensure her protection, there is no good reason to require the continuation of refugee status:

> [I]t could hardly be agreed that the government of a country which had returned to democratic ways should fail to take over the burden of refugees . . . [France] was quite prepared to continue to assist such refugees so long as such assistance was necessary. But if their country reverted to a democratic regime, the obligation to assist them should not fall perforce upon the French Government . . . France had merely said that she did not wish to be under an obligation to continue to provide assistance to refugees who could seek the protection of their country of origin.[101]

On the other hand, the Convention neatly balances this concern to be fair to asylum countries with a clear commitment to avoid the constant uncertainty that would plague a refugee if her protected status were subject to ongoing reassessment. Art. 1(C)(5)–(6) provides that once a refugee's status "has been recognized"[102] it may be ended only if the country conditions giving rise to her refugee status have "ceased to exist" *and* if it is shown

[99] "Refugee status, as conceived in international law, is, in principle, a transitory phenomenon which lasts only as long as the reasons for fearing persecution in the country of origin persist. Once these reasons disappear, refugee status may be legitimately terminated": UNHCR, "Cessation Guidelines," *supra* n. 1, at [1]. This is affirmed also by Art. 34 of the Convention, which merely encourages, rather than requires, states to consider the assimilation and naturalization of refugees. See generally M. Castillo and J. C. Hathaway, "Temporary Protection," in J. C. Hathaway (ed.), *Reconceiving International Refugee Law* (1997) 1.

[100] Thus, "[t]he question whether such circumstances have ceased to exist can only be one to be determined objectively, in the light of any new circumstances presently prevailing in the country of the person's nationality": *R v. Secretary of State for the Home Department; Ex parte Sivakumaran*, [1988] 1 AC 958 (UKHL, Dec. 16, 1987), at 196, per Lord Keith. There can therefore be no "selective use of documentary evidence concerning country conditions": *Hassanzadeh-Oskoi v. Canada*, [1993] FCJ 644 (Can. FCTD, Jun. 25, 1993), at [5].

[101] Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.28 (Jul. 19, 1951), at 12–14. Thus, "[t]hese two clauses reflect an intention by the Convention's founders to maintain the right of signatory states to decide how long refugees should be admitted to their territory, a wariness about equating protection with permanent residence, and a reluctance to feel obliged to continue providing assistance to refugees who could seek the protection of their country of origin": Department of Immigration and Multicultural and Indigenous Affairs (Cth), *An Australian Contribution*, *supra* n. 40, at 16.

[102] Refugee Convention, Art. 1(C)(5)–(6). "It is of some considerable importance that Art. 1(C)(5) does not refer to 'circumstances in connection with which he has become a refugee.' It specifically uses the expression 'circumstances in connection with which he has been recognised as a refugee' . . . It is quite clear that the UNHCR Handbook [at [28]] . . . distinguishes between being a refugee and being recognized as such. It also equates recognition with the formal determination of refugee status by a State": *R (Hoxha) v. Special Adjudicator*, [2003] 1 WLR 241 (Eng. CA, Oct. 14, 2002), at [24]. *Accord* Kneebone and O'Sullivan, *supra* n. 3, at 502. "Recognition" should not be narrowly conceived, for example by reference to the duration of a resultant visa. There is therefore force in a dissenting opinion in the Australian Full Federal Court finding that the Convention's structure requires that Art. 1(C)(5) govern cessation not only in the case of a refugee granted permanent admission, but also in the case of a person recognized as a refugee but granted a visa which does not confer a permanent right to remain: *QAAH v. Minister for Immigration and Multicultural and Indigenous Affairs*, (2005) 145 FCR 363 (Aus. FFC, Jul. 27, 2005), at [65]–[67] (per Wilcox J.).

that she may in consequence "avail herself of the protection" of the home state (or in the case of a stateless refugee, "return to" that country). As outlined below, "ceased to exist" is a more demanding standard than risk below a well-founded fear;[103] and the additional requirement of ability to access protection (or to return for stateless refugees) limits cessation to cases in which there is evidence of access to an affirmative relationship with the home country, not simply the absence of a negative.[104]

The relatively high standard set to terminate the status of a recognized refugee is not a form of arbitrary privileging.[105] As explained by Lord Brown,

> [o]nce an asylum application has been formally determined and refugee status officially granted, with all the benefits both under the Convention and under national law which that carries with it, the refugee has the assurance of a secure future in the host country and a legitimate expectation that he will not henceforth be stripped of this save for demonstrably good and sufficient reason. That assurance and expectation simply does not arise in the earlier period whilst the refugee's claim for asylum is under consideration. Logically, therefore, the approach to the grant of refugee status under 1(A)(2) does not precisely mirror the approach to its prospective subsequent withdrawal under 1(C)(5).[106]

In other words, a refugee whose claim has yet to be determined is less likely to have become so established in the asylum country that unacceptable hardship would follow from dismissing her claim by reference to the usual well-founded fear standard. But once the asylum country has recognized her claim and the refugee has begun to remake her life, real caution is required before ordering a "second uprooting":[107]

> Any reasonable, civilized person or state party to the Refugee Convention would . . . understand the contracting states' obligations to refugees in the context of the likely circumstances of refugees . . . The context includes their probable dislocation and consequent need to re-establish a degree of stability in their and, often, their families' lives. In interpreting the Convention, the possible burden to the states of providing more

[103] See text *infra*, at nn. 111–14. [104] See text *infra*, at nn. 159–66.

[105] In *Mayongo v. Refugee Appeal Board*, [2007] ZAGPHC 17 (SA HC, Apr. 4, 2007), at [8]–[9], the High Court fairly criticized a decision of the Refugee Appeal Board for seeking to rely on the declaratory nature of refugee status to override the clear language of Art. 1(C)(5). While recognizing the clear constraint set by Art. 1(C)(5), the English Court of Appeal has nonetheless suggested that where there has been a long delay in assessing an initially sound refugee claim, any finding that there is no well-founded fear should, by analogy with Art. 1(C)(5), be predicated on demonstration of a fundamental change of relevant circumstances: *Arif v. Secretary of State for the Home Department*, [1999] Imm AR 271 (Eng. CA, Feb. 17, 1999), as modified by *Salim v. Secretary of State for the Home Department*, [2000] Imm AR 503 (Eng. CA, Apr. 14, 2000) and *S v. Secretary of State for the Home Department*, [2002] INLR 416 (Eng. CA, Apr. 24, 2002). Relevant Canadian domestic law incorporating this provision (now found in the Immigration and Refugee Protection Act, SC 2001, c. 27, s. 108) does not contain the Refugee Convention's language limiting this rule to persons whose refugee status has already been recognized, allowing the Federal Court to rule that the only relevant question is whether the person concerned was "at least at one time, [a] Convention refugee": *Guzman v. Canada (Minister of Citizenship and Immigration)*, IMM-3748-97 (Can. FCTD, Oct. 29,1998).

[106] *R (Hoxha)* (UKHL, 2005), at [65]. This passage was adopted by Wilcox J. in *QAAH* (Aus. FFC, 2005), at [65].

[107] *QAAH* (Aus. FFC, 2005), at [106] (per Madgwick J.), regrettably reversed on appeal by the High Court: see *infra* n. 111.

> than protection for the least possible period strictly necessary must be balanced against the demands of humane treatment for the people concerned.[108]

By insisting that only a change of real significance and magnitude is sufficient to allow a refugee's protected status to be called into question, and by further conditioning the cessation decision itself on evidence that protection is in consequence available in the home state, Art. 1(C)(5)–(6) imposes a critical constraint on the involuntary cessation of a refugee's status.

In practice, it is common for cessation due to change of circumstances to be adjudicated in a less methodical way, often referencing a compact, amalgamated standard – for example, whether there is evidence of a change that is "fundamental, stable and durable."[109] While such notions are clearly relevant to the interpretation of Art. 1(C)(5)–(6), there is mounting evidence that cessation decisions not grounded in the express terms of the Convention are insufficiently attentive to respect for the refugee's legitimate interest in stability of her status.[110]

First, inattention to the requirement that "the circumstances in connection with which [the refugee] has been recognized *have ceased to exist*" (emphasis added) has led some courts to apply too low a threshold for cessation of status. A majority in the High Court of Australia suggested that cessation due to change of circumstances requires only the absence of a relevant well-founded fear,[111] with similar sentiments voiced in

[108] *Ibid.*, at [101].

[109] UNHCR Executive Committee Conclusion No. 69 (XLIII), "Cessation of Status," UN Doc. A/47/12/Add.1 (Oct. 9, 1992) ("UNHCR Executive Committee Conclusion No. 69"), at [(b)]. Other formulations include UNHCR Executive Committee Conclusion No. 65 (XLII), "General Conclusion on International Protection," UN Doc. A/46/12/Add.1 (Oct. 11, 1991), at [(q)] ("profound, enduring"); UNHCR, "Cessation Guidelines," *supra* n. 1, at [25]–[26] ("fundamental, durable"); UNHCR, *Guidelines on International Protection No. 3*, *supra* n. 95, at 4–5 ("fundamental, enduring, restoring protection"); Goodwin-Gill and McAdam, *supra* n. 20, at 142–43 ("significant, effective, durable," though treated as "procedural" questions that "acquire . . . meaning only in context"); Hathaway, *Refugee Status*, at 200 ff. ("substantial, effective, durable"); J. C. Hathaway, *The Rights of Refugees under International Law* (2005) ("*Rights of Refugees*"), at 922 ff. ("fundamental, enduring, restoring protection"). The three requirements for cessation under Art. 1(C)(5) first identified in Hathaway, *Refugee Status*, at 200–3 were cited with approval in Australia in *QAAH* (Aus. FFC, 2005), at [60], affirmed in *SZEJU v. Minister for Immigration and Multicultural Affairs*, [2006] FCA 251 (Aus. FC, Mar. 20, 2006), at [44]; and in Canada in *Thalang v. Canada (Minister of Citizenship and Immigration)*, [2007] FCJ 1002 (Can. FC, Jul. 12, 2007), at [2].

[110] While such criteria are clearly relevant to the cessation inquiry, compact formulations of this kind are open to challenge, since none of these adjectives derives from the language of the Convention itself. For example, a decision of the Australian Refugee Review Tribunal observed that "[t]here is no reason in logic that any degree of permanency or durability should be associated with the phrase 'ceased to exist.' And indeed in most contexts, a circumstance ceases to exist the moment that it is no longer operating. Thus, where a person becomes wet due to rain, the circumstance which made the person wet ceases to exist the moment the precipitation stops – there is no requirement that there should be no threat of rain in the foreseeable future. Despite this . . . it is relatively well settled that 'cease to exist' requires the change to have a degree of permanency associated with it": *V04/16763* (Aus. RRT, Jul. 29, 2004), cited in J. Vrachnas et al., *Migration and Refugee Law: Principles and Practice in Australia* (2005), at 268.

[111] *QAAH* (Aus. HC, 2006); *NBGM v. Minister for Immigration and Multicultural Affairs*, (2006) 231 CLR 52 (Aus. HC, Nov. 15, 2006). This finding may be considered *obiter dicta*, since the court accepted the government's submission that cessation of status to a person granted a temporary protection visa did not require satisfaction of the Art. 1(C)(5) test. This view reflects an inappropriately cribbed understanding of the notion of "recognition" of status: see *supra* n. 102, meaning that the cessation criteria of Art. 1(C)(5)–(6) should have been held to govern cessation in this context.

Japan.[112] This reasoning has also been embraced by the Court of Justice of the European Union in the leading decision of *Abdulla*,[113] in which the court held that "[t]he assessment of the significant and non-temporary nature of the change of circumstances . . . implies that there are no well-founded fears of being exposed to acts of persecution."[114] But surely if the drafters had believed that refugee status should end whenever there was less than a well-founded fear of being persecuted, it would have been a straightforward matter to have said precisely that. The text as adopted instead requires evidence that the precipitating causes "have ceased to exist" – mandating a more complete and definitive transformation, not just the reduction of risk below the real chance standard.

Second, some jurisdictions have misconstrued evidence of a fundamental change of circumstances to be the basis for cessation, rather than simply the required precipitating event. The core of Art. 1(C)(5)–(6) is whether "because" of the fundamental change it is now possible for the refugee "to avail himself of the protection of the country of his nationality" (or in the case of a stateless refugee, whether she is now "able to return to the country of [her] former habitual residence"). Yet German courts have effectively obviated this focus by finding that the ability to avail oneself of "protection" is inherent in the absence of a well-founded fear of being persecuted[115] – a position that has some support in the unfortunate language of the European Union's Qualification Directive,[116] and which has been largely endorsed by the Court of Justice of the European Union:

> [The] article establishes, by its very wording, a causal connection between the change in circumstances and the impossibility for the person concerned to continue to refuse and thus to retain his refugee status, in that his original fear of persecution no longer appears to be well-founded . . . [The] protection in question is the same as that which has up to that point been lacking, namely protection against the acts of persecution . . .
>
> In that way, the circumstances which demonstrate the country of origin's inability or, conversely, its ability to ensure protection against acts of persecution constitute a crucial element in the assessment which leads to the granting of, or, as the case may be, by means of the opposite conclusion, to the cessation of refugee status.

[112] *QZP v. Minister of Justice*, (2006) GYO (KO) No. 43 of 2005 (Jap. Osaka HC, Jun. 27, 2006), cited in O. Arakaki, *Refugee Law and Practice in Japan* (2008), at 204–5. Some academic commentary regrettably takes a similar view. Goodwin-Gill and McAdam opine that "[t]he central issue remains that of risk, the assessment of which is a matter of fact; no other *legal* condition is required, such as any degree of permanence, or the holding of elections": Goodwin-Gill and McAdam, *supra* n. 20, at 143 (emphasis in original).

[113] *Abdulla v. Germany*, C-175/08, C-176/08, C-178/08 and C-179/08, [2010] ECR I-01493 (CJEU, Mar. 2, 2010).

[114] *Ibid.*, at [73].

[115] The notion of "protection" has been inappropriately circumscribed to require only the negation of a well-founded fear of being persecuted: *1 C 21/04* (Ger. BverwG [German Federal Administrative Court], Nov. 1, 2005); *10 C 33.07* (Ger. BverwG, Feb. 7, 2008).

[116] Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), [2011] OJ L 337/9 (Dec. 20, 2011) ("Qualification Directive"). The Qualification Directive provides that in considering cessation under the regional equivalent of Art. 1(C)(5)–(6) "Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature *that the refugee's fear of persecution can no longer be regarded as well-founded*": Qualification Directive, at Art. 11(2) (emphasis added).

> Consequently, refugee status ceases to exist when the national concerned no longer appears to be exposed . . . to circumstances which demonstrate that that country is unable to guarantee him protection against acts of persecution.[117]

By adopting an impoverished understanding of "protection"[118] as no more than what is required to eliminate a well-founded fear of being persecuted (i.e. the absence of a negative), the court effectively eliminated the two-part inquiry required by Art. 1(C)(5). Yet there would have been no reason for adopting the clear language of Art. 1(C)(5) – asking whether "because" of the change of circumstances the refugee can once more avail herself of the protection of the home state – if such access to protection has no independent meaning. The court's interpretation is also impossible to reconcile to the stipulation in the companion provision, Art. 1(C)(6), providing that the status of stateless refugees ceases only if they are able to return to their country of origin, since there is no basis to suggest that absence of well-founded fear necessarily implies an ability of the stateless refugee in fact to re-enter her country of origin.

In our view, neither the equation of "ceased to exist" with the absence of a well-founded fear nor the assumption that protection exists (or, in the case of a stateless refugee, that return is possible) simply because the once well-founded fear has dissipated can be reconciled to the text of Art. 1(C)(5)–(6) interpreted in light of its context, object, and purpose. To avoid such distortions, it is important to consider both the requirements inherent in the necessary precipitating event ("the circumstances in connection with which he has been recognized as a refugee have ceased to exist") and the nature of the required consequence of that precipitating event ("[h]e can no longer, because [of that event] . . . continue to refuse to avail himself of the protection of the country of his nationality" – or for stateless persons, "[h]e is . . . able to return to the country of his former habitual residence"). We now assess each of these questions in turn.

As an initial matter, the right to consider the cessation of status is predicated on evidence of a change of circumstances in the country of origin of a quality and magnitude that justifies disrupting the already granted "assurance of a secure future in the host country and a legitimate expectation that [the refugee] will not henceforth be stripped of this save for demonstrably good and sufficient reason."[119] Five considerations may arise in assessing the existence of a relevant precipitating event.

First, the triggering condition for cessation under Art. 1(C)(5)–(6) must be a change in the "objective situation"[120] in the home country. The drafters' focus on reversion to democracy as the rationale for these clauses[121] makes clear that there was no intention to authorize cessation for purely personal reasons – for example, because an individual recognized as a refugee due to risks faced while a child has since become an adult.[122] Indeed, contemplating

[117] *Abdulla* (CJEU, 2010), at [66]–[69].

[118] The court nonetheless helpfully insisted that cessation requires an individuated assessment of access to protection and that an assessment of protection requires verification of "the extent to which basic human rights are guaranteed in that country": *Abdulla* (CJEU, 2010), at [70]–[71]. See generally discussion of the meaning of "protection" in *supra* Ch. 4.2.2.

[119] *R (Hoxha)* (UKHL, 2005), at [65].

[120] UNHCR, "Cessation Guidelines," *supra* n. 1, at [25]. See also UNHCR, *Guidelines on International Protection No. 3*, *supra* n. 95, at [1]; and Goodwin-Gill and McAdam, *supra* n. 20, at 139.

[121] See text *supra*, at nn. 102–4.

[122] Decisions to the contrary in the United States, e.g. *Ixtlilco-Morales v. Keisler*, (2007) 507 F.3d 651 (USCA, 8th Cir., Nov. 2, 2007) and *Valcu v. Attorney General*, (2010) 394 Fed. Appx. 854 (USCA, 3rd Cir., Sept. 20,

cessation because a refugee has matured provides an especially stark example of precisely the sort of unduly intrusive disruption of a recognized refugee's legitimate interest in a secure future that the clauses were designed to avert.[123]

Second, the drafters' focus on an overarching political transformation makes clear that Art. 1(C)(5)–(6) predicates cessation on a change in country conditions that is of substantial political significance.[124] The UNHCR has thus opined that

> [a] complete political change remains the most typical situation in which this cessation clause has been applied. Depending on the grounds for flight, significant reforms altering the basic legal or social structure of the State may also amount to fundamental change, as may democratic elections, declarations of amnesties, repeal of oppressive laws and dismantling of former security services.[125]

Caution of this kind is appropriate in order to ensure that a refugee's life not be disrupted in response to changes that may prove piecemeal or partial, thus providing an insufficient assurance that the causes of the refugee's flight are truly eradicated.

Third, the fundamental change in the objective situation in the home country must actually have occurred. There has too often been an unhealthy willingness to assume change from formal declarations or promises of reform, without carefully assessing the resultant reality on the ground.[126] For example, the fall of the Mengistu regime in Ethiopia,[127] the existence of a formal cease-fire in Somalia,[128] as well as the signing of a peace accord in Guatemala[129] have all been treated as a sufficient basis to authorize cessation of status. Other courts, however, have properly insisted on the need for patience before finding that intentions

2010), gave no consideration to the context, object, or purpose of Art. 1(C)(5)–(6) of the Convention. See also *supra* Ch. 5.9.4.

123 See text *supra*, at nn. 102–4.

124 A Japanese court required evidence of a "drastic" change: *QZP v. Minister of Justice*, (2006) GYO (KO) No. 43 of 2005 (Jap. Osaka HC, Jun. 27, 2006), cited in Arakaki, *supra* n. 112, at 204.

125 UNHCR, "Note on Cessation Clauses," *supra* n. 24, at [20].

126 Governments may also focus unduly on the formalities of change. Australian immigration minister Philip Ruddock's spokesperson was quoted in April 2003 as having said that "Australia has no obligation to take into account the safety of [Iraq], when it comes to returning the refugees," despite the fact that the military victory there was of recent date and the political transition barely commenced: G. Barns, "Sheik's advice for Howard and Bush," *Canberra Times* (Apr. 25, 2003), at A-15.

127 "The Mengistu regime has fallen. The successor government stated that its aim was a 'broad-based transitional government, representative of Ethiopia's various tribes and factions, as a prelude to fair elections and multi-party democracy'": *U91-05190* (Can. IRB, Feb. 21, 1992).

128 Despite its recognition of the need to avoid the premature determination of durability of change, the Full Federal Court of Australia nonetheless deferred to a determination by the tribunal that a Somali claim could be dismissed on the grounds that a cease-fire in the civil war in that country had been announced by warlords eleven days prior to the hearing: *Ahmed v. Minister for Immigration and Multicultural Affairs*, (1999) 55 ALD 618 (Aus. FFC, Jun. 21, 1999). Justice Branson, however, took serious issue with this approach: "First, the cease fire upon which the Tribunal placed reliance was of recent origin . . . A conclusion by a decision-maker as to the likely effectiveness of the cease fire, having regard to the preceding 7 years of civil war in Somalia, called for some caution. Secondly, the material before the Tribunal upon which it based its conclusion that peace had existed in Somalia since 31 January 1998 was, at best, tentative in character": at [31].

129 See e.g. *Gomez-Garcia v. Immigration and Naturalization Service*, 1999 U.S. App. LEXIS 12096 (USCA, 8th Cir., Jun. 11, 1999); *Mazariegos v. Immigration and Naturalization Service*, (2001) 241 F.3d 1320 (USCA, 11th Cir., Feb. 12, 2001).

to reform have in fact led to real change.[130] Given the clear "have ceased to exist" language of Art. 1(C)(5)–(6), cessation should follow only when the structures that produced the risk of being persecuted have actually been eliminated, not simply when there is a commitment in principle to their elimination.[131] As observed in the Australian Full Federal Court,

> [t]he phrase [in Art. 1(C)(5)] is not "abated somewhat," or even "considerably abated." The implication is that safety from serious harm needs to have been re-established (or, in some instances, established for the first time).[132]

Fourth and related, risk in the home country can only be said to have "ceased to exist" if the fundamental political changes have taken hold in a durable way,[133] thus ensuring that protection is not disrupted in circumstances where it is unclear whether safety has been

[130] In a particularly succinct admonition to the official propensity to seek premature revocation of status, the Federal Court of Canada observed that "[i]f the political climate in a country changes to the extent that it adversely affects the status of a refugee, the Minister may make an application to . . . determine whether the person has ceased to be a Convention refugee. Presumably, the Minister would only seek such a determination after monitoring the effects of any political changes in the subject country": *Salinas v. Canada (Minister of Employment and Immigration)*, [1992] FCJ 231 (Can. FC, Mar. 20, 1992). But see *Minister for Immigration and Multicultural Affairs v. Soare*, [2000] FCA 1095 (Aus. FFC, Aug. 9, 2000), in which the court cast doubt on the propriety of the tribunal below having delayed making a decision in order to be sure that fundamental changes in Romania were lasting changes.

[131] Thus, for example, the Canadian Federal Court of Appeal refused to see a relevant change of circumstances in the mere fact that the Siad Barre regime in Somalia had been overthrown, sensibly taking account of the fact that the "country continues to be divided along tribal lines and to be torn by civil war": *Abdulle v. Canada (Minister of Employment and Immigration)*, Dec. No. A-1440-92 (Can. FCA, Sept. 16, 1993). See also *Boateng v. Canada (Minister of Employment and Immigration)*, (1993) 64 FTR 197 (Can. FCTD, May 4, 1993) ("[T]here is movement towards reform in Ghana and . . . some changes have occurred . . . [But the evidence] does not indicate that the Government no longer imprisons dissidents").

[132] *QAAH* (Aus. FFC, 2005), at [110] (per Madgwick J.), successfully appealed to the High Court: see *supra* n. 111.

[133] "Before cessation can be said to have occurred, conditions in the country of nationality must have changed in a significant and enduring way. Anything less would not comply with the language and purpose of [Art. 1(C)(5)]": *QAAH* (Aus. HC, 2006), at [122] (per Kirby J., in dissent). European Union states are required to "have regard to whether the change of circumstance is of . . . a significant and non-temporary nature": Qualification Directive, *supra* n. 116, at Art. 11(2). See also *10 C 33.07* (Ger. BverwG [German Federal Administrative Court], Feb. 7, 2008), at [36], elaborating the "significant and non-temporary" requirement to mean that "a repetition of the acts that were crucial to [the refugee's] flight can be ruled out with sufficient certainty for the foreseeable future" (unofficial citation). As explained in the Federal Court of Australia, "[i]n a Convention whose purpose is avowedly humanitarian and protective, the process by which protections of the Convention are to be seen as over, likely forever . . . should be one which recognises the necessity for the grounds for concluding that cessation has occurred to be clear and lasting": *NBGM v. Minister for Immigration and Multicultural and Indigenous Affairs*, (2006) 150 FCR 522 (Aus. FFC, May 12, 2006), at [172] (per Allsop J., in dissent; though the majority judges indicated that they "agree[d] with the analysis of the Convention obligations undertaken by Allsop J.": at [23]). In response to rejection of the durability test by a panel of the Canadian Immigration and Refugee Board ("[C]an any political change be found to be durable? Adolf Hitler [thought] his Reich would last a thousand years, and it did not"), the Federal Court affirmed the test in Hathaway, *Refugee Status*, at 200, 201, observing that "[s]urely the concept of meaningful and effective change implies an element of durability, not in an absolute sense, but in a comparative sense, for otherwise the change being examined could hardly be described as 'meaningful and effective enough to render the genuine fear of the appellant unreasonable and hence without foundation'": *Ofori v. Canada (Minister of Employment and Immigration)*, [1995] FCJ 398 (Can. FCTD, Mar. 14, 1995), at [7].

reliably restored.[134] Thus the German Administrative Court in 1992 correctly refused to recognize a fundamental change of circumstances in Romania – where, despite promises of reform, the Communist era secret police had been re-established.[135] Similarly appropriate restraint was shown by the Federal Court of Canada, which refused to deny refugee status to an Iranian applicant on the basis of political reforms in that country, it having been determined that the reforms had not, in fact, put an end to the practice of politically inspired arrests and executions.[136]

As a general rule, "all developments which would appear to evidence significant and profound changes [should] be given time to consolidate before any decision on cessation is made."[137] Because the progress of consolidation is context-specific, the time required to establish the durability of change[138] – and hence whether the foundation of the refugee claim has truly "ceased to exist" – will inevitably be longer where the reform was the result of conflict,[139] and therefore less likely to be quickly and wholeheartedly embraced by all:

> Occasionally, an evaluation as to whether fundamental changes have taken place on a durable basis can be made after a relatively short time has elapsed. This is so in situations where, for example, the changes are peaceful and take place under a constitutional process, where there are free and fair elections with a real change of government committed to respecting fundamental human rights, and where there is relative political and economic stability in the country. A longer period of time will need to have elapsed before the durability of change can be tested where the changes have taken place violently, for instance, through the overthrow of a regime. Under the latter circumstances, the human

[134] This argument in Hathaway, *Refugee Status*, at 203, was adopted in *Hlavty v. Canada*, 1993 ACWSJ LEXIS 8395 (Can. FCTD, Oct. 27, 1993), at [32].

[135] *AN 17 K 91 42844; AN 17 K 91 42845* (Ger. VG Ansbach [German Administrative Court, Ansbach], Jan. 22, 1992), reported at (1994) 6 Intl. J. Ref. L. 282. In this context, the UNHCR observed that "[f]undamental civil, political and social changes . . . have resulted in an opening up and democratization process, which is being perceived as a fundamental change in circumstances from a refugee status point of view. This has resulted in the termination by countries of asylum of the refugee status of persons from one or more of these countries. Whereas, in a number of cases, the decision may have been appropriate, in some others the decision to terminate status may have been taken before sufficient time had elapsed since the fundamental changes occurred for the situation in the country of origin to be considered stable": UNHCR, *Report of the High Commissioner for Refugees*, UN Doc. A/46/12 (Jan. 1, 1992), at [18]. See also *Nkosi v. Canada (Minister of Employment and Immigration)*, (1993) 66 FTR 13 (Can. FCTD, Jun. 23, 1993), finding that refugee status should not be refused on the basis of a "hesitant and equivocal finding that certain limited changes in circumstances in Zaire had occurred."

[136] *Hassanzadeh-Oskoi* (Can. FCTD, 1993).

[137] UNHCR, "Note on Cessation Clauses," *supra* n. 24, at [21].

[138] In its "Discussion Note on the Application of the 'Ceased Circumstances' Cessation Clauses in the 1951 Convention," UN Doc. EC/SCP/1992/CRP.1, at [12], the UNHCR advocated that cessation not be considered until at least "12 to 18 months" after the occurrence of profound changes. The agency has noted, though, that the average period is around four to five years from the time fundamental changes commenced: UNHCR, "Note on Cessation Clauses," *supra* n. 24, at [21].

[139] Cessation should clearly not be contemplated simply because there is presently peace in an area previously prone to conflict. This point was neatly made by the Federal Court of Canada. "The very article in *The Economist* cited by the [decision-maker] states merely, 'For now, there is peace . . .', leaving it as an open question to the reader how long this *status quo* will last. Given this result, we do not find it necessary to consider the other matters raised": *Abarajithan v. Canada*, [1992] FCJ 54 (Can. FC, Jan. 28, 1992).

> rights situation needs to be especially carefully assessed. The process of national reconstruction must be given sufficient time to take hold and any peace arrangements with opposing militant groups must be carefully monitored.[140]

Fifth, because the only relevant change of country conditions is one that impacts "the circumstances in connexion with which [the person] has been recognized as a refugee," a causal connection must be established between the change that has taken place and eradication of the actual risk upon which refugee status was predicated.[141] Clearly, the significance of a change of circumstances must be tested by reference to the particularized circumstances of the applicant:[142]

> [W]hen one says that "change" in circumstances is an important consideration, one is not speaking of any change. The [decision-maker] must not be content in simply noting that changes have taken place, but must assess the impact of those changes on the person of the applicant.[143]

The critical issue – no matter how many others may cease to be at risk due to the fundamental changes[144] – is whether those changes eradicate the risk for the specific refugee whose continued status is under review.[145]

Application of this principle has, however, been complicated by the UNHCR's unfortunate practice of issuing blanket statements declaring the refugee status of particular groups to

[140] UNHCR, *Guidelines on International Protection No. 3*, *supra* n. 95, at [13]–[14].

[141] "Fundamental changes are considered as effective only if they remove the basis of the fear of persecution; therefore, such changes must be assessed in light of the particular cause of fear, so as to ensure that the situation which warranted the grant of refugee status has ceased to exist": UNHCR, "Note on Cessation Clauses," *supra* n. 24, at [19]. The Canadian Federal Court has thus insisted that relevant changes must be "so significant, effective and durable . . . as to effectively nullify the objective basis of [the particular refugee's] claim": *Chavez-Menendez v. Canada (Minister of Employment and Immigration)*, (1994) 81 FTR 271 (Can. FCTD, Jun. 16, 1994), at [15]. This implied requirement is made clear in the Canadian domestic statute transposing Art. 1(C)(5)–(6), which requires evidence that "the reasons for which the person sought refugee protection have ceased to exist": Immigration and Refugee Protection Act, SC 2001, c. 27, at s. 108(1)(e).

[142] "States must carefully assess the fundamental character of the changes in the country of nationality or origin, including the general human rights situation, as well as the particular cause of fear of persecution, in order to make sure in an objective and verifiable way that the situation which justified the granting of refugee status has ceased to exist": UNHCR Executive Committee Conclusion No. 69, *supra* n. 109, at [(a)]. Thus, "[i]f a person's claims (found previously to be valid) can be seen to be narrowly based on certain facts, it may be enough that those underlying facts no longer exist. If those facts, however, are only indicative of a more broadly based fear, the circumstances giving rise to that more broadly based fear will need to be examined": *NBGM* (Aus. FFC, 2006), at [230] (per Allsop J., in dissent).

[143] *Boateng* (Can. FCTD, 1993); this approach affirmed in *Arguello-Garcia v. Canada (Minister of Employment and Immigration)*, [1993] FCJ 635 (Can. FC, Jun. 23, 1993).

[144] Addressing the relevance of the fact that some 35,000 other Tamils had returned to Sri Lanka after May 1988, the Canadian Federal Court of Appeal rightly insisted that "[t]here is simply no evidence that these repatriates were similarly situated to the Applicant: that any had been tortured by the Sri Lankan army and/or IPKF and were suspected of being Tamil Tigers by authorities or being informers by the LTTE. That evidence was not relevant": *Sabaratnam v. Canada (Minister of Employment and Immigration)*, [1992] FCJ 901 (Can. FCA, Oct. 2, 1992).

[145] *Trifoni v. Holder*, (2009) 351 Fed. Appx. 19 (USCA, 6th Cir., Nov. 2, 2009), at 9–10. This is in line with the general rule that "[r]efugee status is essentially an individualized status, and the principle of case-by-case assessment is as essential to the proper determination of claims, as it is to procedures and due process in the matter of cessation": Goodwin-Gill and McAdam, *supra* n. 20, at 139.

have ended.[146] In truth, the UNHCR has no authority to deem Convention refugee status to have ceased.[147] States – and only states – are responsible to make a decision that Convention refugee status has ceased.[148] As such, and despite the framing of recent agency statements, purporting to declare when cessation is to occur and to assign states the responsibility only to organize the logistics of cessation,[149] the UNHCR's views must be clearly understood to be no more than evidence that may guide states in the exercise of their legal responsibilities under Art. 1(C)(5)–(6) of the Convention.[150] Of particular importance, because the Convention requires a *particularized* analysis (not a group-based declaration),[151] any refugee subject to

[146] UNHCR, *Guidelines on International Protection No. 3*, *supra* n. 95, at n. 3. In its "Declaration of Cessation – Timor Leste" (Dec. 20, 2002), for example, the UNHCR purported simply to declare "that refugees from East Timor . . . should in principle no longer continue to be regarded as refugees. Accordingly, the 'ceased circumstances' clauses . . . contained in . . . Article 1C(5) and (6) of the 1951 Convention *are applicable* to these persons": at [3]–[4] (emphasis added).

[147] A purely auxiliary role for the UNHCR was clearly contemplated by the Executive Committee, which observed that "the application of the cessation clause(s) . . . rests exclusively with the Contracting States, but . . . the High Commissioner should be appropriately involved": UNHCR Executive Committee Conclusion No. 69, *supra* n. 109, at Preamble, para. 2. Recent declarations of cessation, in contrast, simply conflate cessation under the Statute of the Office of the United Nations High Commissioner for Refugees, UN Doc. A/RES/428(V) (Dec. 14, 1950) ("UNHCR Statute") with that under the Refugee Convention. In relation to Rwandans, for example, the agency opined "that the refugee status of Rwandan refugees who fled the country between 1959 and 31 December 1998 . . . can now be brought to an end pursuant to the 'ceased circumstances' cessation clauses contained in paragraphs 6(A)(e) and (f) of the UNHCR Statute [and] Article 1(C)(5) and (6) of the 1951 Convention": UNHCR, "Implementation of the Comprehensive Strategy for the Rwandan Refugee Situation, including UNHCR's recommendations on the applicability of the 'ceased circumstances' cessation clauses" (Dec. 30, 2011) ("Rwanda Cessation"), at [30].

[148] The view that "[w]here UNHCR has made a declaration of cessation of its competence in relation to *any specified group* of refugees, States may resort to the cessation clauses *for a similar group of refugees* if they deem it appropriate and useful for resolving the situation of these refugees in their territory" (UNHCR, "Note on Cessation Clauses," *supra* n. 24, at [33] (emphasis added)) is overstated. Cessation under Art. 1(C)(5)–(6) cannot be imposed by states on a group basis, and UNHCR advice can be no more than one factor, even if an important one, in the adjudication of cessation.

[149] In regard to Angolan refugees, for example, UNHCR "recommend[ed] that States implement all aspects of the cessation of refugee status . . . during the first half of 2012, with refugee status to formally cease by 30 June 2012 . . . To this end, States should declare cessation of refugee status as soon as possible . . . For countries of asylum that are party to the 1951 Convention . . . national authorities have the ultimate responsibility to establish the modalities for the application of the 'ceased circumstances' cessation clauses": UNHCR, "Implementation of the Comprehensive Strategy for the Angolan Refugee Situation, including UNHCR's recommendations on the applicability of the 'ceased circumstances' cessation clauses" (Jan. 15, 2012) ("Angola Cessation"), at [18], [27], [35]. Much the same overstated language was used in relation to Liberian refugees: UNHCR, "Implementation of the Comprehensive Strategy for the Liberian Refugee Situation, including UNHCR's recommendations on the applicability of the 'ceased circumstances' cessation clauses" (Jan. 13, 2012) ("Liberia Cessation"), at [27], [34].

[150] "Refugee protection is primarily the responsibility of States, and . . . UNHCR's mandated role in this regard cannot substitute for effective action, political will, and full cooperation on the part of States": UNHCR Executive Committee Conclusion No. 81 (XLVIII), "General Conclusion on International Protection," UN Doc. A/52/12/Add.1 (Oct. 17, 1997), at [(d)]. See also UNHCR Executive Committee Conclusion No. 69, *supra* n. 109, at [(a)].

[151] Art. 1(C)(5) provides expressly that "[t]his Convention shall cease to apply *to any person* . . . if *[h]e* can no longer . . . continue to refuse to avail *himself*": (emphasis added). More generally, the removal under the auspices of a general declaration of cessation of a person who remains relevantly at risk would infringe the duty of *non-refoulement*, also framed in individuated terms ("No contracting State shall

loss of protected status must be afforded a fair opportunity to explain why cessation is not appropriate in her specific circumstance[152] despite the salience of the general information found to be credible.

Assuming there is evidence of a substantial and significant change that has eradicated the basis for the original risk,[153] the second part of the inquiry under Art. 1(C)(5)–(6) is to determine whether that precipitating event has also led to the restoration of protection ("[h]e can no longer, because [of that event] . . . continue to refuse to avail himself of the protection of the country of his nationality," or, for stateless refugees,"[h]e is . . . able to return to the country of his former habitual residence").

As previously observed,[154] the clear language of these cessation clauses is at odds with practice that simply assumes protection to exist once the precipitating change of circumstances has been demonstrated. The Convention does not provide that cessation follows automatically from the fact of even a directly relevant change of circumstances in the home state, but uses conjunctive language to condition cessation on a resultant inability of the refugee concerned to "continue to refuse to avail himself of the protection of the country of his nationality."[155] Recalling both the balance sought to be achieved in Art. 1(C)(5) between enabling states to divest themselves of surrogate protection duties once national protection was on offer in the refugee's home country[156] and the overarching goal of refugee law to provide surrogate or substitute protection until and unless *national protection* is available to the refugee,[157] the clear connective language employed in Art. 1(C)(5) sits very comfortably with the context, object, and purpose of both cessation and of the Convention as a whole.[158] To treat the reference to the ability to avail oneself of national protection as mere surplusage, in contrast, is neither respectful of the treaty's language nor consistent with the general goal of refugee law to provide international protection where no national protection exists.

What, then, must be shown? Despite European authority to the contrary,[159] the specific requirement to show the ability of the refugee to *avail herself of home state protection* (rather than just to show the absence of a negative) makes it clear that something positive, something

expel or return ('*refouler*') *a refugee* . . . to the frontiers of territories where *his* life or freedom would be threatened": Refugee Convention, at Art. 33(1) (emphasis added)).

[152] The duty to consider particularized evidence of continuing risk is, for example, explicitly insisted upon in recent agency statements on cessation: UNHCR, "Rwanda Cessation," *supra* n. 147, at [33]–[36]; UNHCR, "Liberia Cessation," *supra* n. 149, at [29]–[32]; UNHCR, "Angola Cessation," *supra* n. 149, at [29]–[33].

[153] Particular care must be taken where the eradication of one refugee-producing risk has simply allowed another such risk to take its place. Thus, "where the particular circumstances leading to flight or to non-return have changed, only to be replaced by different circumstances which may also give rise to refugee-related fear, this cessation clause can clearly not (*sic*) be invoked. Thus in Afghanistan, where one type of civil war was replaced by another, the cessation clause could not be invoked despite a major political change": UNHCR, "Note on Cessation Clauses," *supra* n. 24, at [20].

[154] See text *supra*, at nn. 109–10, 115–18. [155] Refugee Convention, at Art. 1(C)(5).

[156] See text *supra*, at nn. 99–104. [157] See text *supra*, at nn. 1–2.

[158] "[I]t is to be expected that once refugee status has been recognized, the circumstances in which the *loss* of that status arises are not unnaturally strictly circumscribed": *Re C, Refugee Appeal No. 70366/96*, [1997] 4 HKC 236 (NZ RSAA, Sept. 22, 1997), at [136] (emphasis in original). See generally *supra* Ch. 4.

[159] See text *supra*, at nn. 115–18. Even the reference of the Court of Justice of the European Union to the duty to verify "the extent to which human rights are guaranteed in that country" is expressly linked only to the duty to avert persecution: *Abdulla* (CJEU, 2010), at [66]–[67], [70]–[71].

that goes beyond simple absence of a risk of being persecuted, must be demonstrated.[160] As observed by the UNHCR,

> [i]t requires more than mere physical security or safety. It needs to include the existence of a functioning government and basic administrative structures, as evidenced for instance through a functioning system of law and justice, as well as the existence of adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood.[161]

In short, "protection" requires consideration of the sorts of rights critical to reintegration and re-establishment in the home country.[162] And because cessation is premised on the ability to *re-avail* oneself of the home country's protection, the application of Art. 1(C)(5) requires assessment of the availability in fact of such affirmative rights.[163]

In the case of a cessation application involving a stateless refugee, there is a similar duty to show that the fundamental change of circumstances has resulted in the *de facto* ability to reclaim an affirmative relationship with the home state.[164] The text of Art. 1(C)(6) – requiring evidence of a consequential ability of the stateless refugee "to return to the country of his former habitual residence" – predicates cessation upon the stateless refugee's ability to resume the bond to which she is most clearly entitled under international

[160] "For a person already declared to be a Convention refugee, article 1(C)(5) does not mirror the sphere of protection conferred by article 1(A)(2); it enlarges it": Vrachnas et al., *supra* n. 110, at 269. See also M. O'Sullivan, "Withdrawing Protection under Article 1(C)(5) of the 1951 Convention: Lessons from Australia," (2008) 20 Intl. J. Ref. L. 586, at 604–5, finding that Arts. 1(A)(2) and 1(C)(5) "set out separate and distinct criteria."

[161] UNHCR, *Guidelines on International Protection No. 3*, *supra* n. 95, at [15].

[162] As adumbrated by the UNHCR, "a broad range of human rights should be taken into account. International human rights instruments act as a guide in evaluating such improvements. Indicators may include the following: right to life and liberty and to non-discrimination, independence of the judiciary and fair and open trials which presume innocence, the upholding of various basic rights and fundamental freedoms such as the right to freedom of expression, association, peaceful assembly, movement and access to courts, and the rule of law generally": UNHCR, "Note on Cessation Clauses," *supra* n. 24, at [23]. The UNHCR believes that the Art. 1(C)(5) inquiry must be satisfied in relation to the whole, rather than only one part, of the country of origin (UNHCR, "Cessation Guidelines," *supra* n. 1, at [29]; UNHCR, *Guidelines on International Protection No. 3*, *supra* n. 95, at [17]). The agency justifies this view on the basis that the underlying risk has only "come to an end" if "the basis for persecution is removed without . . . precondition" and also that "not being able to move or to establish oneself freely in the country of origin would indicate that the changes have not been fundamental": UNHCR, *Guidelines on International Protection No. 3*, *supra* n. 95, at [17]. Reframed by reference to the actual language of Art. 1(C)(5)–(6), this is an arguable position as the underlying risk has not "ceased to exist" if still extant in part of the home state, and the refugee cannot be said to be able to "avail [herself] of the protection of the country of [her] nationality" if the human right to freedom of internal movement is denied. See also *supra* Ch. 4.3.2.

[163] In line with this approach, the UN Committee on the Elimination of Racial Discrimination has opined that "refugees . . . have, after their return to their homes of origin, the right to participate fully and equally in public affairs at all levels and to have equal access to public services and to receive rehabilitation assistance": UN Committee on the Elimination of Racial Discrimination, "General Recommendation No. XXII: Refugees and Displaced Persons" (1996), UN Doc. HRI/GEN/1/Rev.7 (May 12, 2004) 214, at 215 [2(d)].

[164] Grahl-Madsen observed that until the country of origin "makes known its willingness to re-admit stateless refugees, either by proclamation, by giving the High Commissioner or the Contracting State in question an assurance to the said effect, or in some other conclusive way . . . Article 1 C (6) should not operate against stateless refugees who are not in possession of valid re-entry permits": Grahl-Madsen, *supra* n. 7, at 406 (footnote omitted).

law,[165] that being to return to her country and enjoy protection against expulsion there.[166] The Convention itself unambiguously requires that there be evidence of at least the core of a positive, protective relationship – the ability lawfully to go back and resume habitual residence – before the protected status of a stateless refugee comes to an end.

In sum, if there is evidence of a substantial and significant change in the country of origin that has taken hold and eradicated the basis for the risk once faced by the refugee concerned, the Convention authorizes an inquiry into whether that change has enabled the refugee to resume a positive relationship with her country of origin. If both the precipitating condition and a consequential restoration of protection (or ability to return in the case of a stateless refugee) are shown, cessation of refugee status may lawfully be ordered.

As a procedural matter, the state seeking cessation of status may be expected to make the case for both the required precipitating condition and the resultant restoration of protection.[167] The Supreme Court of Canada, for example, has made clear that

> [t]here should be no burden on a person who has refugee status to persuade the Minister that the conditions which led to the conferral of refugee protection have not changed. This approach is not only consistent with Canada's domestic law . . . but with Canada's international undertakings . . . It also seems to . . . be a more practical and fair approach than placing a burden on refugees to prove current conditions in the country from which they have been absent perhaps . . . for an extended period.[168]

States must "carefully assess"[169] all relevant evidence and reach the conclusion on the basis of "the most substantial and clear grounds"[170] that the criteria of Art. 1(C)(5)–(6) have been

[165] It may well be that progress since 1951 in assimilating the rights of long-term residents to those of citizens means that norms extrinsic to the Refugee Convention will result in additional requirements before an asylum country may repatriate a stateless refugee whose protected status comes to an end pursuant to Art. 1(C)(6). In particular, the right of non-citizens to enjoy protection of the law without discrimination under Art. 26 of the International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, entered into force Mar. 23, 1976, 999 UNTS 171 ("Civil and Political Covenant") is a robust source of rights for non-citizens at international law. See Hathaway, *Rights of Refugees*, *supra* n. 109, at 251 ff., and J. Pobjoy, "Treating Like Alike: The Principle of Non-Discrimination as a Tool to Mandate the Equal Protection of Refugees and Beneficiaries of Complementary Protection," (2010) 34 Melb. U. L. Rev. 181.

[166] See *supra* Ch. 1.3.3.

[167] Thus, the European Union rule is that "the Member State which has granted refugee status shall, on an individual basis, demonstrate that the person concerned has ceased to be . . . a refugee": Qualification Directive, *supra* n. 116, at Art. 14(2). See also UNHCR, *Guidelines on International Protection No. 3*, *supra* n. 95, at [25(ii)] ("The burden rests on the country of asylum to demonstrate that . . . invocation of Article 1(C)(5) or (6) is appropriate"). The major outlier on this question is the High Court of Australia, which has rejected any burden of proof in regard to Art. 1(C)(5)–(6), finding instead that the cessation provisions simply operate "automatically according to [their] terms, and need not for [their] application be triggered by a request for a visa, or any particular kind of visa . . . This is the operation that Art. 1C(5) has, and is the work that it has to do and for which Art. 1A does not make provision": *QAAH* (Aus. HC, 2006), at [44]. Ironically, even the Australian government had earlier accepted the dominant position that "[t]he burden of proof should be on the authorities concerned, not the refugee": Department of Immigration and Multicultural and Indigenous Affairs (Cth), *An Australian Contribution*, *supra* n. 40, at 16.

[168] *Németh v. Canada (Minister of Justice)*, [2010] 3 SCR 281 (Can. SC, Nov. 25, 2010), at [106].

[169] UNHCR Executive Committee Conclusion No. 69, *supra* n. 109, at [(a)].

[170] I. Macdonald and R. Toal, *Immigration Law and Practice in the United Kingdom* (8th edn., 2010), at [12.86], citing in support *Babela v. Secretary of State for the Home Department*, [2002] UKIAT 06124 (UKIAT, Jan. 20, 2003).

"rigorous[ly] established."[171] Put simply, once there is "official acceptance and recognition of refugee status . . . the [decision-maker] needs to be very sure before deciding that a 'change of circumstances' has been established, warranting withdrawal of refugee status and the return [of the refugee] to his country of nationality."[172]

Perhaps because insufficient attention has traditionally been paid to the quite demanding requirements of Art. 1(C)(5)–(6),[173] it has been claimed that an exception to cessation clearly limited to pre-1951 refugees somehow applies to modern refugees as well. While the intentions behind these efforts are no doubt well meaning, the underlying legal analysis for this view is not sound.

Both Art. 1(C)(5) and (6) provide that the general rule authorizing cessation where there is evidence of protection being available consequent to a fundamental change of circumstances does 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" (emphasis added) for refusing to avail herself of home state protection (in the case of a refugee with citizenship) or for refusing to return to that country (in the case of a stateless refugee). The reference to "a refugee falling under section A(1)," thus limiting the scope of this clause to pre-1951 refugees, was no accident. As noted by the House of Lords,

> [t]he United Kingdom delegate at the Geneva Conference [that drafted the Convention], Mr. Hoare . . . stated that he regretted the limitation of the proviso to Art. 1(A)(1) "statutory" refugees, although he appreciated the motives that had prompted it. Nevertheless he accepted it in the interests of accommodating the concerns of other states. There is, then, no getting away from the plain words of the proviso. The only conclusion that can properly be drawn from its terms, having regard to their context and the drafting history, is that the contracting parties were not willing at the time the Convention was entered into to extend the benefit of the proviso to non-statutory refugees.[174]

By virtue of an explicit compromise between the majority of drafters who favored a purely objective test of risk for the continuation of refugee status and the minority that wished to allow refugees from the Holocaust to retain their status despite changed circumstances,[175] those recognized as refugees under earlier agreements were allowed to argue that "compelling reasons arising out of previous persecution" should exempt them from cessation. But for the future, the continuation of refugee status was to be predicated on the inability to secure protection due to risk in the home state. Refugees were required to show "present fear of

[171] *QAAH* (Aus. HC, 2006), at [140] (per Kirby J., in dissent). Indeed, the UNHCR has even suggested that "the host State must be *completely satisfied* that all of the elements of the particular cessation clause have been satisfied before invoking it": UNHCR, "Note on Cessation Clauses," *supra* n. 24, at [36] (emphasis added).

[172] *NBGM* (Aus. HC, 2006), at [34], per Kirby J., in dissent.

[173] See text *supra*, at nn. 120–63.

[174] *R (Hoxha)* (UKHL, 2005), at [16].

[175] The purpose of the clause "was to avert the possibility that [Jewish] refugees of German or Austrian origin living in other countries might be deprived of their refugee status as a result of the restoration of a democratic regime in their country of origin . . . France would adhere to that view, but was anxious to avoid the possibility that the texts in question might be interpreted in such a way as to give rise to an extension, in favour of other groups of refugees": Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.28 (Jul. 19, 1951), at 10–11. The UNHCR has thus confirmed that "[t]he provision was specifically intended to cover persons who suffered atrocious forms of persecution by the Nazi regime": UNHCR, "Cessation Guidelines," *supra* n. 1, at [30].

persecution"[176] and that they "are or may in the future be deprived of the protection of their country of origin."[177] It is thus clear that the text of the Convention does not justify assertion of a legal duty to apply the "compelling reasons" exception to modern refugees.

Because the text of the Convention is clearly at odds with the notion of a legal duty to apply the "compelling reasons" clause to modern refugees, efforts have been made to justify such a duty as a matter of customary international law.[178] But in truth, there is neither compelling evidence of relatively uniform state practice[179] – especially in the less developed world[180] where most cessation occurs – nor of the required *opinio juris*.[181] A second tack, advocated at times[182] by the UNHCR,[183] has been to suggest that there is a responsibility (in principle, if not in law) for states to read the Convention as the effective equivalent of its

[176] Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.18 (Jan. 31, 1950), at 6 [27].

[177] Statement of Mr. Rochefort of France, UN Doc. A/C.3/529 (Nov. 2, 1949), at 4.

[178] See M. O'Sullivan, "The Intersection between the International, the Regional and the Domestic: Seeking Asylum in the UK," in S. Kneebone (ed.), *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (2009), at 272 (arguing that failing to apply the compelling circumstances proviso to modern refugees is "inconsistent with contemporary international refugee law norms"), citing Goodwin-Gill and McAdam, *supra* n. 20, at 145–49.

[179] The customary law claim was considered in great depth by the English Court of Appeal and House of Lords in *R (Hoxha)* (Eng. CA, 2002), appeal dismissed by the House of Lords in *R (Hoxha)* (UKHL, 2005). The House of Lords sensibly determined that there was an absence of pervasive state practice in support of such a putative norm: at [26], [76] ff. While the decision of the European Union in 2010 to mandate consideration of "compelling reasons" in all cessation cases adds significantly to the scope of relevant state practice, the English courts' conclusion that relevant practice exists in only a relatively small number of states remains accurate.

[180] It is noteworthy that the African regional refugee treaty, addressing only contemporary refugee populations, includes no "compelling reasons" exception to changed circumstances cessation: OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted Sept. 10, 1969, entered into force Jun. 20, 1974, 1001 UNTS 45, at Art. 1(4).

[181] See *R (Hoxha)* (UKHL, 2005), at [20]. Indeed, because the extension of the "compelling circumstances" proviso to contemporary refugees is generally understood to follow from humanitarian impulses rather than to meet legal obligations (see Department of Immigration and Multicultural and Indigenous Affairs (Cth), *An Australian Contribution*, *supra* n. 40, at 16), even the more modest alternative to the argument grounded in custom – that state practice in the application of the treaty establishes the understanding of the parties regarding interpretation of Art. 1(C)(5)–(6) – is not viable since Art. 31(3)(b) of the Vienna Convention on the Law of Treaties requires account to be taken only of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". As the English Court of Appeal observed, "some care needs to be taken before it is assumed that the practice of a particular state has been adopted as a matter of interpretation of the international treaty in question": *R (Hoxha)* (Eng. CA, 2002), at [45].

[182] The UNHCR has generally framed its plea for extension of the "compelling reasons" proviso to modern refugees in appropriately hortatory terms, e.g. UNHCR, "Cessation Guidelines," *supra* n. 1, at [31] ("Formally speaking, this provision applies only to a very small group of refugees in the present day context. However, there is nothing to prevent it being applied on humanitarian grounds to other than statutory refugees").

[183] "Application of the 'compelling reasons' exception is interpreted to extend beyond the actual words of the provision to apply to Article 1A(2) refugees. This reflects a general humanitarian principle that is now well-grounded in State practice": UNHCR, *Guidelines on International Protection No. 3*, *supra* n. 95, at [21]. More recently, the agency has suggested that this approach should apply even to initial recognition of refugee status: UNHCR, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, UN Doc. HCR/GIP/06/07 (Apr. 7, 2006), at [16].

own Statute.[184] Yet the terms of the UNHCR mandate are both temporally unconstrained and substantively distinct from the Convention, allowing the agency to continue to protect even modern refugees otherwise subject to changed circumstances cessation so long as the refugee's reasons for refusing to accept the renewed protection of her own country are not simply rooted in economic or other considerations of personal convenience.[185] A contextually sensitive interpretation of the Convention must surely take account of the fact that the treaty's drafters, despite awareness of the approach taken in the UNHCR Statute, chose nonetheless to adopt a significantly less generous standard.

As such, there is no basis to *require* state parties to apply the "compelling circumstances" proviso to modern refugees. It is nonetheless understandable that decision-makers today often feel that it would be unduly harsh to limit relief to what is contemplated by the language of Art. 1(C)(5)–(6). Some states,[186] and most recently the European Union,[187] have explicitly amended their laws to extend the benefit of the "compelling reasons" proviso to modern refugees (rather than just to the class formally entitled to such relief under the terms of the Convention).[188] In other countries, courts have "reasoned by analogy" to the requirements of the Convention to achieve comparable flexibility.[189] These positive initiatives enable refugees to avoid cessation in circumstances sensibly understood to offend both fairness and overarching humanitarian values, very much in line with the hope of the Convention's drafters that the treaty would "have value as an example exceeding its contractual scope."[190]

[184] "[C]ountries of asylum are encouraged to provide, and often do provide, the individuals concerned with an alternative residence status, which retains previously acquired rights, though in some instances with refugee status being withdrawn. Adopting this approach for long-settled refugees is not required by the 1951 Convention per se, but it is consistent with the instrument's broad humanitarian purpose and with respect for previously acquired rights": UNHCR, *Guidelines on International Protection No. 3*, *supra* n. 95, at [22].

[185] "The competence of the High Commissioner shall cease to apply to any person . . . if . . . [h]e can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, *claim grounds other than personal convenience* for continuing to refuse to avail himself of the protection of the country of his nationality. *Reasons of a purely economic nature may not be invoked*": UNHCR Statute, *supra* n. 147, at Art. 6(A)(e) (emphasis added).

[186] Canada, Immigration and Refugee Protection Act, SC 2001, c. 27, at s. 108 (found to be a fundamental part of the domestic refugee definition capable of consideration even at the initial hearing: *Minister of Employment and Immigration v. Obstoj*, [1992] FCJ 422 (Can. FCA, May 11, 1992); Germany, Asylum Procedure Act (*AsylVfG*) (as amended August 2007), July 27, 1993, at s. 73(1).

[187] Qualification Directive, *supra* n. 116, at Art. 11(3).

[188] See D. Milner, "Exemption from Cessation of Refugee Status in the Second Sentence of Article 1(C)(5)/(6) of the 1951 Refugee Convention," (2004) 16 Intl. J. Ref. L. 91, at 96 ff.

[189] Belgian decisions cited by Carlier explicitly rely on analogy rather than on binding obligations ("Qu'il convient de raisonner par analogie avec le §5 de la section C de l'article 1er de la Convention de Genève"): *01-0721/F1512* (Bel. CPRR [Belgian Permanent Refugee Appeals Commission], May 23, 2003) and *04-4014B/F2556* (Bel. CPRR, Jan. 18, 2007), cited in J.-Y. Carlier, *Droit d'asile et des réfugiés: de la protection aux droits* (2008), at 224–25. Similarly, the New Zealand tribunal noted that "[a]lthough the exception is restricted by the Convention to statutory refugees falling under Article 1(A)(1) of the Convention, the validity of the underlying humanitarian principles do[es] not depend upon their inclusion in any one Article": *Refugee Appeal No. 135/92 Re RS* (NZ RSAA, Jun. 18, 1993), at 48.

[190] *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, UN Doc. A/CONF.2/108/Rev.1, at 9 (Recommendation E).

Assuming that a state wishes to do for modern refugees what the Convention compels for pre-1951 refugees,[191] how should the "compelling circumstances" proviso be understood to operate?

Some courts have taken account of the historical beneficiary class (the survivors of the Nazi Holocaust),[192] holding that only persons who have suffered "appalling persecution"[193] – for example, torture and sexual assault[194] – may claim the benefit of this provision. This additional qualification is, however, an unnecessary gloss on the Convention language which distracts attention from the core concern of whether the person concerned can show "compelling reasons"[195] arising out of that past persecution to be immunized from cessation. Yet the wording also makes clear that the proviso is not a general invitation to exercise humanitarian or compassionate jurisdiction.[196] Not only did the drafters decline to adopt the language applicable to the cognate provision in the UNHCR Statute – allowing the agency to grant relief from cessation under its own mandate in response to "grounds other than those of personal convenience"[197] – but they even rejected a proposal to entertain requests for continuation of refugee status based on "compelling family reasons."[198]

By focusing squarely on compelling reasons arising out of past persecution,[199] the drafters sought to take particular account of the psychological hardship that might be faced by the victims of persecution were they to be returned to the country responsible for their

[191] There are, of course, legal bases outside the Refugee Convention upon which such claims might be based: Milner, *supra* n. 188, at 106–7.

[192] See text *supra*, at nn. 174–75. Interpreting the reference in US law to "severe persecution," appellate courts have observed that this notion "is reserved for extreme cases, such as 'for the case of the German Jews, the victims of the Chinese "cultural revolution," [and] survivors of the Cambodian genocide'": *Hana v. Attorney General*, (2005) 157 Fed. Appx. 880 (USCA, 6th Cir., Dec. 14, 2005), citing *Bucur v. Immigration and Naturalization Service*, 109 F.3d 399 (USCA, 7th Cir. 1997), 405.

[193] *Obstoj* (Can. FCA, 1992).

[194] *Arguello-Garcia* (Can. FC, 1993).

[195] The adjective "compelling" was specifically introduced as a qualification to the Israeli proposal in order to constrain the scope of the exemption: Statement of Mr. Petren of Sweden, UN Doc. A/CONF.2/SR.28 (Jul. 19, 1951), at 10.

[196] This analysis in Hathaway, *Refugee Status*, at 204, was cited with approval in *Suleiman v. Canada (Minister of Citizenship and Immigration)*, [2004] FCJ 1354 (Can. FC, Aug. 12, 2004), at [17]. "Less compelling reasons for exemption – for example, family, social and economic ties to the country of refuge, loss of such ties to the home country, age, infirmity, personal convenience, etc – do not warrant exemption from return": Department of Immigration and Multicultural and Indigenous Affairs (Cth), *An Australian Contribution*, *supra* n. 40, at 18.

[197] UNHCR Statute, *supra* n. 147, at Art. 6(A)(f).

[198] The predecessor exemption clause of the International Refugee Organization, in contrast, focused on "compelling family reasons arising out of previous persecution": Weis, *supra* n. 22, at 980. This formulation was viewed as too liberal by some drafters of the Convention, as a result of which the exemption was reduced to its current form. "Could the family attachments which a refugee might have contracted in his country of residence be regarded as compelling reasons? And was separation from his family to be regarded for that purpose as a compelling family reason? . . . He was not convinced that compelling family reasons provided sufficient justification": Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.28 (Jul. 19, 1951), at 11. Outside the Convention, however, family unity is today protected under a variety of regional and international treaties: *see* Hathaway, *Rights of Refugees*, *supra* n. 109, at 533 ff.

[199] Citing this analysis in Hathaway, *Refugee Status*, at 204, the Federal Court of Canada determined that "compelling circumstances (at whatever level of atrocity is required), have to be linked to past persecution": *Nadjat v. Canada (Minister of Citizenship and Immigration)*, [2006] FCJ 478 (Can. FC, Mar. 9, 2006), at [51].

maltreatment.[200] As the US Court of Appeals for the Ninth Circuit has affirmed, "long-lasting, genuine fear can be visited upon somebody even if they do not have a crippled arm or leg to remind them of what they have suffered."[201] The Federal Court of Canada has thus suggested that it is appropriate to inquire whether the refugee should

> be made to face the background set of life which he or she left, even if the principal characters may no longer be present or no longer be playing the same roles[.] The answer lies not so much in established determinative conclusive fact but rather more to the extent of travail of the inner soul to which the [refugee] would be subjugated.[202]

Thus, for example, the High Court of South Africa exempted an Angolan refugee from cessation on the grounds of medical evidence showing that he continued to suffer from post-traumatic stress syndrome and major depressive disorder as the result of his past persecution.[203]

In sum, if the asylum state adduces evidence of a substantial and significant change in the country of origin that has taken hold and eradicated the basis for the risk once faced by the refugee concerned, the Convention authorizes an inquiry into whether that change has enabled the refugee to resume a positive relationship with her country of origin. Assuming that a rigorous examination of all evidence establishes both the precipitating condition and a consequential restoration of protection (or ability to return in the case of a stateless refugee), cessation of refugee status may lawfully be ordered. States prepared to seek inspiration in the historically bounded "compelling circumstances" proviso of Art. 1(C)(5)–(6) should, however, consider exemption from cessation at least where there is sound evidence of a compelling psychological or comparable challenge to successful re-establishment in the country of origin.

6.1.5 Acquisition of a new nationality

The final way in which a refugee may be restored to national protection differs from the first four, each of which canvasses in some fashion the ability of the refugee to secure anew the protection of her home country. In contrast, Art. 1(C)(3) deems refugee status to come to an end if and when the refugee "has acquired *a new nationality*, and enjoys the

[200] "[T]he framers of the Convention had to take into account the psychological factor connected with the existence of previous persecution: having been persecuted by the government of a certain country, the refugee may have developed a certain distrust of the country itself and a disinclination to be associated with it as its national": N. Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* (1953), at 51. See also Grahl-Madsen, *supra* n. 7, at 410: "What the drafters of the Convention had in mind was the situation of refugees from Germany and Austria, who were unwilling to return to the scene of the atrocities which they and their kin had experienced, or to avail themselves of the protection of a country which had treated them so badly." The UNHCR thus suggests that examples of persons eligible for continued protection under this clause include "ex-camp or prison detainees, survivors or witnesses of violence against family members, including sexual violence, as well as severely traumatised persons": UNHCR, *Guidelines on International Protection No. 3*, *supra* n. 95, at [20].

[201] *Lal v. Immigration and Naturalization Service*, (2001) 255 F.3d 998 (USCA, 9th Cir., Jul. 3, 2001) (rejecting the view that some lasting physical disability is required to benefit from the "compelling circumstances" proviso).

[202] *Suleiman* (Can. FC, 2004), at [19].

[203] *RM v. Refugee Appeal Board, 16491/06* (SA HC, Transvaal, Apr. 2, 2007).

protection of the country of his new nationality."[204] By deeming the refugee status of a once unprotected person to come to an end if and when she acquires the national protection of a new country,[205] this provision mirrors the more general rule that a person is a refugee only if able to show a relevant risk in each country of citizenship.[206] As was remarked during the drafting of the Convention,

> [b]oth in theory and in practice, naturalization had always been considered as bringing refugee status to an end . . . [R]efugee status, being abnormal, should not be granted for a day longer than was absolutely necessary, and should come to an end (or, possibly, should never even come into existence) if . . . [the refugee] really had the rights and obligations of a citizen of a given country.[207]

Cessation under Art. 1(C)(3) occurs most commonly when a refugee becomes a citizen of her host state. The naturalization of refugees is, of course, one of the four solutions to refugeehood foreseen by the Convention,[208] with Art. 34 requiring state parties to give consideration in good faith to "the assimilation and naturalization of refugees."[209] If and when a refugee is fully enfranchised as a citizen of the country which has afforded her protected status, the need for the surrogate or substitute protection of refugee status no longer exists. Thus, as the English Court of Appeal observed, "it is plain that a recognized refugee who thereafter obtains the citizenship of his host country, whose protection he then enjoys, loses his refugee status. Article 1C(3) of the Refugee Convention could not be clearer."[210]

The ambit of Art. 1(C)(3) is not, however, limited to the acquisition of host country citizenship.[211] In line with the textual reference to a refugee having "acquired *a* new

[204] Convention, Art. 1(C)(3) (emphasis added).

[205] The question might arise whether the simple ability to acquire a new nationality – even if not acted upon – ought to be a basis for cessation, relying on an analogy to the inchoate nationality issue described in *supra* Ch. 1.3.2. While both the absence of a volition requirement in Art. 1(C)(3) (see text *infra*, at n. 215) and the overarching purpose of the Convention to provide surrogate protection only where national protection is not available might argue for such a reading, two countervailing concerns must be considered. First, the language of Art. 1(C)(3) is quite clearly demanding – "has acquired" a new nationality, rather than the more fungible "country of his nationality" formulation employed in Art. 1(A)(2). The UNHCR thus opines that "[a] new nationality must have been acquired. There must be conclusive evidence to regard the refugee as a national of another country, taking into account both the applicable law and actual administrative practice": UNHCR, "Cessation Guidelines," *supra* n. 1, at [16]. Second, as a cessation clause, Art. 1(C)(3) is subject to the general expectation of restrictive interpretation. "[S]ince the application of the cessation clauses in effect operates as a formal loss of refugee status, a restrictive and well-balanced approach should be adopted in their interpretation": at [2].

[206] Refugee Convention, Art. 1(A)(2), para. 2. See *supra* Ch. 1.3.1.

[207] Statement of Mr. van Heuven Goedhart, UN High Commissioner for Refugees, UN Doc. A/CONF.2/SR.23 (Jul. 16, 1951), at 11.

[208] The four solutions to refugeehood are repatriation, voluntary re-establishment, resettlement, and naturalization. See Hathaway, *Rights of Refugees*, *supra* n. 109, at 913 ff.

[209] Refugee Convention, at Art. 34. See generally Hathaway, *ibid.*, at 977–90.

[210] *DL (DRC) v. Entry Clearance Officer; ZN (Afghanistan) v. Entry Clearance Officer*, [2009] Imm AR 352 (Eng. CA, Dec. 18, 2008), at [29]. Even as the Supreme Court reversed this decision on other grounds, it did not disturb the Court of Appeal's findings in relation to the operation of Art. 1(C)(3): *ZN (Afghanistan) v. Entry Clearance Officer*, [2010] 1 WLR 1275 (UKSC, May 12, 2010), at [9], [20].

[211] "This country is usually the country of refuge, but it may also be another country": UNHCR, "Cessation Guidelines," *supra* n. 1, at [15]. See e.g. *Hanrei Jiho (Ryo Kan-ei)* (Jap. Tokyo HC, Dec. 6, 1982), in which

nationality,"[212] refugee status may also come to an end when a refugee enjoys the protection of any new country of nationality. New nationality in a third state might be acquired on a particularized basis (for example, by marriage to a citizen of the third state) or as part of a more broadly framed process of legal reform (for example, the granting of citizenship to formerly stateless persons,[213] or to the residents of a particular territory by a successor state).[214]

Perhaps the most controversial question is whether Art. 1(C)(3) requires the acquisition of new citizenship to have been a voluntary act. The drafters of the Convention seem to have assumed that only voluntary acquisition of nationality was relevant. Indeed, the representative of the Netherlands moved an amendment expressly to recognize the importance of volition in the choice of a new nationality,[215] but was ultimately persuaded[216] by the British delegate's explanation that the change was not required since the cessation clause

> was not concerned with the imposition of nationality by an outside authority, but related to the acquisition by a refugee of a new nationality other than that of the country of persecution. [Art. 1(C)(3)] was designed to meet the case where a refugee in a particular country of refuge paid a brief visit to another country and took advantage of the facilities available there to acquire the nationality of that country. When such a person returned to the country of refuge, the latter would be faced with the situation of his having acquired a new nationality.[217]

Delegates to the Conference of Plenipotentiaries thus clearly believed that it was not right to force a refugee to accept a citizenship she did not wish to hold.[218]

Further support for a volition requirement can be found in the debates surrounding Art. 34's duty of states to consider in good faith the assimilation and naturalization of

the court determined that an at-risk Laotian who had acquired the citizenship of, and was protected by, Taiwan had ceased to be a refugee pursuant to Art. 1(C)(3).

212 Refugee Convention, at Art. 1(C)(3) (emphasis added).

213 Department of Immigration and Multicultural and Indigenous Affairs (Cth), *An Australian Contribution*, *supra* n. 40, at 14.

214 "[T]he present provision applies irrespective of the way in which the person concerned acquires a new nationality, whether by naturalization in the strict sense (grant on application), by marriage, or by operation of law in any manner whatsoever": Grahl-Madsen, *supra* n. 7, at 396. *Accord* J. Fitzpatrick and R. Bonoan, "Cessation of Refugee Protection," in E. Feller, V. Türk, and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 491, at 527.

215 "Substitute for paragraph (3) of Section [C] the following two paragraphs: (3a) Having voluntarily acquired a new nationality; [or] (3b) Having involuntarily acquired a new nationality, he nevertheless avails himself of the protection of the country of his new nationality": UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Draft Convention Relating to the Status of Refugees*: Netherlands: "Amendment to Article 1," UN Doc. A/CONF.2/73 (Jul. 12, 1951).

216 Statement of Baron van Boetzelaer of the Netherlands, UN Doc. A/CONF.2/SR.23 (Jul. 16, 1951), at 19.

217 Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.23 (Jul. 16, 1951), at 19.

218 "Automatic acquisition of a new nationality might indeed constitute a form of persecution compelling the person against whom it was directed to seek refuge in another country . . . in his opinion, therefore, an individual could not be compelled to acquire a new nationality": Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.23 (Jul. 16, 1951), at 17. *Accord* Mr. Herment of Belgium, who "thought it desirable to provide for the case of a refugee in a receiving country who . . . found himself saddled with a nationality that he did not wish to possess": *ibid.*, at 18.

refugees,[219] clearly a part of the context of Art. 1(C)(3). During debate on Art. 34, the drafters canvassed the possibility that a long-staying refugee who declined an offer of citizenship made by the host country might thereby forfeit refugee status.[220] Despite the argument that such an approach was warranted to combat the aberrational nature of *de facto* statelessness,[221] no state party advocated the loss of status in such circumstances. To the contrary, the drafters understood, and respected, the view that even long-time refugees "may remain fundamentally attached to [their] country of origin and cherish the hope of returning . . . Nationality should not be imposed on a refugee in violence to his inmost feelings."[222] Indeed, as the Israeli representative insisted, a grant of citizenship "if it were not voluntary . . . would be an attack upon the spiritual independence of the refugee."[223] In the result, the drafters committed themselves simply to promote naturalization as an option that should in principle be made available to refugees.

It can thus be seen that both the drafting history of Art. 1(C)(3) itself and that of the contextually relevant Art. 34 provide persuasive support for the view that only the voluntary acquisition of a new citizenship is grounds for cessation. The UNHCR also seems to favor a volition requirement, having opined that cessation under Art. 1(C)(3) occurs only if the refugee concerned "is able *and willing* to avail himself or herself of the protection of the government of his or her new nationality."[224]

Yet it remains that Art. 1(C)(3), in stark contrast to the surrounding paragraphs of Article 1(C), does not expressly condition cessation on a voluntary act.[225] And given refugee law's overarching objective of providing surrogate national protection only to those who do not have a state of nationality able and willing to protect them,[226] why should Art. 1(C)(3) be

[219] "The Contracting State shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings . . . ": Refugee Convention, at Art. 34.

[220] "[T]he idea has been suggested that after a fairly long lapse of time (e.g. fifteen years) the authorities of the country in which the refugee . . . had settled might propose to him that he should apply for naturalization. If he failed to do so within a year, or did not give valid reasons for such failure, the Contracting Party would be entitled to consider itself as released from the obligations of the Convention": UN Ad Hoc Committee on Statelessness and Related Problems, *Status of Refugees and Stateless Persons: Memorandum by the Secretary-General*, UN Doc. E/AC.32/2 (Jan. 3, 1950) ("Memorandum"), at 50.

[221] "If, indeed, it is recognized that an individual has the right to a nationality, as a counterpart it should be the duty of the stateless person to accept the nationality of the country in which he has long been established – the only nationality to which he can aspire – if it is offered him": *ibid.*, at 50.

[222] *Ibid.*, at 51.

[223] Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.39 (Aug. 21, 1950), at 26. See also Secretary-General, Memorandum, *supra* n. 220, at 51: "Compulsory naturalization would be particularly inappropriate in the case of persons who have been prominent politically and represent a cause or a party." As Joly observes, contemporary refugees may not seek citizenship in the asylum state, even when it is available to them. "Despite the advantages to be gained, many, if not most, refugees are reluctant to become citizens of the host country or do so only after a long time has elapsed in exile. Several factors shape this attitude, of which the most important is loyalty to the homeland which they were forced to leave": D. Joly, *Refugees: Asylum in Europe?* (1992), at 64.

[224] UNHCR, "Cessation Guidelines," *supra* n. 1, at [17] (emphasis added). See also the advice of the UNHCR's Senior Protection Officer in the United States, (2003) 11 *Interpreter Releases*, App. 3, at 426, in which the same "able and willing to avail himself or herself" criterion is endorsed.

[225] See Refugee Convention, at Art. 1(C)(1), (2) and (4). "Article 1 C (3) differs from the previously discussed provisions of Article 1 C in that its applicability is not subject to the proviso of voluntariness": Grahl-Madsen, *supra* n. 7, at 395–96.

[226] See *supra* Ch. 4.2.

interpreted in a way that ignores the availability of protection in a new country of nationality? These arguments, grounded both in text and by reference to object and purpose, no doubt explain the preparedness of most commentators and more recent UNHCR opinion to reject a volition requirement, with general agreement on two critical constraints.[227]

First, the only new nationality of relevance to Art. 1(C)(3) cessation is nationality that is "effective."[228] As previously analyzed,[229] an effective nationality is one that is recognized by the state in question, can be accessed in practice, and which dependably delivers the entitlements of citizenship, including a clear right to enter and remain in that state's territory. Because of the importance of substantive efficacy, possession of a state's passport or comparable documentation may be taken as no more than *prima facie* evidence of effective nationality.[230]

Second and most important, the text of Art. 1(C)(3) sets the acquisition of citizenship as only a threshold criterion,[231] the real question being whether the refugee is shown to "enjoy . . . the protection of the country of his new nationality."[232] While overlapping to some extent with the notion of an effective nationality, this core criterion for cessation is said by the UNHCR to mean "that the refugee must secure and be able to exercise all the rights and benefits entailed by possession of the nationality of the country."[233]

The twin requirements that the new nationality be effective and that it deliver all the rights and benefits of nationality go some distance to ensuring that cessation under Art. 1(C)(3) is respectful of the interests of the individual concerned. We believe, however, that there is a closely connected third concern that should be canvassed before cessation is ordered under Art. 1(C)(3): was the grant of new citizenship internationally lawful? This additional constraint derives from both an assumption that the drafters did not intend to withdraw refugee status in consequence of an internationally unlawful act, and more generally that it would be unreasonable to read the Convention as encouraging an asylum state to withdraw status in circumstances amounting to acquiescence in such an unlawful act.

[227] See e.g. Fitzpatrick and Bonoan, *supra* n. 214, at 527: "Article 1(C)(3) contains no explicit requirement of voluntariness. Its application hinges upon the fact that a new nationality has been acquired and a finding that effective national protection is now available." See also Goodwin-Gill and McAdam, *supra* n. 20, at 138; and Department of Immigration and Multicultural and Indigenous Affairs (Cth), *An Australian Contribution*, *supra* n. 40, at 13; Refugee Review Tribunal of Australia, *Refugee Law in Australia*, *supra* n. 19, at 7–11. But see M. Jones and S. Baglay, *Refugee Law* (2007), at 141, suggesting that the "acquisition of new nationality must be conscious."

[228] UNHCR, "Note on Cessation Clauses," *supra* n. 24, at [15].

[229] See generally the discussion of "effective nationality" in *supra* Ch. 1.3.1.

[230] UNHCR, "Cessation Guidelines," *supra* n. 1, at [16]. "For example, Palestinians who hold national passports of certain countries but are not granted full rights and benefits of nationals of those countries, cannot be considered as having the effective protection of those countries": UNHCR, "Note on Cessation Clauses," *supra* n. 24, at [15].

[231] "[T]here should not be a presumption that the country of new nationality will provide adequate state protection to its new citizen; this should be established before Article 1(C)(3) can be relied on; and the relevant question should not be whether there is generalised protection, but whether in an applicant's particular case there is adequate protection": Department of Immigration and Multicultural and Indigenous Affairs (Cth), *An Australian Contribution*, *supra* n. 40, at 13.

[232] Refugee Convention, at Art. 1(C)(3).

[233] UNHCR, "Note on Cessation Clauses," *supra* n. 24, at [15] (though this analysis unhelpfully describes the matter as directed to "effective protection," rather than simply to the actual Convention term of art, "protection." The rationale for the superfluous adjective – can protection which is not effective be protection at all? – is not clear).

As will readily be seen, insistence on this additional criterion helps to meet the concerns of those who advocate a volition requirement, though without the artifice of deeming a volition requirement to be part of Art. 1(C)(3) despite this provision's clear text. For example, a grant of new citizenship is clearly lawful if the refugee has consented to it. The bestowal of unsolicited citizenship might also be lawful, but only if it meets the general requirement of international law that there be a "genuine link" between the refugee and the country granting its citizenship[234] and is effected without breaching the grantee's human rights. Attention might therefore be directed to whether an involuntary grant of new citizenship terminates citizenship in the refugee's country of origin, thus compromising her ability to return to her country if and when safe – contrary to Art. 12(4) of the Civil and Political Covenant.[235] Similarly, as the Australian government has suggested, "traditional practices where women automatically acquire their husband's nationality upon marriage, even if they do not wish it and have taken no steps to acquire it other than the marriage itself, may . . . [raise the issue of] the right to equal protection of the law, as embodied in international human rights law."[236] As these examples make clear, the conditioning of cessation under Art. 1(C)(3) on the international legality of the grant of citizenship avoids at least the most egregious risks associated with involuntary acquisition of citizenship.

In sum, refugee status comes to an end if and when a refugee acquires the citizenship of a new state in a manner that complies with international law, so long as that lawfully acquired citizenship is effective and delivers in practice the rights and benefits of nationality.[237] The acquisition of citizenship need not be voluntary, except to the extent that volition is required in a given context to ensure the lawfulness of the grant of nationality.

6.2 Persons who benefit from alternative forms of protection

To this point, we have considered the circumstances in which the need for refugee status comes to an end because it has been established that the refugee is now protected *as a citizen*

[234] The UNHCR has opined that "the new nationality must be effective, in the sense that it must correspond to a genuine link between the individual and the State": Advice of UNHCR's Senior Protection Officer in the United States, (2003) 11 *Interpreter Releases*, App. 3, at 426. The "genuine link" test derives from the decision of the International Court of Justice in the *Nottebohm Case (Liechtenstein v. Guatemala)*, [1955] ICJ Rep 4 (ICJ, Nov. 18, 1953). The state in which an applicant sought and has enjoyed asylum is likely to meet this criterion, since the longevity and continuity of presence in a state of the individual's choosing were thought relevant by the court to rejection of Liechtenstein's claim to be entitled to exercise diplomatic protection: at 25–26.

[235] "No one shall be arbitrarily deprived of the right to enter his own country": Civil and Political Covenant, *supra* n. 165, at Art. 12(4). This issue was earlier canvassed in the context of inchoate nationality, including noting the importance of not undermining the "preferred solution" of enabling a refugee ultimately to repatriate in safety to her country of origin. See *supra* Ch. 1.3.2.

[236] Department of Immigration and Multicultural and Indigenous Affairs (Cth), *An Australian Contribution*, *supra* n. 40, at 13, n. 30.

[237] By way of further safeguard, in the hopefully unlikely event that a risk of being persecuted arises in the country of new nationality, refugee status grounded in such a new risk remains available despite the original refugee status having come to an end. "Where the person claims a well-founded fear of persecution in relation to the country of his or her new nationality, this creates an entirely new situation calling for a fresh determination of refugee status": UNHCR, "Note on Cessation Clauses," *supra* n. 24, at [18].

by her own, or a new, country.[238] While the restoration of a refugee to national protection is the clearest situation in which the surrogate protection of refugee status is no longer needed, the Convention also withholds protection from other categories of persons. In the two cases considered in this sub-chapter – persons found to be *de facto* nationals of a safe state,[239] and also some persons in receipt of the protection or assistance of an international agency[240] – the rationale for exclusion from refugee status is that what is available by way of protection negates the need for the surrogate protection of refugee law. Despite not meeting the gold standard of protection as a citizen considered in the preceding sub-chapter, these alternative forms of protection are deemed sufficient to displace the presumptive entitlement to refugee status.[241]

6.2.1 Residence with the rights and obligations of nationals

Art. 1(E) of the Convention provides that

> [t]his Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.[242]

Despite its general language, this exclusion clause was included by the drafters to achieve a quite specific end, namely the exclusion from international protection of all ethnic German refugees from Central and Eastern Europe who had taken up residence in Germany during or following the Second World War.[243] The provision reflected the view that Germany was responsible for these populations[244] and was in fact meeting their needs by

[238] See *supra* Ch. 6.1, which analyzed the cessation clauses contained in Art. 1(C)(1)–(6) of the Refugee Convention.

[239] Refugee Convention, at Art. 1(E). [240] *Ibid.*, at Art. 1(D).

[241] This analysis from Hathaway, *Refugee Status*, at 205, was approved in *Jaber v. Minister for Immigration and Multicultural Affairs*, (2001) 114 FCR 506 (Aus. FC, Dec. 20, 2001), at [35].

[242] Refugee Convention, at Art. 1(E).

[243] "This provision was primarily designed to exclude refugees and expellees of German ethnic origin in the Federal Republic of Germany who by virtue of Article 116 of the Basic Law were 'Germans within the meaning of the Basic Law' and, although not possessing German nationality, were treated as if they were German nationals": Weis, *supra* n. 22, at 982. Analysis of the historical rationale for Art. 1(E) from Hathaway, *Refugee Status*, at 211 ff. was adopted in *Barzideh v. Minister for Immigration and Ethnic Affairs*, (1996) 69 FCR 417 (Aus. FC, Aug. 21, 1996), at 425.

[244] "He did not think that the German Government should be encouraged to shift all responsibility for them to the United Nations": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.3 (Jan. 17, 1950), at 9 [38]. The Israeli delegate went so far as to characterize the exclusion as a matter of retribution: "It was known that a number of such persons had helped to carry out Hitler's policy even more than the Germans residing in Germany, as they had been able to act under the cover of their new nationality, while preserving their original German nationality. When called upon, they had not hesitated to join the German army, and it was perhaps among them that the most fanatical Nazis had been found. There was no need, therefore, to invoke humanitarian principles in favour of that type of individual who in no way deserved to be granted the status of international refugee": Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.5 (Jan. 18, 1950), at 10 [44].

admitting and assimilating them,[245] even though not always granting them formal German nationality.[246]

Concern about the diplomatic wisdom of a specific reference to Germany in the Convention,[247] however, initially led the drafters to propose the exclusion of ethnically or culturally affiliated residents of a country who receive the same protection as that provided to nationals.[248] Ironically, this "politically sensitive" avoidance of a country-specific reference to Germany generated substantial debate when the General Assembly considered the draft convention. The Mexican representative opposed what he saw as an effort to exclude from refugee status the Spanish refugees admitted to his country, or of Spanish Basques in France.[249] The delegate of Saudi Arabia denounced the view that "persons forced to flee to a neighboring State, the inhabitants of which might have similar racial and cultural characteristics, would be denied the protection both of the Convention and of the High Commissioner's Office."[250]

French assurances that the clause was intended to exclude only the German minorities notwithstanding,[251] the reference to "culturally affiliated residents" was ultimately dropped.[252] The substitute language adopted by the Assembly, now found in Art. 1(E) of the Convention, omits any reference to ethnic or cultural kinship, and focuses instead on prior residence while enjoying treatment genuinely equivalent to that afforded nationals.[253] Indeed, despite the continuing understanding of the drafters that Art. 1(E) was intended to exclude only "persons involved in mass movements of population due to frontier changes, who possessed the same rights as the inhabitants of the country in which they were currently living,"[254] there is no language in the provision that can be relied on to limit exclusion to persons who secure the rights and obligations of nationals as part of such a mass movement.

[245] This paragraph is intended to exclude from the benefits of the Convention members of former German minorities outside of Germany who returned to, sought refuge in, or were expelled to Germany, and who are living there. It reflects the view that these individuals should be and are being assimilated into the German community and are not properly refugees: "Comments on the Draft Convention and Protocol: General Observations," Annex II to "Draft Report of the Ad Hoc Committee on Statelessness and Related Problems" (16 January–February 1950), UN Doc. E/AC.32/L.38 (Feb. 15, 1950), at 16.

[246] The provision was primarily directed to ethnic Germans displaced by the Second World War whose citizenship status was contested by virtue of their residence outside the territory of the former German Reich.

[247] See e.g. Statement of Mr. Rochefort of France, UN Doc. E/1703/Add.5 (Jun. 26, 1950), at 5, who noted that the exclusion clause "would still serve its purpose if . . . [one were to avoid] reference by name to a Government with which, incidentally, a number of states entertain diplomatic relations."

[248] The clause considered by the General Assembly provided for the exclusion of "a person who has entered a country with whose nationals he has close ties of ethnic and cultural kinship and, because of such kinship, enjoys the rights and privileges usually attached to the possession of the nationality of such country": UN Doc. A/C.3/L.131 (Nov. 30, 1950), at 2.

[249] Statement of Mr. Noriega of Mexico, 5 UNGAOR 376–77 (Dec. 1, 1950).

[250] Statement of Mr. Baroody of Saudi Arabia, 5 UNGAOR 376 (Dec. 1, 1950).

[251] Statement of Mr. Rochefort of France, 5 UNGAOR 376 (Dec. 1, 1950).

[252] UNGAOR 380 (Dec. 1, 1950).

[253] In moving the final language, the representative of New Zealand acknowledged his desire to meet the Saudi Arabian delegate's concern regarding genuine equivalency of rights and obligations: Statement of Mr. Davin of New Zealand, 5 UNGAOR 394 (Dec. 4, 1950), referring to the Statement of Mr. Baroody of Saudi Arabia, 5 UNGAOR 392 (Dec. 4, 1950).

[254] Statement of Mrs. Roosevelt of the United States, 5 UNGAOR 389 (Dec. 4, 1950). *Accord* Statement of Mr. Noriega of Mexico, 5 UNGAOR 390 (Dec. 4, 1950); and Statement of Mr. Lequesne of the United Kingdom, 5 UNGAOR 390 (Dec. 4, 1950).

As such, and despite the limited purpose of concern to the Convention's drafters, the general language of Art. 1(E) affords state parties a lawful basis to exclude from refugee status not just persons securing rights as part of a broadly based program, but also *individuals* who have resided in a safe country who may reasonably be understood to be "*de facto* nationals" of that state.[255] While we concede that an interpretation predicated on the clause's object and purpose would be unlikely to reach this result,[256] it must be acknowledged that the text of the Convention – entitled, of course, to substantial weight in the interpretive process – provides no basis whatever for limiting the application of Art. 1(E) to persons benefiting from rights under a form of collective enfranchisement, much less to only the German minorities initially of concern to the drafters. We therefore focus here on the development of a principled and contextually sensitive interpretation of the text of Art. 1(E). Indeed, as developed later in this sub-chapter,[257] such an understanding of the text may serve as an important means to challenge the advent of regimes established by some states to refuse protection to persons on the basis of no more than a tenuous connection to a safe country.

Exclusion under Art. 1(E) may be contemplated only in the case of a refugee who "has taken residence" in a third country.[258] Residence denotes a continuing status,[259] meaning

[255] The UNHCR seems to have simply accepted that this evolution of purpose is permissible. After recounting the clause's group-based and historically limited purpose, the agency moves without comment to analysis of the clause as applicable in both an individuated and open-ended way: "UNHCR Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees" (Mar. 2009) ("Article 1E"), at [3]–[4].

[256] One author nonetheless insists that "nowadays this clause has little, if any, relevance in State practice": R. Marx, "Article 1E," in A. Zimmermann (ed.), *The 1951 Convention relating to the Status of Refugees and its Protocol: A Commentary* (2011) 571, at 577. The author grounds his conclusion in large measure on the basis of the history just recounted, noting that Art. 1(E) "was originally aimed at German refugees. Germany has accepted a huge number of 'German refugees' by applying its specific concepts to assimilate these refugees": *ibid.*

[257] See text *infra*, at n. 278.

[258] While this may be a country in which asylum has been sought and secured, there is no requirement limiting the application of the clause to such a country: *Kroon v. Canada (Minister of Employment and Immigration)*, [1995] FCJ 11 (Can. FCTD, Jan. 6, 1995). *Accord* UNHCR, "Article 1E," *supra* n. 255, at [4].

[259] *Mahdi v. Canada (Minister of Citizenship and Immigration)*, (1994) 26 Imm. L. R. (2d) 311 (Can. FCTD, Nov. 15, 1994), affirmed at (1995) 32 Imm. L. R. (2d) 1 (Can. FCA, Dec. 1, 1995). Art. 1(E) does not apply if the right to residence is lost during the time taken for refugee status adjudication, including where it is lost because the individual herself failed to take action to keep the right of residence current. This is so because Art. 1(E) is not a punitive provision but is rather grounded in the illogic of granting international protection to an at-risk person who does not need it because she has the equivalent of national protection in a safe country (see UNHCR, "Article 1E," *supra* n. 255, at [2]); *Refugee Appeal No. 76370* (NZ RSAA, Sept. 17, 2009), at [12]. *Accord* UNHCR, "Article 1E," *supra* n. 255, at [7]: "Article 1(E) applies only to cases where the person is *currently* recognized by the country concerned as having these 'rights and obligations.' If the competent authorities of the country concerned recognized the person as having such rights in the past but no longer endorse this recognition, Article 1(E) is inapplicable" (emphasis in original). But see *Minister of Citizenship and Immigration v. Choovak*, [2002] FCJ 767 (Can. FCTD, May 17, 2002); *Minister of Citizenship and Immigration v. Manoharan*, [2005] FCJ 1398 (Can. FC, Aug. 22, 2005). The asylum state may, of course, require the person awaiting the results of refugee status assessment to take reasonable steps to keep her foreign residence status current (see e.g. *Shamlou v. Canada (Minister of Citizenship and Immigration)*, [1995] FCJ 1537 (Can. FCTD, Nov. 15, 1995)), but failure to comply may lead only to immigration or other penalties, not to the denial of refugee status. By the same logic, if *de facto* nationality that meets the requirements of Art. 1(E) arises after a claim to

that there must be evidence of more than simply a transient or temporary presence.[260] Because the clause requires residence, physical presence in another state that falls short of residence is insufficient to justify exclusion.[261] As well, the tense in which the clause is framed ("has taken residence") makes clear that a right to go to, or even to reside in, some other state is not the basis for exclusion.[262]

Assuming that the person concerned has already taken residence in the other country, the core inquiry is whether she is recognized by the authorities of that state as "having the rights and obligations which are attached to the possession of the nationality of that country." It is not enough simply to hold a particular formal status (such as a right of permanent residence); the focus of analysis must rather be on the substance of rights and obligations.[263] While it is generally agreed that a state in which there is a risk of being persecuted would fall below this standard,[264] the requirements of Art. 1(E) go far beyond a duty to avoid the risk of

refugee status is made, it may be taken into account in the assessment of the claim: *Mohamed v. Canada (Minister of Citizenship and Immigration)*, [1997] FCJ 400 (Can. FCTD, Apr. 7, 1997).

260 Applying its domestic analog to Art. 1(E), an American court suggested the importance of evidence of "a lengthy, undisturbed residence" in the state in question: *Tap v. Immigration and Naturalization Service*, 232 F.3d 896 (USCA, 9th Cir., Jul. 31, 2000). Similarly, the Federal Court of Canada determined that "[i]f the applicant has some form of temporary status which must be renewed, and which could be cancelled, or if the applicant does not have the right to return to the country of residence, clearly the applicant should not be excluded under Art. 1(E)": *Kanesharan v. Canada (Minister of Citizenship and Immigration)*, [1996] FCJ 1278 (Can. FC, Sept. 23, 1996), at [11].

261 "The clause refers to a person who has 'taken residence' in the country concerned. This implies continued residence and not a mere visit": UNHCR, *Handbook*, *supra* n. 3, at 34; *accord* Refugee Review Tribunal of Australia, *Refugee Law in Australia*, *supra* n. 19, at 7–24.

262 "The wording of Article 1(E) limits its application to a person who 'has taken residence' in the country under consideration. It does therefore not apply to individuals who could take up residence in that country, but who have not done so": UNHCR, "Article 1E," *supra* n. 255, at [9]. See also UNHCR (Canada), "Article 1.E of the 1951 Convention" (Apr. 3, 1989), at 2: "It is important to note that Article 1.E only applies to a person who '*is* recognised' as having the rights and obligations which are attached to the possession of the nationality of a country. This indicates that persons who could have applied for such recognition but failed to do so, are not excluded from refugee status pursuant to Article 1.E." Thus, Art. 1(E) was held not to apply where there was a right to apply for admission but "applications would be dealt with on a 'case-by-case' basis": *Olschewski v. Canada*, [1993] FCJ 1065 (Can. FCTD, Oct. 20, 1993), at [3]. See also *Dawlatly v. Canada (Minister of Citizenship and Immigration)*, [1998] FCJ 848 (Can. FCTD, Jun. 16, 1998), finding that mere eligibility for temporary residence in Greece, a country where the applicant had never resided, was not a basis for application of Art. 1(E).

263 While it is often said that permanent residence is the basis for exclusion under Art. 1(E), the UNHCR has cautioned against such formalism. By way of example, the agency cited Canada's failure to protect "landed immigrants" on terms of equality with citizens in relation to both extradition and access to public employment in support of its conclusion "that landed immigrants do not have the rights attached to Canadian citizenship as intended in Article 1.E and, therefore, that Article 1.E does not apply to refugees who have 'landed immigrant' status in Canada nor to refugees with an equivalent status elsewhere": UNHCR (Canada), "Article 1.E of the 1951 Convention," *supra* n. 262, at 1. See also UNHCR, "Article 1E," *supra* n. 255, at [11].

264 *Olschewski* (Can. FCTD, 1993); *Kroon* (Can. FCTD, 1995); *Choovak* (Can. FCTD, 2002); *Tharmalingam v. Minister for Immigration and Multicultural Affairs*, [1999] FCA 1180 (Aus. FFC, Aug. 26, 1999). Thus, the UNHCR concludes that "[a]lthough the competent authorities of the country in which the individual has taken residence may consider that he or she has the rights and obligations attached to the possession of the nationality of that country, this does not exclude the possibility that when outside that country the individual may nevertheless have a well-founded fear of being persecuted if returned there. To apply Article 1(E) to such an individual, especially when a national of that country who is in the same circumstances, would not be excluded from being recognized as a refugee, would undermine

being persecuted, or even to afford the equivalent of refugee rights.[265] Exclusion based on *de facto* nationality is truly an exceptional occurrence which requires the effective assimilation of the refugee to the population of the country in which she has taken residence,[266] including a consequential guarantee of rights at a very high level.[267]

Courts seeking to define the content of this appropriately demanding test have understandably given particular emphasis to the applicant's present right[268] to enter[269] and remain[270] in the state, generally agreed to be a non-negotiable requirement.[271] Beyond this point, the general view[272] is that it is enough that the rights received are broadly

the object and purpose of the 1951 Convention": UNHCR, "Article 1E," *supra* n. 255, at [17]. Similarly, the Australian tribunal has concluded that "[e]ven if an applicant is found to have the same rights and obligations in a third country as those of a national of that country, it is appropriate to consider whether the applicant would have recourse to the protection of the authorities in the third country from persecution in that country": Refugee Review Tribunal of Australia, *Refugee Law in Australia*, *supra* n. 19, at 7–27.

265 *Thiyagarajah v. Minister for Immigration and Multicultural Affairs*, (1997) 73 FCR 176 (Aus. FC, Mar. 3, 1997), at 185; *Nagalingam v. Minister for Immigration and Local Government and Ethnic Affairs*, (1992) 38 FCR 191 (Aus. FC, Sept. 22, 1992), at 198–200.

266 "[T]hey possess the rights and obligations which are attached to the possession of nationality, although they need not officially be naturalized. It suffices if they are only *de facto* citizens of the country": Robinson, *supra* n. 200, at 55. This analysis in Hathaway, *Refugee Status*, at 212–13, was cited in *Shamlou* (Can. FCTD, 1995), at [20].

267 The UNHCR refers to this as a "much more stringent test" than the rights owed to refugees under the Convention: UNHCR, "Article 1E," *supra* n. 255, at [12]. "The relevant criteria will change depending on the rights which normally accrue to citizens of the country of residence subject to scrutiny": *Hamdan v. Canada (Minister of Citizenship and Immigration)*, (1997) 38 Imm. L. R. (2d) 20 (Can. FCTD, Mar. 27, 1997), at [7].

268 *Refugee Appeal No. 76370* (NZ RSAA, 2009), at [11]–[12].

269 *Wassiq v. Canada (Minister of Citizenship and Immigration)*, (1996) 33 Imm. L. R. (2d) 238 (Can. FCTD, Apr. 10, 1996), at [9]. See also *Rajendran v. Minister for Immigration and Multicultural Affairs*, (1998) 86 FCR 526 (Aus. FFC, Sept. 4, 1998), emphasizing the importance of a practical assessment of the individual's right "to re-enter and to reside permanently" in the putative country of *de facto* nationality. The Australian courts have determined that a legally enforceable right to re-enter may, in at least some circumstances, be shown by proof that "the third country [has given] an undertaking to Australia that a certain person would be admitted and allowed to reside in that country": *Minister for Immigration and Multicultural Affairs v. Applicant C*, (2001) 116 FCR 154 (Aus. FFC, Sept. 18, 2001), at [64].

270 "While I am not prepared to say that Section E of Article 1 . . . means that a person . . . must have rights that are identical in every respect to those of a national of the country in which he or she resides, it does, in my view, mean that an important right such as the right to remain (in the absence of unusual circumstances such as a criminal conviction) must be afforded": *Minister of Citizenship and Immigration v. Mohamud*, [1995] FCJ 782 (Can. FCTD, May 19, 1995), at [7]. Indeed, there is reason to doubt that even a narrow criminality exception to the right to remain is lawful, since citizens are subject to no such limitation.

271 See e.g. *Mahdi* (Can. FCTD, 1994), affirmed in *Mahdi* (Can. FCA, 1995). These factors have been termed "essential": Goodwin-Gill and McAdam, *supra* n. 20, at 162. The UNHCR has similarly taken the view that "[t]he person concerned must benefit from a residency status which is secure and hence include[s] the rights accorded to nationals to return to, re-enter and remain in the country concerned. These rights must be available in practice": UNHCR, "Article 1E," *supra* n. 255, at [10]. Thus, where the country in question imposes requirements for return that are not clearly met in the individual case, Art. 1(E) is not applicable: *Choezom v. Canada (Minister of Citizenship and Immigration)*, [2004] 43 Imm. L. R. (3d) 171 (Can. FC, Sept. 30, 2004).

272 "While it is generally agreed that Article 1(E) applies in cases where the person concerned possesses something less than formal nationality, there is a divergence of opinion amongst commentators as to precisely what would suffice, in terms of rights and obligations, to satisfy Article 1(E)": Refugee Review

analogous[273] to those of citizens. Particular emphasis is often placed on guarantees of economic rights,[274] with a more flexible attitude taken to explicitly political rights,[275] especially the right to vote.[276] Yet given the quite strict language of the provision – "having the rights and obligations which are attached to the possession of the nationality of that country" – it might be argued that *any* deviation from the rights of nationals renders Art. 1(E) inapplicable.[277]

A clear understanding of Art. 1(E) is especially important because this clause sets the Convention's limit on the exclusion from refugee status of persons who have a relationship with another state that falls short of national protection. In line with the *exclusio unius* principle,[278] domestic laws that purport to deny refugee status on substantively cognate grounds but by reference to criteria that do not conform to Art. 1(E) should be understood to be in breach of the Convention. The Convention speaks clearly to the circumstances in which access to national protection falling short of citizenship should lead to the denial of Convention refugee status, and provides that this should be so only if the demanding criteria of Art. 1(E) are met. Especially given the general agreement that clauses purporting

Tribunal of Australia, *Refugee Law in Australia*, *supra* n. 19, at 7–26. Nor has clarity been advanced by the UNHCR view that "'[r]ights and obligations' is a reference to rights and obligations generally, not just to 'fundamental' rights and obligations such as those mentioned, for instance, in a national Constitution. The rights and obligations need not be identical in every respect to those enjoyed by nationals of the country in question, but divergences should be few in number and only minor in character": UNHCR, "Article 1E," *supra* n. 255, at [13] (footnote omitted).

273 *Mohamud* (Can. FCTD, 1995). The same court has adumbrated this concept, defining the threshold as "enjoy[ing] the same basic rights of status as nationals," though sensibly insisting that the rights granted to citizens in the proposed destination country be "consistent with international conventions and treaties relating to rights and obligations of individuals": *Kroon* (Can. FCTD, 1995), at [9], [10]. The Full Federal Court of Australia has, however, rightly insisted that just because rights on offer are "consonant" – in the sense of "directed to the same purpose" – with those afforded citizens does not mean that the standard of Art. 1(E) is satisfied: *Applicant C* (Aus. FFC, 2001), at [61].

274 For example, Canadian cases have expressed some support for the view that in addition to the right to return, the individual must have the rights to work, study, and access social services: *Shamlou* (Can. FCTD, 1995), at [35]–[36]. Yet this list appears arbitrary, with no rationale provided for its adoption either by the court or in L. Waldman, *Immigration Law and Practice* (1992), at [8.204]–[8.205], from which the list was drawn.

275 "[S]hort of matters of a political kind, it seems to me that the rights and obligations of which the Article speaks must mean all of those rights and obligations [of nationals] and not merely some of them": *Barzideh* (Aus. FC, 1996), at 429. Similarly, the UNHCR has recently suggested that "being barred from certain public positions of high office might be acceptable for purposes of the application of Article 1(E), but being barred from public positions generally would not. Similarly, an exemption from the obligation to perform military service would also be admissible": UNHCR, "Article 1E," *supra* n. 255, at [13]. But the same flexibility should not apply to civil (as opposed to political) rights: *Barzideh* (Aus. FC, 1996), at 428–29. Thus, limitations on freedom of internal movement are not consistent with the requirements of Art. 1(E): *Choezom* (Can. FC, 2004). From this perspective, the view of the Australian Federal Court that lack of access to international travel documents does not disallow exclusion under Art. 1(E) may therefore not be correct: *Rajendran* (Aus. FFC, 1998).

276 *Shamlou* (Can. FCTD, 1995).

277 As observed in the Federal Court of Australia, Art. 1(E) "is concerned with *de facto* rights rather than legal rights. That having been said, however, it is not correct that the rights, whatever those relevant rights may be, may be some only of the rights of a national or that the obligations be some only of the obligations of a national. The rights and obligations must be the same as those of a national but fall short of a grant of citizenship": *Barzideh* (Aus. FC, 1996), at 426–27.

278 Essentially, that whatever is omitted is understood to be excluded: see *supra* n. 49.

to exclude persons who meet the inclusion criteria of the Convention definition are to be treated as exhaustive,[279] there is no basis to read-in additional barriers to protection that fail to respect the requirements of Art. 1(E).

Yet Canadian law not only incorporates the exclusionary requirements of Art. 1(E),[280] but purports also to make ineligible for refugee status any person who "has been recognized as a Convention refugee by a country other than Canada and can be sent to that country."[281] Indeed, the Canadian Federal Court of Appeal has held that a status akin to refugee status, but which does not entail a duty to respect even Refugee Convention rights, may suffice to render someone ineligible for refugee protection.[282] This is clearly not a rule that can be reconciled to the requirements of Art. 1(E) since recognition as a refugee in a given country does not necessarily imply prior residence there, much less a forward-looking right to enter and remain indefinitely there with the rights and obligations of nationals of that country.

Australian law goes farther still,[283] incorporating a more general provision that denies the existence of "protection obligations" to any person "who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently . . . any country apart from Australia."[284] While this rule has at times been validated on the grounds that it implements Art. 1(E) of the Convention,[285] the more general (and candid) judicial assessment is that – similar to the Canadian eligibility provision – the Australian rule circumvents the refugee status inquiry altogether[286] on the basis of a "qualified right . . . merely . . . to enter and reside in the other country; it is not a right equivalent to recognition of the non-citizen as entitled to all the attributes of citizenship or even refugee

[279] "The exclusion clauses in the 1951 Convention are exhaustive": UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, UN Doc. HCR/GIP/03/05 (Sept. 4, 2003) ("*Guidelines on International Protection No. 5*"), at [3]. Speaking specifically to Art. 1(E), the agency has observed that "[t]he object and purpose of this Article is to exclude from refugee status those persons who do not require refugee protection because they already enjoy a status which, possibly with limited exceptions, corresponds to that of nationals. A strict test is, therefore, called for in order to be excludable under Article 1E": UNHCR, "Article 1E," *supra* n. 255, at [2].

[280] Immigration and Refugee Protection Act, SC 2001, c. 27, s. 98. [281] *Ibid.*, at s. 101(d).

[282] The Federal Court of Appeal determined that "withholding of removal" status in the United States amounts to "recognition as a refugee" despite the fact that it provides only protection against *refoulement*, not a guarantee of access to the mandatory rights of refugees found in Arts. 2–34 of the Convention: *Wangden v. Canada (Minister of Citizenship and Immigration)*, [2009] FCJ 1540 (Can. FCA, Nov. 23, 2009), affirming the decision of Mosley J. below, reported at *Wangden v. Canada (Minister of Citizenship and Immigration)*, [2008] FCJ 1541 (Can. FC, Nov. 5, 2008). This understanding seems not only to be at odds with a substantive understanding of "recognition as a refugee," but is clearly irreconcilable to the requirements of Art. 1(E) of the Convention which require evidence that the person has "the rights and obligations which are attached to the possession of the nationality of that country," not simply those that inhere in Convention refugees. See text *supra*, at n. 263.

[283] See *supra* Ch. 1.2.3. [284] Migration Act 1958 (Cth), s. 36(3)–(5).

[285] Specifically citing Arts. 1(E) and 33 of the Refugee Convention, the Full Federal Court has observed that "[i]n consequence of these provisions, there has developed in Australia a body of law to the effect that, where a country other than the country of the claimant for refugee status, and other than Australia, would provide for that applicant effective protection, the person is not a person to whom Australia owes protection obligations": *Al Toubi v. Minister for Immigration and Multicultural Affairs*, [2001] FCA 1381 (Aus. FFC, Sept. 28, 2001), at [3]–[5].

[286] *NAEN v. Minister for Immigration and Multicultural and Indigenous Affairs*, (2004) 135 FCR 410 (Aus. FFC, Feb. 13, 2004).

status in the other country."[287] Given both its failure to engage with the relevant triggering condition ("has taken residence") and its explicit limitation of relevant rights to no more than a right to enter and remain, this is not a rule that can be justified by reference to Art. 1(E).

Indeed, for the reasons earlier set out in detail,[288] exclusion on grounds of the kind set out in these domestic rules is more broadly non-compliant with Refugee Convention requirements. Even if treated as a question of the availability of "protection elsewhere" and raised at the eligibility stage before Art. 32 obligations inhere (rather than at the hearing into status itself where Art. 1(E) would ordinarily be canvassed), the state seeking to dislodge its presumptive responsibility to protect may only do so lawfully on the basis of anxious scrutiny of the destination country's record of respect for all acquired refugee rights (not just the duty of *non-refoulement*), as well as after having satisfied itself that it is not aiding or assisting that other country to breach its international obligations.[289]

As problematic as schemes such as those enacted by Canada and Australia clearly are, they pale in comparison with the so-called "firm resettlement" bar to asylum under US law.[290] While characterized by Anker as "analogous to" Art. 1(E) of the Convention,[291] the connection is loose at best. In essence, the rule stipulates that asylum is to be denied to persons otherwise entitled to refugee status if they have received an offer of some kind of permanent resident status[292] from another country. Courts have interpreted the notion of permanent or "firm" resettlement in extraordinarily broad terms,[293] extending even to persons with no more than highly insecure status abroad – for example, those awaiting the results of a refugee inquiry there,[294] and persons able to live elsewhere illegally.[295] The focus is moreover not on the ability to return and take up residence elsewhere, but simply on whether an *offer* of "residence" was made,[296] even if it no longer

[287] *SZMWQ v. Minister for Immigration and Citizenship*, (2010) 187 FCR 109 (Aus. FFC, Aug. 6, 2010), at [34].

[288] See generally *supra* Ch. 1.2.3. [289] See generally *ibid.*

[290] Immigration and Nationality Act 1952 (US), 8 USC §1158(b)(2)(vi). The core of the definition of "firm resettlement" focuses on whether "if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement": 8 CFR § 208.15.

[291] D. Anker, *The Law of Asylum in the United States* (2011), at 506 § 6:38. See generally at 505–16 §§ 6:38–6:41.

[292] *Dhoumo v. Board of Immigration Appeals*, (2005) 416 F.3d 172 (USCA, 2nd Cir., Jul. 27, 2005).

[293] For example, the ability to live "undisturbed" in a country with "work and travel privileges" despite failure to receive an offer of permanent residency there was held sufficient to enliven this bar: *Tap* (USCA, 9th Cir., 2000).

[294] *Farbakhsh v. Immigration and Naturalization Service*, (1994) 20 F.3d 877 (USCA, 8th Cir., Apr. 4, 1994), affirmed in *Rife v. Attorney General*, (2004) 374 F.3d 606 (USCA, 8th Cir., Jul. 7, 2004); *Maharaj v. Attorney General*, (2005) 416 F.3d 1088 (USCA, 9th Cir., Aug. 4, 2005).

[295] The "firm resettlement" bar was, for example, deemed to apply to a Cuban who had bribed an official to secure a visa to enter Costa Rica where he had resided for six months before coming to the United States after learning that the Costa Rican government was planning a process to verify the validity of visas: *Barreto-Clara v. Attorney General*, (2001) 275 F.3d 1334 (USCA, 11th Cir., Dec. 19, 2001). The same result was reached in the case of a Peruvian refugee who fraudulently obtained a Venezuelan refugee stamp that enabled him to live in that country for more than a year: *Salazar v. Attorney General*, (2004) 359 F.3d 45 (USCA, 1st Cir., Feb. 26, 2004).

[296] *Diallo v. Immigration and Naturalization Service*, (2000) 232 F.3d 279 (USCA, 2nd Cir., Nov. 13, 2000); *Maharaj* (USCA, 9th Cir., 2005).

subsists[297] and even if re-entry is not presently authorized.[298] Indeed, despite the clear statutory language, "a firm resettlement" exclusion has at times been ordered even where no offer of residence was ever made.[299] Most perversely of all, and despite the fact that the "substantial and conscious" restriction of rights is said to rebut a presumption of firm resettlement,[300] US courts have upheld exclusion even where there was evidence that the destination country would not even be able to protect the putative refugee against the risk of being persecuted.[301]

This is in substance a punitive rule, which fails to meet even the broadest understanding of Art. 1(E).[302] And because asylum is the only means by which refugees arriving in the United States receive anything approaching a guarantee of Convention rights, continued reliance by the US on this bar to asylum puts that country squarely in breach of its international obligations.[303]

[297] Thus, despite having been informed by Danish authorities that she was no longer recognized as a refugee and having her Danish passport confiscated, an Iraqi refugee was found to be firmly resettled in Denmark: *Ali v. Immigration and Naturalization Service*, (2001) 237 F.3d 591 (USCA, 6th Cir., Jan. 10, 2001). "The fact that the Truongs allowed their permission to return to Italy to lapse once they arrived in the United States does not alter the fact of their firm resettlement in Italy": *Truong v. Immigration and Naturalization Service*, (2002) 48 Fed. Appx. 705 (USCA, 9th Cir., Oct. 16, 2002).

[298] A finding of "firm resettlement" was made despite the fact that "[t]he record contains evidence that the Nasirs' residence permits have expired and they are not entitled to a residence permit at this time . . . The German government has no legal obligation to readmit them and . . . since they have been in the United States for over a year, their application for readmission would 'most probably' be rejected. Whether Germany will re-admit the Nasirs is not, however, a question which is now before us": *Nasir v. Immigration and Naturalization Service*, (2002) 30 Fed. Appx. 812 (USCA, 10th Cir., Feb. 7, 2002), at 815.

[299] *Matter of A-G-G-*, (2011) 26 I & N Dec. 486 (USBIA, May 12, 2011), finding that even if an offer of permanent residence has not been made, "firm resettlement" may still be found on the basis of the "totality of the evidence," affirming in this regard the approach traditionally taken by US Courts of Appeal for the Second and Fourth Circuits: at 503. Relevant factors were said to include "the length of an alien's stay in the third country, familial ties, receipt of benefits, and business or property connections": at 496. This extended (non-offer-based) approach has been justified on the grounds that the regulation permits a finding of firm resettlement where there is evidence of "some other type of permanent resettlement": *Sall v. Attorney General*, (2006) 437 F.3d 229 (USCA, 2nd Cir., Feb. 3, 2006), at 233.

[300] An exception to "firm resettlement" exists if "the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled": 8 CFR § 208.15. There is also an exception where residence was secured abroad only as a necessary consequence of flight from persecution.

[301] The bar was held to apply despite evidence of the inability of authorities to provide protection against skinhead violence. As noted by a dissenting member of the panel, "[a]lthough the officials in the United Kingdom were apparently willing – to some degree – to protect the Hamdanis from persecution, they were not able to do so": *Hamdani v. Immigration and Naturalization Service*, (2003) 66 Fed. Appx. 131 (USCA, 9th Cir., Jun. 3, 2003), at 133.

[302] Anker observes that "[c]ases barring individuals for past or terminated status do seem limited to particular circumstances suggesting abuse or unjustifiable 'asylum-shopping' by an applicant. In cases that have held past and terminated status sufficient, the courts have found that applicants had voluntarily disengaged from another country in which they had status or potential status because of a preference for U.S. residency": Anker, *supra* n. 291, at 516 § 6:41. Yet even assuming this to be so, the Convention does not authorize exclusion from refugee status on such grounds.

[303] While "asylum" is in principle only a means of securing access to the discretion of the Attorney General, it generally leads to a *de facto* grant of most Convention rights. In contrast, "withholding of removal" – which is not subject to the "firm resettlement" bar – is available only to persons who meet a more demanding standard of risk (probability of harm) than is set by the Convention and in any event guarantees only protection against *refoulement* to the country in which the probability of being persecuted

In sum, Art. 1(E) excludes from refugee status all persons who may truly be said to be *de facto* nationals of a safe country in which they have previously taken residence. This intentionally high standard requires not simply the ability to enter the putative state of *de facto* nationality and to be protected against the risk of being persecuted there, but rather the possession of rights, including economic rights, that are broadly analogous to those of citizens.

As such, Art. 1(E) does not validate the exclusion of persons simply because someone may have been recognized elsewhere as a refugee, might benefit from protection elsewhere, or is deemed to have received an offer of some form of admission or status from another country. To the contrary, exclusion under Art. 1(E) is lawful only in the case of persons who have, in fact, already *resided* elsewhere and who, whatever their formal status in that country of prior residence, enjoy in practice a subsisting right to enter and remain in that other country permanently and with clear guarantees of rights and obligations that bespeak true assimilation to the nationals of that state.

6.2.2 United Nations protection or assistance

Every basis for cessation or exclusion considered to this point is predicated on the ability of the person concerned to access the protection of a state. Given the purpose of international refugee law – to provide surrogate international protection until and unless *national* protection is available[304] – this basic approach is clearly sound. In only one, very specific, situation did the drafters agree that refugee status was to be denied on the basis of the ability to secure something less than the protection of a state. Article 1(D) provides that

> [t]his 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 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.[305]

As has recently been observed, "[a]lmost every element of Article 1D is 'pregnant with ambiguity.'"[306] Given the general approach of the Convention, why should anything less than national protection be the basis to refuse access to the protection of refugee status? If UN protection is thought a sufficient basis to withhold refugee protection, why would access to the protection of the very agency with a mandate to protect refugees – the UNHCR – be explicitly deemed not a basis for exclusion from refugee status? If the goal is to identify persons not in need of surrogate protection, why is status to be withheld on the basis of access to "protection *or assistance*"? Why would the General Assembly have a role in bringing this exclusion to an end?

Many of these questions can be answered by consideration of the clause's object and purpose. Art. 1(D) was included in the Convention to be a narrowly bounded response to

has been identified. As such, the "firm resettlement" bar to *asylum* means that some refugees to whom the United States owes protection obligations will not in fact receive those protections, even if granted withholding of removal.

[304] See *supra* Chs. 1.3, 4.1. [305] Refugee Convention, at Art. 1(D).

[306] Refugee Review Tribunal of Australia, *Refugee Law in Australia*, *supra* n. 19, at 7–15.

a very particular historical concern.[307] While the language of Art. 1(D) is admittedly more vague than would have been optimal, the phrase "who are at present receiving [protection or assistance] from organs or agencies of the United Nations"[308] is, as leading courts have affirmed,[309] intended to secure one specific objective: exclusion of the Palestinians who became refugees upon the establishment of Israel.[310] Because the United Nations Relief and Works Agency for Palestine Refugees in the Near East ("UNRWA")[311] and the United Nations Conciliation Commission for Palestine ("UNCCP")[312] were the only UN bodies other than the UNHCR entrusted with protecting and assisting refugees at the time of the Convention's adoption in 1951, the framing of Art. 1(D) achieved this limited goal in a politically neutral, if nonetheless awkwardly framed, way.

This understanding of Art. 1(D) as directed solely to the exclusion of the Palestinian refugee population[313] is clear from its drafting history.[314] The primary justification for

[307] *El Kott, Radi, and Ismail v. Hungary*, C-364/11 (CJEU, Dec. 19, 2012), at [47].

[308] "The softer terminology used by the French version ['*organisme*,' rather than '*organe*'] arguably attests to the fact that the terms did not intend to give effect to a technical meaning and, more so, their broad meaning shows that the intention was to include all types of UN actors and mechanisms": M. Qafisheh and V. Azarov, "Article 1D," in Zimmermann, *supra* n. 256, 537, at 556 [43].

[309] See *infra*, at nn. 314, 332.

[310] This interpretation is not self-evident from the text read literally. Indeed, the UNHCR's *Handbook* suggests that Art. 1(D) might also apply to persons who in 1951 were in receipt of assistance from the United Nations Korean Reconstruction Agency ("UNKRA"): UNHCR, *Handbook*, *supra* n. 3, at [142]. This reference has, however, been deleted from the agency's more recent position on Art. 1(D): UNHCR, "Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees" (Oct. 2009) ("Article 1D"). Exclusion of this group based on a literal construction of Art. 1(D) would, however, be of little practical impact since North Koreans are generally entitled to citizenship in the Republic of Korea and hence would be unable to establish a relevant well-founded fear of being persecuted in relation to each country of actual or inchoate nationality: Republic of Korea, Law No. 16, Nationality Act (Dec. 20, 1948); see *Dyli v. Secretary of State for the Home Department*, [2000] Imm AR 652 (UKIAT, Aug. 30, 2000), at [45].

[311] UNRWA was established by resolution of the General Assembly: "Assistance to Palestinian Refugees," UNGA Res. 302 (IV), UN Doc. A/RES/302 (IV) (Dec. 8, 1949). Its territorial competence extends to Jordan, Syria, Lebanon, and the Gaza Strip. It was established to meet the needs of Palestinians "who lost both home and means of livelihood as a result of the 1948 conflict" at the creation of the state of Israel, and its competence was extended "as a temporary measure" to other Palestinians displaced by the 1967 Israeli–Arab conflict and subsequent hostilities: UNRWA, "Consolidated Eligibility and Registration Instructions" (2009), at 3–4, 7; "Humanitarian Assistance," UNGA Res. 2252 (ES-V), UN Doc. A/RES/2252 (ES-V) (Jul. 4, 1967), at [6].

[312] UNCCP was established in 1948 to promote reconciliation in the region, including to "facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees": "Palestine – Progress Report of the United Nations Mediator," UNGA Res. 194 (III), UN Doc. A/RES/194 (III) (Dec. 11, 1948), at [11]. The analysis in Hathaway, *Refugee Status*, failed to acknowledge the role of UNCCP, an omission helpfully corrected by the judgment of the Full Federal Court of Australia in *Minister for Immigration and Multicultural Affairs v. WABQ*, (2002) 121 FCR 251 (Aus. FFC, Nov. 8, 2002), and noted by BADIL Resource Center, *Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention* (2005) ("*Palestinian Refugees*"), at 46. See also *El Kott* (CJEU, 2012), at [6]–[7].

[313] The UNHCR's position on this issue is confusing. Whereas the *Handbook* suggests that "[t]here could be other similar situations in the future" (UNHCR, *Handbook*, *supra* n. 3, at [142]), the agency's most recent discussion of Art. 1(D) contains no such reference and restricts itself to discussion of the exclusion of Palestinians: UNHCR, "Article 1D," *supra* n. 310.

[314] "Though there is some suggestion in the literature to the contrary I think it is entirely plain, from the *travaux* and the Convention's historical setting, that Art. 1(D) is concerned only with Palestinian Arabs . . . [T]he Article's scope does not in my judgment extend to any other groups": *El-Ali v. Secretary*

differentiating Palestinian refugees from all other refugees[315] was the strongly held view of Arab states that because the plight of Palestinian refugees was the consequence of the establishment of Israel by the United Nations itself, the UN should bear a more direct and obvious responsibility for their well-being:[316]

> [T]he Palestine 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.[317]

5 The Arab states therefore resisted any move that might decrease the distinct visibility of the Palestinians' predicament:

> If the General Assembly were to include the Palestine refugees in a general definition of refugees, they would become submerged and would be relegated to a position of minor importance.[318]

Closely allied to this concern, there was awareness that access to Convention refugee status would facilitate mobility for Palestinian refugees, thus potentially creating a diaspora and undermining the political will to effect their repatriation:[319]

of State for the Home Department, [2003] 1 WLR 95 (Eng. CA, Jul. 26, 2002), at [22]. *Accord WABQ* (Aus. FFC, 2002).

315 One common misunderstanding regarding the purpose of Art. 1(D) is that this exclusion clause exists in order to ensure that there is no institutional conflict between the work of the UNHCR and that of other UN agencies ministering to refugee populations: see e.g. UNHCR, "Article 1D," *supra* n. 310, at [2]; Qafisheh and Azarov, *supra* n. 308, at 542 [1], 550 [24], 556 [45], 569 [80]. It is true that Art. 1(D) took as its template Art. 7(d) of the simultaneously drafted UNHCR Statute, a key purpose of which was to avoid overlapping institutional competence between the UNHCR and these other specialized entities: see e.g. Statement of Mrs. Roosevelt of the United States, 5 UNGAOR 363 (Nov. 29, 1950); S. Aga Khan, "Legal Problems Relating to Refugees and Displaced Persons," (1976) 149 *Recueil des cours* 287, at 299. Yet this functionalist explanation for including Art. 1(D) in the Refugee Convention can surely be no more than incidental since even if the prospect of an institutional conflict were thought real, this would be grounds only to exclude the Palestinians from the UNHCR's competence, not from the scope of the refugee definition binding states under the Convention. In any event, in the view of the French drafter there was no such institutional conflict as "[t]he United Nations assistance to Arab refugees was material assistance and could not be compared with the legal protection of the High Commissioner": Statement of Mr. Rochefort of France, 5 UNGAOR 391 (Dec. 4, 1950).

316 This historical analysis in Hathaway, *Refugee Status*, at 204–7 was drawn upon in the key English decision of *El-Ali* (Eng. CA, 2002), at [15].

317 Statement of Mr. Azkoul of Lebanon, 5 UNGAOR 358 (Nov. 27, 1950).

318 Statement of Mr. Baroody of Saudi Arabia, 5 UNGAOR 359 (Nov. 27, 1950). *Accord* Statement of Mr. Azmi Bey of Egypt, 5 UNGAOR 358 (Nov. 27, 1950).

319 The consistent focus on the goal of repatriation is clear. "[I]t should be noted . . . that the present situation of [Palestinian] refugees was a temporary one, and that the relevant resolutions of the General Assembly provided that they should return to their homes": Statement of Mr. Mostafa Bey of Egypt, UN Doc. A/CONF.2/SR.19 (Jul. 13, 1951), at 16.

> The Arab States desired that those refugees should be aided pending their repatriation, repatriation being the only real solution of their problem. To accept a general definition . . . would be to renounce insistence on repatriation.[320]

While the main proponents of the exclusion of the Palestinians were thus the Arab states determined not to undermine the broader political project of the return of Palestinians to their homeland,[321] that imperative coincided with a determination by some Western delegates to avert the prospect of claims to refugee status by Palestinians. The French representative, for example, "considered that the problems in their case were completely different from those of the refugees in Europe, and could not see how Contracting States could bind themselves by a text under the terms of which their obligations would be extended to include a new, large group of refugees."[322] Indeed, the American representative warned that the inclusion of Palestinians "would present Contracting States with an undefined problem, and so reduce the number of States in Europe that would find it possible to sign the Convention."[323]

Reflecting both the Arab and European concerns, delegates were presented with a draft providing for the exclusion from the Convention definition of "persons who are at present receiving from other organs or agencies of the United Nations protection or assistance."[324] As observed by the English Court of Appeal,

> [i]t is not hard to see that this uneasy and ironic conformity between the stance of the Arab States and the anxieties of the Europeans drove toward a disposition . . . of the plight and the claims of the Palestinian refugees which would be quite different from the notion of protection in any of the Signatory States obliged to harbour a refugee who fled to its borders.[325]

Art. 1(D) does, however, provide a critical residual remedy for Palestinian refugees. Realizing that what is now the first paragraph of this clause would leave displaced Palestinians completely adrift if the specialized agencies established for their benefit were to cease operations before the refugees were repatriated,[326] the Arab states secured the Palestinians'

[320] Statement of Mr. Baroody of Saudi Arabia, 5 UNGAOR 359 (Nov. 27, 1950). *Accord* Statement of Mr. Azmi Bey of Egypt, 5 UNGAOR 358 (Nov. 27, 1950).

[321] "The French representative had rightly recalled that the Arab refugees from Palestine had been excluded from the mandate of the High Commissioner for Refugees as a result of the action taken by the delegations of the Arab States at the fifth session of the General Assembly": Statement of Mr. Mostafa Bey of Egypt, UN Doc. A/CONF.2/SR.20 (Jul. 13, 1951), at 8.

[322] Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.19 (Jul. 13, 1951), at 11.

[323] Statement of Mr. Warren of the United States, UN Doc. A/CONF.2/SR.19 (Jul. 13, 1951), at 23. The contrary position of the United Kingdom is noteworthy: "Even if such an influx into Europe did occur, was it conceivable that European countries which had hitherto given refugees certain minimum rights would, even in the absence of a Convention, give the new arrivals less?": Statement of Mr. Hoare of the United Kingdom, at 19.

[324] UN Doc. A/1751 (Dec. 19, 1950).

[325] *El-Ali* (Eng. CA, 2002), at [16].

[326] "It was only right and proper that, as soon as the Palestine problem had been settled and the refugees no longer enjoyed United Nations assistance and protection, they should be entitled to the benefits of the Convention": Statement of Mr. Mostafa Bey of Egypt, UN Doc. A/CONF.2/SR.20 (Jul. 13, 1951), at 9. "It was obvious that, if the Egyptian amendment was rejected, the refugees it was designed to protect might eventually find themselves deprived of any status whatsoever": Statement of Mr. Al Pachachi of Iraq, UN Doc. A/CONF.2/SR.29 (Jul. 19, 1951), at 8.

automatic "deferred inclusion"[327] as Convention refugees at such time as specialized operations in Palestine might come to an end. The Egyptian representative who proposed what became the second paragraph of Art. 1(D) was clear that

> [t]he object of the Egyptian amendment was to make sure that Arab refugees from Palestine who were still refugees when the organs or agencies of the United Nations at present providing them with protection or assistance ceased to function, would *automatically* come within the scope of the Convention.[328]

In sum, it was the shared intention of Arab and Western states to deny Palestinians access to the Convention-based regime so long as the United Nations continued to assist them in their own region, thereby keeping the prospect of repatriation alive. But with an eye to the need to protect the Palestinians until and unless such a fundamental resolution was achieved, the Arab states secured unconditional access for Palestinian refugees to the benefits set by the Refugee Convention should the specialized UN engagement on their behalf ever be terminated.[329]

Despite general agreement that Art. 1(D) exclusion is directed only to Palestinian refugees, contemporary jurisprudence suggests that significant differences remain with regard to three main issues. First, exactly which Palestinians are the "persons who are *at present* receiving" UN protection or assistance and hence excluded by Art. 1(D)? Second, can specific members of the presumptively excluded class of Palestinians somehow be liberated from exclusion if, in particular, they have not personally claimed or received UN protection or assistance, or if they depart the region in which such assistance is on offer? And third, if the agency protection or assistance ends without the General Assembly having resolved the underlying situation, what does it mean to say that those previously excluded "shall *ipso facto* be entitled to the benefits of this Convention"?

"At present receiving . . . protection or assistance"

Given that only Palestinians are to be excluded under this clause,[330] exactly which Palestinians are the "persons who are *at present* receiving" UN protection or assistance, and hence excluded by Art. 1(D)? While there is judicial support both for a historically bounded ("at present" means the date on which the Convention was adopted)[331] and a continuative ("at present" means at the present moment, that is, when refugee status is being assessed)[332] interpretation of this phrase, the context of Art. 1(D) argues strongly for the historically bounded

[327] Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.3 (Jul. 3, 1951), at 10.

[328] Statement of Mr. Mostafa Bey of Egypt, UN Doc. A/CONF.2/SR.29 (Jul. 19, 1951), at 6 (emphasis added), referring to his amendment, UN Doc. A/CONF.2/13. *Accord* Grahl-Madsen, *supra* n. 7, at 262–65.

[329] While not specifically alluded to in the drafting history, it is clear that the second paragraph also serves an important political purpose. Because the consequence of disestablishing UNRWA would be to enable all Palestinian refugees to enjoy protection in the state party of their choice, Art. 1(D) plays a pragmatic role in ensuring continued support for the agency.

[330] See text *supra*, at nn. 313–25.

[331] See e.g. *El-Ali* (Eng. CA, 2002), at [28]–[50].

[332] See e.g. *Bolbol v. Hungary*, C-31/09, [2010] ECR I-05572 (CJEU, Jun. 17, 2010), at [50]–[51]; affirmed in *El Kott* (CJEU, 2012), holding that the phrase "at present receiving" protection or assistance does not limit the excluded class to those Palestinians eligible for UN protection or assistance when the Convention was adopted on July 28, 1951. Rather, in the view of the Court of Justice of the European Union, all Palestinians (including those not even alive on July 28, 1951) are potentially excluded by the provision.

interpretation, meaning that it applies only to Palestinians eligible for UN protection or assistance on the date of the Convention's adoption, July 28, 1951.

First, this conclusion follows from comparison with the simultaneously drafted Statute of the UNHCR. The cognate clause of the UNHCR Statute excludes any person "[w]ho continues to receive"[333] relevant UN protection or assistance, thus arguably mandating exclusion under a continuative interpretation. But the drafters rejected this language for Art. 1(D) of the Convention, opting to exclude only those who "at present" received UN protection or assistance. The decision to reject the "[w]ho continues to receive" language thus argues strongly against the continuative (when refugee status is claimed or assessed) view. Indeed, had the continuative meaning been intended, no qualifier would have been required at all: it would have sufficed (and been much more straightforward) to have excluded simply "persons who receive" protection or assistance.[334]

Second, the continuative interpretation has been found to be at odds with the truly extraordinary strength of the residual remedy set by the second paragraph – *ipso facto*, that is, automatic, entitlement to all Convention rights in the event of the ending of UN agency protection *in situ*.[335] As the English Court of Appeal determined, such a robust and unconditional guarantee would not likely have been made to other than a narrowly defined class of known size.[336]

Third, a continuative interpretation is difficult to square with the historical goals of the clause. As observed by Lord Phillips in the English Court of Appeal, the drafters

> believed that they were dealing with a short-term situation that would reasonably soon be resolved. They did not anticipate that, half a century later, there would be second or third generations of Palestinian Arabs, living outside the territories from which their parents or grandparents had been displaced, and enjoying the assistance of UNRWA . . .
>
> . . . I do not accept . . . that, had the parties to the Convention envisaged what was to come, they would have agreed that the regime provided for by Article 1(D) would apply

[333] UNHCR Statute, *supra* n. 147, at Art. 7(c).

[334] "[P]aragraph [D] [is intended] to exclude persons who were defined as those who at the time when the convention came into force were receiving protection or assistance from United Nations organs or agencies": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.29 (Jul. 19, 1951), at 20. *Accord* Commission of the Churches on International Affairs, UN Doc. A/CONF.2/NGO/10 (Jul. 6, 1951), at 1; Grahl-Madsen, *supra* n. 7, at 264. Yet treating the question as one of first impression and adopting a largely literal approach, the Court of Justice of the European Union reached the conclusion that "at present" does not refer to the original group of Palestinians known to the drafters, and that based on the "amendment" of the Convention by the Protocol it cannot be ruled out that persons displaced as the result of the 1967 conflict are also excluded by Art. 1(D): *Bolbol* (CJEU, 2010), at [46]–[48]. The court referred to none of the national appellate decisions that has adumbrated the meaning of Art. 1(D), and determined that the UNHCR's work on Art. 1(D) "fails to provide sufficiently clear and unequivocal guidance": at [34].

[335] This residual clause is discussed in detail at text *infra*, at nn. 353–68.

[336] *El-Ali* (Eng. CA, 2002), at [50]. Indeed, the unlikelihood of this reasoning makes clear why not even the direct descendants of the historical group should be excluded. The UNHCR nonetheless argues that the descendants of the Palestinians displaced in 1948 are also excluded: UNHCR, "Article 1D," *supra* n. 310, at [4]. Indeed, the UNHCR goes farther, advocating the view that the clause also excludes those who became refugees as the result of the "1967 Arab–Israeli conflict": at [1]–[4]. But in rejecting this view, the English Court of Appeal sensibly observed that under such an interpretation, the phrase "no longer means what it says; it includes also persons who later receive such assistance": *El-Ali* (Eng. CA, 2002), at [33].

> indefinitely to all displaced or stateless Palestinian Arabs who might find themselves receiving assistance from UNRWA.[337]

Indeed, these remarks suggest an important fourth reason to adopt the historically bounded interpretation of the words "at present receiving," that being that this approach ensures that Art. 1(D) is a minimally intrusive deviation from the norm of providing protection without reference to ethnicity or place of origin.[338] It results in an understanding of Art. 1(D) that excludes only a clearly circumscribed class, the size of which diminishes each year and will cease to exist in the medium term. The ultimate demise of Art. 1(D) exclusion is, in our view, a result that is not only legally correct, but also deeply principled, as it will restore Palestinians to the position of all other groups who are entitled to protection as refugees so long as they meet the requirements of the refugee definition.

Particularized exceptions to Art. 1(D) exclusion?

Those who believe that Art. 1(D) presumptively excludes even Palestinians not alive in 1951 – contrary to the view we advance above – often seek to soften an otherwise harsh result by particularizing their inquiry.[339] It is thus often suggested that Art. 1(D) does not apply to Palestinians who can show that they did not *personally* seek or receive UN protection or assistance in the region.[340] Alternatively, it is sometimes said that even persons who did seek and receive such protection or assistance may avoid exclusion by showing that the UN protection or assistance "has ceased" *for them personally*, either because there has been a particularized instance in which protection or assistance was lacking,[341] or, more fundamentally, because an individual Palestinian has chosen to leave the area of UN operations.[342] The common thread among all of these approaches is that Art. 1(D) is treated

[337] *El-Ali* (Eng. CA, 2002), at [65]–[66] (per Lord Phillips M.R.).

[338] Adoption of the historically bounded interpretation of "at present" is in line with the duty to interpret this exclusion clause restrictively, since fewer persons able to meet the Convention's usual inclusion criteria will be denied protection. "[G]iven the possible serious consequences of exclusion, it is important to apply [the exclusion clauses] with great caution and only after a full assessment of the individual circumstances of the case. The exclusion clauses should, therefore, always be interpreted in a restrictive manner": UNHCR, *Guidelines on International Protection No. 5*, *supra* n. 279, at [2]. See also *El Kott* (CJEU, 2012), at [47].

[339] Reliance on the word "receiving" to achieve this end is not viable. While rejecting the view that "receiving" means "entitled to receive," the Full Federal Court of Australia nonetheless made clear that "[o]nce it is accepted that it is a class of persons which is being considered, where not every member of the class will actually be receiving either assistance or protection, the difference between the two views is not really significant": *WABQ* (Aus. FFC, 2002), at 267–68 [69(3)].

[340] The Court of Justice of the European Union softened the blow of its decision that all Palestinians – whether alive in 1951 or not – were potentially subject to Art. 1(D) exclusion by finding that despite presumptive exclusion of the class of Palestinian refugees, only those Palestinians who have actually claimed UN agency protection or assistance are excluded. "It followed from the clear wording of Article 1(D) of the [Refugee] Convention that only those persons who have actually availed themselves of the assistance provided by UNRWA come within the clause excluding refugee status . . . [Art. 1(D) must] be construed narrowly and cannot therefore also cover persons who are or have been eligible to receive protection or assistance from that agency": *Bolbol* (CJEU, 2010), at [51].

[341] The Court of Justice of the European Union determined that even those who have claimed UN agency protection or assistance will not be excluded if their protection needs are not being met in fact: *El Kott* (CJEU, 2012), at [56]–[65].

[342] This understanding has been adopted by the Court of Justice of the European Union: *Bolbol* (CJEU, 2010), at [51]; *El Kott* (CJEU, 2012), at [52].

not as an exclusion provision aimed at a class of persons, but rather as an exclusion clause that can be averted by personal decision or circumstances.

In our view, such a particularized approach runs roughshod over the object and purpose of Art. 1(D), its clear text, and a contextually informed understanding of the clause.

First and most fundamentally, the notion that an individual Palestinian might avoid Art. 1(D) by deciding to decline an offer of UN protection or assistance is at odds with the purposes of the exclusion clause. Both the Arab states' goal of avoiding a diaspora that would threaten the cause of Palestinian self-determination and the desire of Europeans to avoid the onward migration of Palestinians towards Europe[343] would be frustrated if a given Palestinian could simply choose not to be part of the excluded class. More generally, there is no basis to assert that the decision to define the excluded class by reference to receipt of UN protection or assistance was intended to operate as some sort of implied penalty that would deprive an individual of the ability to seek asylum. To the contrary, the drafting history recounted above supports the view that the phrase "persons . . . receiving . . . [UN] protection or assistance" was a neutrally framed means of excluding the Palestinians – the only such group in receipt of relevant protection or assistance in 1951. The English Court of Appeal was thus surely right to have concluded that the drafters "did not intend that Article 1D would apply piecemeal and haphazardly, its scope marked off by reference to the persons who at any given moment were or were not within the UNRWA territories receiving assistance."[344]

Second, the comprehensive, class-based nature of Art. 1(D) exclusion is clear also from its text. As observed by the Australian Full Federal Court, Art. 1(D)

> [i]s looking at a class of persons . . . 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 . . .
>
> [L]ike the first paragraph, the second paragraph is concerned not with individuals, but with the class of individuals. This is important because a construction which required the question of cessation of protection or assistance to be tested on an individual to individual basis would permit the argument to be made that the benefits of the Convention would become available to an individual once that individual moved from the area of operations of the relevant United Nations agency. In my view that argument cannot be made.[345]

Indeed, whereas every other part of the refugee definition – including its core inclusion content,[346] the cessation clauses,[347] and even the other exclusion clauses[348] – speaks in individuated terms, all parts of Art. 1(D) are framed in collective terms: the Convention shall not apply "to persons" unless there is a definitive resolution of the situation of "such persons," failing which "these persons" receive Convention benefits. Given this clearly unusual use of collective language in Art. 1(D), it would be unreasonable to read that language away in order to ascribe an individuated optic to Art. 1(D).

Third, there is contextual evidence that this choice of clearly unusual, collectively framed language for Art. 1(D) was quite intentional. Significantly, the relevant part of the simultaneously drafted Statute of the UNHCR excludes only "a person" who continues to receive from

[343] See text *supra*, at nn. 313–25. [344] *El-Ali* (Eng. CA, 2002), at [47].
[345] *WABQ* (Aus. FFC, 2002), at 267 [69(1)], 269 [69(5)]. [346] Refugee Convention, at Art. 1(A)(2).
[347] *Ibid.*, at Art. 1(C). [348] *Ibid.*, at Arts. 1(E) and 1(F).

other organs or agencies of the United Nations protection or assistance.[349] Yet when the General Assembly reviewed a draft of the Convention that contained the individuated language drawn from the UNHCR Statute, it opted specifically to delete the individuated framing in favor of the collective terminology now found in Art. 1(D) – "*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 [emphasis added]." Thus while the UNHCR mandate includes "a person" who no longer "continues to receive" regional UN protection or assistance because she has chosen to leave the region, the Convention's express rejection of this language makes clear that the refugee definition that binds states does not.[350]

For all these reasons, Art. 1(D) should be understood to exclude a class of persons – not simply those Palestinians who, perhaps unwittingly or cunningly, failed to seek the UN protection or assistance on offer in their own region. The collectively framed language and context of the clause do not provide any license to argue that individuated decisions or circumstances are relevant to defining the scope of that excluded class, including in particular an individual's decision simply to leave the relevant area of operation.[351] To the contrary, Art. 1(D) exists to ensure that the needs of Palestinian refugees as at July 28, 1951 are addressed *in situ* until and unless a true political solution is brokered that provides them with a secure homeland.[352]

Ipso facto *residual entitlement*

As noted above,[353] the collective focus of Art. 1(D) is clear in part from its second paragraph, which provides that if UN protection or assistance ends "without the position of

[349] UNHCR Statute, *supra* n. 147, at Art. 7(c).

[350] "It would be noted that, whereas in paragraph [D] of article 1 of the draft Convention reference was made to 'persons who are at present receiving . . . protection or assistance,' the parallel clause in the Statute of his Office referred to refugees 'who continue to receive . . .'. That difference in wording implied a difference in consequences": Statement of Mr. van Heuven Goedhart, High Commissioner for Refugees, UN Doc. A/CONF.2/SR.21 (Jul. 14, 1951), at 12.

[351] In reaching this conclusion, the English Court of Appeal pointedly observed that "subject only to any practical constraints upon his ability to travel from place to place, [the alternative] interpretation would put the applicability of the 1(D) regime entirely at the choice of the individual Palestinian": *El-Ali* (Eng. CA, 2002), at [44]. The court "recognise[d]" but did not adopt a "limited alternative view" that would deem protection or assistance to have ceased in the case of the individual actually being prevented from returning to the UNRWA area of operation: at [48]. The Australian Full Federal Court has also taken the view that "it is highly unlikely that the delegates . . . would have accepted the view that a Palestinian could bring himself or herself within the Convention simply by leaving the area of operation of UNRWA": *WABQ* (Aus. FFC, 2002), at 269 [69(5)].

[352] This analysis in Hathaway, *Refugee Status*, at 208, was adopted in *Al-Khateeb v. Minister for Immigration and Multicultural Affairs*, (2002) 116 FCR 261 (Aus. FC, Jan. 11, 2002), at 267 [23]; *Abou-Loughod v. Minister for Immigration and Multicultural Affairs*, [2001] FCA 825 (Aus. FC, Jun. 26, 2001), at [13]; and in *Sahtout v. Minister for Immigration and Multicultural Affairs*, [2002] FCA 114 (Aus. FFC, Feb. 20, 2002), at [32]. But in *Minister for Immigration and Multicultural Affairs v. Quiader*, [2001] FCA 1458 (Aus. FC, Oct. 16, 2001) it was determined that despite the general salience of this understanding, Art. 1(D) is not a bar to recognition of refugee status in the case of a person entitled to UNRWA assistance but who faces a relevant fear of being persecuted in his place of habitual residence. *Accord* UNHCR, *Handbook*, *supra* n. 3, at [143]; UNHCR, "Article 1D," *supra* n. 310, at [7]–[8]; *1 C 42.88* (Ger. BverwG [German Federal Administrative Court], Jun. 4, 1991), reported at (1992) 4 Intl. J. Ref. L. 386; *Assfour v. France, 493412* (Fr. CNDA [French National Court of Asylum], May 14, 2008).

[353] See text *supra*, at nn. 335–36.

such persons being definitively settled in accordance with the relevant resolutions . . . of the United Nations"[354] then those excluded "shall *ipso facto* be entitled to the benefits of this Convention." This is clearly a commitment that if no solution exists when the UN in-region response ends, members of the group excluded by Art. 1(D) may automatically claim in any state party the protections due refugees under Arts. 2–34 of the Convention.[355]

Perhaps because of the clear link between the strong residual clause and a collective and historically bounded understanding of the excluded class,[356] a straightforward understanding of the "*ipso facto*" residual clause has been resisted by many who have advocated a continuative and/or individuated approach to Art. 1(D). Arguments have been variously advanced that persons seeking to benefit from the "*ipso facto*" residual clause must still meet the usual inclusion criteria of the refugee definition;[357] that they must at the very least not fall afoul of the Convention's cessation or exclusion clauses;[358] or that they are not really entitled

[354] All such UN resolutions are, of course, also directed to collective concerns. "The 'relevant UN resolutions' include primarily . . . GA Res. 194(III). Resolution 194 has been reaffirmed by the [General Assembly] almost yearly since 1948 and the UN has never wavered from its terms. Resolution 194 envisages a *comprehensive settlement* of Palestinians as a people": Qafisheh and Azarov, *supra* n. 308, at 564 [67] (emphasis in original).

[355] "The term 'benefits of the 1951 Convention' refers to the standard of treatment that States Parties to the 1951 Convention are required to accord to refugees under Articles 2 to 34 of the Convention": UNHCR, "Article 1D," *supra* n. 310, at [9(a)]. Inexplicably, the Australian Full Federal Court adopted a highly selective interpretation, opining that "[t]he benefits of the Convention are those benefits, such as the non-expulsion provisions of Art 32 and the *non-refoulement* provisions of Art 33. But those benefits are available only to those persons who are refugees. They are not available to anyone else": *WABQ* (Aus. FFC, 2002), at 270 [69(6)]. Yet Art. 1(D) does not provide that there shall be *ipso facto* entitlement only to such refugee rights as are uniquely applicable to refugees, but rather to "the benefits of this Convention," which clearly include some rights with resonance to non-refugees as well. *See also* Qafisheh and Azarov, *supra* n. 308, at 568 [76], affirming that the term "benefits of the 1951 Convention" embraces all rights set by Chapters II–IV of the Convention.

[356] As a senior court considering this clause observed, "[s]o great a parcel of rights would not likely be conferred, I think, unless the class of its recipients were clear and certain, and this is given by the interpretations I favour both of 'at present' [the group existing when the Convention was adopted] and 'such protection or assistance has ceased for any reason' [the ending of UNRWA activities]. At the end, each of these interpretations is in constellation with the others": *El-Ali* (Eng. CA, 2002), at [50].

[357] Even as it acknowledged the plausibility of the view that "the words '*ipso facto*' in the second paragraph of Article 1(D) suggest that no new screening is required for the persons concerned to become entitled to the benefits of the Convention," the Full Federal Court of Australia noted the propensity of many judicial decisions to read the clause as implying "that each person's claim to refugeehood is to be tried in accordance with the provisions of Article 1(A)(2)": *Sahtout* (Aus. FFC, 2002), [40]–[41]. The latter approach was endorsed by two judges of a differently constituted Full Court, who argued in *obiter* that the *ipso facto* clause merely entitled a Palestinian to have his refugee claim assessed in relation to the criteria of Art. 1(A)(2): *WABQ* (Aus. FFC, 2002), at 270 [69(6)] (per Hill J.), 297 [172] (per Tamberlin J.). In contrast, the Court of Justice of the European Union has recently rejected this view, finding that it "would be superfluous and ineffective if its only purpose was to point out that the persons who are no longer excluded from refugee status by virtue of the first sentence of that provision may rely on the directive to ensure that their application for refugee status will be considered": *El Kott* (CJEU, 2012), at [73]. This is consistent with the UNHCR view that "[i]n the case of persons falling within paragraph 2 of Article 1D, no separate determination of well-founded fear under Article 1(A)(2) of the 1951 Convention is required to establish that such persons are entitled to the benefits of the Convention": UNHCR, "Article 1D," *supra* n. 310, at [9(b)].

[358] The Court of Justice of the European Union determined that if a given Palestinian is liberated from exclusion (because she did not actually claim protection or assistance, or because the UN agency has failed to deliver that protection or assistance in fact) she may still be denied Convention protection if a

to the rights of refugees, but only to some amorphous variant of international assistance.[359] But none of these interpretations can be reconciled to the very clear and emphatic language of the second paragraph of Art. 1(D), which employs the unconditional "*ipso facto*" language to define how residual access to the benefits of the Refugee Convention is to be conceived.[360] As found by the English Court of Appeal,

> [t]he phrase "*ipso facto*" in the English text is mirrored in the French by "de plein droit," and it is suggested that this points even more strongly than does the Latinism to an intention, once the second sentence bites, to confer on all its beneficiaries the substantive rights which the Convention guarantees automatically, with nothing else to be established . . .
>
> There is nothing in the context or the surrounding circumstances that makes it necessary to give the phrase . . . other than its normal meaning. Article 1D was designed to deal with those who might otherwise be entitled to the benefits of the Convention. Under the first sentence these persons were to be deprived of those benefits for so long as the United Nations was providing protection or assistance. I can see nothing irrational, or contrary to the object of the Convention in general and article 1D in particular, in . . . agreeing that the defined category of the displaced Palestinian Arabs who were, at the time, receiving assistance from UNRWA should be treated as refugees should that assistance be withdrawn before they were resettled.[361]

cessation or exclusion clause applies in her case: *El Kott* (CJEU, 2012), at [64], [76]–[77]. The UNHCR has taken a similar view. "It should normally be sufficient to establish that the circumstances which originally made him qualify for protection or assistance from UNRWA still persist and that he has neither ceased to be a refugee under one of the cessation clauses nor is excluded from the application of the Convention under one of the exclusion clauses": UNHCR, *Handbook*, *supra* n. 3, at [143]. See also UNHCR, "Article 1D," *supra* n. 310, at [4] ("On the other hand, persons falling within Articles 1C, 1E or 1F of the 1951 Convention do not fall within the scope of Article 1D").

359 "'Automatic entitlement' does *not* mean that the individual Palestinian refugee arriving in a Contracting State is thereupon entitled to asylum and residence; it does mean, however, that he or she should be treated as a refugee, and that the State is required to seek an appropriate solution in light of that status, and in cooperation with UNHCR and UNRWA": Goodwin-Gill and McAdam, *supra* n. 20, at 159 (footnote omitted). It is unclear what being "treated as a refugee" entails if not respect for the rights of refugees under the Refugee Convention; much less is it clear what would amount to "an appropriate solution" that presumably falls short of respect for such rights. No support is provided for this argument. In contrast, the Court of Justice of the European Union has determined that "[t]he words 'shall *ipso facto* be entitled to the benefits [of the Convention]' must be interpreted . . . as permitting the persons concerned to benefit 'as of right' from the regime of the [C]onvention and the 'benefits' conferred by it": *El Kott* (CJEU, 2012), at [71].

360 After reviewing five distinct approaches to the "ipso facto" clause, a recent commentary concludes that "[a]lthough the most common interpretation is that *de facto* refugees should be eligible for consideration under the general definition . . . and required to meet the nexus requirements of a 'well-founded fear,' this is not the correct interpretation of Art. 1(D) read in the light of its history and protection purpose. The plain meaning of the terms 'ipso facto' holds that no other criteria need to be used for assessing the situation – they are by the fact of that precondition alone *de jure* refugees under the 1951 Convention, and should thereby be entitled to refugee status in any State party to the 1951 Convention": Qafisheh and Azarov, *supra* n. 308, at 567–58 [75] (footnotes omitted).

361 *El-Ali* (Eng. CA, 2002), at [49] (per Laws L.J., May L.J. agreeing), [74] (per Lord Phillips M.R.). See also *1 C 42.88* (Ger. BverwG [German Federal Administrative Court], Jun. 4, 1991), reported at (1992) 4 Intl. J. Ref. L. 386, determining that Palestinians are not required to meet the usual inclusion criteria of Art. 1(A)(2).

Indeed, any less definitive construction would fail to honor the historical compromise under which the Arab states seeking to further the interests of the Palestinian refugees insisted that there should be automatic, unconditional access to refugee protection abroad should the regional UN regime end before a definitive solution was secured.[362]

Access to this residual remedy is based on a determination that "such protection or assistance has ceased for any reason," a formulation that clearly recalls the original reason for exclusion under Art. 1(D), that being that the persons concerned were "receiving . . . protection or assistance" when the Convention came into force.[363] While, as explained above, the focus is on institutional presence and capacity rather than on particularized access to protection or assistance,[364] the question remains: for purposes of triggering the residual clause, is it enough if only one of "protection" or "assistance" is on offer for the group to be excluded? Or must there be neither protection nor assistance available to the excluded group?

The Full Federal Court of Australia determined in one case that because UNCCP has effectively ceased to exist, and because only it (and not the still extant UNRWA) provided "protection,"[365] a reading of this clause as positing "true alternatives" compels the conclusion that because one of the two functions is no longer on offer, the residual remedy described in the second paragraph of Art. 1(D) is now available.[366] In truth, UNRWA may fairly be understood presently to provide both assistance and protection,[367] meaning that even on the "true alternatives" reading of the triggering clause, exclusion of the historically bounded

[362] See text *supra*, at nn. 326–28.

[363] Interpretation of the first clause is of little practical import if one accepts the historically bounded interpretation described above (since it is generally agreed that at least in 1951 the Palestinians received "protection" from UNCCP and "assistance" from UNRWA). But if this contextually based interpretation is rejected, it is possible to read Art. 1(D) as having ongoing and generic relevance, a view contrary to the broadly based agreement that it is of relevance only to Palestinian refugees.

[364] See text *supra*, at nn. 343–50.

[365] "By the early 1950s the UNCCP had reached the conclusion that it was unable to fulfill its mandate. Since this period, the UNCCP has not provided Palestinians with the basic international protection accorded to other refugees. Today the UNCCP still exists in name and produces an annual one-page report on its activities": Refugee Review Tribunal of Australia, *Refugee Law in Australia*, *supra* n. 19, at 7–16.

[366] *WABQ* (Aus. FFC, 2002), at 268–69. This interpretation may arguably have led the majority of the court into error in its construction of the nature of the "*ipso facto*" access to Convention protection remedy, which it determined as meaning no more than a right to seek to establish a claim based on the usual requirements of Art. 1(A)(2). But see text *supra*, at nn. 356–62.

[367] "Notwithstanding UNRWA's focus on assistance activities, its mandate has included some additional activities, at various times and in various situations when the security and human rights of the Palestine refugees were under particular threat, which may be considered as types of 'protection' in the sense that through these activities the Agency aimed to secure some of the refugees' basic rights . . . [For example, during] [t]he first *intifada* of 1987–1993 . . . UNRWA was requested by the Secretary-General to enhance its 'general assistance' capacity . . . UNRWA then initiated the Refugee Affairs Officers programme (RAO) under which international staff were dispatched to monitor, report, and intervene with the Israeli authorities, on the ground, if possible. During the second *intifada*, UNRWA introduced an Operational Support Officers (OSO) programme to facilitate its emergency activities . . . [T]o the extent it has assisted in the delivery of essential humanitarian aid to the refugees, its activities can be said to qualify as a form of protection. In short, due to overlaps between some forms of assistance and protection, some of UNRWA's general assistance activities may be considered types of protection because they relate to securing the basic rights of the refugees": BADIL Resource Centre, *Palestinian Refugees*, *supra* n. 312, at 51–53. *Accord* Qafisheh and Azarov, *supra* n. 308, at 546 [13]: "The UNRWA has progressively developed its protection role, and considers itself the 'global advocate for the protection and care of Palestine refugees.'"

class of Palestinians remains in force. More fundamentally, though, the reasoning favored by the court would have been more compelling had the condition been framed as "when *either* such protection or assistance" or "when such protection *and* assistance" comes to an end. In our view the more natural meaning of the condition for access to the residual remedy (and of the primary exclusion clause itself) is that so long as either protection *or* assistance is on offer exclusion follows and the *ipso facto* clause is not satisfied.[368]

Relevance of UN protection or assistance to non-Palestinians

The question sometimes arises whether Art. 1(D) is relevant to the exclusion of persons otherwise entitled to refugee status on the basis of access to contemporary forms of protection or assistance from a UN organ or agency other than UNHCR – for example, under the auspices of bodies such as UNMIK (in Kosovo)[369] or UNTAET (in East Timor).[370] In view both of the authentic meaning of "at present receiving" – namely, July 28, 1951[371] – and the unambiguous object and purpose of this exclusion clause – limited to addressing the situation of the Palestinian refugees[372] – such persons are not lawfully excluded under Art. 1(D).[373]

But even if persons able to benefit from modern forms of UN protection are not excluded under Art. 1(D), one can nonetheless imagine particular cases in which a UN or other international agency dependably provides support to a government that enables that state to meet its duty to protect its citizens,[374] thus negating any real chance of being persecuted in that country.[375] So long as there is no foreseeable risk of the UN or other international

[368] Indeed, it has been argued that "[t]he drafting history . . . reveals that the words 'protection' and 'assistance' had not been intended to imply a technical/legal meaning . . . [T]he words 'protection' and 'assistance' are used as synonyms; this can be further understood from the coordinating conjunction 'or' inserted between the two words. The two words together imply 'care,' or 'aid,' or 'support,' or 'protection,' or 'assistance' of the UN": Qafisheh and Azarov, *supra* n. 308, at 558 [52]. Yet it is true that this interpretation has the unfortunate consequence of providing no relief to an excluded person who would be at risk of being persecuted in the area of UNRWA operations (the drafters having presumed, one imagines, that no such risk would exist in an area under UN mandate): *Sahtout* (Aus. FFC, 2002); *El Kott* (CJEU, 2012), at [56]–[61]. This result would be mitigated only where the harm feared is the subject of an independent duty of non-return, e.g. under Art. 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, entered into force Jun. 26, 1987, 1465 UNTS 85.

[369] The United Nations Interim Administration Mission in Kosovo ("UNMIK") was established by UNSC Res. 1244, UN Doc. S/RES/1244 (Jun. 10, 1999) to help ensure conditions for a peaceful and normal life for all inhabitants of Kosovo and advance regional stability in the western Balkans.

[370] The United Nations Transitional Administration in East Timor ("UNTAET"), established by UNSC Res. 1272, UN Doc. S/RES/1272 (Oct. 25, 1999) to assume "overall responsibility for the administration of East Timor and [with power] to exercise all legislative and executive authority, including the administration of justice" (at 2), operated until independence on May 20, 2002.

[371] See text *supra*, at nn. 330–38.

[372] See text *supra*, at nn. 308–12.

[373] "Art 1D 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": *WABQ* (Aus. FFC, 2002), at 267 [69(2)].

[374] "Article 1D has been held not to be exhaustive of all the circumstances in which the role of international agencies is relevant for the purposes of the Convention definition": Macdonald and Toal, *supra* n. 170, at [12.90].

[375] In contrast, the English Court of Appeal reached the deeply disturbing conclusion that even when there was no functioning legal, judicial, policing, or administrative structures in Kosovo, the presence

support being withdrawn, or of the host country opting to dismiss the international agency, it would be appropriate to assess the existence of a well-founded fear of being persecuted taking into account that international support, just as it would be fair to assess risk on the basis that a government demonstrably supported by one or more partner states is in consequence able to afford protection in a dependable way.[376]

But such considerations are unlikely to avert the duty to recognize refugee status in the context of a transitional or other volatile moment, most especially when an international agency replaces rather than merely supports a national government.[377] Recalling that the Refugee Convention mandates only surrogate protection for the duration of risk, the legally appropriate tack in such circumstances is to assess refugee status by reference to the usual standard of whether the applicant is positioned to avail herself of "the protection of that country"[378] – not an agency – and to invoke the Convention's cessation provisions to bring refugee status to an end if and when national protection is once more on offer.[379]

In sum, Art. 1(D) is an exclusion clause of minimal and ever-diminishing relevance. It requires the provisional exclusion of only one group: Palestinians entitled to benefit from UNCCP and/or UNRWA protection or assistance as of the Convention's adoption on July 28, 1951. Neither descendants of this group nor the Palestinians who became entitled to UN protection or assistance subsequent to that date are excluded; their protection needs should be assessed in the usual way, with no reference to Art. 1(D). The exclusion of the historically circumscribed group persists until and unless either the General Assembly adopts a resolution providing for the definitive settlement of the position of these Palestinians or the United Nations ceases to provide protection or assistance to the excluded class of Palestinians. In the former case, the members of the excluded group will enjoy protection (and hence not need refugee status)[380] or will have the ability like all others to seek recognition of refugee status on terms of equality in the face of a relevant risk. In the alternative case of the ceasing of United Nations efforts before a definitive resolution is achieved, the members of the excluded group are entitled automatically and without status assessment to receive protection in line with the requirements of Arts. 2–34 of the Refugee Convention in any state party to which they travel.

of UN agencies there and the UNHCR's (premature) encouragement of repatriation meant "that most Kosovar Albanians could safely be returned and their asylum claims considered in accelerated procedures notwithstanding that the level of protection available to them was insufficient for Convention purposes": *Canaj v. Secretary of State for the Home Department*, [2001] INLR 342 (Eng. CA, May 24, 2001), at [11].

376 This is not the same as suggesting that agency protection is tantamount to the Convention's focus on state protection: see *supra* Ch. 4.1. An unfortunate concession by counsel allowed the English Court of Appeal to assume "that if, as a matter of practical reality, protection is being provided by UNMIK and [the NATO Kosovo Force], then that is capable of constituting protection for purposes of the Convention": *Canaj* (Eng. CA, 2001), at [9]. In the court below, counsel had made the (correct) argument that agency protection is not "protection of that country" as required by the Convention: at [8].

377 But see *Gardi v. Secretary of State for the Home Department*, [2002] 1 WLR 2755 (Eng. CA, May 24, 2002), at 2761 [15], finding that protection sufficient to negate refugee status can exist where there is an "internationally recognised body in control" to which the nominal state has "ceded its protective function."

378 See *supra* Ch. 4.1.

379 The "change of circumstances" cessation clause is analyzed *supra* at sub-chapter 6.1.4.

380 "States expected that the Palestine refugee problem would be resolved on the basis of the principles laid down in UNGA resolution 194 (III), particularly through repatriation and compensation in accordance with paragraph 11, and that protection under the 1951 Convention would ultimately be unnecessary": Goodwin-Gill and McAdam, *supra* n. 20, at 155.

Where the issue is the relevance of UN or other efforts on behalf of persons other than the Palestinians eligible for protection or assistance in 1951, exclusion under Art. 1(D) is not permissible. Such protection activities are instead relevant to the assessment of refugee status only to the extent that they dependably contribute to enabling an applicant's home country to discharge its protection obligations, such that there is no real chance of being persecuted there.