

**Determining Refugee Status Under Directive
2004/83: Comment on *Bolbol* (C-31/09)**

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Determining Refugee Status Under Directive 2004/83: Comment on *Bolbol* (C-31/09)

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Abstract

In Bolbol, the European Court of Justice considered the refusal of the Hungarian authorities to grant refugee status to a stateless Palestinian. Her claim relied on a provision of the Geneva Convention contained in Directive 2004/83 on minimum standards for the qualification and status of third-country nationals as refugees. The ECJ was willing to consider that the minimum standards extended to considering the eligibility of a Palestinian displaced after 1951 as a refugee, but that the individual in question must have actually, not potentially, availed themselves of UN protection or assistance. The Court interpreted a vaguely worded provision of the Geneva Convention in a narrow way, though it rejected the even narrower approaches put forward by some Member States. In this article, the author discusses the balancing act undertaken by the ECJ when considering minimum standards legislation in a dynamic and rapidly evolving domain of EU law-making.

Introduction

The European Court of Justice (ECJ) had two occasions in the first half of 2010 to rule on provisions of EU law relating to Palestine and the Palestinians. In *Brita*,¹ the Court ruled that goods originating from the occupied West Bank are not entitled to enter the European Union under the preferential terms allowed by the EU-Israel Association Agreement. The case discussed here, *Bolbol*,² relates not to goods but to people and the specific situation of displaced Palestinians. The case concerns the extent to which decisions on refugee status are affected by EU law in addition to domestic and international law. As an area in which an evolving body of EU law sits between well-established (though not always fully defined) provisions of international law and domestic interpretations, further complications arise in relation to the unique legal position of displaced Palestinians.

In this article, the author first considers the legal basis and development of the EU-wide provisions on refugees and asylum seekers and the workings of Directive 2004/83.³ The article then examines the dispute between Ms Bolbol and the Hungarian authorities which resulted in the preliminary reference procedure being engaged; the Opinion of the Advocate General; and the reasoning of the ECJ in reaching its decision. This article concludes by considering two aspects arising from the decision: the meaning of art.1D of the Geneva Convention insofar as it concerns displaced Palestinians, and the way in which the Court enforces

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¹ *Brita GmbH v Hauptzollamt Hamburg-Hafen* (C-398/06) February 25, 2010. For comment, see P.J. Cardwell, "Adjudicating on the origin of products from Israel and the West Bank: *Brita*" (2011) 17 E. P. L. 37 and G. Harpaz and E. Robinson, "The interface between trade, law and politics and the erosion of normative power Europe: comment on *Brita*" (2010) 34 E. L. Rev. 551.

² *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal* (C-31/09) June 17, 2010.

³ Directive 2004/83 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection guaranteed [2004] OJ L304/13.

the minimum standards provisions in an evolving and uncertain legal environment. The article contends that the *Bolbol* decision is to be welcomed for its clarity, in that it gives some indication as to how the Court will interpret provisions originating in international legal sources, but that Member States are likely to seek to “race to the bottom” rather than use the minimum standards in the Directive as a springboard to higher protection for refugees and asylum seekers.

Legal framework

The *Bolbol* case arose against the background of a growing set of instruments at EU level dealing with legal issues relating to refugees and asylum seekers, which had largely been beyond the scope of EU law.⁴ The Treaty of Amsterdam had considerably strengthened the competences of the EU institutions under the EC Treaty to harmonise aspects of migration law. The Treaty also obliged the Council to adopt measures on asylum, in accordance with the Geneva Convention of July 28, 1951, within five years from the date of entry into force of the Treaty.⁵ Following Amsterdam, the European Council’s Tampere Conclusions in October 1999 served as a guide to the “milestones” to be created towards a Union of Freedom, Security and Justice.⁶ The Tampere Conclusions stated the aim of creating a Common European Asylum System (CEAS) to include clear and uniform rules and standards on procedures, and recognition and reception of asylum seekers.⁷ Subsequent directives built on these conclusions and also on pre-existing measures, in particular the Dublin Convention (1990) which created a framework to designate the Member State responsible for dealing with individual asylum applications.⁸ Other measures covered minimum reception conditions for asylum seekers,⁹ the responsibility of the Member States for considering an application for asylum, minimum standards of procedures in Member States for granting or withdrawing refugee status,¹⁰ and a directive covering the situation of a mass influx of persons from a specific geographical area.¹¹

Directive 2004/83 establishes minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection, and the content of that protection. The Directive shares with the other CEAS measures the emphasis on minimum standards to be adopted rather than full harmonisation.¹² As such, art.3 states that Member States,

“may introduce or retain favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection ... in so far as those standards are compatible with this Directive.”

The case here concerns the interpretation of this Directive, in particular art.12(1)(a), which deals with exclusion from the category of refugees or stateless persons under international law. At the heart of

⁴ The only reference to refugees pre-1999 was found in Regulation 1408/71 (Social Security Regulation) art.1(d) [1971] OJ L149/2; E. Guild, “The Europeanisation of Europe’s Asylum Policy” (2006) 18 *International Journal of Refugee Law* 631. Co-ordination between Member States to prevent multiple asylum applications had, however, been discussed in the Council as early as the 1980s: E Denza, *The Intergovernmental Pillars of the European Union* (Oxford: Oxford University Press, 2002), p.196.

⁵ Article 63 EC (now 78 TFEU).

⁶ European Council, “Presidency Conclusions” (Tampere: 1999), available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en9.htm [Accessed December 16, 2010].

⁷ European Council, “Presidency Conclusions”, 1999, para.13.

⁸ The Dublin Convention was later transformed into Regulation 343/2003 (Dublin II Regulation) [2003] OJ L50/1.

⁹ Directive 2003/9 [2003] OJ L31/18.

¹⁰ Directive 2005/85 [2005] OJ L326/13.

¹¹ Directive 2001/55 [2001] OJ L212/12.

¹² Formerly art.63 EC, as amended by the Treaty of Amsterdam. The parts of the provision relating to minimum standards (art.63(1) and (2)) were repealed by the amended TFEU. Article 63(3) and (4) EC are now found in art.79 TFEU, which does not refer to minimum standards.

international refugee law is the Geneva Convention relating to the Status of Refugees of July 28, 1951 as supplemented by the New York Protocol of January 31, 1967. The underlying principle of the Geneva Convention is that of *non-refoulement* and the assurance by signatories that nobody is sent back to a country where they face persecution. All Member States of the European Union have signed and ratified the Convention.

The *Bolbol* case

The *Bolbol* case explores the right to be recognised as a refugee under the Geneva Convention, and hence under the Directive. However, refugee status in this case also turned on the unique situation of Palestine and Palestinian refugees, who are the subject of the only UN agency specifically tasked with dealing with refugees from one geographical location. Nawras Bolbol, a stateless Palestinian, arrived in Hungary in January 2007 and was granted a residence permit by the Hungarian authorities. She then applied for refugee status in order to ensure that, in the event that her permit was not extended, she would not be returned to the Gaza Strip. Her application under art.1D of the Geneva Convention as a Palestinian resident outside the zone under the mandate of the United Nations Relief and Works Agency for Palestinian Refugees (UNRWA) was rejected by the Immigration and Citizenship Office (Bevándorlási és Állampolgársági Hivatal—the BAH). Ms Bolbol challenged this rejection in the Budapest Metropolitan Court (Fővárosi Bíróság) which stayed proceedings and referred three questions to the ECJ: first, for the purposes of art.12(1)(a) of the Directive, must someone be regarded as receiving UN protection and assistance merely by virtue of being entitled to receive it? Secondly, does cessation of the protection or assistance mean residence outside the agency's area of operations or an objective obstacle such that the person entitled thereto is unable to avail himself of that protection or assistance? Thirdly, do the benefits of this Directive mean automatic recognition as a refugee, or merely inclusion in the scope *ratione personae* of the Directive?

Ms Bolbol based her claim for refugee status on the second subparagraph of art.1D of the Geneva Convention. The full article provides that:

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

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

Ms Bolbol claimed that she fell within the scope of this paragraph since she was entitled to the protection or assistance of UNRWA, based on a family connection. It was not disputed in the case, however, that she had not *actually* availed herself of the protection or assistance of UNRWA. Her claim was therefore based on the *entitlement* to protection or assistance. The BAH disputed her claim to be eligible for protection and UNRWA had not been able to confirm her right to be registered on the basis of her family connections. It rejected her application, although she was placed under the protection of *non-refoulement*, meaning that she could not be returned to Palestine.

Before the domestic court and the ECJ, Ms Bolbol argued that the second paragraph of art.1D is a separate basis for recognition as a refugee from the “general” art.1 of the Geneva Convention, and that since she was outside of UNRWA's area of operation (and cannot be expected to return) then refugee status must *automatically* be granted. As the defendant in the proceedings, the BAH contended that recognition is not automatic but must be assessed on a case-by-case approach. In order to qualify under the second paragraph of art.1D, Ms Bolbol would have had to have left Palestine under the conditions set out in art.1A (“owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”). For the BAH, the second paragraph of

art.1D merely establishes the scope of the Directive *ratione personae* and does not automatically grant a basis for refugee status.

The Opinion of the Advocate General

In A.G. Sharpston's Opinion,¹³ Ms Bolbol's argument that her mere entitlement to protection or assistance brought her within the scope of the Geneva Convention art.1D (and hence art.12(1)(a) of the Directive) was not considered to be well founded.

The Advocate General relied on both the establishing statutes and persuasive statements from the Office of the United Nations High Commissioner for Refugees (UNHCR) on the interpretation of the relevant Geneva Convention¹⁴ and noted the absence of a ruling by the International Court of Justice on art.1D. She found that the UNHCR handbook covers exceptions for Palestinians unable to avail themselves of the assistance of UNRWA under art.1D, the normal characteristic of which should be that conditions which originally qualified the individual for protection or assistance still apply and that cessation and exclusion clauses do not apply.¹⁵ UNRWA guidance notes dating from 2002 and 2009 on Palestinians leaving the territory treated the first sentence of art.1D as alternative, rather than cumulative, and stated that "receiving ... protection or assistance" can be regarded as "being entitled to receive". The 2009 note, issued by UNHCR in the context of the preliminary reference from the Hungarian court to the ECJ, suggests that persons previously registered who travel outside the UNRWA zone are within the notion of protection which has "ceased for any reason".¹⁶

The Advocate General considered that being outside the geographical zone could allow an individual to invoke the second sentence of art.1D but that the consecutive nature of the provision means that it should first be ascertained whether their situation came within the first sentence. If not, then the individual may still apply for individual assessment under art.1A. The Advocate General rejected as too rigid a submission by the United Kingdom that "at present" in art.1D refers only to the time of drafting, i.e. 1951. However, she also dismissed Ms Bolbol's argument that anyone who has ever received assistance from UNRWA falls within the first sentence of art.1D as being too broad a position. Coming to the view that a time limitation is necessary, her view was that the phrase "at present receiving" within art.1D means "persons who are currently receiving protection or assistance from UN organs or agencies other than the UNHCR".¹⁷

The Advocate General did agree with the submission by the UK Government¹⁸ that "receiving" is not the same as "is entitled to receive" and was minded to follow the clear (and unamended for 50 years) text of the first sentence of art.1D, in contrast to the UNHCR's own interpretation, finding that a strict interpretation was necessary.¹⁹ She also rejected Ms Bolbol's submission that the scope of the second sentence of art.1D covered *all* those excluded from the first sentence. Rather, she found that the key lies in whether the individual has *voluntarily* removed themselves from the geographical area of operation of UNRWA.²⁰ The individuals caught by the second sentence of art.1D would be those affected by UNRWA ceasing its activities, not those who had departed voluntarily. Finally, the Advocate General opined that "*ipso facto* ... entitled to the benefits of this convention" meant automatic grant of refugee status, rather

¹³ *Bolbol* (C-31/09) Opinion of A.G. Sharpston March 4, 2010.

¹⁴ *Bolbol* (C-31/09) Opinion of A.G. Sharpston at [9]–[20], [37].

¹⁵ *Bolbol* (C-31/09) Opinion of A.G. Sharpston at [17].

¹⁶ *Bolbol* (C-31/09) Opinion of A.G. Sharpston at [20].

¹⁷ *Bolbol* (C-31/09) Opinion of A.G. Sharpston at [70].

¹⁸ The United Kingdom had "opted in" to Directive 2004/83 as per arts 1 and 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the TEU and EC Treaty.

¹⁹ *Bolbol* (C-31/09) Opinion of A.G. Sharpston at [73]–[74].

²⁰ *Bolbol* (C-31/09) Opinion of A.G. Sharpston at [81].

than (as suggested by the United Kingdom and Belgium) merely the entitlement to be assessed under art.1A.²¹

Applying *mutatis mutandis* her interpretation to art.12(1)(a), she recognised that the meanings are identical, but acknowledged:

“Both the State’s legitimate interest in checking whether a particular individual is entitled to what he claims and the very real, practical problems that any displaced person seeking refugee status may face in proving his entitlement.”²²

Registration with UNRWA is “a matter of evidence, not of substance” though full UNRWA registration may not be necessary.²³ She gave substantially the same response on evidence to the second question, in that cessation of protection or assistance must not be by an individual’s own volition.²⁴

On the third question, the Advocate General found that by considering the scheme of the Directive more globally, as transposing obligations under international law, the “benefits of this Directive” are taken to mean qualification as a refugee and automatic entitlement to refugee status.²⁵ Such an interpretation avoids the risk of an individual fulfilling both parts of art.12(1)(a) but nevertheless failing to be classified as a refugee.

The judgment of the Court of Justice

The judgment is much briefer than the Opinion, though it arrived at the same conclusion following a similar reasoning, at least as far as the first referred question is concerned. The Court ruled that for the purposes of the first sentence of art.12(1)(a) of the Directive,

“A person receives protection or assistance from an agency of the United Nations other than UNHCR, when that person has *actually* availed himself of that protection or assistance.”²⁶ (Emphasis added.)

Since this responded to the first question referred, the Court did not find it necessary to offer responses to the second and third questions.²⁷

The Court arrived at its decision by referring to the legal context—at the international level, this included selected United Nations General Assembly Resolutions from 1949,²⁸ 1967²⁹ and 2008.³⁰ The latter extended the mandate of UNRWA, noting the importance of its “unimpeded operation”.³¹ The Court did not, in contrast to the Advocate General, make use of the non-binding statements from the UNHCR or its handbook in its initial outline of the relevant legal context, noting later in its judgment that the 2002 note “fails to provide sufficiently clear and unequivocal guidance to guarantee consistent application of that provision [art.1D] with regard to Palestinians”.³² The Court also pointed to other provisions in the Directive, including respect for fundamental rights and compliance with the Geneva Convention. The Court noted the national

²¹ *Bolbol* (C-31/09) Opinion of A.G. Sharpston at [89].

²² *Bolbol* (C-31/09) Opinion of A.G. Sharpston at [95].

²³ *Bolbol* (C-31/09) Opinion of A.G. Sharpston at [97]–[99]. France had submitted that only full proof of registration with UNRWA would suffice, which was rejected by the Advocate General.

²⁴ *Bolbol* (C-31/09) Opinion of A.G. Sharpston at [100]–[102].

²⁵ *Bolbol* (C-31/09) Opinion of A.G. Sharpston at [109].

²⁶ *Bolbol* (C-31/09) at [57].

²⁷ *Bolbol* (C-31/09) at [56].

²⁸ UNGA Resolution 302 (IV) of December 8, 1949.

²⁹ UNGA Resolution 2252 (ES-V) of July 4, 1967.

³⁰ UNGA Resolution 63/91 of December 5, 2008.

³¹ UNGA Resolution 63/91 of December 5, 2008, para.3.

³² *Bolbol* (C-31/09) at [34].

legal provisions in force in Hungary (all enacted prior to the entry into force of the Directive) but, following the Opinion,³³ found that the non-transposed Directive could be relied on directly.³⁴

The Court observed that the Directive must be interpreted in the light of “its general scheme and purpose”,³⁵ and that its purpose is to set minimum standards with respect to the Geneva Convention as the “cornerstone of the international legal regime for the protection of refugees”.³⁶ These observations are in fact a recital of the words used in the case of *Salahadin Abdulla*,³⁷ which related to the same Directive, albeit on the conditions under which classification as a refugee may cease which were not directly relevant.

The Court dealt with the first question in relatively few paragraphs. It pointed to the Advocate General’s observations on UNRWA’s registration instructions that Palestinian refugees can be those displaced after 1967, and recognised that someone in Bolbol’s position cannot be ruled out of the scope of art.1D.³⁸ The Court explicitly rejected the UK Government’s argument to the contrary.³⁹ Nevertheless, the Court found that art.1D is sufficiently clear when it refers to persons “at present receiving” protection or assistance from an organ or agency of the UN other than the UNHCR. On this basis, the Court decided that the clear wording pointed to a narrow interpretation of art.1D and only those who have *actually* availed themselves of protection or assistance fall within the scope of the clause.⁴⁰ However, full UNRWA registration appears not to be required by the ECJ, which opened the door to “evidence of that assistance by other means”.⁴¹ The Court also pointed to an alternative course of action for those in Ms Bolbol’s situation who have not actually availed themselves of protection (or who cannot provide satisfactory evidence) by highlighting that they may be considered for refugee status under the more general art.2(c) of the Directive.⁴²

Analysis

This section focuses on two related issues raised by the *Bolbol* judgment. The first is the specific context of art.1D, which was clearly written with the situation of Palestinians in mind. The second is the light the decision sheds on the notion of minimum qualification standards under the Directive.

Article 1D in context

As the Advocate General noted in her Opinion, the meaning and construction of art.1D contained at least four areas of “opacity”.⁴³ The provision gives little clue as to either the geographical boundaries or time-limit for persons receiving protection or assistance; the difference between actual protection and entitlement, as well as the nature of UNRWA registration; the circumstances which amount to a cessation of protection or assistance; or the meaning of “these persons shall *ipso facto* be entitled to the benefits of this Convention”.⁴⁴

One means of resolving these issues is to consider the overall purpose of art.1D in its historical and contemporary context. For the Advocate General, consideration must be given to the need to avoid any

³³ *Bolbol* (C-31/09) Opinion of A.G. Sharpston at [29].

³⁴ *Bolbol* (C-31/09) at [33].

³⁵ *Bolbol* (C-31/09) at [36].

³⁶ *Bolbol* (C-31/09) at [37].

³⁷ *Aydin Salahadin Abdulla v Germany* (C-175/08), *Kamil Hasan v Germany* (C-176/08); *Ahmed Adem and Hamrin Mosa Rashi v Germany* (C-178/08); *Dler Jamal v Germany* (C-179/08) March 2, 2010.

³⁸ *Bolbol* (C-31/09) at [46].

³⁹ *Bolbol* (C-31/09) at [47].

⁴⁰ *Bolbol* (C-31/09) at [51].

⁴¹ *Bolbol* (C-31/09) at [52].

⁴² Article 2(c) reproduces the definition of a “refugee” pursuant to art.1A of the Geneva Convention.

⁴³ *Bolbol* (C-31/09) Opinion of A.G. Sharpston at [46].

⁴⁴ *Bolbol* (C-31/09) Opinion of A.G. Sharpston at [47].

denial of protection and assistance for genuine refugees.⁴⁵ To do otherwise, it is implied, would be to undermine the EU's values,⁴⁶ as well as Treaty based commitments to upholding human rights⁴⁷ and to the "strict observance" of international law.⁴⁸ Furthermore, art. 1D was drafted to give special consideration to displaced Palestinians and must be read in the light of the continued "unhappy reality" of displaced Palestinians at the present time and not just before 1951.⁴⁹ However, the specificity of their situation does not mean that Palestinians, whether or not actually having had protection or assistance from UNRWA, have an automatic right to refugee status elsewhere. The Advocate General also put forward her view that since the second sentence of art. 1D was intended to supplement the first, they should be read "consecutively, not disjunctively"; but the provision should be read as a whole to find a "reasonable balance between caring for displaced Palestinians (under art. 1D) and caring for other potential refugees (under the 1951 Convention as a whole)".⁵⁰

Although the exclusion from having the status of a refugee in art. 1D of the Geneva Convention was framed in general terms, the *travaux préparatoires* of the Geneva Conference in 1951 clearly show that the Palestinian situation was at the forefront of the minds of the drafters.⁵¹ That the Advocate General and the Court considered that the words "at present" in the text of the Convention applies to displaced Palestinians not only at the time of the drafting of the Convention but afterwards too is unsurprising. The continued existence of UNRWA (by a mandate renewed every three years) is evidence that a restrictive reading is incompatible with the continued mission to aid displaced persons. Again, this would seem to be particularly acute due to the unique situation of displaced Palestinians, most of whom do not have residence, social or civil rights elsewhere. Their situation differs, legally and factually, from other examples of displaced persons such as Greek-Cypriots in the period following 1974.⁵²

It would thus have been unusual to recognise the continuously renewed mandate of UNRWA and yet to find, as the UK Government submitted to the Court, that only Palestinians affected by displacement in 1951 would be covered. Case law in the United Kingdom provides an interesting comparator since, in the case of *El-Ali and Daraz v Secretary of State for the Home Department*,⁵³ the Court of Appeal had also considered the case of a Palestinian who had received protection from UNRWA before claiming refugee status in the United Kingdom. In that case, Laws L.J. responded to the assertion that art. 1D had a continued effect by stating that:

"Under the suggested interpretation, 'at present' does not refer to a specific date (28 July 1951 or otherwise) as setting the time when the membership of the class described in the first sentence is fixed (which is surely the ordinary sense of the words used) but merely to a start-date, a *terminus a quo*, for the identification of the class whose membership may, however, be swelled by new entrants thereafter. I think this is a very considerable distortion of the Article's language."⁵⁴

⁴⁵ *Bolbol* (C-31/09) Opinion of A.G. Sharpston at [49].

⁴⁶ Now found in art. 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

⁴⁷ Article 6 TEU.

⁴⁸ Article 3(5) TEU.

⁴⁹ *Bolbol* (C-31/09) Opinion of A.G. Sharpston at [51].

⁵⁰ *Bolbol* (C-31/09) Opinion of A.G. Sharpston at [56].

⁵¹ *Bolbol* (C-31/09) Opinion of A.G. Sharpston at [42]–[44].

⁵² P. Loizos and T. Kelly, "The Refugee Factor in Two Protracted Conflicts: Cyprus and Palestine Compared" in Dawn Chatty and Bill Finlayson (eds), *Dispossession and Displacement: Forced Migration in the Middle East and North Africa* (Oxford: Oxford University Press, 2010), p.233.

⁵³ *El-Ali and Daraz v Secretary of State for the Home Department* [2002] EWCA Civ 1103; [2003] 1 W.L.R. 95.

⁵⁴ *El-Ali and Daraz* [2003] 1 W.L.R. 95 at [33].

Laws L.J. also referred to one of the only other cases on interpretation of art.1D, which also happened to concern an EU Member State—Germany. In a case from 1991,⁵⁵ the German Federal Administrative Court (Bundesverwaltungsgericht) accepted that “at present” referred to 1951 but that this did not exclude the class of persons enjoying protection or assistance after that date. The German court did, however, state that those who left UNRWA’s zones voluntarily should not have the option to benefit automatically from the Convention.

The consequences of different interpretations of art.1D stem from the vagueness of the provisions. In *Bolbol*, the extent to which the Advocate General and the Court relied to greater or lesser extents on the non-binding legal documents used by the UNHCR demonstrates that the terms of this provision can be read in different ways. Certainly, as Lambert correctly noted in 2006,⁵⁶ the ambit of art.1D as set out in art.12(1)(a) of the Directive is wider than the UK courts had envisaged. NGO research on the status of Palestinian refugees in EU countries (prior to the entry into force of the Directive) reveals substantial disparities in the interpretation of art.1D.⁵⁷ Of course, the nature of the Directive allows Member States the right to adopt more favourable treatment, but not the reverse. The decision in *Bolbol* will therefore have an impact on the interpretation of this provision by the Member States. Nevertheless, both the Advocate General and the ECJ were careful to avoid extending the scope of the provision and it could be seen that the interpretation chosen (i.e. individuals actually having availed themselves of assistance or protection) falls short of UNHCR’s interpretation of the section. This can be seen from UNHCR’s interpretation of art.1D, which,

“is not based on that Article’s literal meaning, but takes into account the general principle of international law that a treaty should be interpreted in accordance with the rules of interpretation codified in the 1969 Vienna Convention on the Law of Treaties, as acknowledged by the ECJ. Thus, in addition to the text and ordinary meaning of the terms included in Article 1D, the object and purpose of the 1951 Convention, as well as its overall historical objective and context in which it was drafted and developments subsequent to its conclusion will be relevant ...”⁵⁸

For UNHCR, developments since 1967 can result in individuals being caught by art.1D and the 2009 note does not specify a need, in UNHCR’s view, for a person to be fully registered with UNRWA to benefit but simply to be “inside UNRWAs area of operations”.⁵⁹ In its revised statement considering the questions referred by the Hungarian court, insisting on registration (or at least something close to it) as proof of entitlement is “not conclusive as to whether he or she falls within that Article’s scope”.⁶⁰ UNRWA does not automatically provide help or assistance to everyone with the areas in which it operates. As such, UNHCR considers that the provision applies to those not covered by arts 1C, 1E or 1F of the Convention who are inside the area of operations of UNRWA. “At present receiving” means a category of persons defined by geographical reach, rather than whether the individual concerned is personally eligible. Similarly, since UNRWA continues to provide protection and assistance in its areas of operation, the “ceased”

⁵⁵ Decision of June 4, 1991 (Bverg I C 42.88) (1992) 4(3) I.J.R.L. 387 Case 1200.

⁵⁶ H. Lambert, “The EU Asylum Qualification Directive, its Impact on the Jurisprudence of the United Kingdom and International Law” (2006) 55 I.C.L.Q. 161, 171.

⁵⁷ E. Sondergaard, “Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention and 1954 Stateless Convention” (2004) 22 *Al Majdal* 27, available at <http://www.badil.org/en/al-majdal/itemlist/category/29-issue22> [Accessed December 16, 2010]. On asylum claims more generally, see France Terre d’Asile, “La protection subsidiaire: une mosaïque des droits” (2008) *Cahier du social* No.18, available at http://www.france-terre-asile.org/images/stories/publications/cahiersdusocial/cs18_bon_de_commande.pdf [Accessed November 4, 2010].

⁵⁸ UNHCR Revised Statement on Article 1D of the 1951 Convention (2009), p. 6.

⁵⁹ UNHCR Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees (2009), p.3.

⁶⁰ UNHCR Revised Statement on Article 1D of the 1951 Convention (2009), p.7, fn.33.

dimension can only refer to situations other than those envisaged when the provision was drafted (i.e. that UNRWA would essentially be a temporary entity). “For any reason” suggests including cases where the Palestinian has left that area, with no indication as to whether this was voluntary or caused by a well-founded fear of persecution.⁶¹

Within this context, the ECJ strikes a balance between the restrictive view of art.1D taken by some Member States and the wider view of UNHCR. Following this decision, for the purposes of the Directive, an individual must have actually availed themselves of protection or assistance from UNRWA. Of course, art.1D applies only to the “exceptionalism” of the Palestinian case,⁶² rather than the more general definitions or categories covered by the Geneva Convention and, therefore, the Directive. As the Court points out, reading the Directive in this way does not prevent individuals such as Ms Bolbol from applying for refugee status pursuant to art.1A, although this would require proof of a “well founded fear” rather than automatic entitlement.

Applying minimum qualification standards

The ECJ’s interpretation of the text is to be welcomed for its clarity, and was no doubt greatly aided by the Advocate General’s comprehensive classification of the five potential outcomes of reading the provisions in different ways.⁶³ As a means by which the Common European Asylum System is to be put in place, the judgment in *Bolbol* demonstrates the Court’s willingness to ensure that minimum harmonisation measures are just that. In a sense, the judgment provides some indication of how the Court may act in interpreting the Directive when it relies directly on a source of international law. One might also refer to the words of Judge Lenaerts (extra-judicially) on asylum, that the ECJ “now enjoys jurisdiction to answer questions referred by inferior courts, which will certainly contribute to improving the dialogue between the judiciary at national and EU level”.⁶⁴ It is notable that neither the Advocate General nor the Court had the opportunity to refer to previous cases in this area—however, two joined cases relating to the interpretation of the Directive are (at the time of writing) pending before the Court⁶⁵ and it is likely that the ECJ is going to face an increasing number of delicate questions relating to the post-Tampere Directives.

The Commission, in a review of the application of the Directive (published at the same time as the *Bolbol* judgment was delivered) notes numerous difficulties in applying minimum harmonisation measures in the Member States. Although conceptually, minimum harmonisation measures work as a potential means to move towards an eventual greater degree of uniformity between the Member States, the introduction of an additional legal source in between international and domestic law may have unintended consequences in terms of practical application. Furthermore, as Gil-Bazo has noted, the minimum standards Directives were agreed in the era of post-September 11 security anxiety. Member States were keen to ensure that *refoulement* could be an option for “security” reasons as an exception to the general rule of *non-refoulement*. The Directive prevents *refoulement* when prohibited by international law, but if the limits of the prohibition are uncertain, then it would fall to the ECJ to decide on the limits. Uncertainty in international law, coupled with another level of uncertainty in EU law could potentially allow Member States to remove individuals in breach of international law. It would be difficult, in the absence of further definition, for the ECJ to find *refoulement* for security reasons to be contrary to EU law unless it found

⁶¹ UNHCR Revised Statement on Article 1D of the 1951 Convention (2009), pp.7–8.

⁶² For more on the evolving nature of Palestinian exceptionalism, see M. Kagan, “The (Relative) Decline of Palestinian Exceptionalism and its Consequences for Refugee Studies in the Middle East” (2010) 22 *Journal of Refugee Studies* 417.

⁶³ *Bolbol* (C-31/09) Opinion of A.G. Sharpston at [90].

⁶⁴ K. Lenaerts, “The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice” (2010) 59 I.C.L.Q. 255, 291.

⁶⁵ *Germany v B* (C-57/09) and D (C-101/09) Opinion of A.G. Mengozzi June 1, 2010.

that a Member State was acting contrary to fundamental rights.⁶⁶ In this respect, the danger inherent in minimum standards harmonisation is that Member States may seek to take advantage of ambiguously worded provisions: according to Costello, governments have consistently made “crude and repeated alterations to asylum processes across Europe over the past two decades, as [their] primary response to the ‘asylum crisis’”.⁶⁷ The submissions by some Member States in *Bolbol* suggest that if the Court wishes to ensure the effective workings of the CEAS, it may need to be assertive in diverting from what (some) Member States contend to be the proper interpretations of sources of international law. In support of this potential course of action, one might recall here the Opinion of the Advocate General in *Kadi* that “it would be wrong to conclude that, once the Community is bound by a rule of international law, the Community Courts must bow to that rule with complete acquiescence and apply it unconditionally in the Community legal order”⁶⁸ and the subsequent judgment by the Court in the same case, which recalled the nature of the European Union as “an autonomous legal system which is not to be prejudiced by an international agreement”.⁶⁹

A proposal made by the Commission in 2009 for a recasting of the Directive⁷⁰ to achieve higher standards of protection across the European Union does not include proposed changes to art. 12, though it does cover significant changes to the wording of most other provisions in a move designed “to take further steps towards a uniform status”.⁷¹ In a separate document assessing the impact of another Directive on minimum standards,⁷² the Commission laments the different levels of procedural standards across the Member States and contends that there is a risk of a “race to the bottom”, continuing,

“since those Member States currently providing more generous protection standards may be inclined to lower their standards in order to avoid ‘attracting’ larger numbers of asylum seekers.”⁷³

The Commission also notes that:

“The asylum acquis and corresponding national measures appear to be an increasingly complex system of law in which both the accessibility of substantive rights and the procedural consequences largely depend on the applicant’s individual acts.”⁷⁴

Using this as a justification for higher standards at EU level would succeed in greater harmonisation—but also recognises the reasoning why Member States may resist it. The interventions of certain Member States in *Bolbol* demonstrate the often restrictive way in which international (as well as EU) legal provisions are preferred to be seen by Member State governments conscious of domestic political sensitivities around asylum and immigration. Whether the proposed recasting of the Directive succeeds or not, it is highly

⁶⁶ M.-T. Gil-Bazo, “Refugee Status and Subsidiary Protection under EC Law: The Qualification Directive and the Right to Be Granted Asylum” in Anneliese Baldaccini, Elspeth Guild and Helen Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Oxford: Hart, 2007), p.255.

⁶⁷ C. Costello, “The Asylum Process Directive in Legal Context: Equivocal Standards Meet General Principles” in *Whose Freedom, Security and Justice?*, 2007, pp.153–154.

⁶⁸ *Yassin Abdullah Kadi Al Barakaat International Foundation v Council of the European Union and European Commission* (C-402/05 P and C-415/05 P) Opinion of A.G. Poiares Maduro January 18, 2008 at [24].

⁶⁹ *Yassin Abdullah Kadi* (C-402/05 P and C-415/05 P) [2008] E.C.R. I-6351 at [316].

⁷⁰ Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted COM(2009) 551 final.

⁷¹ Proposal for Qualification Directive COM(2009) 551, p.10.

⁷² Commission, Staff Working Document accompanying the Proposal for a Directive of the European Parliament and of the council on minimum standards on procedures in Member States for granting and withdrawing international protection SEC(2009) 1376 final.

⁷³ Staff Working Document SEC(2009) 1376, pp.23–24.

⁷⁴ Staff Working Document SEC(2009) 1376, p.41.

likely that the Court will be called on to decide similar cases in the near future relating to this important, yet still nascent, aspect of the European integration project.

Conclusion

The *Bolbol* decision is likely to be one of an increasing number of cases brought before the ECJ as the European Union moves towards consolidating the CEAS. In *Bolbol*, the issue at stake was on the one hand rather specific as it concerned the unique situation of the displaced Palestinians under international law. The judgment turned on the interpretation of a specific provision of the Geneva Convention, which is directed at the Palestinians without mentioning them by name. In this regard, the ECJ gives a clear and lucid interpretation of the provision by bearing in mind the likely impact on the individual concerned. On the other hand, the Court's decision can be seen more generally as achieving a balancing act between the interests of the Member States and the limited nature of minimum harmonisation measures in a way which could be used in the future as a basis for interpretation of provisions stemming from sources of international law—whether relating to migration or not.