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Forced to Flee and Forced to Repatriate? How the Cessation Clause of Article 1C(5) and (6) of the 1951 Refugee Convention Operates in International Law and Practice

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NOTES

Forced to Flee and Forced to Repatriate? How the Cessation Clause of Article 1C(5) and (6) of the 1951 Refugee Convention Operates in International Law and Practice

ABSTRACT

The purpose of refugee law is to provide international protection for vulnerable people who are denied state protection. In fulfilling this purpose, the United Nations High Commissioner for Refugees (UNHCR) and asylum states have different legal foundations and implementing materials. When terminating refugee status and protection under the 1951 Refugee Convention Relating to the Status of Refugees, the obligations and legal authorities of UNHCR and asylum states differ. The UNHCR implementing statute allows the facilitation of voluntary repatriation when refugees can return in safety and with dignity. In contrast, host states are able to mandate repatriation when a change in circumstances occurs in the country of origin. The different evidentiary thresholds for voluntary and mandated repatriation have created deep confusion regarding states' ability to end refugee status and the UNHCR's role in facilitating returns. This Note proposes placing voluntary and mandated repatriation on a timeline contingent on developments in the country of origin. Using the current displacement of Rwandan refugees from Uganda as a case study, this Note reconciles the conflicting standards in international law through this timeline.

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I. INTRODUCTION

The United Nations High Commissioner for Refugees (UNHCR) estimates that ten million refugees exist worldwide.¹ Eighty percent reside in developing countries.² Over half of all refugees are considered to be “protracted”—the conflict that caused them to flee their home country has remained unresolved for five or more years.³ International protection substitutes for national protection as long as refugee status is maintained.⁴

The legal authority for international protection is located in three foundational documents. States’ legal obligations are found in the 1951 Refugee Convention Relating to the Status of Refugees (1951 Refugee Convention) and the 1967 Protocol Relating to the Status of Refugees (1967 Protocol). These instruments require state parties to grant refugees rights and provide additional safeguards regarding assets, travel, and employment, among others.⁵ The third foundational instrument is the UNHCR statute. In conjunction with states’ legal obligations, UNHCR is tasked with providing international protection to refugees and supervising host-state responsibilities.⁶

These different legal authorities place affirmative obligations on host states and UNHCR that overlap harmoniously, with the notable exception of the cessation of international protection. The UNHCR statute and the 1951 Refugee Convention divide into two distinct structures when governing cessation of refugee status. Under its statute, UNHCR may effect voluntary repatriation, on both an individual and group basis.⁷ First, individual refugees can voluntarily cease protection under the 1951 Refugee Convention by

1. *Refugee Figures*, UNHCR—UN REFUGEE AGENCY, <http://www.unhcr.org/pages/49c3646c1d.html> (last visited Apr. 19, 2011).

2. Press Release, U.N. High Comm’r for Refugees [UNHCR], UNHCR Annual Report Shows 42 Million People Uprooted Worldwide (June 16, 2009), available at <http://www.unhcr.org/4a2fd52412d.html>.

3. *Id.*

4. UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, ¶¶ 115, 118, 135, U.N. Doc. HCR/IP/4/Eng/REV.1 (1967) (reedited 1992) [hereinafter REFUGEE HANDBOOK].

5. Convention Relating to the Status of Refugees, arts. 12–24, July 28, 1951, entered into force Apr. 22, 1954, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention].

6. Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428 (V), U.N. GAOR, 5th Sess., Supp. No. 20, ¶ 1, at 46, U.N. Doc. A/1775 (Dec. 14, 1950) [hereinafter UNHCR Statute]; 1951 Refugee Convention, *supra* note 5, art. 35.

7. UNHCR Statute, *supra* note 6, ¶¶ 1, 8(c); see generally VOLUNTARY REPATRIATION: INTERNATIONAL PROTECTION, ch. 1.6 (1996) [hereinafter VOLUNTARY REPATRIATION HANDBOOK] (summarizing UNHCR’s methods for voluntary repatriation).

taking affirmative steps to reacquire their nationality or a new nationality, re-availing themselves of the protection of their home country, or reestablishing themselves in the country that they left.⁸ Second, if UNHCR determines that refugees can return “in safety and with dignity,” UNHCR may actively promote voluntary repatriation programs to large groups of refugees, eventually ending UNHCR protection.⁹

In contrast, asylum states can revoke international protection by activating a cessation clause. Article 1C(5) and (6) of the 1951 Refugee Convention allows states to cease refugee status when a change in circumstances takes place in the country of origin that ends the fear of persecution causing flight.¹⁰ State cessation of refugee status is termed “mandated repatriation.” This option is not well developed in international practice.¹¹ UNHCR has set forth recommended criteria states can use for evaluating whether fundamental change has occurred.¹² However, UNHCR’s interpretations of the 1951 Refugee Convention obligations, while authoritative, are not binding on states.¹³ As this Note demonstrates, the legal requirements states must satisfy to mandate repatriation under the 1951 Refugee Convention are not clear, and confusion exists at the intersection of voluntary and mandated repatriation.

Even when UNHCR begins coordinating voluntary repatriation with a specified group of refugees, host-state obligations under the 1951 Refugee Convention may continue because the evidentiary requirements to mandate repatriation may be higher than the

8. 1951 Refugee Convention, *supra* note 5, art. 1C(1)–(4).

9. See VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 1.6 (stating the current UNHCR mandate to promote “the voluntary repatriation of refugees once conditions are conducive to return”).

10. 1951 Refugee Convention, *supra* note 5, art. 1C(5)–(6).

11. See Susan Kneebone and Maria O’Sullivan, *Article 1 C 1951 Convention, in THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY* 513 (Andreas Zimmermann ed., 2011) (noting that “there is relatively little older jurisprudence on Art. 1 C, para. 5,” and much of the jurisprudence in existence concerns non-recognized refugees).

12. See UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION: CESSATION OF REFUGEE STATUS UNDER ARTICLE 1C(5) AND (6) OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES, ¶¶ 10–12, U.N. Doc. HCR/GIP/03/03 (Feb. 10, 2003) [hereinafter GUIDELINES ON INTERNATIONAL PROTECTION].

13. See James Hathaway, *The Right of States to Repatriate Former Refugees*, 20 OHIO ST. J. ON DISP. RESOL. 175, 204–06 (2005).

While all states have the sovereign authority to allow any person they wish to remain on their territory and while it will often be humane and right to extend such generosity, this is not a matter fairly understood to be required by either the text or purposes of the refugee law.

Id. (footnote omitted).

requirements necessary to support voluntary repatriation.¹⁴ When host states mandate repatriation under the authority of the 1951 Refugee Convention, this action can clash with UNHCR's statutory obligation to implement voluntary repatriation and place UNHCR or host states in danger of violating international law.

This Note harmonizes voluntary repatriation and mandatory repatriation by placing these options on a continuum, dependent upon positive developments in the country of origin and an end of the fear of persecution that caused flight. Reading UNHCR interpretations and recommendations in the aggregate, UNHCR creates a linear progression of steps toward cessation of refugee status. By placing UNHCR interpretive guidelines on a timeline, voluntary repatriation becomes a necessary, but not sufficient condition in the progression toward mandatory repatriation, instead of operating as a competing and distinct option. Part I presents the background the 1951 Refugee Convention and UNHCR's role in refugee protection. Part II outlines the 1951 Refugee Convention cessation clause. Part III sets forth UNHCR's statutory obligation to support voluntary repatriation. Part IV details the cessation of international protection under the 1951 Refugee Convention, examining the authority of states to mandate repatriation and the guidelines UNHCR sets forth for this determination. Syncing voluntary and mandated repatriation measured against progress in the country of origin, Part V recommends that UNHCR articulate this timeline as its interpretation of the 1951 Refugee Convention and actively promote state adherence. Part VI applies this analysis to the current situation of Rwandan refugees living in Uganda and Uganda's invocation of mandated repatriation.

II. 1951 REFUGEE CONVENTION AND THE AUTHORITY OF UNHCR

The 1951 Refugee Convention categorized two types of refugees: Article 1A(1) refers to people classified as refugees pre-1939; Article 1A(2) refers to those who have a well-founded fear of being persecuted "due to race, religion, membership of a particular social group or political opinion" and because of this fear cannot avail themselves of the protection of their country of origin.¹⁵ The 1951 Refugee

14. VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 2.2. UNHCR states two reasons why voluntary repatriation can occur at a lower threshold of change. First, the change of circumstances requirement "implies the consolidation, over time, of a process of stabilization." *Id.* Second, the voluntary nature of this choice is "the core element in promoting and facilitating repatriation." *Id.*

15. See 1951 Refugee Convention, *supra* note 5, art. 1A(1)-(2) (showing that, as originally signed, Article 1A(2) limited the definition to events occurring before January 1951).

Convention retroactively applied to refugees granted status under the League of Nations and replaced the authority of the instruments that originally granted that status.¹⁶ The 1967 Protocol removed the temporal limitations in the 1951 Refugee Convention, thereby preserving the continual authority of the 1951 Refugee Convention.¹⁷

The 1951 Refugee Convention granted UNHCR the statutory authority to declare refugee status and facilitate asylum.¹⁸ A grant of refugee status triggers UNHCR's responsibilities, first, to allocate resources to alleviate the immediate crisis, and second, to seek a permanent solution for refugees.¹⁹ Articulated in Article 35, UNHCR's role in this process is supervisory, and necessarily dependent on host-state cooperation:²⁰

The contracting States undertake to co-operate with the office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this convention.²¹

"Supervision," as envisioned and enacted by UNHCR, encompasses a range of activities, including protection efforts, daily field activities, overseeing state action, organizing aid, and monitoring nongovernmental organization (NGO) work.²² Article 35 is thus UNHCR's legal authority in requesting states to accept UNHCR's role in protection, provide UNHCR with information, and adhere to UNHCR policy statements.²³

UNHCR's work in host countries is multifaceted. When a refugee crisis first arises, UNHCR supervises the application of international conventions,²⁴ and coordinates the admission of refugees and the transfer of refugee assets to host countries.²⁵ For the duration of convention protection, UNHCR works to improve the

16. David Milner, *Exemption from Cessation of Refugee Status in the Second Sentence of Article 1C(5)/(6) of the 1951 Refugee Convention*, 16 INT'L J. REFUGEE L. 91, 94 (2004).

17. *Id.*; Protocol Relating to the Status of Refugees, art. 1(2), Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

18. 1951 Refugee Convention, *supra* note 5, pmbl. paras. 5–6.

19. UNHCR Statute, *supra* note 6, ¶ 1.

20. 1951 Refugee Convention, *supra* note 5, art. 35; 1967 Protocol, *supra* note 17, art. 2.

21. 1951 Refugee Convention, *supra* note 5, art. 35.

22. Walter Kalin, *Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 615 (Feller et al. eds., 2008) [hereinafter REFUGEE PROTECTION].

23. *Id.* at 619.

24. UNHCR Statute, *supra* note 6, ¶ 8(a).

25. *Id.* ¶ 8(d).

general situation of refugees and meet their material needs.²⁶ Article 35 expands state cooperation to all these functions of the High Commissioner, not just treaty cooperation.²⁷ As Walter Kalin states:

By establishing a duty on States Parties to cooperate with UNHCR in the exercise of its functions, Article 35(1) of the 1951 Refugee Convention does not refer to a specific and limited set of functions but to all tasks that UNHCR has under its mandate or might be entrusted with at a given time. Thus, the cooperation duties follow the changing role of UNHCR.²⁸

These cooperation duties become muddled when UNHCR or host states seek to facilitate refugee returns because UNHCR statutory requirements are different than the 1951 Refugee Convention requirements.

III. THE 1951 REFUGEE CONVENTION CESSATION CLAUSE

Once refugee status is conferred, that status remains unless individual refugees re-avail themselves of the protection of their home country²⁹ or a third party (UNHCR or the host state) invokes a cessation clause.³⁰ Withdrawal of refugee status declares that international protection is no longer necessary and ends refugee rights and benefits conferred by the 1951 Refugee Convention.³¹ Contracting states have a duty not to return refugees if their “life or freedom would be threatened on account of race, religion, nationality, membership [in] a particular social group, or political opinion” (mirroring the persecution requirement in Article 1A(2)).³² Encoded in Article 33 of the 1951 Refugee Convention, this duty of nonrefoulement is legally binding on state parties. UNHCR states that involuntary repatriation “would in practice amount to refoulement.”³³

26. See *id.* ¶¶ 8(b), (d), (i), 10 (outlining the mandates through which the High Commissioner must “provide for the protection of refugees falling under the competence of his office,” and requiring the High Commissioner to administer any funds “he receives for assistance to refugees” to the private and public agencies “he deems best qualified to administer such assistance”).

27. Kalin, *supra* note 22, at 616–17.

28. *Id.* at 617.

29. 1951 Refugee Convention, *supra* note 5, art. 1C(1)–(4); REFUGEE HANDBOOK, *supra* note 4, ¶¶ 114–15.

30. 1951 Refugee Convention, *supra* note 5, art. 1C(5)–(6); UNHCR Statute, *supra* note 6, ¶ 6(A)(ii)(e).

31. UNHCR, *Note on Cessation Clauses*, ¶ 6, U.N. Doc. EC/47/SC/CRP.30 (May 30, 1997) [hereinafter *Note on Cessation*], available at <http://www.unhcr.org/refworld/docid/47fdfaf1d.html>.

32. 1951 Refugee Convention, *supra* note 5, arts. 1A(2), 33(1).

33. VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 2.3. UNHCR materials seem to be in tension regarding mandatory repatriation. While this quote

In facilitating the end of convention protection, UNHCR may implement voluntary repatriation.³⁴ Paragraph 6(A)(ii)(e) of the UNHCR statute provides that “the competence of the High Commissioner” ceases to apply to a refugee when the circumstances causing him to be recognized as a refugee have changed, and no other grounds exist that prohibit him from availing himself of the protection of his country of origin.³⁵ When UNHCR determines that such a change has occurred, UNHCR implements large-scale voluntary repatriation programs.³⁶

In contrast, the 1951 Refugee Convention allows host states to determine an end to refugee status and mandate repatriation. Article 1C(5) and (6) of the 1951 Refugee Convention provides for cessation of refugee status in the following circumstances:

(5) He can no longer, because the circumstances in connection 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 . . .

(6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence.³⁷

While the duty of nonrefoulement prohibits states from returning persons recognized as refugees under international law,³⁸ Article 1C(5) and (6) allows states to mandate return, on an individual and group basis, when the fear of persecution is eliminated and circumstances in the country of origin have improved such that national protection is available.³⁹ As will be described in detail in Part IV, the evidentiary burden states must meet to move from

from the *Voluntary Repatriation Handbook* implies that involuntary repatriation is always refoulement, UNHCR has also said that mandated repatriation does not need the refugee's consent. UNHCR, Statement on the “Ceased Circumstances” Clause of the EC Qualification Directive, § 2.1 (Aug. 2008) [hereinafter UNHCR Statement], available at <http://www.unhcr.org/refworld/docid/48a2f0782.html>. Additionally, UNHCR has published guidelines governing the process of mandated repatriation. See GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12. From this, one may logically infer that if a state satisfies UNHCR guidelines governing mandated repatriation, involuntary repatriation would therefore not amount to refoulement.

34. See UNHCR Statute, *supra* note 6, ¶ 1 (noting the goal of the UNHCR “to facilitate the voluntary repatriation of [] refugees”); *id.* ¶ 8(c) (mandating that UNHCR “[a]ssist[] governmental and private efforts to promote voluntary repatriation”).

35. *Id.* ¶ 6(A)(ii)(e).

36. See VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 3 (outlining the process UNHCR uses to determine when voluntary repatriation programs are appropriate).

37. 1951 Refugee Convention, *supra* note 5, art. 1C(5)–(6).

38. *Id.* art. 33(1).

39. *Id.* art. 1C(5)–(6); see also VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 1.2 (noting that a reestablishing of national protection is part of the inquiry on whether a fear of persecution has ceased).

refoulement to properly mandated repatriation—from illegal to legal action—is unclear in international law and state practice.

Combining these cessation provisions, Joan Fitzpatrick summarizes the five contexts in which cessation occurs:

- (i) cessation of UNHCR protection under the Statute; (ii) cessation of State protection of refugees previously recognized on a group basis; (iii) individualized cessation for recognized refugees; (iv) withdrawal of temporary protection; and (v) denial of initial claims to asylum based upon changed conditions between flight and status determination.⁴⁰

While cessation of status is provided for in these international instruments, the temporal boundaries of refugee protection are not clearly delineated in international law.⁴¹

The 1951 Refugee Convention cessation clause and the UNHCR statutory cessation provision each require a change in circumstances that negates the need for international protection. It remains unclear whether the degree of change required to facilitate voluntary repatriation and to mandate repatriation are the same.⁴² UNHCR maintains that the evidentiary threshold for mandating repatriation is much higher than the threshold for implementing voluntary repatriation.⁴³ State jurisprudence is not uniform on the interpretation of international requirements for repatriation. However, UNHCR requirements and state practice can be harmonized by understanding voluntary repatriation to serve as a benchmark toward mandated repatriation.

IV. UNHCR'S STATUTORY REQUIREMENT TO FACILITATE VOLUNTARY REPATRIATION

A. Ending UNHCR Protection: Voluntary Repatriation as a Durable Solution

Under the UNHCR statute, UNHCR must “provide a legal framework for discontinuation of UNHCR protection”⁴⁴ and support voluntary repatriation.⁴⁵ Voluntary repatriation of former refugees is UNHCR's preferred method of ending refugee protection, as opposed

40. Joan Fitzpatrick & Rafael Bonoan, *Cessation of Refugee Protection*, in REFUGEE PROTECTION, *supra* note 22, at 492.

41. See Hathaway, *supra* note 13, at 175, 182–84 (addressing the “conceptual void” states face when seeking to implement repatriation).

42. See generally VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 2.2 (stating that voluntary repatriation can occur at a lower threshold of change); Hathaway, *supra* note 13, at 175, 200, 211–12 (discussing this confusion in standards and ultimately disagreeing with UNHCR that a higher threshold is legally necessary).

43. VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 2.2.

44. *Note on Cessation*, *supra* note 31, ¶ 31.

45. UNHCR Statute, *supra* note 6, ¶ 1.

to local integration and resettlement.⁴⁶ The scope of UNHCR repatriation efforts occurs in stages. UNHCR will facilitate repatriation at the individual refugee's request even if it does not think the situation is objectively safe for returns.⁴⁷ Two considerations justify this lower threshold. First, the Universal Declaration of Human Rights provides that every person has a right to return to his or her own country.⁴⁸ This principle is the foundation for facilitating voluntary return.⁴⁹ Second, change in the country of origin occurs over time, and at certain points returning becomes an option for particular groups even when returning remains unsafe for other refugees.⁵⁰ UNHCR-facilitated individual, voluntary returns are therefore not sufficient indicators that conditions in the country of origin have improved to such a degree that all fear of persecution is negated.

When changes in the country of origin satisfy UNHCR requirements, UNHCR considers implementing voluntary repatriation programs.⁵¹ This consideration arises in three contexts.⁵² Substantial changes in a country of origin may convince UNHCR to promote the voluntary repatriation of refugees and discontinue assistance programs.⁵³ UNHCR also reviews refugee caseloads and, in the course of this review, may reevaluate the need for protection.⁵⁴ Finally, UNHCR responds to inquiries from state parties seeking reevaluation and advises governments based on its own initiative.⁵⁵ If promotion of voluntary repatriation is successful, UNHCR may consider declaring the cessation of statutory protection under criteria provided in paragraph 6(A)(ii)(e) of its statute.⁵⁶ In these circumstances, host states cannot automatically declare cessation under the 1951 Refugee Convention.⁵⁷ "The burden rests on

46. Hathaway, *supra* note 13, at 180.

47. VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 3.1.

48. *Id.* ch. 2.1.

49. *Id.* The 1951 Refugee Convention also lists several additional international instruments that reflect this right to return. 1951 Refugee Convention, *supra* note 5, pmbl. Related rights, such as a right to a nationality, also support this principle. For a definition of "voluntary" in the context of repatriation, see VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 2.3.

50. See VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, chs. 2.2, 3.1 (supporting the notion that change in the country of origin occurs over time, and each refugee's individual circumstances impact a cessation determination as well as UNHCR's promotion of voluntary repatriation).

51. *Id.* ch. 3.1.

52. Fitzpatrick & Bonoan, *supra* note 40, at 499-511. Fitzpatrick and Bonoan list several examples of each evaluation. See *id.*

53. *Id.* at 499.

54. *Id.* at 500.

55. *Id.*

56. UNHCR Statute, *supra* note 6, ¶ 6(A)(ii)(e).

57. Note on Cessation, *supra* note 31, ¶¶ 33-34; UNHCR, Executive Committee Conclusion No. 69 (XLIII), Cessation of Status, ¶¶ (a)-(b) [hereinafter Cessation of

the country of asylum [to show] that . . . an invocation of Article 1C(5) or (6) is appropriate.”⁵⁸

UNHCR applied the ceased circumstances provision of its statute in only twenty-five instances from 1973 to 2008.⁵⁹ Each time, the provision was invoked because significant political changes had occurred and democratic rule was instituted.⁶⁰ Fitzpatrick categorizes the circumstances in which UNHCR has invoked cessation into three groups: (i) accession to independent statehood; (ii) achievement of a successful transition to democracy; and (iii) resolution of a civil conflict.⁶¹ UNHCR has provided two reasons for this limited application.⁶² First, alternative solutions, such as encouraging voluntary repatriation on an individual basis, limit the need to invoke the cessation clause.⁶³ Second, the requisite determination—whether a fundamental, durable change has occurred, ending the fear of persecution—is difficult and resource intensive.⁶⁴

B. UNHCR Guidelines for Promoting Voluntary Repatriation

In the context of repatriation, “voluntariness” is the absence of physical, psychological, or material pressure.⁶⁵ In the *Handbook on Voluntary Repatriation*, UNHCR sets forth two overarching principles governing voluntary returns that enshrine this definition:⁶⁶ Repatriation must be carried out “in safety and with dignity.”⁶⁷ A safe and dignified return is one “without harassment, arbitrary detention, or physical threats.”⁶⁸ A return “in safety” requires physical safety, legal safety, and material security.⁶⁹ Physical safety includes protection from armed attacks, and the absence of land

Status], available at <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3ae68c431c&query=%22executive%20committee%20conclusion%20no.%2069%22>.

UNHCR actions are instructive, but not sufficient.

58. GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶ 25(ii).

59. UNHCR Statement, *supra* note 33, Intro. For a detailed list, see generally *Note on Cessation*, *supra* note 31, ¶ 32; and Fitzpatrick & Bonoan, *supra* note 40, at 501.

60. *Note on Cessation*, *supra* note 31, ¶ 32.

61. Fitzpatrick & Bonoan, *supra* note 40, at 501.

62. GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶ 3.

63. *Id.*

64. Fitzpatrick & Bonoan, *supra* note 40, at 501. This is the authors' viewpoint and not the expressed view of UNHCR.

65. VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 2.3.

66. *Id.* ch. 2.4.

67. *Id.*

68. *Id.*

69. *Id.*

mines along the refugees' route of return.⁷⁰ Countries of origin can demonstrate advances in legal safety by "amnesties, public assurances of personal safety, integrity, non-discrimination and freedom from fear of persecution or punishment upon return."⁷¹

Given that the goal of refugee law is to fill in the void created by the absence of state protection with international protection, legal safety ensures that international protection can cease because returning refugees are accorded rights as citizens.⁷² Material security includes "access to land or means of livelihood."⁷³ This prong involves investigation into whether refugees can thrive upon return. To this end, refugees should be allowed to return with possessions acquired while living in the asylum country.⁷⁴

A return with dignity ensures that the country of origin restores and protects former refugees' rights.⁷⁵ This element is less tangible than safety, and encompasses benchmarks that reflect respect and honor.⁷⁶ Examples include allowing family members to return together, protecting vulnerable returnees, and ensuring freedom of movement.⁷⁷ Refugees should have access to resources and be treated equally with other nationals as they integrate into the national community.⁷⁸

To ensure that these principles are satisfied, UNHCR requires fulfillment of several preconditions before it will promote voluntary repatriation as a durable solution. First, the country must have undergone an "overall general improvement" to the degree that UNHCR believes that the return will be in safety and with dignity.⁷⁹ Second, the host state, country of origin, and refugee must agree that the return is voluntary.⁸⁰ The legal status of refugees in host countries is an important factor in considering true voluntariness.⁸¹ If refugees' rights are not recognized and they are confined in camps,

70. *Id.* Recognizing that it may be infeasible to provide a mine-free route, the *Voluntary Repatriation Handbook* states, "if not mine-free then at least demarcated settlement sites." *Id.*

71. *Id.*

72. REFUGEE HANDBOOK, *supra* note 4, ¶¶ 115, 118, 135.

73. VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 2.4.

74. *Id.* ch. 2.4. UNHCR includes compensation for movable and immovable property refugees left behind in the host country, though this benchmark is phrased more as a suggestion rather than a requirement. *Id.* ch. 3.6.

75. *Id.*

76. *See* Hathaway, *supra* note 13, at 207. Hathaway points out several problems with UNHCR terms, suggesting that it link these requirements to other international legal instruments that governments' respect.

77. VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 2.4.

78. *Id.* ch. 6.4.

79. *Id.* ch. 3.1.

80. *Id.*

81. *Id.* ch. 2.3.

it is less likely that the decision to repatriate is voluntary.⁸² In addition, UNHCR must have unimpeded access to refugees.⁸³ Finally, the terms of the repatriation must be formalized in an agreement between UNHCR and the countries involved.⁸⁴ If these conditions are satisfied, UNHCR will undertake a campaign to promote repatriation.⁸⁵

One striking difference between mandatory and voluntary repatriation is the role of the country of origin. Before implementing voluntary repatriation programs, UNHCR requires a high level of cooperation with the government of the country of origin. It must formally guarantee the ability of refugees to return safely.⁸⁶ In addition to this formal guarantee, the government must provide travel documents and proof of citizenship for returnees and their children.⁸⁷ The government must agree to allow UNHCR to monitor returnees, ensuring that national protection is adequate.⁸⁸ In contrast, no similar requirements are present when host states choose to mandate repatriation.

V. MANDATED REPATRIATION

As set forth above, UNHCR implements voluntary repatriation programs, dependent on positive changes in the country of origin. In contrast, states can mandate repatriation without the consent of refugees.⁸⁹ UNHCR has put forth requirements states should follow when determining if mandating repatriation, and therefore ceasing international protection, is appropriate.⁹⁰ Though not extensively used in state practice, state jurisprudence interpreting UNHCR guidelines is not clear. This section details the conflict between UNHCR recommendations and state practice.

82. *Id.* ch. 2.3.

83. *Id.*, ch. 3.1.

84. *Id.*

85. *Id.*

86. *Id.* ch. 1.4.

87. *Id.* ch. 2.6.

88. *Id.* chs. 1.6, 2.6.

89. UNHCR Statement, *supra* note 33, § 2.1.

90. See generally REFUGEE HANDBOOK, *supra* note 4 (outlining the basic principle that cessation of refugee status requires more than a determination that the fear of persecution has ceased); GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12 (same); UNHCR Statement, *supra* note 33 (same).

A. *UNHCR Guidelines for Declaring Cessation
Under the 1951 Refugee Convention*

As the agency tasked with supervising the 1951 Refugee Convention, UNHCR guidelines are instructive in interpreting convention requirements. The overarching principle is that cessation of protection under the 1951 Refugee Convention arises when a change takes place in the country of origin, "which can be assumed to remove the basis of the fear of persecution."⁹¹ According to UNHCR, for a state to mandate repatriation and invoke Article 1C(5) and (6) of the convention, thereby ceasing international protection, the host state must determine that changes are fundamental and durable, and effective protection must be available in the country of origin.⁹² Changes that qualify as "fundamental" most often involve an end to hostilities and a political change resulting in a return to peace and stability.⁹³ This type of change is supported by significant reforms that alter the basic legal or social structure of the state, including "democratic elections, declarations of amnesties, repeal of oppressive law and dismantling of former security services."⁹⁴ If a society undergoes a change that eliminates the original cause of the fear of persecution, but the change creates a new fear of persecution that could potentially give rise to refugee status, the cessation clause cannot be invoked.⁹⁵

Additionally, UNHCR maintains that the change must be durable and stable.⁹⁶ UNHCR cautions that a change is not durable if the country's political and economic climate is currently in flux or is still potentially volatile.⁹⁷ UNHCR recommends that host states wait a minimum of twelve to eighteen months after a fundamental change is implemented before determining whether the change is durable.⁹⁸ If the change was undertaken violently, a longer timeframe is appropriate.⁹⁹ "The process of national reconstruction must be given

91. REFUGEE HANDBOOK, *supra* note 4, ¶ 135; UNHCR Statement, *supra* note 33, § 2.2; GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶¶ 10–12.

92. UNHCR Statement, *supra* note 33, § 2.2; *see also* GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶¶ 10–16 (elaborating on the operation of the aforementioned triggering criteria).

93. GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶ 11; *Note on Cessation*, *supra* note 31, ¶ 20.

94. *Note on Cessation*, *supra* note 31, ¶ 20.

95. GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶ 12.

96. *Note on Cessation*, *supra* note 31, ¶¶ 20–21; GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶¶ 13–14.

97. *Note on Cessation*, *supra* note 31, ¶ 21; GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶¶ 13–14; UNHCR Statement, *supra* note 33, § 2.1.

98. *Note on Cessation*, *supra* note 31, ¶ 21. UNHCR notes that the average time for fundamental enduring changes to take root is between four and five years. *Id.*

99. GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶¶ 13–14.

sufficient time to take hold and any peace arrangements with opposing militant groups must be carefully monitored.”¹⁰⁰

Finally, UNHCR requires that the home country be able to provide effective protection, thus negating the need for international protection.¹⁰¹ Under the UNHCR definition, effective protection requires a functioning government and administrative structures, a working law enforcement and justice system, and the ability of returning refugees to access livelihoods.¹⁰² Large-scale voluntary repatriation of refugees is one indicator that changes have occurred.¹⁰³ However, UNHCR notes that in instances when the return of former refugees is likely to reignite tensions, repatriation can actually indicate the absence of fundamental, durable changes.¹⁰⁴

Analyzing whether these three factors—a fundamental, durable change that establishes effective protection—eliminate the fear of persecution that caused flight necessitates inquiry into whether other international human rights norms are fulfilled.¹⁰⁵ In the UNHCR *Note on Cessation Clauses*, specific factors include:

The 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.¹⁰⁶

Creating institutions to monitor human rights protection is a strong indicator of a fundamental change.¹⁰⁷

In determining the applicability of cessation, UNHCR interprets Article 1C(5) and (6) to place an affirmative obligation on asylum states to evaluate the conditions of the country of origin. Asylum states must allocate resources for investigation and information gathering to identify a fundamental, durable, and stable change that eliminates the fear of persecution.¹⁰⁸ Any state declaring cessation should use numerous sources of evidence and include information from both governmental and nongovernmental sources.¹⁰⁹ UNHCR recommends that refugee status review be infrequent, in conjunction with refugees’ need for stability.¹¹⁰ The burden of assessing

100. *Id.* ¶ 14.

101. *Note on Cessation*, *supra* note 31, ¶ 6.

102. GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶ 15; UNHCR Statement, *supra* note 33, §§ 4.2.1, 4.2.3.

103. GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶ 12.

104. *Id.*

105. *Note on Cessation*, *supra* note 31, ¶ 23.

106. *Id.*

107. *Id.*

108. GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶ 25(i)–(iii).

109. *Id.*; Cessation of Status, *supra* note 57, ¶¶ (a)–(b).

110. REFUGEE HANDBOOK, *supra* note 4, ¶ 135; *Note on Cessation*, *supra* note 31, ¶ 6.

circumstances in the country of origin—combined with the increase in administrative costs of mandating repatriation—limits the application of this clause.¹¹¹

If, after such an investigation has occurred, a host state chooses to declare cessation, UNHCR insists that several procedural guidelines be followed. Declarations of cessation must be public.¹¹² The host state must provide counseling and assistance to refugees,¹¹³ allow adequate time to prepare for return, and respect the acquired rights of long-term residents.¹¹⁴ Moreover, cessation of refugee status does not automatically result in mandatory repatriation.¹¹⁵ Invoking cessation for a nationality group creates a rebuttable presumption that cessation applies to individual members.¹¹⁶

B. State Practice Under the Ceased Circumstances Provision

UNHCR and state parties seem to agree that the cessation clause should be invoked cautiously.¹¹⁷ In practice, the procedures outlined above for applying the cessation clause are not well developed.¹¹⁸ This gap in international law places refugees at high risk of prematurely losing protection and increases the burden on asylum countries.¹¹⁹ Additionally, state jurisprudence on Article 1C(5) to (6) is limited and inconsistent.

A few courts have articulated a much more narrow conception of protection than the interpretation advanced by UNHCR. The High Court of Australia, in *The Minister for Immigration and Multicultural Affairs v. QAAH*, found that when determining whether a fear of persecution still exists, the refugee has the burden of proving a continued fear of persecution.¹²⁰ The court interpreted the 1951 Refugee Convention and domestic law to require Australia to extend protection only to persons who continued to meet the definition set forth in Article 1A(2), which governs the initial determination of

111. Expert Roundtable, Lisbon, Port., May 3–4, 2001, *Summary Conclusions: Cessation of Refugee Status*, ¶¶ 1–2 (June 2003), available at <http://www.unhcr.org/refworld/publisher,CUP,THEMGUIDE,,470a33bcd,0.html>.

112. GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶ 25(iv).

113. *Id.* ¶ 25(v).

114. *Id.* ¶ 25(vi).

115. *Id.* ¶ 25(ix); REFUGEE HANDBOOK, *supra* note 4, ¶ 136.

116. GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶ 19; REFUGEE HANDBOOK, *supra* note 4, ¶ 136.

117. Fitzpatrick & Bonoan, *supra* note 40, at 498–99 (citing the Commission on European communities and the policies of the Australian and Dutch governments as examples of state policy that tracks UNHCR reasoning).

118. *Id.* at 499.

119. Hathaway, *supra* note 13, at 182–83.

120. Kneebone & O'Sullivan, *supra* note 11, at 514 (citing *Minister of Immigration & Multicultural & Indigenous Affairs v. QAAH* (2006) 231 CLR 1 (Austl.)).

refugee status.¹²¹ This understanding of the convention makes refugee status evaluation and cessation determination the same inquiry, rather than discrete procedures with separate evidentiary requirements.¹²² The court construed the cessation clause to operate automatically, in direct contradiction to UNHCR interpretation.¹²³ Most troubling, the court rejected the affirmative burden UNHCR places on states to investigate a change in circumstances.¹²⁴

Likewise, Germany has interpreted this burden of protection narrowly in recent case law. In 2008, the German Federal Administrative Court withdrew refugee status from an individual because the court determined that the fear of persecution had ceased.¹²⁵ Echoing the reasoning of the High Court of Australia, the German court articulated symmetry between the definition of “refugee” set forth in Article 1A(2) and cessation in Article 1C(5).¹²⁶ The court rejected the broad articulation of protection advanced by UNHCR that includes an investigation into fundamental, durable changes in the country of origin.¹²⁷

In an advisory opinion on the German cessation cases, the European Court of Justice (ECJ) set forth a more inclusive understanding of protection than that outlined by the German court, but did not fully endorse UNHCR recommended guidelines.¹²⁸ When deciding whether a refugee should continue receiving protection, the host country must determine whether the country of origin has a functioning legal system and whether the individual in question will have access to that system.¹²⁹ The ECJ also recommended that the host country take into account the basic human rights situation in the country of origin.¹³⁰ These standards are higher than the narrow determination focusing solely on a fear of persecution, but still do not reflect the breadth of UNHCR recommendations.

121. *Id.*

122. *See id.* (noting the mirrored standard between Article 1C(5) and 1A(2)).

123. *Id.* at 515. UNHCR states in several publications that cessation procedures must take into account the individual circumstances that caused flight, and therefore refugees should not lose status without the opportunity for a hearing. *See* GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶ 19 (explaining the “general principle” that all refugees should have the possibility for a continuation of status based on their individual case); *Note on Cessation*, *supra* note 31, ¶ 7 (“[N]o refugee claim, whether for granting of refugee status or for its continuation, should be rejected without an individual assessment on its merits.”).

124. Kneebone & O’Sullivan, *supra* note 11, at 515 (citing *QAAH*, 231 CLR 1).

125. *Id.* at 516.

126. *Id.*

127. *Id.* For other academic criticisms of this understanding of the 1951 Refugee Convention, *see id.* at 516 n.283.

128. *Id.* at 517 (citing *Joined Cases 175–179/08, Abdullah et al. v. Bundesrepublik Deutschland*, 2010 E.C.R. 113/4).

129. *Id.*

130. *Id.*

UNHCR responded by reiterating its much broader conception of states' obligations under the 1951 Refugee Convention in its statement on the ECJ ruling. In interpreting Article 1C(5), UNHCR stated:

Application of the "ceased circumstances" clause should be informed by the overall objective of refugee protection, which aims at finding durable solutions for refugees. Durable solutions are integration in the host State, resettlement to a third State and voluntary return to the home State if this is possible in safety and dignity.¹³¹

Notably absent from this list of durable solutions is mandatory repatriation. Yet, UNHCR stated that application of Article 1C(5) and (6) does not require the consent or any voluntary act of the refugee.¹³²

The cases from Australia and Germany reflect an understanding of protection that begins and ends with a fear of persecution.¹³³ In contrast, UNHCR clarified that "protection," as envisioned in the mandate, means more than an absence of persecution.¹³⁴ It requires the availability of "effective protection," understood in the broad sense of a stable, functioning state.¹³⁵ The purpose of refugee law "entails protection against return to persecution (as enshrined in the principle of nonrefoulement) and protection allowing for a life in dignity in the host state."¹³⁶ Therefore, when a host state applies Article 1C(5) of the 1951 Refugee Convention, the state declares that the need for international protection no longer exists.¹³⁷ Accordingly, UNHCR maintains that cessation is not appropriate when protection against persecution can be provided only with the help of multinational forces.¹³⁸ The authority of non-state actors cannot be substituted for the power of a state to effect the rule of law because under international law, non-state actors are not accorded the same

131. UNHCR Statement, *supra* note 33, § 2.1.

132. *Id.*

133. See Kneebone & O'Sullivan, *supra* note 11, at 514 (discussing the common threads, but sometimes conflicting conclusions, between cases).

134. See UNHCR Statement, *supra* note 33, § 4.1.2 (arguing that an "effective protection" determination is broader than the grant of status in Article 1A(2) of the 1951 Refugee Convention). When determining cessation, UNHCR states that the question is not whether the fear of persecution has ceased, but rather whether national protection is sufficient. *Note on Cessation*, *supra* note 31, ¶ 25.

135. GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶ 15; see also *Note on Cessation*, *supra* note 31, ¶ 25. Along with legal and physical safety, UNHCR includes returnees' access to livelihoods when determining whether a state is "functioning." Hathaway notes that this requirement is above what is guaranteed by international human rights law, which includes only a right to basic necessities. Hathaway, *supra* note 13, at 212-13.

136. UNHCR Statement, *supra* note 33, § 4.1.2.

137. *Id.*

138. *Id.* § 4.2.1.

rights and authority as state actors.¹³⁹ As a result, their ability to implement national, fundamental, durable change is necessarily limited.

Other state parties to the 1951 Refugee Convention have hewed closer to UNHCR's interpretation of the requirements for mandatory repatriation, placing the evidentiary burden on the host country during refugee status determinations.¹⁴⁰ United States immigration regulations require the government to prove that a change in circumstances has occurred, thereby eliminating the fear of persecution.¹⁴¹ The refugee does not have to prove a continuing fear of persecution. Similarly, United Kingdom policy documents and case law place the evidentiary burden on the immigration authority to establish that the individual's refugee status has ceased.¹⁴² While these state practices differ from Australian and German case law, it is unclear whether the evidentiary burden in more favorable jurisdictions reaches the threshold advocated by UNHCR, which includes both the end of a fear of persecution and proof of effective national protection.

C. The "Compelling Reasons" Exception to Mandatory Repatriation

The tension between a determination of refugee status based on current fear of persecution and a continuation of status based on past persecution is demonstrated in the exceptions to cessation. If an asylum state applies the ceased circumstances provision to a group and thereby mandates repatriation, UNHCR recommends the state provide a method for reviewing the individual circumstances of a refugee.¹⁴³ At this stage, the focus is on the specific causes of an individual's flight.¹⁴⁴ The inquiry is twofold: first, whether the documented change eliminated the risk of persecution and second, whether national protection can replace international protection.¹⁴⁵ The first step of the inquiry recognizes that a formal regime change

139. *Id.*

140. Kneebone & O'Sullivan, *supra* note 11, at 526.

141. *Id.*

142. *Id.* at 527. Kneebone and O'Sullivan note that UNHCR's interpretation of the evidentiary burden required to invoke Article 1C(5) is supported by many academic commentators. *Id.*

143. GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶ 25(vii)–(viii); Fitzpatrick & Bonoan, *supra* note 40, at 513. In group mandated repatriation, allowing a forum to contest cessation helps ensure that states are not violating the Article 33 prohibition on nonrefoulement. 1951 Refugee Convention, *supra* note 5, art. 33(1).

144. GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶ 25(ix); see generally REFUGEE HANDBOOK, *supra* note 4, ¶¶ 37–45 (explaining the objective and subjective elements of a "well-founded fear of persecution").

145. See GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶¶ 19–21 (describing compelling reasons that negate a refugee's ability to return to the country of origin).

does not necessarily negate prejudices and the possibility that persecution will continue at the hands of non-state actors.¹⁴⁶ If the regime change does not end a valid fear of persecution, cessation is improper, regardless of the change in circumstances.¹⁴⁷

When a change in circumstances has alleviated the well-founded fear of persecution, thereby satisfying the first prong of the inquiry, UNHCR asks states to allow refugees to invoke the humanitarian principle.¹⁴⁸ Found in Article 1C(5), this exception is limited to pre-1939 refugees.¹⁴⁹ UNHCR strongly recommends that states allow all refugees the opportunity to apply for a continuation of status.¹⁵⁰ Terming this exception “the humanitarian principle,” a refugee maintains his status, despite the host state’s invocation of cessation, if he can establish “compelling reasons arising out of previous persecution for refusing to avail himself of the protection of his country of nationality.”¹⁵¹ Such reasons might include severe forms of persecution that result in continuing trauma.¹⁵² The provision protects refugees who have suffered so greatly that they cannot be expected to return to their country of origin.¹⁵³ UNHCR encourages states to apply this principle to current convention refugees on humanitarian grounds.¹⁵⁴ Several countries, including the United States, Canada, and the Netherlands, adopted the humanitarian principle into domestic legislation; other countries, notably France and Germany, expressly declined to extend this principle to convention refugees.¹⁵⁵

146. See REFUGEE HANDBOOK, *supra* note 4, ¶ 136 (noting that a formal regime change does not ensure that all citizens have undergone the same change of mindset toward the previously persecuted group).

147. *Note on Cessation*, *supra* note 31, ¶ 19; Fitzpatrick & Bonoan, *supra* note 40, at 517.

148. 1951 Refugee Convention, *supra* note 5, art. 1C(5); see also Hathaway, *supra* note 13, at 204–06 (arguing that UNHCR’s interpretation of the text of the 1951 Refugee Convention is based on its own statutory interpretation, and therefore this obligation is not required under the convention).

149. 1951 Refugee Convention, *supra* note 5, art. 1C(5).

150. See VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 2.2 (noting that individual refugees may continue to have a fear of persecution despite significant changes in the country of origin); *Note on Cessation*, *supra* note 31, ¶ 24 (listing examples of what might qualify as “compelling”).

151. 1951 Refugee Convention, *supra* note 5, art. 1A(a), C(5).

152. *Note on Cessation*, *supra* note 31, ¶ 24.

153. UNHCR Statement, *supra* note 33, § 2.3; Milner, *supra* note 16, at 94.

154. GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶ 21; see also Milner, *supra* note 16, at 96 (noting the “Conclusions of the Lisbon Expert Roundtable” found that extension of this humanitarian principle is “well grounded in state practice” and applies to all Article 1A(2) refugees). However, UNHCR’s recommendation of socioeconomic factors is not explicitly included in the 1951 Refugee Convention. *Id.* at 103.

155. Milner, *supra* note 16, at 97.

David Milner highlights the tension between Article 1A(2), which grants protection based on current risk, and this humanitarian principle, which continues protection based on past persecution.¹⁵⁶ Milner seeks to reconcile this tension by focusing on the substitution of the word “person” for “refugee.”¹⁵⁷ By using the term “person,” UNHCR is acknowledging that protection for these individuals should continue, but not formally as refugees.¹⁵⁸ While Milner’s reconciliation satisfies the formality of the instruments, the language of the convention does not obligate states to consider this humanitarian principle.¹⁵⁹

VI. HARMONIZING MANDATORY REPATRIATION WITH UNHCR’S PRINCIPLE OF VOLUNTARY REPATRIATION

UNHCR guidelines and state practice can be understood to set forth a timeline for repatriation that ensures the continued safety and protection of the refugee. Beginning when refugee status is conferred, UNHCR aids voluntary repatriation at the request of the individual refugee.¹⁶⁰ As the situation that initially caused flight improves, UNHCR implements voluntary repatriation programs directed at large groups of refugees.¹⁶¹ These voluntary repatriation programs are indicators that states may consider activating the cessation clause for individual refugees.¹⁶² Mandated repatriation on a group scale is the last stage, implemented after the fear of persecution causing flight is extinguished and the evidentiary burden established by UNHCR is satisfied.¹⁶³ Group cessation carries the highest evidentiary burden because it ceases international protection.¹⁶⁴ This timeline syncs these two legal foundations and

156. See *id.* at 95, 99–104 (identifying three rationales for this exception: breaking of the social contract, psychological damage, and a socioeconomic obstacle to return).

157. *Id.* at 95.

158. *Id.*

159. Hathaway, *supra* note 13, at 204–06.

160. See VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 3.1. UNHCR outlines the reasoning behind UNHCR’s stages for voluntary repatriation. UNHCR notes that from the onset of a refugee crisis, the organization begins addressing the crisis through political avenues and relief on the ground.

161. *Id.* Terming these measures “promotion of repatriation,” UNHCR distinguishes these group programs from its role in facilitating repatriation at the individual refugee’s request.

162. GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶ 12.

163. 1951 Refugee Convention, *supra* note 5, art. 1C(5)–(6).

164. Cf. GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶¶ 6–7 (discussing cessation in conjunction with the need to provide durable solutions for refugees); *Note on Cessation*, *supra* note 31, ¶ 6; UNHCR Statement, *supra* note 33, § 4.2.1 (asserting that the concept of protection is broader than merely an absence of

their explanatory documents in a linear development that reflects the progress of change in the country of origin and guarantees that the refugee is never without protection.

Understanding voluntary repatriation and mandated repatriation to form a continuum that is dependent on changes in the country of origin unites UNHCR's institutional mandate, convention-based repatriation, and the overarching goals of refugee law. When UNHCR manages repatriations, it operates in line with its statutory requirement to implement only voluntary repatriation.¹⁶⁵ As established earlier, UNHCR will facilitate repatriation at the individual refugee's request even if it does not think the situation is objectively safe for returns.¹⁶⁶ UNHCR-facilitated individual, voluntary returns alone cannot be taken as authoritative indicators that a fundamental change has occurred in the country of origin.

UNHCR promotes voluntary repatriation on a larger scale when it determines that returns can take place in safety and with dignity.¹⁶⁷ This standard—"in safety and with dignity"—requires that the legal status of returning refugees is secure under national law.¹⁶⁸ When UNHCR determines that conditions have improved such that national protection is sufficient and refugees will thrive upon return, transition from a management to return model is appropriate.¹⁶⁹ At this stage of investigation, the inquiry moves beyond merely assessing whether a fear of persecution has ceased to considering other human rights concerns.¹⁷⁰ UNHCR properly roots this obligation in other human rights norms to ensure that it is not violating international law and returning vulnerable people to unsafe situations.¹⁷¹

persecution—adequate state protection should not rely on non-state actors, including international organizations).

165. UNHCR Statute, *supra* note 6, ¶¶ 1, 8(c) (stating that UNHCR must "facilitate" voluntary repatriation and assist government efforts to "promote" voluntary repatriation). Hathaway notes that UNHCR operates as if it is authorized to effect only voluntary repatriation. Hathaway, *supra* note 13, at 192.

166. VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 3.1. UNHCR will facilitate returns at the request of individual refugees to return to unsafe situations based on the right to return guaranteed in the Universal Declaration of Human Rights. *Id.* ch. 2.1.

167. *Id.* chs. 2.4, 3.1.

168. *See id.* ch. 4.1 (noting that misrepresentation of legal status negates the voluntary nature of the return); *see also Note on Cessation, supra* note 31, ¶ 6 (stating that cessation should not result in refugees losing all legal status).

169. *See generally* VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 3 (describing the stages of voluntary repatriation).

170. *See id.* ch. 2.1 (discussing the right to return and its relation to other fundamental human rights).

171. *Id.*; *see also Note on Cessation, supra* note 31, ¶ 6 (discussing the object and purpose of cessation clauses in conjunction with the principles of refugee protection). *But see* Hathaway, *supra* note 13, at 208–09 (arguing that UNHCR should articulate the connection with other human rights instruments more clearly).

As UNHCR and state parties have recognized, revoking international protection without the consent of the refugee places the burden on the state seeking to terminate status to prove that fear of persecution has ceased and that international protection is no longer necessary.¹⁷² This evidentiary burden is very high, as demonstrated by the fundamental, durable, and effective protection standards required.¹⁷³ Though the case law from Australia and Germany seems contrary to UNHCR's timeline, those cases involved individual status determinations.¹⁷⁴ When mandating repatriation to an entire group of refugees, multiple legal obligations are acting upon states. First, the duty of nonrefoulement in Article 33, interpreted with the "change in circumstances" necessary in Article 1C(5), requires that the "well-founded" fear of persecution based on convention criteria has ceased.¹⁷⁵ Second, host states must satisfy other international human rights obligations to which they are parties in addition to the 1951 Refugee Convention.¹⁷⁶ State practice supports incorporating these human rights principles into an inquiry of status determination.¹⁷⁷ UNHCR materials can be understood to encode these international human rights obligations. Therefore, while UNHCR materials are not legal per se, the guidelines reflect duties host states may have under international human rights law.¹⁷⁸

Reading UNHCR guidelines to create a timeline of repatriation, and placing voluntary and mandatory repatriation on this continuum, clarifies UNHCR's interpretation of states' obligations under the 1951 Refugee Convention. UNHCR's continual advocacy of solely voluntary repatriation complicates the standards for states implementing mandated repatriation.¹⁷⁹ UNHCR may facilitate voluntary repatriation efforts long before conditions have changed to

172. Kneebone & O'Sullivan, *supra* note 11, at 526; UNHCR Statement, *supra* note 33, § 2.1.

173. See VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 2.2. The voluntary nature of the refugee's decision to return is a key justification for this lower evidentiary requirement. Accordingly, UNHCR places a great emphasis on ensuring that a refugee's decision is truly voluntary and not caused by a hostile environment in the host country. *Id.* ch. 2.3.

174. Kneebone & O'Sullivan, *supra* note 11, at 514–16.

175. 1951 Refugee Convention, *supra* note 5, art. 33; see generally REFUGEE HANDBOOK, *supra* note 4, ¶¶ 37–45 (noting that a "well-founded fear of persecution" includes a refugee's own perception as well as the context of the country of origin).

176. See VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 2.1 (giving examples of human rights norms activated during cessation).

177. Kneebone & O'Sullivan, *supra* note 11, at 526; see also text accompanying notes 140, 172.

178. For a discussion of applicable human rights norms, see Hathaway, *supra* note 13, at 208–11. Hathaway disagrees that international human rights law places as high a burden on host states. *Id.* at 212.

179. *Id.* at 199.

a degree that supports mandated repatriation.¹⁸⁰ However, when UNHCR has begun to promote voluntary repatriation, states have taken this action as a signal that their duties as asylum states are fulfilled.¹⁸¹ This timeline places UNHCR-facilitated voluntary repatriation as a necessary, but not sufficient, benchmark toward group, mandated repatriation. Host states have an affirmative obligation to investigate and evaluate a change in circumstances.¹⁸²

At the beginning of the analysis, this Note recognized that UNHCR materials, while authoritative, are not the sole means of interpreting the 1951 Refugee Convention. State practice sets standards in understanding what is required under international law. James Hathaway notes that UNHCR, in an effort to raise humanitarian standards, may actually contribute to their erosion by not acknowledging states' ability to end refugee status.¹⁸³ UNHCR can proactively contribute to the development of international law by encouraging states to adhere to the high evidentiary standard when mandating repatriation.

VII. RWANDAN REFUGEES IN UGANDA

As set forth above, tension exists between the UNHCR requirement to implement voluntary repatriation and a state's ability to mandate repatriation under the 1951 Refugee Convention. These conflicting standards are demonstrated by the actions of UNHCR, Uganda, and Rwanda in facilitating repatriation and determining the end of refugee status.

180. See generally VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 3.1 (explaining "essential preconditions" for promotion of repatriation). UNHCR states that it will facilitate repatriation at the request of the refugee before the standard to implement the cessation clause has been reached. *Note on Cessation*, *supra* note 31, ¶ 29.

181. Hathaway, *supra* note 13, at 193. UNHCR states that large-scale repatriation can be a factor states consider when determining whether a fundamental change has occurred. *Note on Cessation*, *supra* note 31, ¶ 29. For a discussion of the current confusion of these two evidentiary burdens, see Hathaway, *supra* note 13, at 199–200.

182. See, e.g., GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶ 25 (noting that the burden should be on the country of asylum to prove change in the country of origin).

183. Hathaway, *supra* note 13, at 199. Additionally, UNHCR's *Handbook on Voluntary Repatriation* instructs host states to follow UNHCR's lead in promoting voluntary repatriation. VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 2.5.

A. Background of Rwandan Refugees in Uganda

In April 1994, Rwanda disintegrated into violence.¹⁸⁴ Hutus, the ethnic majority in Rwanda, began attacking Tutsis in a systematic and organized campaign of murder.¹⁸⁵ An estimated 800,000 Tutsis were murdered over the course of four months.¹⁸⁶ Following the genocide, millions of Rwandans fled to neighboring countries.¹⁸⁷ UNHCR has been assisting the voluntary repatriation of Rwandan refugees since 1995.¹⁸⁸

Currently, 60,000–65,000 Rwandan refugees live in asylum countries,¹⁸⁹ and 16,300 reside in Uganda.¹⁹⁰ Host countries in this region have not always been hospitable. In 1996, Tanzania forced the return of tens of thousands of Rwandan refugees.¹⁹¹ The government of Burundi pursued a similar strategy in 2005, forcibly returning over 6,000 Rwandan refugees.¹⁹² These states demonstrated no proof that they had undertaken efforts to establish a change in circumstances, as UNHCR maintains is mandated by the 1951 Refugee Convention.¹⁹³

In 2003, Uganda began advocating the cessation of refugee status for all Rwandan refugees,¹⁹⁴ and in July of that year, Uganda, Rwanda, and UNHCR signed a tripartite agreement for the voluntary repatriation of the over 23,000 Rwandan refugees living in Uganda.¹⁹⁵ The terms of the agreement provided that Rwandans may return to Rwanda without satisfying any preconditions, and no refugee will be forced to return.¹⁹⁶ Subsequently, UNHCR began

184. Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1222 (2000).

185. *Id.* at 1223.

186. *Id.* at 1222.

187. David Nthengwe, *UNHCR and Rwanda Seek Enduring Solution for Protracted Refugee Situation*, UNHCR—UN REFUGEE AGENCY (Oct. 20, 2009), <http://www.unhcr.org/4aadd7fd9.html>.

188. *Id.*

189. *Id.*

190. UNHCR, *Uganda*, in GLOBAL APPEAL UPDATE 84, 84–87 (2011) [hereinafter *Uganda Needs Assessment*], available at <http://www.unhcr.org/4cd969139.html>.

191. Lori A. Nessel, *Rape and Recovery in Rwanda: The Viability of Local Justice Initiatives and the Availability of Surrogate State Protection for Women that Flee*, 15 MICH. ST. J. INT'L L. 101, 126 (2007).

192. *Tanzania/Uganda: Prevent Forced Return of Refugees*, HUMAN RIGHTS WATCH (June 19, 2009), <http://www.hrw.org/en/news/2009/06/19/tanzaniauganda-prevent-forced-return-refugees>.

193. See, e.g., Nessel, *supra* note 191, at 126 (discussing state behavior inconsistent with obligations under the 1951 Refugee Convention).

194. *Uganda: Tripartite Agreement Signed on Return of Rwandans*, UNHCR—UN REFUGEE AGENCY (July 25, 2003), <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3f20fbe2c&query=rwanda%20repatriation> [hereinafter *Uganda Tripartite Agreement*].

195. *Id.*

196. *Id.*

promoting voluntary repatriation.¹⁹⁷ In April 2009, UNHCR met with the governments of Rwanda and Uganda to discuss the continued repatriation of Rwandan refugees.¹⁹⁸ UNHCR and both governments agreed that continuing refugee status for Rwandans living in Uganda was no longer necessary.¹⁹⁹ UNHCR set a goal for ending Rwanda's protracted refugee problem by 2011.²⁰⁰

NGOs expressed concern that the repatriation advocated by UNHCR would be involuntary.²⁰¹ The Refugee Law Project, reporting on ReliefWeb, urged UNHCR to clarify the voluntary nature of repatriation and to educate refugees on protection options if they did not wish to return.²⁰² The lack of consideration for individual circumstances and alternative durable solutions was particularly concerning.²⁰³ Reports of the April 2009 meeting do not include any reference to investigation by Uganda into the changed circumstances in Rwanda.²⁰⁴

UNHCR originally set a July 31, 2009, benchmark for repatriation before camps closed.²⁰⁵ In May 2009, news reports documented that Rwandan refugees living in camps in Uganda had begun to flee, fearing forced repatriation.²⁰⁶ Among the reasons cited for wanting to remain in Uganda included fear of persecution and imprisonment upon return.²⁰⁷ Refugees caught fleeing were arrested.²⁰⁸ Confronting these reports, UNHCR repeated that repatriation was voluntary and that UNHCR would still provide aid to those remaining in the camps.²⁰⁹

In June 2009, Human Rights Watch urged the government of Uganda to educate Rwandan refugees, before the camps closed in July, on their protection under international law.²¹⁰ Although the tripartite agreement pledges that Uganda will provide alternative

197. *UNHCR Mounts Campaign for Return of 80,000 Rwandan Refugees*, UNHCR—UN REFUGEE AGENCY (Nov. 6, 2003), <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3faa72027&query=rwanda%20repatriation>.

198. Memorandum from Chris Dolan, Dir., Refugee Law Project on Rwandese Repatriation (May 15, 2009) [hereinafter *Rwandese Repatriation Memo*], available at <http://reliefweb.int/node/312404>.

199. *Id.*

200. UNHCR, *Rwanda*, in GLOBAL APPEAL UPDATE 34, 34–38 (2011) [hereinafter *Rwanda Global Appeal*], available at <http://www.unhcr.org/pages/49e45c576.html>.

201. *Rwandese Repatriation Memo*, *supra* note 198.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Rwanda-Uganda: Refugees Leave Camps Fearing Repatriation*, INTEGRATED REGIONAL INFO. NETWORKS, May 14, 2009, available at <http://www.unhcr.org/refworld/country,,,RWA,456d621e2,4a0bdbc819,0.html>.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Tanzania/Uganda: Prevent Forced Return of Refugees*, *supra* note 192.

solutions for refugees who were unwilling to repatriate,²¹¹ Uganda had taken no affirmative steps to provide alternative solutions.²¹² Refugees continued to flee, fearing forced repatriation.²¹³

The July 2009 deadline was subsequently extended to August 31, 2009.²¹⁴ Reports from August document the Rwandan government threatening to revoke citizenship of refugees who had not returned by that deadline.²¹⁵ A Rwandan government official was quoted: “[Rwanda] shall apply the secession [sic] clause if they have returned by the end of December, there is no more reason for any Rwandan to become a refugee.”²¹⁶ However, as of 2010, camps remained open.²¹⁷ Uganda continued to force returns in spite the public condemnation from UNHCR.²¹⁸ In one incident, two men died jumping from trucks as Ugandan police attempted to drive refugees across the Rwandan border.²¹⁹

In its 2011 country report on Rwanda, UNHCR described the domestic political situation as “relatively stable,” with pockets of unrest during the presidential election.²²⁰ Rwanda frequently requests that UNHCR invoke the cessation clause, ending international protection of refugees.²²¹ UNHCR reiterates the goal of invoking its statutory clause by the end of 2011.²²² Until then, UNHCR will continue to promote the voluntary repatriation of Rwandan refugees.²²³

211. *Id.*

212. *Id.*

213. *Id.*

214. *Rwanda-Uganda: Repatriation Deadline Extended*, INTEGRATED REGIONAL INFO. NETWORKS, Aug. 10, 2009, available at: <http://www.unhcr.org/refworld/docid/4a85177b2c.html>.

215. *Rwanda/Uganda: Go Home, Uganda Tells Rwandan Refugees*, INTEGRATED REGIONAL INFO. NETWORKS, Aug. 4, 2009 [hereinafter *Go Home*], available at <http://www.unhcr.org/refworld/country,,,RWA,456d621e2,4a7fcc92c,0.html>.

216. *Id.* This quote reflects a fundamental misunderstanding of international law. As the country of origin, Rwanda has no authority to invoke the cessation clause. See Ben Simon, *Rwanda Refugees Pushed to Return to a Home They Consider Unsafe*, CHRISTIAN SCI. MONITOR, July 30, 2009, <http://www.csmonitor.com/World/Africa/2009/0730/p06s04-woaf.html> (noting that the desire to invoke the clause stems from national pride).

217. *Rwanda Global Appeal*, *supra* note 200.

218. *UNHCR Condemns Forced Return of 1,700 Rwandans from Uganda*, UNHCR—UN REFUGEE AGENCY (July 16, 2010), <http://www.unhcr.org/4c406edb6.html> [hereinafter *UNHCR Condemns*].

219. *Id.*

220. *Rwanda Global Appeal*, *supra* note 200.

221. *Id.*; see, e.g., *Go Home*, *supra* note 212 (quoting Rwandan official expressing desire to invoke cessation clause).

222. *Rwanda Global Appeal*, *supra* note 200.

223. *Id.*

B. Comparing UNHCR Promotion of Voluntary Repatriation
of Rwandan Refugees with UNHCR Guidelines

UNHCR has stated that in order to promote voluntary repatriation, the situation in the country of origin must have improved to an extent that refugees can return in safety and with dignity.²²⁴ Regarding legal and physical safety, Rwanda worked with UNHCR in providing assistance, including mediating land disputes,²²⁵ and it has pledged to receive any Rwandan who wishes to return.²²⁶ UNHCR notes that border skirmishes may challenge repatriation, but not prevent efforts.²²⁷ The tripartite agreement signed by UNHCR, Rwanda, and Uganda agrees to voluntary returns and UNHCR's continual role in resettlement.²²⁸ These facts, in addition to the advances in governance noted below, support the initiation of voluntary repatriation programs.²²⁹

However, the scarcity of land and lack of resources caution against initiating large-scale voluntary repatriation programs. Returnees' ability to thrive seems uncertain, given the lack of land and livelihood programs.²³⁰ UNHCR notes that refugee households are dependent on UNHCR assistance for their survival.²³¹ Just as the presence of multinational forces calls into question a state's ability to provide sufficient protection,²³² dependence on multinational aid and assistance for basic survival challenges the ability of the state to ensure the material security of returnees.

Additionally, Uganda's actions raise significant questions about whether returns would actually be voluntary. The process by which Uganda has gone about closing camps—including the lack of notice, inability for individual review, abrupt closing of camps, and destruction of homes—indicates that these returns are coerced.²³³

224. VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 3.1.

225. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, 2009 HUMAN RIGHTS REPORT: RWANDA (2010), available at <http://www.state.gov/g/drl/rls/hrrpt/2009/af/135971.htm>.

226. Nthengwe, *supra* note 187.

227. See *Rwanda Global Appeal*, *supra* note 200 (noting that military operations and political uncertainty in the eastern parts of the DRC may hamper the voluntary repatriation of refugees from Rwanda).

228. *Uganda Tripartite Agreement*, *supra* note 194.

229. See *supra* Part III; see generally VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 3 (outlining changes that support implementing the promotion of voluntary repatriation programs).

230. *Rwanda Global Appeal*, *supra* note 200.

231. *Id.*

232. UNHCR Statement, *supra* note 33, § 4.2.1.

233. See VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 2.3 (noting that physical, psychological, or material pressure from the host country negates the voluntariness of returns); GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶ 25(vi) (requiring that a gap of time occur between declaration of cessation and subsequent facilitation of returns).

Invoking its statutory cessation clause in this circumstance seems contrary to UNHCR's own standards given the demonstrated lack of national protection, continued regional instability, and involuntary returns.

*C. Evaluating Uganda's Actions Under UNHCR Guidelines
and the Precedent of State Practice*

In determining whether Uganda's forced repatriation of Rwandan refugees violates the 1951 Refugee Convention, UNHCR materials and state jurisprudence provide insight. Following the timeline model, mandated repatriation should only be implemented after UNHCR has begun large-scale voluntary repatriation programs and an intensive investigation occurs. Using the UNHCR guidelines in evaluating whether a fundamental, durable change that provides effective protection has occurred over the last fifteen years requires inquiry into the political, economic, and social structures of current Rwandan society.²³⁴ Since Uganda has taken steps to forcibly return refugees, compliance with UNHCR standards ensures that they are not in breach of the Article 33 nonrefoulement prohibition of the 1951 Refugee Convention.²³⁵

1. Fundamental Change

Fundamental changes eliminate the fear of persecution that caused flight.²³⁶ These changes usually involve an end to hostilities and a political change resulting in peace and stability.²³⁷ UNHCR reports regarding advances in governance are particularly promising for Rwanda.²³⁸ Recent elections were peaceful and the political situation remains relatively stable.²³⁹ In 2010, the government established the Ministry of Disaster Management and Refugee Affairs to provide assistance for refugees within Rwanda and to

234. See UNHCR Statement, *supra* note 33, § 4.1 (providing references for requirements for change used by UNHCR).

235. UNHCR guidelines include establishing that a fear of persecution has ceased and national protection is sufficient, therefore mandating repatriation after satisfying these requirements necessarily means that states are not in violation of their Article 33 requirements. See Hathaway, *supra* note 13, at 179 ("[B]ecause repatriation of the former refugee cannot by definition involve a risk of refoulement . . . repatriation does not require a former refugee's consent."). While Australia and Germany seem to establish contrary evidentiary burdens, that case law reflects individual status hearings and not group mandated repatriation. Kneebone & O'Sullivan, *supra* note 11, at 514–16.

236. See GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶¶ 10–16 (discussing character and duration of change required).

237. *Id.* ¶ 11.

238. *Rwanda Global Appeal*, *supra* note 200.

239. *Id.*

facilitate returns.²⁴⁰ Additionally, the Rwandan Parliament recently passed a gender law addressing equality at all sectors of society and the economic independence of women.²⁴¹

It remains unclear whether this progress truly eliminates the fear of persecution that Rwandan refugees face. In the aftermath of the genocide, many Hutus fled to Uganda fearing persecution for acts of genocide.²⁴² They remain hesitant to return, afraid of harassment by the current government.²⁴³ Reports on Rwanda's progress remain mixed. The U.S. Department of State documents government efforts to eliminate ethnic references in government materials, and it has abolished the quota system.²⁴⁴ The Rwandan Constitution calls for the promotion of national unity over ethnic distinctions.²⁴⁵ However, success remains uncertain, and discrimination continues.²⁴⁶

2. Durable Change

Evaluations of durability assess whether the changes documented above are sustainable.²⁴⁷ UNHCR reports positive strides in the development of governance in Rwanda.²⁴⁸ However, respect for human rights and the continuance of peace and security are in question, and protection of general human rights remains tenuous.²⁴⁹ The legal system in Rwanda continues to garner much criticism for selective prosecution, especially of genocide crimes.²⁵⁰ Defense witnesses testifying in front of the International Criminal Tribunal for Rwanda do not travel to Rwanda, because their safety cannot be guaranteed by the United Nations.²⁵¹ While the gacaca courts (local courts) have made positive strides in reconciling communities, the situation is far from one of nondiscrimination and freedom from fear of persecution.²⁵²

240. *Id.*

241. *Id.*

242. Simon, *supra* note 216; *see generally Go Home, supra* note 215 (discussing efforts by Uganda and Rwanda to get refugees to return to Rwanda); Nthengwe, *supra* note 187 (discussing flight of Rwandans).

243. Simon, *supra* note 216; *see, e.g., Go Home, supra* note 215 (discussing refugee fears).

244. *See* U.S. DEP'T OF STATE, *supra* note 225.

245. *Id.*

246. *Id.*

247. *See* discussion *supra* Part IV (explaining the cessation clause and relevant UNHCR guidelines).

248. *Rwanda Global Appeal, supra* note 200.

249. *See* HUMAN RIGHTS WATCH, *Rwanda, in* WORLD REPORT (2011), available at <http://www.hrw.org/en/world-report-2011/rwanda>.

250. George Norris, *Closer to Justice: Transferring Cases from the International Criminal Court*, 19 MINN. J. INT'L L. 201, 214-15 (2010).

251. *Id.* at 214.

252. *Id.*; *see generally* HUMAN RIGHTS WATCH, LAW AND REALITY: PROGRESS IN JUDICIAL REFORM IN RWANDA (2008), available at <http://www.hrw.org/en/reports/2008/>

Additionally, the government has twice invaded neighboring Democratic Republic of the Congo (DRC) to fight Hutu forces.²⁵³ Rwandan armed forces just withdrew from the DRC border in March 2009.²⁵⁴ The lack of protection for human rights and prevalence of border skirmishes draw the durability of progress into question. As noted above, many refugees are afraid to return because they believe the Rwandan government will persecute them based on their ethnicity.²⁵⁵ This fear, combined with recent military activity against Hutu militia, arguably establishes the lack of a fundamental change.

3. Effective Protection

Lastly, Uganda must evaluate whether the Rwandan government can adequately protect its citizens, ending the need for international protection.²⁵⁶ In addition to advances in governance and legal safety, UNHCR requires that refugees have access to livelihoods.²⁵⁷ In its 2011 country assessment of Rwanda, UNHCR notes that the majority of refugee households in Rwanda remain dependent on UNHCR support.²⁵⁸ Rwanda is not providing for its own citizens residing in domestic camps.²⁵⁹ “The returnees face extreme poverty, as well as land and shelter issues, lack of medical coverage, a dearth of job opportunities, and the need to walk long distances in search of water.”²⁶⁰ Land is scarce, and other citizens have claimed homes abandoned by refugees.²⁶¹

The principles of refugee protection include alleviating the immediate crisis and seeking durable solutions.²⁶² In the context of cessation, durable solutions involve ensuring refugees have stable legal status and are not returned to a volatile situation.²⁶³ Forcing involuntary returns increases the chance that such refugees will flee

07/24/law-and-reality-0 (examining changes to Rwanda’s judicial system from 2004 to 2008).

253. *Rwanda: How the Genocide Happened*, BBC, Dec. 18, 2008, <http://news.bbc.co.uk/2/hi/1288230.stm>.

254. *UNHCR Helps Rwandan Civilians Return Home*, UNHCR—UN REFUGEE AGENCY (Mar. 9, 2009), <http://www.unhcr.org/49b549cd2.html>.

255. Simon, *supra* note 216; *see generally* Nthengwe, *supra* note 187 (discussing flight of Rwandans); *Go Home*, *supra* note 215 (discussing ethnic tensions).

256. *Note on Cessation*, *supra* note 31, ¶ 6.

257. GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶ 15; *see also* UNHCR Statement, *supra* note 33, §§ 4.2.1, 4.2.3 (noting minimum standard of living requirements).

258. *Rwanda Global Appeal*, *supra* note 200.

259. *Id.*

260. *Id.*

261. Simon, *supra* note 216.

262. *Note on Cessation*, *supra* note 31, ¶¶ 19, 28 (discussing the central role of the “durable solution” in repatriation programs).

263. *Id.* ¶ 28.

again, causing additional instability in regions that have recently begun recovering from conflict.²⁶⁴

D. Recommended Action

UNHCR creates a timeline for repatriation that ensures the continued safety and protection of the refugee, beginning with individual voluntary repatriation and ending in the cessation of status.²⁶⁵ Uganda's actions have disrupted this timeline, drawing the safety of Rwandan refugees into question. Given UNHCR's task to "provide permanent solutions," supporting voluntary repatriation in this case may be preferred over local integration or third country resettlement.²⁶⁶ Resettlement in Uganda does not seem to be a viable option, as demonstrated by attacks and forcible returns.²⁶⁷ Moreover, Uganda has demonstrated a willingness to violate its obligations under the 1951 Refugee Convention.²⁶⁸ Instituting voluntary repatriation programs in this environment may be the best solution from a pool of less than ideal options. If Uganda continues to close camps and effectively mandate repatriation, Rwandans remaining in Uganda may have no legal status.²⁶⁹ Decreased access to refugees limits UNHCR's ability to educate refugees about their rights, ensuring that the decision to return is voluntary.²⁷⁰ This limitation also truncates UNHCR's ability to organize orderly returns. In addition, food supply to the camps is inconsistent and necessary items are often lacking.²⁷¹ Facilitating voluntary repatriation may provide more protection and security than advocating continued asylum.

According to the timeline set forth in UNHCR materials, Uganda may be in breach of its duty of nonrefoulement under the 1951

264. *Id.*

265. See VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 3.1 (discussing the UNHCR goals of facilitating and promoting repatriation). The overarching goal of cessation is providing a durable solution. Given that mandatory cessation does not require consent and terminates refugee status, the risks are greater and therefore, should be undertaken cautiously. GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶¶ 6-7.

266. See UNHCR Statement, *supra* note 33, § 2.1 ("The 'ceased circumstances' clause should . . . not result in uncertain status in the host State nor compel individuals to return to a volatile situation.").

267. See generally Simon, *supra* note 216 (discussing recent violence); UNHCR Condemns, *supra* note 218.

268. See 1951 Refugee Convention, *supra* note 5, art. 33(1). The principle of nonrefoulement prohibits Uganda from forcibly returning refugees when their life or freedom is threatened on account of race (among other designations).

269. UNHCR cautions states against creating this situation. See Note on Cessation, *supra* note 31, ¶ 6 (noting that countries should avoid leaving refugees in the country of asylum without a definite legal status or with an illegal status).

270. VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 3.1.

271. Uganda Needs Assessment, *supra* note 190.

Refugee Convention.²⁷² Although changes have occurred in Rwanda's system of governance, it is not certain that these changes are durable and eliminated the fear that caused flight. By July 2010, 3,320 Rwandans in Uganda had filed for asylum, and 98 percent of the applications were denied.²⁷³ This indicates that Uganda is not adequately considering individual cases.²⁷⁴ If Uganda continues to pressure for mandated repatriation in the absence of an independent investigation into the current stability of Rwanda, the government of Uganda may be in violation of international law.²⁷⁵ To satisfy its obligations under the 1951 Refugee Convention,²⁷⁶ Uganda can either undertake an investigation determining whether the original cause of flight has ceased²⁷⁷ or allow Rwandan refugees to remain in Uganda.²⁷⁸

VIII. CONCLUSION

According to UNHCR, Article 1C(5) and (6) of the 1951 Refugee Convention Relating to the Status of Refugees gives asylum states such as Uganda the authority to mandate repatriation when the country of origin has made fundamental, durable, and stable changes that end refugees' fear of persecution. In comparison, UNHCR can facilitate voluntary returns at a much lower threshold of change. As this Note demonstrates, these two legal standards are not concentric. Rather, these standards form a timeline of repatriation, starting at voluntary individual repatriation and ending in cessation of status. This timeline ensures international protection remains constant until national protection can resume and reconciles the ability to mandate repatriation with states' duty of nonrefoulement.

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272. 1951 Refugee Convention, *supra* note 5, art. 33(1).

273. *UNHCR Condemns*, *supra* note 218.

274. GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 12, ¶ 25(vii)–(viii).

275. VOLUNTARY REPATRIATION HANDBOOK, *supra* note 7, ch. 2.3.

276. Uganda is also a party to several other international human rights conventions that may be activated here, including the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, and the Convention on the Rights of the Child. Hathaway, *supra* note 13, at 207–10.

277. 1951 Refugee Convention, *supra* note 5, art. 1C(5)–(6).

278. *Id.* art. 33.

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