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Reviewing the application of the Cessation Clause of the 1951 Convention relating to the status of refugees in Africa

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Abstract

Four decades after their arrival in Sudan, in September 1999, the Government of Sudan and the UNHCR deemed most Ethiopian refugees to be no longer in need of protection. This group now inhabits a twilight zone between the end of protection and a still elusive durable solution as neither refugees nor residents. They are subjected continually to arbitrary arrests, detention by government security forces, and their lack of status has also led to serious economic and social deprivation. The Ethiopians in Sudan are the unintended victims of the ‘ceased circumstances’ Cessation Clause of the 1951 Convention relating to the Status of Refugees. The waning welcome for these refugees has prompted states’ interest in the Cessation Clause as it signals the end of protection obligations and allows for the repatriation of refugees. This paper attempts to address the questions of when and how protection should end and the impact of the highly individualized 1951 Convention on mixed-motive, mass refugee flows. Using the Ethiopian caseload as a case study, the paper surveys the Cessation Clauses of the 1951 Convention and the criteria developed by the UNHCR to assess fundamental change in the country of origin. The paper grapples with the difficulties in assessing fundamental change in protracted and complex civil conflicts and points out the challenges of delivering fair cessation procedures during mass refugee influxes. The paper also discusses the consequences of ill-conceived cessation declarations on refugees and recommendations on the role of the UNHCR, which has an influential presence in Africa. I argue that the 1951 Convention cannot address the complexities of cessation declarations in Africa on its own. The paper asserts that cessation declarations in Africa must be considered within the framework of durable solutions and with due regard for the OAU Convention.

Introduction¹

The Cessation Clauses of the 1951 Convention Relating to the Status of Refugees² allow States to withdraw refugee status in five circumstances. Four of the circumstances relate to the actions of the individual refugee.³ This paper examines the fifth circumstance, known as the ‘ceased circumstances’ Cessation Clause (hereinafter the Cessation Clause), which is based on the premise that when the circumstances causing the refugee to flee have ceased to exist, a refugee is required to return to his country of origin.⁴ Once a state has determined that the ‘ceased circumstances’ apply to an individual or group of refugees, a state may forcibly repatriate such refugees. Until the mid-1980s the provision had not been the subject of extensive critical examination either by academics or the Office of the United Nations Commissioner for Refugees (UNHCR).⁵ The waning welcome for refugees and a shift to repatriation, rather than resettlement or local integration as the most appropriate durable solution for refugees, has heightened interest in the Cessation Clause and resulted in a flurry of works on the subject.⁶ In responding to the interest of state parties on the subject, the UNHCR has attempted to interpret and define the contours of the Cessation Clause in a series of Executive Committee Conclusions, Notes and Guidelines, elaborating the ‘soft law’ component of the Clause.

Although its language appears theoretically coherent, the Cessation Clause has proven to be troublesome in its application both on account of premature declarations of cessation that return refugees to situations that are still uncertain as well as on account of the legal consequences for those refugees refusing to return.⁷ In the North, states that are party to the 1951 Convention have rarely applied the Cessation Clause to refugees, generally providing individual refugees with an alternate status once their protection needs have ended. In contrast, Southern states have invoked the Cessation Clause twenty-five times between 1973 and 2008 for a variety of refugee groups in a more logistically challenging and complex legal

¹ The topic for this paper came about after a three month assignment for UNHCR in eastern Sudan where among other duties the author initiated recommendations an appeal process for Ethiopian Refugees. I would like to thank Nazila Ghanea, my thesis supervisor, UNHCR staff in Showak, Sudan, and Dr Alice Edwards, Dr Andrew Shacknove and Haroon Siddiqui for their support and encouragement. Thanks also to Claire Lauterbach for her fine editing and patience.

² Convention relating to the Status of Refugees, 28 July 1951 189 UNTS 150 (entered into force 22 April 1954) [hereinafter 1951 Convention].

³ Article 1C (1) - (4). The Convention ceases to apply to any person if “he has voluntarily re-availed himself of the protection of the country of his nationality, having lost his nationality had voluntarily re-acquired it, he has acquired a new nationality and enjoys the protection of the country of his new nationality or he has voluntarily re-established himself in the country which he left or outside which he remained owing to a fear of persecution.”

⁴ Article 1C (5). Article 1C (6) differs from Article 1C (5) only in that it relates to stateless persons.

⁵ The mid-1980s and early 1990s saw mass influxes of refugees, particularly Bosnian and Kosovar, into Europe, prompting an academic interest in the Cessation Clause.

⁶ Joan Fitzpatrick has carried out arguably the most extensive research on the Cessation Clause itself; the majority of other scholars, including James C. Hathaway, B.S. Chimni, Gervase Cole, Richard Black, and Khalid Koser, to name a few, have generally written on the Cessation Clause in relation to repatriation.

⁷ Fitzpatrick and Brotman (2001).

landscape for refugees.⁸ Many Southern states in Africa and Latin America are party to two refugee Conventions.⁹ Moreover, the vast majority of refugees in the South cross international borders en masse and are accepted as refugees on a *prima facie* or group basis.¹⁰ National refugee status determination capacity in these states is underdeveloped or absent and the UNHCR normally fills this gap.¹¹

Three procedural aspects of the Cessation Clause have been flagged as being particularly problematic: “[the] objective assessment of the situation in the country of origin, procedural fairness to ensure risk of persecution has been eliminated for individual applicants and consideration of exceptions to the Clause.”¹² This paper examines these three issues and the resulting protection gap in the broader context of the politics of repatriation and durable solutions debates. The analysis centers on a case study of Ethiopian refugees in Sudan. After almost four decades in Sudan, in September 1999, non-Eritrean Ethiopians who had fled during the 1991 overthrow of the Mengistu regime were deemed to be no longer in need of protection by the Government of Sudan and the UNHCR.¹³ Known as the pre-1991 Ethiopian refugees, this group now inhabits a twilight zone between the end of protection and an as-yet elusive durable solution as neither refugees nor residents, while subjected to continual arbitrary arrests, and detention and harassment by government security forces. Their status (or lack thereof) has also led to serious economic and social deprivation. These Ethiopian refugees represent the unintended victims of the ‘ceased circumstances’ Cessation Clause.

Although the Ethiopian cessation declaration was described as a success,¹⁴ closer examination suggests that the situation is far more complex. Three aspects of the case of Ethiopian refugees in Sudan warrant attention. First, as these refugees fled for a variety of reasons – the secessionist war, ethnic and political conflicts, a brutal regime and famine – they demonstrate the difficulty of assessing a change in country conditions. Secondly, they have remained in exile for a number of years, forging new links within their country of asylum that are difficult to break when a cessation of protection is declared. Thirdly, the case study highlights the extent of UNHCR involvement in a cessation declaration while demonstrating the shortcomings of their procedures in situations of mass influx. By these aspects the Ethiopian caseload is illustrative of many other refugee groups in the South, particularly in Africa.

⁸ Cessation has been declared for 25 countries during this period, only five, the former Czechoslovakia, Hungary, Bulgaria, Tajikistan and Romania, were outside the South, as listed in Annex 1.

⁹ Organization of African Unity, Convention on the Specific Aspects of the Refugee Problems in Africa opened for signature 10 September 1969 1000 UNTS 46 (entered into force 20 June 1974) [hereinafter OAU Convention], Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984.

¹⁰ During mass influxes, states and the UNHCR abandon individual assessment of refugees, granting status on a *prima facie* basis “when the reasons for flight are objectively apparent and there is no evidence to the contrary” UNHCR (2003c).

¹¹ Alexander (1999).

¹² Fitzpatrick and Boanan (2003).

¹³ The bulk of refugees from pre-partitioned Ethiopia were Eritrean Muslims who still remain under the protection of the Government of Sudan and the UNHCR. This paper deals with the smaller group of mostly non-Muslim Ethiopian refugees.

¹⁴ Fitzpatrick (2001).

This paper attempts to address the questions of when and how protection should end in circumstances of mixed motive mass influxes, the impact of the 1951 Convention and the Organization for African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa and what the UNHCR's role should be in the decision to end protection. Where the UNHCR has a significant presence in the South, state cessation declarations are greatly influenced by the institutional practice of the organization.¹⁵ Although only states can declare cessation under the Convention and forcibly repatriate refugees the UNHCR can and does declare cessation of protection and assistance under its Statute. It also "facilitates" and "promotes" voluntary repatriation at a lower threshold than that required by the Cessation Clause,¹⁶ thus further complicating an already complex legal issue. The UNHCR also designs and implements cessation procedures as states in the South often do not have the resources to do so. This merging of roles sometimes obfuscates the demarcation of responsibilities of states and the UNHCR and the differences between the provisions of the 1951 Convention and the institutional standards of the UNHCR. As will be discussed, this has implications in the decision to withdraw refugee protection.

The scholarship and interpretation efforts of the UNHCR have tended to focus on the 1951 Convention and its highly individualized refugee definition and cessation provisions.¹⁷ Despite declarations of cessation being issued in the South on a regular basis since 1973, and the fact that 80 per cent of the world's refugees reside there,¹⁸ there has been little sustained academic study of the how the Cessation Clause would operate in mixed-motive mass influx situations.¹⁹

Methodology

Between 16 October 2008 and 27 December 2008, the author was in Khartoum and Eastern Sudan where she interviewed UNHCR staff, employees of Sudan's Commissioner of Refugees and numerous Ethiopians who lost their refugee status in the 2000/2001 cessation exercise conducted jointly by the Government of Sudan and the UNHCR. Other primary source material examined includes a study of the 1951 Convention, the OAU Convention, national laws and regulations pertaining to refugees in Sudan, General Assembly Resolutions, UNHCR Executive Committee Conclusions, Notes and Guidelines on the Cessation Clause, commentary on durable solutions and standards for voluntary repatriation.

Sections

The paper's first section describes the legal situation faced by refugees in Sudan. It sets out the ceased circumstances provisions of the 1951 Refugee Convention, the OAU Convention, the Statute and standards of the UNHCR and policy framework of the Cessation Clauses in the context of the literature on repatriation. The section will provide a template for the analysis of the different stages of a cessation declaration which is addressed in sections two and three.

The second section explains the numerous causes of the flight of refugees from Ethiopia and illustrates the difficulty of assessing a change in circumstances in the country of origin when there are numerous and indistinct motives for flight and refugees are too numerous to assess

¹⁵ Hathaway (2005).

¹⁶ UNHCR (1996).

¹⁷ Chimni (1993).

¹⁸ UNHCR (2006a).

¹⁹ Fitzpatrick concedes as much in her exhaustive study of the cessation clause (1998-1999).

individually. It deals with the need to be cognisant of the dual definition of refugee in the OAU Convention applicable to refugees in Africa when assessing a change of circumstances.

The third section addresses the declaration of cessation by the Government of Sudan and the UNHCR for pre1991 Ethiopian refugees, the shortcomings in the procedures and the confusion surrounding the different thresholds for a declaration of cessation between the 1951 Convention and the voluntary repatriation standards of the UNHCR.

The fourth section will discuss residual caseloads, potential violations of refugee rights in situations of declared cessation and the need to consider cessation and the withdrawal of protection in the context of durable solutions. Each section will build on the argument that implementing the Cessation Clause of the 1951 Convention in the South is fraught with challenges not contemplated in its text. The UNHCR plays a pivotal role in declarations of cessation in the South, and as such, its inability to maintain procedural coherence in these circumstances not only impacts state behaviour but also the fate of refugees that it is mandated to protect.²⁰

The paper concludes with suggestions for the UNHCR's role in a declaration of cessation and possible future courses of action.

1 Repatriation and the legal framework for Cessation in Africa

When does the refugee cycle end? Does it end when states withdraw protection under the Cessation provisions of the 1951 Convention? Or does it end when the ruptured bond between a refugee and his or her community that caused his or her “refugeehood” is restored²¹ through one of the three durable solutions: repatriation to the country of origin, integration in the country of asylum or resettlement in a third country?²²

This section discusses several background issues relevant to the central premise of this paper: that the Cessation Clauses of the 1951 Convention and procedures employed in its application do not take into account the complexity of mass influxes, and thus create protection gaps that leave many refugees in a legal limbo. I will first set out the reasons for the recent interest in the Cessation Clause and repatriation as the durable solution of choice for states.²³ This will be followed by a discussion of the Cessation Clause and its interpretation. I will also set out the relevant provisions of the OAU Convention and the UNHCR institutional standards for repatriation both of which impact cessation declarations in Africa.

²⁰ Steiner, Alston and Goodman (2008).

²¹ Shacknove (1985).

²² UNHCR (2006b).

²³ Although this paper focuses on declarations of cessation in the South, it was only after states in the North began to see repatriation as the most preferred durable solution that an academic interest in the subject arose. There is still very little scholarship by major scholars on cessation declarations in the South, despite the fact that it is there that the vast majority of refugees reside.

It has been argued that once the criteria of the Cessation Clause have been met, states are permitted to withdraw protection and repatriate former refugees to their country of origin by force if necessary.²⁴ It is this aspect of the “ceased circumstances” Cessation Clause – the ability to forcibly repatriate refugees – that has become particularly attractive to states faced with mass influxes.²⁵ Developed states have used the Cessation Clause infrequently to force repatriation after circumstances in the country of origin undergo a fundamental change. As Hathaway notes:

“...the use of repatriation as a durable solution was little used by Northern states, where ‘interest-convergence’ between refugees and governments prompted industrialised states to offer permanent residence to asylum seekers.”²⁶

However, the nature of present-day asylum seekers in the North, originating as they do from racial, cultural and religious backgrounds dissimilar to those of their asylum countries of choice and whose acceptance presents little political advantage for Northern states, precludes the possibility of a similar “interest convergence.”²⁷ Chimni cites ensuring “that the growing global refugee population does not flood their borders or tax their treasuries” as the main reason for the growing interest in the “ceased circumstances and mandatory repatriation.”²⁸ Others suggest, less diplomatically, that “racism and nativism” are factors that influence refugee policy in the North.²⁹

In the South, a different set of causes animates the interest in the Cessation Clause. Refugees regularly arrive on a scale unimaginable in the North and refugee status has always been regarded as temporary, if indefinite.³⁰ The practice of repatriating refugees predates the current interest in the subject in the North by at least a decade.³¹ Impoverished countries of first asylum, struggling with the political, environmental³² and economic impact of large

²⁴ Hathaway (1997b).

²⁵ Previously, the interests of state parties allowed for refugees’ integration in their countries of asylum or for their resettlement. This point is dealt with later in this chapter. Although repatriation by a refugee can occur at any time during the refugee cycle, states can only repatriate by force once the criteria of the Cessation Clauses have been met. This has created a robust debate as thus far states have generally viewed repatriation, under the influence of the UNHCR Statute, as voluntary. Mass influxes in the North are dealt with outside the refugee regime. See European Union (2001). http://ec.europa.eu/justice_home/fsj/asylum/temporary/fsj_asylum_temporary_en.htm

²⁶ Hathaway (1997b). Hathaway says that the crisis in Yugoslavia led to “a resurgence among Northern governments in the Conventions paradigm of temporary protection including the right to repatriate refugees when refugee status comes to an end.”

²⁷ Some of those interests included scoring ideological points against the Soviet Union by accepting refugees from Communist countries as well as the requirement for cheap labor, Hathaway (2005). See also Chimni (1993).

²⁸ Chimni (1993). According to Chimni “the ideological justification for refugees [has] largely disappeared.”

²⁹ Mertus (1998).

³⁰ Okoth-Obbo (2001).

³¹ Voluntary Repatriation and Temporary Protection were subjects of discussion within UNHCR and widely practiced in the South. See Executive Committee of the High Commissioners Programme Conclusions No. 18 (XXXI) 1980, No. 40 (XXXVI) 1985 and No. 41 (XXXVII) 1986.

³² Berry (2008).

numbers of refugees and frustrated with the lack of international burden-sharing, have applied the Cessation Clauses on numerous occasions since 1973.³³ Rogge notes:

... the hospitable and generous response once attributed to African first asylum states has, in many cases, changed to one of reluctance, if not outright resistance to granting rights to refugees to locally integrate.³⁴

Scholars are divided on the appropriateness of repatriation as durable solution. Some argue that "...the 1951 Refugee Convention does not require that refugees be granted *asylum* in the sense of permanent admission to a new political community..."³⁵ Others hold that the Convention "implicitly favours integration" in the country of asylum.³⁶ According to Fitzpatrick, there is "tension" between Article 1 C (5) and Articles 12-30 and Article 34 of the Convention. The former allows states to end protection when it is deemed no longer necessary while the latter provisions favor economic and social assimilation and naturalization.³⁷

Despite the debate on the most suitable durable solution for refugees, it is relatively settled that the 1951 Convention foresees the end of protection in its Cessation Clauses.³⁸ The so-called "cessation clauses" (Article 1 C (1)-(6) of the 1951 Convention) spell out the conditions under which a refugee ceases to qualify for that legal designation. They are based on the consideration that "international protection should not be granted where it is no longer necessary or justified."³⁹

The end of protection as a subject of debate in refugee discourse intensified in the early 1990s after states in the North were confronted with some of the largest refugee influxes since World War II.⁴⁰ The result was a new interest in a "long neglected...subject of refugee law" – the

³³ See Annex 1.

³⁴ Rogge (1993).

³⁵ Hathaway (2005).

³⁶ Zieck (2004). According to Zieck, when the UNHCR was established, solutions to the predominantly European problem of refugees were considered in terms of exile rather than return and this thinking is reflected in the 1951 Convention that implicitly favors integration in the country of refuge.

³⁷ Fitzpatrick (1998-1999). Articles 12 to 20 deal with personal status, moveable and immovable property, artistic and industrial property, right to association, access to courts, public education, public relief, labor legislation and social security, administrative assistance, freedom of movement, identity and travel papers, fiscal charges, and transfer of assets. Article 34 states that "[t]he contracting states as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings." See also Goodwin-Gill and McAdam (2007). In referring to UNHCR recommendations that states are under no obligation to accord a solution by way of local integration, Goodwin-Gill states that "it is difficult to reconcile the absoluteness of this statement with the obligations which many states have expressly accepted in articles 2-34 of the 1951 Convention." Executive Committee of the High Commissioners Programme Conclusion No. 104 (LVI) 2005.

³⁸ The rationale for the Cessation Clauses was expressed at the Conference of Plenipotentiaries in the drafting of the 1951 Convention by the first United Nations High Commissioner for Refugees, G.J. van Hueven Goedhart. He stated that refugee status should not be granted for a day longer than absolutely necessary..." (UNHCR 1997).

³⁹ Paragraph 111 (UNHCR 1992c).

⁴⁰ Koser and Black (1999). The breakup of the former Soviet Union resulted in almost two million refugees. A similar number fled the war in Yugoslavia, most of them fleeing to Europe. In 1983, Europe received fewer than 100,000 refugees; in 1992, the number was 720,000 (Goodwin-Gill 1995).

“ceased circumstances” Cessation Clause of the 1951 Convention⁴¹ and the related issue of repatriation as the durable solution of choice.⁴²

Three legal instruments have played an important role in Cessation declarations in Africa and although states are party to only two of them – the 1951 Convention and OAU Convention – the Statute and institutional practices of the UNHCR have had an important role to play in declarations of cessation in the South.⁴³ A survey of the Cessation Clauses of these three influences is instructive in understanding their differences and sometimes contradictory provisions.

Article 1 C (5) of the Convention states:

He (a refugee) can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.⁴⁴

Article 4 (e) of the OAU Convention states:

He (a refugee) can no longer, because the circumstances in connection with which he was recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality ...⁴⁵

As can be seen, the Cessation Clauses of the two Conventions are similar the only difference being the latter does not recognize any exceptions to the Cessation Clause.

Despite the similarities, it should be noted that the Cessation Clause of the 1951 Convention applies only to those with a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership in particular social group or political opinion...” By contrast, the OAU Convention, the “effective regional compliment in Africa...” of the 1951 Convention,⁴⁶ encompasses two definitions of a refugee – the traditional definition⁴⁷ and a broader definition that includes:

...every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his

⁴¹ Fitzpatrick (1998-1999). According to Chimni (1998), a Northern agenda has determined the focus of refugee discourse.

⁴² Sadako Ogata, United Nations High Commissioner for Refugees from 1991-2000, called the 1990s “the decade of repatriation” (Ogata 2003).

⁴³ “The Statute constitutes a legal basis for international protection in countries that have not ratified the Convention or do so with limitations.” Unlike the convention, the statute is not limited by the 1951 dateline or by geography (Andrysch 1998). Even in states that have signed the Convention, the UNHCR may still play an important role in advising governments, conducting procedures and generally assisting in the protection of refugees to the extent that it is sometimes unclear where the jurisdiction of the UNHCR ends and that of the state begins. See Hathaway (2005).

⁴⁴ Article 1 A (1) of the 1951 Convention deals with statutory refugees, i.e. persons considered to be refugees under the provisions of international instruments preceding the Convention.

⁴⁵ Organization of African Unity Convention (1969).

⁴⁶ Ibid. Article 8 (2)

⁴⁷ Ibid. Article 1 (1)

country of citizenship or nationality.⁴⁸

It is this extended definition that generally characterizes mass outflows in Africa. The difference between the two Conventions creates challenges for the application of the Cessation Clause in Africa. Academics suggest that the Cessation under the OAU Convention may be conducted within the framework of the 1951 Convention.⁴⁹ However, as will be shown, this has proven more difficult in practice than in theory.

As explained earlier, the situation is further compounded by the fact that refugee protection in Africa is heavily influenced by the institutional practices of the UNHCR. Unlike in the North where the UNHCR generally has little influence, Southern states lack refugee processing resources and the UNHCR steps in to fill this gap.

The Statute of the UNHCR also has Cessation Clauses that allow for the competence of the High Commissioner to cease applying refugee status in circumstance similar to those of the Convention, including a “ceased circumstances” Clause.⁵⁰ The Clause states:

He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, claim grounds other than personal convenience for continuing to refuse to avail himself of the protection of the country of his nationality. Reasons of a purely economic character may not be invoked (emphasis added).⁵¹

The Cessation Clause of the Statute differs in a variety of respects from the 1951 Convention. Unlike the Convention, it is not limited to statutory refugees and the basis of its exception – “grounds other than those of personal convenience”⁵² – is considered broader than the 1951 Convention’s exception of “compelling reasons.” Marsden describes the scope of the exceptions thus:

Outside the scope of ‘personal convenience’ fall such grounds as the creation of new family ties in the country of refuge, and the rooting of one’s family in the new environment, along with the severance of all ties with the country of origin as a result of persecution, war or simply lapse of time. Also one is not motivated merely by ‘personal convenience’ if one hesitates to return to a country where there is no abode, no vocation and nothing else which formerly bound oneself to that country.⁵³

It can be argued that refugees under the protection of UNHCR can claim a wider range of exceptions than those protected by states under the Convention. Finally the UNHCR standard for voluntary repatriation, “return in safety and dignity”, can lead to confusion with the higher standard of “fundamental change” required for cessation and mandatory repatriation.

⁴⁸ Article 1 (2), Organization of African Unity Convention (1969).

⁴⁹ Fitzpatrick (1998-1999).

⁵⁰ According to Fitzpatrick (1998-1999), the cessation under the UNHCR statute “is not strictly that of persecution but of UNHCR protection and assistance.”

⁵¹ Article 6 A (e), United Nations General Assembly (1950).

⁵² See Grahl-Madsen (1966). The phrase borrowed from Article 1(2) of the Convention of 10 February 1938 [192 LoNTS 59] “was apparently meant to refer to such considerations as the memory of past sufferings”[cf. UN Doc. A/CONF.2/SR.19,14]. The conference of Plenipotentiaries found the phrase might give rise to wider interpretations which did not correspond to the intention of the drafters and they consequently decided to delete it from the Convention.

⁵³ Ibid.

Table of Cessation Clauses and the UNHCR voluntary repatriation standard

Convention	Cessation Clause	Exception	Criteria
1951	Applies to those with a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion	“Compelling reasons” limited to Statutory refugees; however in practice applied to all Convention refugees based on humanitarian principle	Circumstances in connection with which he has been recognized as a refugee have ceased to exist
OAU Convention	Applies to above and to those who owing to external aggression, occupation, foreign domination or events seriously disturbing public disorder... is compelled to leave...	No exceptions	Scholars suggest should be similar to 1951 Convention
Statute of the UNHCR	Applies to Mandate refugees ⁵⁴ and to persons in “refugee-like situations” ⁵⁵	Grounds other than “personal convenience”; Purely economic grounds may not be invoked	
UNHCR Standards Voluntary Repatriation	Applies to all refugees at any time during the refugee cycle		UNHCR facilitates voluntary repatriation when refugees wish to return even when a situation may be unsettled. It can only promote repatriation when refugees can “return in safety and dignity”

In 1979, the UNHCR undertook a comprehensive interpretation of the Convention, including the Cessation Clause, in a Handbook that has become the definitive interpretative guide to the 1951 Convention for the organization.⁵⁶ Two aspects of cessation were addressed: when changes in a country of origin are sufficiently “fundamental” and exceptions to the cessation clause.⁵⁷ The Handbook states that only “fundamental” changes in the country of origin would justify application of the Cessation Clause:

⁵⁴The Statute definition of a refugee is the same as the Convention definition but does not include the category of membership in a particular social group. See Article 6 A (ii).

⁵⁵ On account of the non-exhaustive nature of the 1951 Convention definition of a refugee, the General Assembly has frequently extended the competence of the UNHCR to act on behalf of refugees not falling under the statutory definition of refugee but in “refugee-like situations.” See Andrysch (1998).

⁵⁶UNHCR (1992). The Handbook’s definitive status is not accepted in all jurisdictions and many of its provisions are contested by states. It is widely used, however, in the status determination of refugees arriving in Canada.

⁵⁷ Developed countries have spent millions of dollars on procedures for determining refugee status but far less on mandatory repatriation. Although individual branches of the UNHCR have standard operating procedures, the first institution-wide standardized procedure was issued internally in 2003 and publicly in 2005 (UNHCR 2003d).

A mere – possibly transitory – change in the facts surrounding the individual refugee’s fear, which does not entail such major changes of circumstances, is not sufficient to make this clause applicable.⁵⁸

The effort to further clarify the law and provide guidance on the application of the “ceased circumstances” remained dormant for almost two decades until it received renewed attention in 1991 under pressure from its member states.⁵⁹ Since the 1979 explication of the Cessation Clause by the UNHCR, states and academics have grappled with what “fundamental” change meant in an “era of lingering and irreconcilable ethnic conflicts, protracted civil wars and indecisive peace agreements.”⁶⁰ Hathaway described the change needed to justify a declaration of cessation as “change [that] must be of substantial political significance in the sense that the power structure under which persecution was deemed a real possibility no longer exists.” According to Fitzpatrick, the various characterizations of fundamental change “intimate that such developments must be comprehensive in nature and scope.”⁶¹ The advent of “illiberal democracies, involving elected governments that abjure the rule of law and perpetuate extensive human rights violations...”⁶² gave rise to a concern for the effectiveness and durability of change. In 1991, the Executive Committee stated that for the Cessation Clause to apply, changes in the country of origin should be “profound and enduring.”⁶³

The UNHCR suggested a period of twelve to fifteen months for assessing the durability of change.⁶⁴ Several factors were identified as markers of change, including democratic elections,⁶⁵ declarations of amnesties, repeal of oppressive laws and dismantling of former security services – in short, “reforms altering the basic legal or social structure of the state.”⁶⁶ In addition several other factors were identified, evidence of respect for fundamental freedoms, “access to courts”, “fair and open trials”, and “the rule of law generally.”⁶⁷

In 1992, the Executive Committee issued its first comprehensive Conclusion on the Cessation of Status⁶⁸ in which it advises states to:

⁵⁸ UNHCR (1996) ‘Handbook’, Paragraph 135. The requirement that changes be “fundamental” and not of a “possibly transitory” nature were intended to prevent frequent review of a refugee’s status.

⁵⁹ “[The] UNHCR’s existence and ability to carry out its programs have been dependent upon its ability to respond to the interests of a relatively small number of donor states.” Of the top ten donors to UNHCR, eight are European (Loescher, Betts and Milner (eds) 2008).

⁶⁰ Rogge and Akol (1989).

⁶¹ Fitzpatrick and Boanan (2003).

⁶² Fareed Zakaria, quoted in Fitzpatrick (1998-1999).

⁶³ Executive Committee of the High Commissioners Programme Conclusion No. 65 (XLII), Cessation of Refugee Status (1991).

⁶⁴ UNHCR (1992a).

⁶⁵ Zakaria cautions that holding “free and fair elections” is insufficient evidence of political liberalism. See Fitzpatrick (1998-1999.)

⁶⁶ Large-scale spontaneous repatriation is also to be considered among the indicators of fundamental change in the country of origin though this alone cannot be considered sufficient to make such a determination.

⁶⁷ Fitzpatrick and Boanan (2003).

⁶⁸ Executive Committee of the High Commissioners Programme Conclusion No. 69 (XLIII) Cessation of Refugee Status (1992). Two other Conclusions deal with aspects of the Cessation clause. No. 18 (XXXI) 1980 recognized the importance of refugees being provided with the necessary information regarding conditions in their country of origin and visits by refugees or refugee representatives to the country of origin being of assistance in this regard. Conclusion No. 65 (XLII) 1991 underlined the

...carefully assess the fundamental character of the changes in the country of nationality or origin including the general human rights situation, as well as the particular cause of fear of persecution in order to make sure in an objective and verifiable way that the situation which justified the granting of refugee status has ceased to exist.⁶⁹

Besides political change, the economic sustainability of return for refugees including the “restoration of land and property rights” and sufficient means of livelihood became issues to be addressed before cessation declarations were considered.⁷⁰

The exceptions to the Cessation Clause proved equally difficult to define. The Convention allows for one exception to the Cessation Clause, stating in part that:

... this paragraph (Article 1 C (5)) shall not apply to a refugee ... who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.⁷¹

The Handbook on Procedures and Criteria for Determining Refugee Status⁷² describes “compelling reasons” as “where a person may have been subjected to very serious persecution in the past” and will therefore not cease to be a refugee even if fundamental changes have occurred in his country of origin.⁷³ The Convention limits the provision to “statutory refugees” – those refugees under Article 1 A (1).⁷⁴ However the UNHCR recommends that it be “applied to refugees other than statutory refugees”,⁷⁵ stating that the exception “reflects a more general humanitarian principle.”

It was only in 1992 that a second possible exception arose under the rubric of acquired rights. It was recommended that those with “strong economic ties and/or family and social links in the country of asylum, particularly when all or most ties in the country of origin have been lost” be considered as being eligible for exception under the Cessation Clause.⁷⁶ The exception acknowledges the “significant difficulties inherent in having to break, *once again* the social, cultural and professional ties, that by force of circumstances the person had had to develop abroad” (emphasis mine).⁷⁷ This view was not generally shared among scholars.⁷⁸ In the same year (1992), the Executive Committee made a similar recommendation “so as to avoid hardship cases that states seriously consider an appropriate status, preserving previously

possibility of its use in situations where a change in circumstances in a country is of “such profound and enduring nature” as to warrant its application, and called upon the UNHCR to explore the application of the cessation clauses. Executive Committee Conclusions represent the “soft law” of the refugee regime and as such are influential in shaping state practice.

⁶⁹ Ibid. Paragraph (a). The emphasis on the objective situation in the country of origin is viewed by some scholars as a diminishment of the subjective element or the role of refugees in determining when it is safe to return. See Chimni (1999).

⁷⁰ The subject received a brief mention in the 1999 and 2003 Guidelines on Cessation. See UNHCR (2003c).

⁷¹ UNHCR (1996) ‘Handbook.’

⁷² Ibid.

⁷³ Ibid, paragraph 136.

⁷⁴ 1951 Convention n 1, Article 1 A (1) (United Nations General Assembly 1951).

⁷⁵ UNHCR (1996) ‘Handbook’, paragraph 136.

⁷⁶ UNHCR (1992a).

⁷⁷ Ibid.

⁷⁸ According to Hathaway, however, the exception to the Cessation Clause was “not for general humanitarian relief based on factors such as family circumstances...”

acquired rights ... for those persons who cannot be expected to leave the country of asylum due to long stay ...”⁷⁹ Subsequent documents note the “serious consequences” that may result from a premature declaration of cessation including “illegal stay” and suggest that states should consider “appropriate status”, including “permanent residence status.”⁸⁰

The issue of “residual caseloads” is one that confounds all cessation declarations, particularly in the South where they tend to be large and states are reluctant to provide an alternate status or durable solution in such cases. Fitzpatrick lists four types of “residual caseloads”: those “with a continuing risk of persecution; those with compelling reasons arising out of previous persecution”, those “eligible for protection against involuntary repatriation under human rights treaties”, vulnerable people, and those “who have developed close family and economic ties in the host country.”⁸¹ Procedures to distinguish these types of residual caseloads require extensive resources in the logistically challenging terrain of the South. States in the North have elaborate and costly⁸² refugee determination procedures that are well suited to address the individualized aspects of a change of circumstances proceeding from an individualized initial determination of status. On the other hand, in the South, where the vast majority of refugees cross international borders en masse and are accepted as refugees on a *prima facie* or group basis, state structures to determine refugee status are underdeveloped or absent and it is the UNHCR that fills this gap. It is in these circumstances that procedural guidelines take on a greater significance.

Given the lack of resources in the South, the UNHCR has provided the expertise and resources to assist states in cessation declarations. The organization advises states on country conditions, declaration of cessation for groups of refugees, and in conducting procedures,⁸³ sometimes conducting the latter jointly. At times, the UNHCR also takes a “proactive approach”⁸⁴ to cessation by “surveying conditions in countries of origin to determine whether the Cessation Clause applies.”⁸⁵ The UNHCR has been actively involved in Africa, the continent hosting the largest number of refugees in the world.⁸⁶ Among the countries of the continent, Sudan, better known for the refugees it produces than those that it protects, has been among the most generous of hosts. In 1988, five per cent of Sudan’s total population were refugees.⁸⁷ It currently hosts approximately 300,000 refugees.⁸⁸ By far the largest influx has been from Ethiopia. Most of Sudan’s Ethiopian refugees reside in eastern Sudan, housed

⁷⁹ Executive Committee Conclusion No.69 (UNHCR 1992b).

⁸⁰ Note on the Cessation Clauses (UNHCR 1997). In this Note there was an effort to de-link a cessation declaration from durable solutions that was later rescinded in the 2003 Guidelines. The Guidelines reminds states to keep in mind the broad “durable solutions context of refugee protection informing the object and purpose of these clauses” (UNHCR 2003c).

⁸¹ Fitzpatrick (1998-1999).

⁸² It costs the Immigration and Refugee Board of Canada 29,000 Canadian dollars to process one refugee.

⁸³ Fitzpatrick in Feller, Turk and Nicholson (2003)

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ United States Committee for Refugees and Immigrants (2006). This does not include Palestinian refugees in the Middle East who do not fall under the Mandate of the UNHCR.

⁸⁷ Bulcha (1988). At the same time, Sudan is also a source of refugees for its nine neighbours.

⁸⁸ The World Refugee Survey estimates there are 310,500 refugees in Sudan from, in order of number, Eritrea, Chad, Ethiopia, the Democratic Republic of Congo, and the Central African Republic. Other sources put the figure at 200,000 (UNHCR 2008c).

in fourteen far-flung refugee camps. Despite the overwhelming conditions in these sprawling camps, war, political repression, ethnic rivalries, famine and a devastated economy in Ethiopia ensured there was little repatriation prior to 1991. However, changes in country conditions in both the host state and the country of origin have since led to the repatriation of large numbers of Ethiopians and an interest in applying the Cessation Clause to those who remained.⁸⁹

Cessation declarations occur in three situations: when the countries in question achieve independence; a change in regime and a transition to democracy; or when there is a settlement of civil conflict.⁹⁰ Of the five contexts in which the Cessation Clause operates, this paper is concerned with two of them: “the cessation of state protection of refugees previously recognized on a group basis” and cessation of refugee protection under the Statute.⁹¹ In the sections to follow, this paper will consider the case of pre-1991 Ethiopian refugees in Sudan and the declaration of cessation by the Government of Sudan and the UNHCR in September 1999. As stated earlier, it will focus in particular on the three aspects of the Cessation Clause identified by Fitzpatrick that need to be addressed: “an objective assessment of the situation in the country of origin; procedural fairness to ensure risk of persecution has been eliminated for individual applicants; and consideration of exceptions to the Clauses and the feasibility of involuntary return after a lengthy protection.”⁹²

2 Assessing fundamental change

In this section I deal with the first challenge in applying the Cessation Clause identified by Fitzpatrick: an objective assessment of the situation in the country of origin,⁹³ the OAU Convention, and conflicting standards of repatriation.

We will not return till the Tigray-led government is removed.⁹⁴

Almost three decades after his arrival in Eastern Sudan, and ten years after the Government of Sudan and the UNHCR had declared a cessation for all pre-1991 Ethiopian refugees who fled the Mengistu regime, the words of this refugee elder were defiant. He was speaking on behalf of the “residual caseload” of the September 1999 cessation declaration and referring to the Tigray Peoples Liberation Front (TPLF)-led coalition that overthrew the brutal Mengistu regime in 1991 and was seen as the harbinger of a new era of democracy for Ethiopia. His

⁸⁹ Rogge (1999). The changing attitude of governments towards refugees will be discussed later.

Between 1991 and 1999, almost 100,000 refugees repatriated to Ethiopia; most of them were non-Eritreans.

⁹⁰ Fitzpatrick and Boanan (2003). In seven instances the countries achieved independence in twelve there was regime change and in two settlement of civil conflict.

⁹¹ Fitzpatrick (1998-1999). The other three are individualized cessation for recognized refugees, withdrawal of temporary protection, and denial of initial claims to asylum based upon changed conditions between flight and status determination.

⁹² Fitzpatrick (1998-1999).

⁹³ Ibid.

⁹⁴ Ethiopian refugee in Sudan as interviewed by author in December 2009 at Um Gulja, the “closed camp” for pre-1991 Ethiopian refugees in Eastern Sudan. “Closed camps” are those camps handed over to the Sudanese government by the UNHCR after the declaration of cessation. The Tigrayan People’s Liberation Front is the main party of the Ethiopian People’s Revolutionary Democratic Front formed after the overthrow of the Mengistu regime.

words demonstrate the challenges of a generalized declaration of cessation for large groups of refugees who fled for an array of political, ethnic and other reasons.⁹⁵

The Horn of Africa has been plagued by some of the most prolonged and brutal conflicts in the world.⁹⁶ The region's population has shifted back and forth across international borders seeking refuge not only from violence, but also from poverty, famine, natural disasters, failed states, and repressive governments.⁹⁷ By the late 1970s and mid-1980s, hundreds of thousands of refugees fled Ethiopia to neighbouring countries, 90 per cent of them to Sudan and Somalia:⁹⁸ "[t]he first officially recognized refugees from Eritrea... a province in northern Ethiopia... arrived in Sudan as early as 1967."⁹⁹ They were fleeing a war of independence initiated by Eritrea against the Ethiopian government. An escalation of the conflict in 1978 led to a large influx of refugees into Sudan in 1978. A second flow of Ethiopian refugees occurred in 1984 when drought and famine forced 160,000 to flee, followed by 300,000 more the succeeding year. By April 1985 the total number of Ethiopian refugees in Sudan had reached half a million,¹⁰⁰ forming the largest single national group of refugees in Sudan.¹⁰¹

Political complexities in Ethiopia resulted from a web of ethnically based political parties that engaged in almost continuous battles since the 1950s with the central government and with each other.¹⁰² Besides inter-group rivalry, intra-group rivalry splintered political parties that formed new parties in alliance with former rivals, and along with ethnic and "nationalities" struggles,¹⁰³ drought and famine drove a continuous stream of people across international borders.¹⁰⁴ According to Terrazas it is impossible to distinguish those fleeing poverty and famine from those fleeing political repression, war, and ethnic conflict. In his opinion the outflows from the region represent a combination of motives for flight.¹⁰⁵ As Bulcha says, "the refugee streams from Ethiopia are characterized by a diversity of motivations of the groups and individuals that constitute them" and their reasons for flight often overlap. In a survey of Ethiopian refugees who arrived in Sudan between 1974 and 1982, Bulcha found that 26.6 per cent had fled on account of violence from a variety of sources in the lead up to the Ethiopian Revolution deposing the Haile Selassie regime. Only 6.5 per cent left on account of political opposition to the Mengistu regime, although many more left on account of Mengistu "government policies", such as forced labor and mass reallocations. The largest percentage,

⁹⁵ Bulcha (1988).

⁹⁶ Terrazas (2007).

⁹⁷ Ibid.

⁹⁸ In 1991, half of the estimated 6-7 million refugees in Africa were from the Horn of Africa with Ethiopia being the largest producers of refugees, the majority of which fled to Sudan (Kebbede 1991).

⁹⁹ UNHCR (2000b).

¹⁰⁰ Figures for the number of Ethiopian refugees in Sudan vary widely. The figure was estimated to be 500,000 in 1985, according to UNHCR Official Records in Bulcha (1988).

¹⁰¹ Carlin (1982).

¹⁰² Exile groups from Ethiopia have included opponents of Haile Selassie, some of them arriving in Sudan as early as 1956, followed by opponents of the Marxist Regime of Mengistu Haile Miriam, including TPLF, and EPLF, victims of infighting among these groups, members of Ethiopian Democratic Union (EDU) seeking to restore the imperial regime Salehyan (2001).

¹⁰³ Karadwi (1991).

¹⁰⁴ See De Waal (1991).

¹⁰⁵ De Waal (1991).

46.5 per cent, fled war and military conscription.¹⁰⁶ Those who fled for reasons that might be considered voluntary or for lack of jobs, education and health “came from conflict-affected environments” and belonged in the middle “of a continuum linking the typical refugee with the typical migrant.”¹⁰⁷ The violence affected “every part of the country and every section of society.”¹⁰⁸ Ethiopian refugees of all nationalities were housed in some of the largest refugee camps in the world that by the 1980s had come to “replace the previous practice of allowing refugees to settle amongst the local population.”¹⁰⁹ Significant numbers returned when the rains returned to Ethiopia in the mid-1980s¹¹⁰ and again after the overthrow of the Mengistu regime and the end of the thirty-year war civil war in 1991. However, thousands remained. It is to this complex group of remaining refugees that the UNHCR issued a declaration of cessation of its protection and assistance in September 1999. Its cessation declaration stated that:

... with the collapse in 1991 of the military regime of Mengistu which had banned all opposition activities in Ethiopia (1974-1991) and had led to the exodus of thousands of Ethiopians in search of protection outside their country, a fundamental and durable change took place in that country so as to generally remove the reasons for fearing persecution of those refugees who had sought protection outside their country before 1991.¹¹¹

The Government of Sudan followed suit, issuing an “Information Announcement to the Ethiopian Refugees in the Sudan”¹¹² that stated that despite the tripartite agreements signed by the Government of Sudan, the UNHCR and the Government of Ethiopia in 1993 to assist refugees to repatriate after the overthrow of the Mengistu regime in 1991, thousands of refugees remained in Sudan.¹¹³ According to the announcement:

International and regional conventions on refugees do not entertain unlimited and continuous refugee status without end especially where there are no convincing reasons for that [sic]. Ever since the collapse of Mengistu’s [sic] regime in 1991, the causes which led to the Ethiopians to take refuge have become non existent [sic] after that. For these reasons and based on this fact, UNHCR declared a ‘cessation clause’ in September 1999 to be applied to all Ethiopian refugees all over the Sudan (emphasis in original).¹¹⁴

¹⁰⁶ Bulcha (1988). The largest group of Ethiopians consisted of Eritreans fleeing a war of independence from an undivided Ethiopia. This study is not concerned with them but with the much smaller groups of mainly Christian Ethiopians who were settled mainly in eastern Sudan. 160,000 Eritreans remain in Sudan despite Eritrea gaining independence in 1993.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ UNHCR (2000b).

¹¹⁰ The Tigrayan People’s Liberation Front “encouraged people to go home” and 170,000 did so in mid-1985. 75,000 returned between 1993 and 1995. 75,000 returned between 1993 and 1995. See UNHCR (2000b).

¹¹¹ UNHCR (1999a).

¹¹² According to a petition filed with African Court of Human and People’s Rights by Ethiopian refugees, a “notice was posted on the door of the UNHCR compound in Khartoum...in early 2000.” See Doebbler (2006).

¹¹³ Figures vary, however estimates state that there were 30,000 Ethiopian refugees remaining in Sudan at the time of the declaration of cessation (United States Committee for Refugees 2001).

¹¹⁴ Doebbler (2006).

At first glance the declaration of cessation seemed reasonable.¹¹⁵ The UNHCR had adhered to the letter of the law and the guidance of the Executive Committee Conclusions and its own extensive commentary on the subject. Thousands of refugees had spontaneously repatriated to Ethiopia between 1993 and 1995,¹¹⁶ one of the indicators of changed circumstances.¹¹⁷ Secondly, the UNHCR waited nine years after the change of regime to declare a cessation – far longer than that recommended or practised by states – taking into consideration the fact that the change had occurred violently over a long period of time and involved numerous belligerents.¹¹⁸ The UNHCR list of factors that it considered in declaring a cessation for Ethiopia included: a broad-based coalition government involving all the ethnic groups in Ethiopia, democratic elections since 1995, a new constitution, regional and local elections, a federal system of government, a proclamation by the Ethiopian government of the right and freedom of every Ethiopian national to return to Ethiopia without the fear of persecution on account of having been a refugee, as well as the tripartite agreements signed by the Ethiopian government, the UNHCR and various countries of asylum, including Sudan, to assist Ethiopian refugees to return to Ethiopia.¹¹⁹

Nevertheless, a perusal of documentary evidence of country conditions at the time of the declaration of cessation in September 1999 presents a less positive picture. The political system in Ethiopia has been called a “...one-party dominant political system and that dominance over the last decade has been all but absolute.”¹²⁰ According to Vaughn, the “operation of the political system in much of the country is such as to render it almost impossible for opposition parties to use the democratic institutions effectively to challenge the ... ruling party.”¹²¹ Political dissidents, including members of the All Amhara People’s Organization¹²² were jailed. There were reports of torture and disappearances. Human rights monitors were harassed, forcing them “underground or into exile.”¹²³ Journalists critical of the government were also detained.¹²⁴ According to the International Committee of the Red Cross (ICRC), there were 10,000 political prisoners in 1998.¹²⁵ About 500 members of minority ethnic groups in the Omo district were detained.¹²⁶ In the north, a border dispute between

¹¹⁵ The cessation declaration for pre-1991 refugees is referred to by the UNHCR and some scholars as a successful targeted declaration. See Fitzpatrick and Boanan (2003).

¹¹⁶ In December 1995, organized repatriation of Ethiopian refugees began from Sudan; 20,000 refugees were returned out of a planned figure of 50,000 for 1996.

¹¹⁷ “Large-scale spontaneous repatriations of refugees do not themselves constitute fundamental change...such repatriation may be an indication of changes...” See UNHCR (1997), ‘Note on the Cessation Clause.’

¹¹⁸ Bulcha (1988).

¹¹⁹ Tripartite agreements were signed in 1991 1993 and 1994 between the Government of Ethiopia, the UNHCR and various countries where Ethiopian refugees resided (UNHCR 1999a). Nearly 75,000 returned to Ethiopia from Sudan between 1993 and 1995. In 1998 8,000 returned leaving an estimated 30,000 Ethiopian refugees in Sudan at the end of 1999. Beginning in March 2000, most Ethiopian refugees arriving in Sudan no longer received automatic refugee status. See United States Committee for Refugees (2001).

¹²⁰ Vaughn (2004).

¹²¹ Ibid.

¹²² Most of the remaining refugees are Amhara.

¹²³ Vaughn (2004).

¹²⁴ Human Rights Watch (1999).

¹²⁵ ICRC (2011).

¹²⁶ Human Rights Watch (1999).

Eritrea and Ethiopia erupted into war in 1999, with “drastic humanitarian consequences”,¹²⁷ including the displacement of 400,000 villagers from the border areas. In the Oromo, Ogaden, and Sidama regions, “low level insurgencies intensified.”¹²⁸ The Ethiopian army sent troops and tanks into Somalia and made excursions into Kenya. The widespread use of mines claimed mainly civilian victims.¹²⁹ Five million people in the south and south east were threatened with hunger in 1999 as a result of “intense drought conditions.”¹³⁰

According to Barnes, experts have always been “ambivalent” about the progress of democracy in Ethiopia; however, “in contrast to the ... views of the experts, until very recently, Ethiopia’s international partners have been wholly enthusiastic about the country’s transitional process towards democracy.”¹³¹ According to Bulcha, much of the academic research on refugees conducted in Africa “addresses itself to practical problems concerning the provision of asylum and protection” and less to motives or reasons for flight.¹³² Changes of circumstances in Africa are viewed through the lens of the 1951 Convention drafted at a time when there were “clear winners and losers”¹³³ and regime change was swift and supported by interested international parties.¹³⁴ This is very different from the types of conflict in Africa and other parts of the South where a change in regime has not always meant a clear transition to democracy. The recommended time frame of 12 to 18 months for a change to take hold is relatively short¹³⁵ and allows states that wait slightly more than the suggested guideline before declaring cessation to claim that they have abided by and exceeded the requirements of the Executive Committee recommendations and the UNHCR Guidelines. As is evident from numerous examples, the suggested time frame grossly underestimates the intractability of many conflicts in Africa and the South. As Zakaria notes:

¹²⁷ Ibid. See also Amnesty International (2000).

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Barnes (2006).

¹³² Bulcha (1988).

¹³³ Such as post-WWII Germany.

¹³⁴ Zakaria (1997) cites Poland, Hungary, and the Czech Republic as “the furthest along in consolidating democracies.” The transition from communist to democratic governments was achieved relatively peacefully. The UNHCR declared cessations for all three countries. See also Black (2002) where he discusses Yugoslavia’s experience with a brutal ethnic conflagration that has proven difficult to resolve and complicated for the return of refugees. Although not strictly a cessation declaration as the refugees were only given “temporary protection”, a mechanism to deal with mass influxes outside the framework of the 1951 Convention, the situation is more analogous to that of Africa where mass influxes are provided temporary albeit extended protection.

¹³⁵ The UNHCR recommends that the 12-18 months be “regarded as a minimum.” The UNHCR declarations “average a period of four to five years.” The practice of Switzerland and Norway is two and three years respectively. There is recognition in the documents that change that occurs violently may take longer to stabilize. The 2003 Guidelines acknowledge that in cases of conflict involving different ethnic groups, “progress towards a genuine reconciliation has often proven difficult.” Although the overthrow of the Mengistu regime was achieved by parties representing different ethnic groups and the new government is a coalition of groups of different ethnicity, ethnic rivalry has always been the subtext of Ethiopian politics.

In Africa the past decade has been a crushing disappointment. Since 1990, 42 of 48 countries of sub-Saharan Africa have held multiparty elections in the hope that Africa might finally move beyond its reputation for rapacious despots and rampant corruption.¹³⁶

He goes on to state that although there is a “degree of stability” in these countries, elections have “also produced a degree of chaos and instability...and lawlessness” that is worse. Durability or “enduring change”¹³⁷ has proven elusive under such circumstances despite evidence in Ethiopia of developments at the national level, of “democratic elections, declarations of amnesties, repeal of oppressive laws and dismantling of former security services.”¹³⁸ It has been observed that the establishment of democratic processes is “hardly” sufficient for cessation conditions.¹³⁹ Zakaria identifies Mozambique as the only successful transition to democracy in sub-Saharan Africa, after a prolonged civil war¹⁴⁰ and cites Ethiopia as an example of an “illiberal democracy” with an “elected government (that) turns its security forces on journalists and political opponents, doing permanent damage to human rights (as well as human beings).”¹⁴¹

Fitzpatrick notes that the emphasis on “free and fair elections” and improvements at the national level should be balanced with closer monitoring of the situation “on the ground.”¹⁴² Such monitoring is not easy; Ethiopia had banned some international organizations while allowing access to others.¹⁴³ “The government’s efforts to suppress political dissent and armed insurgency led to widespread human rights abuses”; however, the international community was muted in its condemnation.¹⁴⁴ The mixed record of Ethiopia and countries like it make a comprehensive assessment of changed circumstances difficult. A 1997 Note cautions “a

¹³⁶ Zakaria (2003).

¹³⁷ UNHCR (2003c).

¹³⁸ Fitzpatrick and Boanan (2003).

¹³⁹ Kourula (1997).

¹⁴⁰ Zakaria describes “illiberal democracies” as “states that mix elections and authoritarianism.” He attributes Mozambique’s success to “enormous help from the United Nations and international community unlikely to recur in every African country.” The repatriation of over a million Mozambican refugees was the largest conducted by the UNHCR. See Zakaria (2003).

¹⁴¹ Zakaria (2003).

¹⁴² Fitzpatrick (1998-1999).

¹⁴³ Human Rights Watch staff were denied entry to Ethiopia and although Amnesty International was granted permission for admission. Its report was rejected. The ICRC was denied access to police lockups where there were reports of routine abuse of detainees at the Central Investigation Department. However, they were allowed access to prisons where they assisted 10,000 prisoners jailed in connection with internal security matters. The Ethiopian Human Rights Council (EHRCO) was registered in May 1999 as “the only openly operating monitoring group in the country.” It also allowed the functioning of organizations that focused on civic and public education. It “continued to suppress the Human Rights League, a monitoring organization established in December 1996 by members of the Oromo community.” EHRCO also noted that “[s]imilar repressive measures forced other monitoring groups underground or into exile, including the Ogaden Human Rights Committee, the Solidarity Committee for Ethiopian Political Prisoners, and the Oromo Ex-Prisoners for Human Rights.”

¹⁴⁴ As an important US ally in the containment of Sudan the US played an important role as a mediator in the war between Eritrea and Ethiopia but failed to condemn Ethiopia for its human rights abuses. The Committee for the Protection of Journalists listed Ethiopia as one of the worst offenders of press freedoms (2011).

situation which has changed, but which also continues to show signs of volatility is not by definition stable.”¹⁴⁵ As Rogge says:

...the challenge today is how one might best determine that a Cessation declaration in the context of multiple causes of flight including fear of persecution for the five Convention grounds, military conflicts between independence movements and colonial authorities followed by warring factions in post independence struggles, inter-ethnic and intra group conflicts, irredentist territorial claims, drought and famine that characterise current conflicts.¹⁴⁶

Refugees from Ethiopia fled for a variety of reasons.¹⁴⁷ Many of them would have fallen within the definition of a refugee as provided for in the 1951 Convention and Article 1 (1) of the OAU Convention, which is similar—i.e. those who flee on account of a well-founded fear of persecution based on, race nationality, religion, political opinion, or membership in a particular social group. Those who fled persecution by the Mengistu regime would have fallen within this category.¹⁴⁸ For some but not all of them, the overthrow of the Mengistu regime could be characterized as a “fundamental” change. However, it would be difficult to conclude that a “profound and enduring”¹⁴⁹ change had occurred for all refugees. For those who fled for reasons covered by the extended OAU definition, that is “... external aggression, occupation, foreign domination or events seriously disturbing public order either in whole or in part of his country of nationality...”¹⁵⁰ the declaration was premature.¹⁵¹ Given the war with Eritrea in the north, the ethnic insurgencies and famine in the south and south-east, one would be hard-put to say that there had been a change of circumstances under Article 1.4(e) of the OAU Convention.¹⁵²

The OAU convention “explicitly gave credence to the fact that a refugee exodus could be of a more general nature rather than individual fears” and “expanded the number of persons who

¹⁴⁵UNHCR (1997).

¹⁴⁶Rogge (1993).

¹⁴⁷ Jackson (1999). The refugee definition is identical in both the Statute and the 1951 Convention. According to Jackson, “there was general recognition” that some of the refugees who fled Ethiopia prior to 1991 were 1950/51 refugees, however, the applicability of the OAU Convention made it unnecessary to distinguish between refugees and Sudan and the UNHCR abandoned any efforts to do so. Jackson describes the changing perceptions of the arrivals from Ethiopia. According to Jackson, the UNHCR did not consider the drought victims of 1983 to be refugees in the “strict sense.” De Waal on the other hand views the famine in some areas of Ethiopia the outcome of war policies by the Mengistu regime that would have arguably brought some those affected by it within the ambit of the 1951 and OAU Convention. It has been suggested that the OAU Convention is flexible enough to encompass refugees fleeing drought and famine under the provision governing “...events seriously disturbing public order...”

¹⁴⁸ Ibid.

¹⁴⁹ UNHCR (1992b).

¹⁵⁰ Article 1 (2); Organization of African Unity Convention.

¹⁵¹ As a signatory to the OAU Convention, it is the Government of Sudan that is responsible for the applying the provisions of the regional instrument. The UNHCR is mandated to supervise only the application of the 1951 Convention.

¹⁵² According to Fitzpatrick, there was disagreement between the government of Sudan and the UNHCR on the timing of the declaration. The Government of Sudan was concerned at the loss of assistance money and their ability to comply with the requirements to conduct individual assessments for those who claimed a continuing fear of persecution. The UNHCR assuaged their concerns. In a telephone interview I conducted with the Director of the Commissioner of Refugees in Sudan, the Government of Sudan did not consider the timing appropriate given the conditions in Ethiopia at the time.

could legitimately be considered refugees.”¹⁵³ However, the difficulty in applying the Cessation Clause is more than one of numbers, as Okoth- Obbo affirms:

The second part of that definition is widely viewed as having been elaborated to cover so-called ‘massive refugee situations.’ While strictly speaking this is not correct, it is true that the language of the Convention, and the interpretation which has been placed on it in practice, are much more accommodating of large-scale refugee situations than similar interpretations that have taken root around the 1951 Convention.¹⁵⁴

Herein lies the dilemma. The 1951 Convention applies to only one type of refugee, and the OAU Convention to two. The differences between the two definitions puts many refugees in Africa in the curious position of fleeing for reasons enumerated under the expanded definition of generalized violence but being required to return to their country of origin on the basis of a provision that was drafted to address individualized fears of persecution for five specific grounds. Doebbler¹⁵⁵ argues that the OAU Convention is the *lex specialis* in the region, the “effective legal complement” to the 1951 Convention, and therefore should take precedence over the more generalized international Convention. What then should be the threshold for cessation for the expanded definition of refugee? Should it be the same as that used for the 1951 Convention? Or should it be lower given that it does not require a refugee to establish an individual, well-founded fear of persecution? These and other questions have yet to be addressed by scholars. It is clear from the country conditions, however, that this aspect of the OAU Convention was given little attention in the case of the Ethiopian refugees either by the Government of Sudan or by the UNHCR. According to Karadawi, it was Commissioner of Refugees responsibility to “implement policy based on OAU norms.”¹⁵⁶ While this may be legally accurate, the level of expertise at Commissioner of Refugees is inadequate to the task.¹⁵⁷ It could be argued that the UNHCR is only responsible for supervising the 1951 Convention; however, this would be an unduly narrow view, given that the UNHCR has long protected persons other than those covered by the 1951 Convention, such as those in “refugee-like situations” including those covered by the extended OAU Convention definition.

In addition to the two Conventions, the Statute of the UNHCR and the institutional practice of the organization¹⁵⁸ also impacts cessation declarations by states in the South. The UNHCR is charged with:

... seeking permanent solutions for the problems of refugees by assisting Governments and, subject to the approval of the Governments concerned...to facilitate the voluntary repatriation of such refugees...¹⁵⁹

The UNHCR facilitates repatriation even when it considers the situation in the country of origin not to be objectively safe if the return of refugees is voluntary. It promotes repatriation “when it appears that objectively it is safe for most refugees to return and that such returns have good prospects of being durable....”¹⁶⁰ “There must be an overall general improvement

¹⁵³ Oloka-Onyango (1991).

¹⁵⁴ Okoth-Obbo (2001).

¹⁵⁵ Doebbler (2006).

¹⁵⁶ Karadawi (1999).

¹⁵⁷ I base my claim on my extensive dealings with Commissioner of Refugees staff.

¹⁵⁸ Hathaway (2005).

¹⁵⁹ United Nations General Assembly (1950), Chapter 1 General Provisions, Article 1.

¹⁶⁰ UNHCR (1996).

in the country of origin such that return in *safety and dignity* can take place” (emphasis added).¹⁶¹ The conditions of return in “safety and dignity” include:

return... without any fear of harassment, discrimination, arbitrary detention, physical threat or persecution...guarantees and/or amnesties to this effect...measures to ensure the restoration of full national protection.¹⁶²

The UNHCR often promotes and organizes repatriation under such conditions, which at all times remains voluntary. State declarations of cessation require the higher standard of “fundamental change” (described in section 1) in the country of origin such that it removes the individual fear of persecution. This is essential, since once this higher standard is met, states may declare cessation allowing them to withdraw refugee status from those who remain and repatriate them by force, if necessary. States and the UNHCR declare cessation at the same time allowing it to terminate its protection and assistance activities.

According to Hathaway, the UNHCR equates the standard of voluntary repatriation, “return in safety and dignity” with that required for a declaration of cessation by states, causing confusion over the threshold to be met for a cessation declaration. He holds that that the right of states to repatriate former refugees mandatorily has not been clearly articulated by the UNHCR:¹⁶³

... Conflation of the rules for what are substantively distinctive frameworks for return under the singular rubric of voluntary repatriation... (it is) too easy for governments simplistically to invoke UNHCR repatriation activities as authorization of repatriation in general avoiding the more exacting requirements of cessation of status which in fact bind them.¹⁶⁴

The declaration of cessation by the Government of Sudan reflects this tendency. Issued under the heading of an “Information Announcement”, it places the responsibility for the declaration on the UNHCR stating in part “...for these reasons and based on this fact, UNHCR declared a ‘cessation clause’ in September 1999 to be applied to all Ethiopian refugees all over the Sudan.”¹⁶⁵ There exists “a common assumption (that) State parties should look to UNHCR’s position to determine when refugee status may legitimately end”¹⁶⁶. The resulting “blurring of standards” and responsibilities¹⁶⁷ can lead to situations in which States either “manipulate reliance on voluntary repatriation” to repatriate refugees before the criteria for a declaration of cessation have been met¹⁶⁸ or for the UNHCR to pressure States to declare a cessation “as a result of institutional over-reaching.”¹⁶⁹

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Hathaway (2005).

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Zieck (2004).

¹⁶⁸ Hathaway (2005).

¹⁶⁹ Ibid. According to Hathaway, the UNHCR reassured the Zambian Government that they would “remind” Angolan refugees of the threat of mines thereby allaying the concerns of Zambia at the planned repatriation of Angolan refugees: “Governments feel most pressured to follow suit when UNHCR not simply to withdraw assistance or encourage repatriation but to issue a ‘formal declaration’ of cessation”, the legal relevance of which is ambiguous to States.”

Sudan is a party to both the international¹⁷⁰ and regional conventions on refugees¹⁷¹ playing an active role in “formulating OAU strategy on refugees.”¹⁷² It is also a member of the UNHCR’s Executive Committee.¹⁷³ Despite its experience and involvement in the international refugee regime, the dominant force in Sudan, as in many African countries, is the UNHCR. The organization has been present in Sudan for more than forty years, undertaking a variety of functions including advising the Sudanese government on domestic refugee legislation, supervising adherence to the 1951 Convention, training of Commissioner of Refugees adjudicators, financing and maintaining a fledgling refugee determination system in eastern Sudan, providing legal protection to refugees, issuing documents, and delivering humanitarian assistance to thousands of refugees in sprawling refugee camps in southern, eastern and north-western Sudan (Darfur). The organization provides housing, water and sanitation facilities, health and educational services, agricultural expertise and livelihood training.¹⁷⁴ It provides crucial funding for the Government and much-needed employment for hundreds of local staff.

It is not surprising that under these circumstances it “insisted” that a cessation declaration proceed with regard to the pre-1991 Ethiopians despite the misgivings of the Government of Sudan.¹⁷⁵ Hathaway comments on the “ambition” of the UNHCR to decide when it is appropriate for state parties to apply the Cessation Clause and suggests that a UNHCR “declaration to end its mandate” may be the result of budget constraints, the need to cut long-term care maintenance costs or pressure from state parties.¹⁷⁶ With refugees caught between conflicting standards and interests,¹⁷⁷ it is difficult not to sympathize with the conclusion of an

¹⁷⁰Sudan has one reservation to the 1951 Convention related Article 26 pertaining to Freedom of Movement (UNHCR 2011).

¹⁷¹<http://www.au.int/en/treaties>

¹⁷² Sudan was one of the Committee of 10, countries delegated to make recommendations to “solve the problems of refugees in the country of asylum” in preparation of drafting the OAU Convention during which Sudan played an important role. Rwanda, Burundi, Democratic Republic of the Congo (DRC), Uganda, Tanzania, Senegal, Nigeria, Ghana, and Cameroon were the other nine.

¹⁷³Sudan is also party to additional human rights instruments, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Elimination of all Forms of Discrimination and the African Charter on Human and People’s Rights. <http://www.au.int/en/treaties>

¹⁷⁴ Slaughter and Crisp (2009). The level of the UNHCR involvement in Sudan is not unlike that in other African countries. It may however be exacerbated on account of a lack of international and local NGO expertise. The former are mostly barred from the country while the latter are as yet underdeveloped. The UNHCR is involved in building local NGO capacity.

¹⁷⁵According to Fitzpatrick, Sudan was concerned about the loss of assistance money once refugees and the onerous task of implementing procedures for those refugees who professed a continuing need for protection. The UNHCR promised to assist Sudan with the latter. I interviewed the Commissioner of Refugees in Khartoum. He told me that Sudan did not consider the timing of the declaration appropriate due to the unsettled conditions in Ethiopia. One can only speculate as to why the UNHCR “insisted” on a declaration of cessation.

¹⁷⁶ Hathaway (2005).

¹⁷⁷Various actors in Sudan worked to resolve the refugee crisis as competing interests rather than as partners; international organizations have their own policies mandates and interests that may not be compatible with the host government, Bulcha (1988).

African commentator who notes that “African refugees cannot in total confidence look to the existing regional or international legal protections for relief.”¹⁷⁸

These considerations raise the question of whether the Cessation Declaration as envisaged in the 1951 Convention and adopted in its entirety by the OAU Convention is applicable in Africa without due regard for the special circumstances of the refugee situation in this region. In volume, motives for flight, and length of time in exile, the Ethiopian caseload is not unlike others in the region. However, for the present, there is little else to fill the protection gap and the more prudent course of action would be to develop cessation guidelines specific to the situation in Africa.

After the declaration of cessation, approximately 10,000 Ethiopian refugees registered for repatriation with the UNHCR and about 20,000 remained,¹⁷⁹ among them the village elder who refused to return until the Ethiopian government was overthrown. He was to be subjected to a procedural process to determine whether he fit within the exception to the Cessation Clause which will be discussed in the next section.

3 Applying the Cessation Clause: Procedures and exceptions

In this section I address the last three issues raised by Fitzpatrick: “procedural fairness to ensure risk of persecution has been eliminated for individual applicants, [and] consideration of exceptions to the Clauses and the feasibility of involuntary return after a lengthy protection.”¹⁸⁰

Galligan articulates the importance of procedures thus: “without procedures, law and legal institutions would fail in their purposes”, therefore the law and the procedures that implement the law “must be seen as equal partners.”¹⁸¹ Neither the 1951 Convention nor the OAU Convention indicate what types of procedures are to be adopted either for the identification of refugee status or for determining its end. ‘Treaty texts do not address many of the salient contemporary issues concerning termination of international protection’ and there is little state practice to learn from.¹⁸² Goodwin-Gill calls the textual inadequacies of the ‘ceased circumstances’ Cessation Clauses “glaring and perverse.”¹⁸³

In the context of the Africa and other countries of the south, conducting cessation procedures presents some significant challenges. Southern states do not have the funding, expertise or infrastructure to conduct the individualized assessments required to determine whether there are “compelling reasons”¹⁸⁴ or continuing protection needs that may apply to those refugees

¹⁷⁸Oloka-Onyango (1991).

¹⁷⁹ Source B UNHCR, staff, Showak Eastern Sudan, personal interview 28 November 2008, Abdallah Idris Protection Clerk, Eastern Sudan.

¹⁸⁰ Fitzpatrick (1998-1999).

¹⁸¹ Galligan (1997).

¹⁸² Fitzpatrick (1998-1999).

¹⁸³ Goodwin-Gill quoted in Fitzpatrick (1998-1999).

¹⁸⁴ In the case of the Ethiopian refugees, evidence that may have suggested the possibility of “compelling reasons” for refugees not returning remained unexplored. In one case, a refugee is reluctant to return due to the trauma of “seeing a house where her family died.” It is not clear if interviewers were briefed

who do not repatriate after a cessation declaration. The sheer numbers involved can overwhelm even the UNHCR, which conducts procedures for states that are unable to do so. In Sudan, more than 4,000 heads of households representing approximately 15,000 pre-1991 Ethiopian refugees applied to have their refugee status reconsidered in a joint operation conducted by Government of Sudan and the UNHCR.¹⁸⁵ Nevertheless, given the stakes involved in returning refugees to situations where they face significant risk of persecution, UNHCR procedures “*must incorporate the highest standards of fairness and due process*” (emphasis in original).¹⁸⁶

There are three types of challenges facing the application of cessation in the field: logistical, procedural, and legal.

Logistical/infrastructural Issues

Refugee camps in Africa are generally consigned to remote, difficult-to-access areas for security and other reasons.¹⁸⁷ In Sudan, Ethiopian refugees are scattered among a dozen far-flung camps in the remote eastern region. Even semi-urban camps are more than an hour’s drive from the closest UNHCR office, while some rural camps are three hours by car. Adjudicators, interpreters and refugees have to travel long distances, limiting the time available to conduct a proper interview. The logistics of conducting individual assessments under these circumstances are liable to compromise even the most basic “elements of a fair process ...” including notice to appear, a full and fair interview and an appeal process.¹⁸⁸

In a Submission¹⁸⁹ to the African Commission made on behalf of the pre-1991 Ethiopian refugees, the petitioners claim that their rights to “have their cause heard” under the African Charter were violated by the Government of Sudan.¹⁹⁰ The refugees also allege insufficiency of notice, lack of legal representation, bias of interpreters and inadequate “qualifications and knowledge” of those hired to make a determination in the proceedings.¹⁹¹

by the UNHCR to canvass if there were compelling reasons or alternate relief for refugees to remain. Ethiopian refugees interviewed in February 2001 in eastern Sudan as part of the cessation exercise.

¹⁸⁵ According to UNHCR official Mathijs Le Rutte, the UNHCR sometimes underestimates the number of refugees that are likely to challenge the cessation declaration, telephone and e-mail interview with author. It is difficult to get exact numbers of Ethiopian refugees who applied to have their statuses re-examined. Doebbler states that he represents approximately 14,000 refugees (2006). These are the cases waiting for an appeal process. Other sources put the total number of Ethiopian refugees in Sudan at approximately 19,500. The additional 5000 consist of post-1991 Ethiopian refugees and those accepted as being in need of continuing protection and this paper does not apply to them. The author counted 4,238 pre-1991 Ethiopian files (each file represents at least three people) awaiting appeal in eastern Sudan and Khartoum and reviewed the 2,338 files in the east.

¹⁸⁶ Fitzpatrick (1998-1999)

¹⁸⁷ Bulcha (1988). Settling refugees in camps makes it easier to provide services but also to control refugees. Governments also fear tension between refugees and local communities. In Sudan the movement of refugees is restricted to camps; special permission is required to move to urban areas.

¹⁸⁸ Fitzpatrick (1998-1999). Sufficient notice, an impartial decision maker, the ability to provide evidence, and adequate interpretation are some of the elements of due process.

¹⁸⁹ Doebbler (2006).

¹⁹⁰ Organization for African Unity (1991). Article 7(1): “Every individual shall have the right to have his cause heard.” This comprises: (a) the right to an appeal... (c) the right to be defended by counsel of his choice.

¹⁹¹ Doebbler (2006).

According to many Ethiopian refugees, there was confusion about when and where interviews were being held and also widespread “misinformation” about the process.¹⁹² Some complained of being left out of the screening process due to the distance of interview locations¹⁹³. Between November 2000 and 31 January 2001, fifteen decision-makers in teams of two decided over 4000 cases at four locations.¹⁹⁴ A review of files of pre-1991 Ethiopian cases supports the conclusion of critics that procedures conducted by the UNHCR generally do not adhere to due process standards.¹⁹⁵

Procedural Issues

One of the major concerns of the UNHCR procedures is the quality of decision-makers. Goodwin-Gill describes some of the essential tasks of a decision-maker:

Identifying material facts, weighing relevant country of origin evidence, assesses credibility, identifies and interprets the relevant law, applies the law to the facts in a reasoned way; and determines whether the claimant is a refugee.¹⁹⁶

In claims where refugees are not represented¹⁹⁷ and sometimes have little education, such as most of the Ethiopian refugees in the east, it takes skilled decision-makers to elicit evidence and recognize issues. As the Handbook states:

...while the burden of proof in principle rests with the applicant; the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.

Commissioner of Refugees adjudicators have limited interviewing skills, country-of-origin information and knowledge of refugee law. Unfortunately, this also appears to be the case of the lead adjudicators fielded by the UNHCR for the cessation procedures.¹⁹⁸ The Ethiopian interviews generally consisted of between one and four questions, commencing with why applicants did not want to return to Ethiopia.¹⁹⁹ The response to such a question, particularly in protracted situations when many years have elapsed between the time of flight and a

¹⁹² Interviews with refugees, UNHCR and CoR staff in Eastern Sudan. All suggested that the process was flawed. Refugees were told by some Camp Managers that interviews would take place in the camps, which was not the case.

¹⁹³ There were four interview locations and refugees told the author that they could not afford the rental of a pick-up truck for their interviews some about 100 kilometres away.

¹⁹⁴ Draft Appeal. Each Team was made up of two decision makers, one from COR and the other a United Nations Volunteer. Interviews with UNHCR staff reveal that decision makers were doing 4-5 cases a day and approximately 20 cases a week. In Canada even the “fast-track” cases, cases that are “manifestly unfounded”, or from countries where the objective evidence for granting refugee status is clear, decision-makers do no more than 12 cases a week without the logistical issues. The author is a former Member of the Immigration and Refugee Board of Canada.

¹⁹⁶ Goodwin-Gill in Alexander (1999).

¹⁹⁷ According to Curtis Doebbler, the counsel representing the Ethiopian refugees before the African Commission, he was prevented from entering Sudan to meet with refugees. See Doebbler (2006).

¹⁹⁸ UNHCR adjudicators received two weeks training before the commencement of interviews (UNHCR 2000; Doebbler 2006). The author trained several CoR decision-makers in November/December 2008, some of whom participated in the pre-1991 Ethiopian screening process eight years prior. Even in 2008, their skills were rudimentary.

¹⁹⁹ UNHCR (2008a).

cessation declaration, is unlikely to reflect the reasons for original flight. Why a refugee left his country of origin may not be the same reasons why he does not wish to return. The issue is further complicated by the fact that individual refugee status determination had not been conducted for the pre-1991 Ethiopian refugees. Under these circumstances, it is better practice to first determine the cause of flight so that a proper assessment can be made of whether the reasons for flight have ceased to exist, followed by an enquiry into any new fears of persecution. Reasons for decisions in the cases were between one line and one paragraph in length, with minimal analysis. “Decisions for reasons are recognized as an essential prerequisite for fundamental justice”,²⁰⁰ Alexander asks; “[h]ow can a decision be meaningfully challenged if reasons are not clearly stated”?²⁰¹

Among those claiming a continuing fear persecution, two types of claims were made. The first concerned livelihood prospects based on the unavailability of land for farming. The second concerned membership in political groups, such as the Ethiopian Democratic Union (EDU) and the Ethiopian People’s Revolutionary Party.²⁰²

The majority of the rejected files²⁰³ in the east were based on the absence of livelihood prospects on account of the alleged refusal by the Government of Ethiopia to give land to farm to the applicants. The claims were dismissed with a one line decision – “land and shelter are not grounds for a refugee claim.”²⁰⁴ There was little exploration of whether the denial of land and therefore of livelihood was based on a Convention (1951) ground, such as nationality or political opinion, a line of questioning not unreasonable in the Ethiopian context. According to Barnes, “a shortage of land and geographical and political divisions based on ethnicity are a source of friction in Ethiopia.”²⁰⁵ The issue of land distribution is one of “intense competition between ruling and opposition parties ...”²⁰⁶ The regional land policies of northern Ethiopia (Tigray and Amhara zones where most of the Ethiopian refugees originate) require residency in the village to qualify for usufruct rights. These requirements would disqualify most of the refugees who are Amhara. Ethiopian refugees claimed that the fertile Amhara regions of Ethiopia had been absorbed into Tigray areas causing conflict between the two ethnic groups.²⁰⁷ Amhara are forced to move south where “ethnic tensions are very high.”²⁰⁸ This is

²⁰⁰ Goodwin-Gill in Alexander (1999).

²⁰¹ Ibid.

²⁰² Information on these files is derived from the Submissions to the African Commission on Human and People’s Rights made on behalf of the pre-1991 Ethiopian Refugees and constitute the bulk of the files in Khartoum that the author has not reviewed. However, the same concerns regarding the quality of the adjudication in the Khartoum claims have been raised in the Submissions to the African Commission.

²⁰³ 791 claims were based on political grounds, such as membership in the Ethiopian Democratic Union; 47 claims were rejected on the application of the Exclusion Clause Article 1F(a) the rest were based on the lack of livelihood prospects.

²⁰⁴ Draft Report n 200.

²⁰⁵ Barnes (2006).

²⁰⁶ Vaughn (2004). See also Wibke, Ayarlneh and Benedikt (2008) who hold that the issue of land policy is one of “fierce political debate.” Land policy did not change after the fall of the Mengistu regime. The current constitution enshrines public ownership of land. Individuals only have usufruct rights with no rights to sell or mortgage property. According to the authors “[l]and policy is the real source of power in imperial and contemporary Ethiopia.”

²⁰⁷ Siddiqui (2008).

not to suggest that the claims made by the pre-1991 Ethiopian refugees warrant continuing international protection, only that issues of access to land in Ethiopia are complex and have political and ethnic overtones; a lack of understanding of refugee law can lead to highly prejudicial consequences for refugees.

The claims based on membership in the EDU suffer similar shortcomings²⁰⁹. Records of interviews indicate a lack of decision-maker knowledge of the political landscape of Ethiopia and its constantly shifting alliances. Decisions cite the return of opposition groups, including members of the EDU to Ethiopia, and the multiparty coalition government as reasons for rejection. Interviewers characterized the applicants as “low-level” members of the EDU and therefore at little risk of persecution.²¹⁰ Yet country-of-origin information reveals that while the EDU Party was part of the Transitional Government of Ethiopia, it does have a history of violent clashes with the TPLF (the dominant party in the current government coalition) and a splinter group of the EDU, active in the Ethiopian Diaspora, is the TPLF’s main “provincial adversary” in the opposition.²¹¹

Decision-makers reference a “UNHCR Policy Paper” as the source of their information. A concerted effort to locate it failed.²¹² Commentators on UNHCR procedures deplore the lack of transparency surrounding the evidence used to make decisions. According to one source, the “UNHCR’s insistence on using secret evidence parallels government efforts to compromise due process in the context of the war on terrorism”²¹³ and it is used to “prevent applicants from cross-examining or rebutting documentary evidence or other witness statements made against them”²¹⁴. Generally the UNHCR justify low due process standards on

²⁰⁸ Helena Kifle, Interview by author in Toronto, Canada, Winter 2009. MSc Capacity Development and Extension in Ethiopia, University of Guelph, Canada.

²⁰⁹ Cases were dismissed on the basis the applicant did not know how fighting groups were organized in militias or because applicants had insufficient knowledge of the ideology of political parties. Most Ethiopian refugees in the East are minimally educated farmers and the interviewers seem to have set an extraordinarily high standard for what they were expected to know.

²¹⁰ As rank and file members, refugees claimed they were at greater risk than the high-profile EDU members who had returned. From Interviews of Ethiopian refugees conducted in February 2001 during the cessation exercise in eastern Sudan. Draft Report of the RSD Consultant on an Appeals Procedure for pre-1991 Rejected Ethiopian Cases, December 2008. (Written by the Author)

²¹¹ Although the two parties joined forces to oust the Mengistu regime, they parted ways once the regime was overthrown. Thirty to forty members of the original EDU joined the TPLF coalition government. The rest joined the opposition COEDEF. The EDU originated as an Amhara/Tigrayan Monarchist party opposed to the Marxist Leninist TPLF. They also oppose the Government’s ethnic federalism and the independence of Eritrea. The splinter group’s main platform is “land to the tiller.” The ruling party, on the other hand, supports public ownership of property. According to different sources, including UNHCR staff with knowledge of the subject, EDU members and supporters are viewed with suspicion by the current Ethiopian government, not least because of Sudanese support for EDU rebels who fled Ethiopia in the late 1980s when they split with the TPLF. See Marcus (2002). Interview with Germay Hadera, EDU official, on relations between EDU and TPLF. http://en.ethiopianreporter.com/index.php?option=com_content&task=view&id=755

²¹² Despite quite extensive attempts, the author failed to locate the “UNHCR Policy Paper” on Ethiopia referenced in the decisions.

²¹³ Refugee Status Determination Watch (2010).

²¹⁴ Ibid.

resource shortages.²¹⁵ However, as RSDWatch points out, disclosing information does not require a resource outlay.

Over 4000 claims impacting approximately 14,000 people were rejected. The end of the cessation procedures in early 2001 saw the withdrawal of protection and assistance from those refugees who were rejected and the closing and handing over of several camps, home to pre-1991 Ethiopian refugees for over twenty years, to the Government of Sudan. The procedural concerns raised in the preceding paragraphs are not unique to the Ethiopian caseload. The UNHCR procedures have been criticized on several fronts and in many locations, characterized by a:

lack of definitive procedural standards, inconsistent refugee status determination, non-availability of independent legal advice, not allowing advisers or representatives to be present at interviews, no access to files by the applicant and non-disclosure of 'all information used in making a decision.'²¹⁶

No opportunity to appeal the cessation decisions was provided to the rejected Ethiopian refugees contrary to practice.²¹⁷ Generally, refugee status is maintained until an appeal decision is made.²¹⁸ Sudan's asylum law does not explicitly allow for an appeal, stating only that:

If the application of a refugee is not approved... , the Minister shall enable him to communicate with foreign missions or other countries for the purpose of submitting an application to them. If he does not find any country which approves his application, he shall be granted another period of three months, which may be renewed until a country which accepts him is found, or the Minister makes a decision in respect of him (emphasis added).²¹⁹

Interviews with Sudanese lawyers indicate that "administrative decisions" rendered by Ministries of the Government of Sudan or their agencies are subject to appeal.²²⁰ Under the circumstances of joint procedures, such as those conducted for the pre-1991 Ethiopian

²¹⁵ According to Alexander (1999), determining refugee status is a diminishing priority for the UNHCR. The UNHCR is faced with the 'dilemma' of providing food and shelter for an ever-growing numbers of asylum seekers, refugees and displaced persons. However, as he points out, the UNHCR has legal obligations towards refugees.

²¹⁶ Alexander (1999). Alexander's is one of the few studies done on UNHCR procedures. Although he focuses on refugee status determination, the processes for post-cessation declaration hearings are essentially the same and, as pointed out by Fitzpatrick and Boanan (2003), should adhere to the same exacting standards. According to Alexander, "whilst there are strong arguments that the 'fair hearing' requirements of international human rights law apply to refugee status determination, there has yet to be a definitive ruling (by the Human Rights Committee) on this question. Nevertheless, in practice many governments extend fair hearing rights to asylum seekers within their borders." Despite the lack of a definitive ruling and the debate on whether the UNHCR and other UN agencies are bound by international law, Alexander holds that the "UNHCR has effectively become a proxy decision maker for...governments..." and as such RSD interviews should be conducted with due regard for fair hearing requirements. See also Kagan (2006) and Chimni (2005).

²¹⁷ The Standard Procedures allow for an appeal of a cessation declaration. See also Alexander (1999) who reviews RSD procedures including the in-house appeal process of many UNHCR Branch and field offices. After eight years of protests, the Government of Sudan and the UNHCR signed a Memorandum of understanding to conduct joint appeal procedure.

²¹⁸ E-mail interview Michelle Alfaro, Protection Officer, UNHCR.

²¹⁹ Article 6 (3) Refugee Asylum Act 1976.

²²⁰ Interview with Dirdeiry Ahmed, Sudanese lawyer, 13 August 2009. Oxford, UK. The Commissioner for Refugees is a department of the Ministry of Interior.

refugees by Government of Sudan and the UNHCR, the question arises: does a decision that is jointly signed by an administrative body of a state and an international organization remain an “administrative decision” subject to appeal under domestic law? In view of this lack of clarity, it is easy under such circumstances for one party to blame the other for procedural shortcomings.²²¹

Both General Assembly Resolutions and ExCom Conclusions have called for access to fair procedures for refugees.²²² According to Alexander:

whilst there are strong arguments that the ‘fair hearing’ requirements of international human rights law apply to refugee status determination, there has yet to be a definitive ruling (by the Human Rights Committee) on this question. Nevertheless, in practice many governments extend fair hearing rights to asylum seekers within their borders.²²³

Despite the lack of a definitive ruling and the debate on whether the UNHCR and other UN agencies are bound by international law, Alexander holds that the “UNHCR has effectively become a proxy decision maker for...governments...” and, as such, RSD interviews should be conducted with due regard for fair hearing requirements.²²⁴ This is not to say that the UNHCR does not have the expertise to conduct fair procedures. It does.²²⁵ However, its resources are limited and the cost of outside expertise is high. For a cash-strapped and overburdened organization, deploying scarce talent to remote regions for obscure refugee caseloads²²⁶ is not necessarily a priority and the logistics and volume of files to process would overwhelm even the best intentioned efforts.

Legal issues/exceptions to cessation

The legal issues surrounding the application of the exceptions to the Cessation Clause are also challenging. First, only having “compelling reasons” is a statutory requirement under the 1951 Convention.²²⁷ Executive Committee Conclusion No. 69 recommends that:

to avoid hardship cases that States seriously consider an appropriate status, preserving previously acquired rights, for persons who have compelling reasons arising out of previous persecution for refusing to re-avail themselves of the protection of their country...²²⁸

Hathaway argues that states are not required by “either (by) the text or purposes of refugee law” to apply the “compelling reasons” exception to post-1951 Convention refugees. In his view, retention of status after a cessation declaration is applicable on the basis of “emotional

²²¹ In the communication by the Ethiopian Refugees to the African Commission, the Government of Sudan blames the UNHCR for shortcomings in the procedures and claims it was not a party to the September 1999 announcement by the UNHCR to apply the Cessation Clause. While strictly correct, this ignores the Government’s own announcement to this effect.

²²² In Doebller (2006), footnotes 24 and 25 G.A. Resolution 49/169, 23 December 1995 at paragraph 5. and General Conclusion on International Protection, No.17 (1993), Report of the 44th Session, UN doc A/AC.96/821, para 19 (k)(l).

²²³ Alexander (1999).

²²⁴ Ibid.

²²⁵ The UNHCR has numerous talented protection officers capable of conducting refugee interviews at the highest level. The author has been involved with UNHCR staff in Jordan and Sudan.

²²⁶ See Democracy Now (1999). Comparing Refugee Camps in Africa and the Balkans, May 28, 1999. http://www.democracynow.org/1999/5/28/comparing_refugee_camps_in_africa_and

²²⁷ See Section 1 of this paper.

²²⁸ ExCom conclusion No.69. As has been shown earlier, individual interviews were of insufficiently high quality to determine “compelling reasons.”

and psychological reasons” to pre-1951 refugees only and to those who “show a continuing objective risk.”²²⁹ However, as discussed earlier, UNHCR policy and state²³⁰ practice support extending the exception to post-1951 Convention refugees.

The second exception – “...those persons who cannot be expected to leave the country of asylum, due to long stay in that country resulting in strong family, social and economic links there”²³¹ – is not provided for in the 1951 Convention. It forms the soft law component of the 1951 Convention and may be read into the exceptions of the UNHCR Cessation Clause.²³² According to Hathaway, there is a tendency for the UNHCR to “read the Convention as the effective equivalent to the Statute” so that it “has the broader authority to retain under its competence persons who no longer face persecution as long as it is not simply rooted in economic or personal convenience.”²³³

The OAU Convention, on the other hand, has no exceptions to its cessation provisions. How does one resolve this dilemma? In the event of states being parties to both Conventions, which of the Conventions would apply?²³⁴ Out of 52 African states, 47 are Party to the 1951 Convention and 41 to the OAU Convention. Should the more recent OAU Convention apply, as the *lex specialis* of the region apply or the 1951 Convention that allows for “compelling reasons” exceptions? And how would one distinguish between 1951 Convention refugees and OAU Convention refugees to apply the Convention, given that in mass influx situations, refugees are accepted on a prima facie basis? Or should the exceptions apply to all refugees?

One could argue that in Africa there is no legal basis to provide exceptions for long-stay refugees. However, scholars recognize that it is problematic for long-stay refugees to return to their country of origin. Hathaway recommends that “the system must...have the capacity to offer residual solutions to those refugees whose special needs make temporary protection an inappropriate response, or who are unable to return home...”²³⁵ On the other hand, it is also problematic for states in Africa to absorb them given the large numbers of refugees involved. How many states in the north would provide continuing refugee or alternate status for residual caseloads of up to 20,000 refugees, as is the case of Ethiopian refugees in Sudan?

After almost thirty years in Sudan, the Ethiopian refugees more than meet the definition of those whom the Executive Committee recommends should be allowed to stay.²³⁶ Ethiopian refugees determined to have no refugee-related cause for staying but wishing to remain in Sudan due to their family, social and economic links to the country of asylum were

²²⁹ Hathaway (2005). See also Vienna Convention on The Law of Treaties, 1155 U.N.T.S. 331, entered into force 27 January 1980.

²³⁰ Canada, Great Britain, Australia, Sweden, and Norway, to name a few.

²³¹ ExCom Conclusion No. 69.

²³² See chart in Section 1 (pg 12).

²³³ Statute Article 6 (f)

²³⁴ Article 30 (2) (3) Vienna Convention on The Law of Treaties, 1155 U.N.T.S. 331, entered into force 27 January 1980. Out of 52 African states, 47 are party to the 1951 Convention (UNHCR 1992c). Handbook on Procedures. 41 African States are party to the OAU Convention.

²³⁵ Hathaway (1997a).

²³⁶ ExCom conclusion No 69.

“encouraged” to regularize their status under the national laws of the country.²³⁷ The recommendations do not suggest that “the proper solution (for these groups) is to continue refugee status.”²³⁸ However, nine years after the cessation declaration, the pre-1991 Ethiopian refugees do not have a secure legal status. The Ethiopian residual caseload is issued renewable identity cards under a confusing administrative process. The local Aliens Department issues identity cards for six months,²³⁹ charging a fee for them, even though Ethiopian refugees do not always have the means to pay for them.²⁴⁰ Aliens are prohibited from residing in Sudan without a residence permit and a resident permit requires an identity document, usually a passport,²⁴¹ which the residual caseload is unwilling to acquire from the Government of Ethiopia.²⁴² The identity cards issued to the residual caseload are not subject to the provisions of any laws or regulations. Their issuance is an ad hoc arrangement, their fee and length of validity arbitrary and subject to change by local security officials and governments.²⁴³ Fitzpatrick warns that in such situations, refugee status should not be withdrawn.²⁴⁴ The lack of identity documents has resulted in daily round-ups, mistreatment and detention for some refugees.²⁴⁵ Without identity cards, their freedom of movement is restricted, resulting in a lack

²³⁷ UNHCR (2003e). UNHCR staff suggest that the UNHCR did little to assist the refugees or pressure Government of Sudan to provide them with an alternate status. Interview with Sara Abbo, UNHCR Senior Protection Clerk, Khartoum, 30 December 2008.

²³⁸ Fitzpatrick and Boanan (2003).

Fitzpatrick suggests that for those falling within the category of “compelling reasons,” continued refugee status is the best option.

²³⁹ Draft Report

²⁴⁰ Identity cards cost 51 SDG to issue and the same amount to renew. Refugees interviewed by the author said that the majority of residents do not have the money to renew their cards stating that “if we do not pay they beat us.” According to the refugees, the Commissioner of Refugees sometimes issues an “Attestation Letter” in the event a refugee does not have a government-issued identity card, charging a fee for them. CoR officials refuted the allegations. The refugees also indicated that CoR “attestation Letters were not recognized by the government.” Interviews with refugees at Um Gulja and CoR Project Director.

²⁴¹ Generally, aliens have passports of their country of nationality on which their residence permits are recorded. There are three types of Residence Permits allowed by the Passport and Immigration Act 2003: special permits which require 15 years residence, ordinary permits (not less than 5 years residence) and temporary permits (for those who do not fall within either of the first two categories), valid for five, two and one year respectively. Chapter 4 Article 14, The Laws of New Sudan, Passport and Immigration Act 2003.

²⁴² The residual caseload insists that they have a continuing fear of persecution by the Ethiopian government. A UNHCR staff member told me that the residual caseload were viewed with suspicion by the Ethiopian government on account of their membership in anti-government political parties

²⁴³ Interview with Sudanese Lawyer former employee of CoR. After the refugee status of rejected pre-1991 Ethiopian refugees ceased, the rejected caseload was provided with identity cards issued by the Alien Department of Gedarif State. The Laws of New Sudan, Passport and Immigration Act 2003. Generally Aliens have passports of their country of nationality on which their residence permits are recorded. There are three types of Residence Permits, allowed by the Passport and Immigration Act 2003, special permits which require (15 years residence), ordinary permits (not less than 5 years residence) and temporary permits (for those who do not fall within either of the first two categories), valid for five, two and 1 year respectively. Chapter 4, Article 14, Passports and Immigration Act (Government of Sudan, 2003b).

²⁴⁴ Fitzpatrick and Boanan (2003).

²⁴⁵ The author visited three “closed camps” or settlements where many pre 1991-Ethiopian refugees reside. The residents of Um Gulja, a non-agricultural camp close to an urban centre, appeared to be

of access to jobs to pay for health, educational and municipal services that they no longer receive from the UNHCR. In Um Gulja, the worst-off of the camps that the author visited, the sick are unable to pay for malaria treatment and many of the approximately one thousand children in the camp do not attend the local school as their parents are unable to pay school fees.²⁴⁶ Their small businesses are taxed, preventing them from being profitable. The taxes and payment for services are justified on the basis that the caseload are no longer refugees and should be treated similarly to other aliens. This argument is specious. The former refugees appear to have all of the obligations of aliens without any of the benefits.

Sudan is unwilling to naturalize the pre-1991 Ethiopian caseload even though the Nationality Act allows for the naturalization of those who have lengthy residence in Sudan²⁴⁷ and neither the Government of Sudan nor the UNHCR claim they are responsible for their protection. The outcome of the cessation declaration has been to render them illegal. In 2003, UNHCR announced that ‘the era of the East with Eritrean and Ethiopian refugees has come to an end’.²⁴⁸ Obviously, for the refugees themselves, this was not the case.

4 Is the Cessation Clause of the 1951 Convention applicable in Africa?

In light of the confusing legal landscape, multiple influences on cessation declarations in Africa and the impact they have on refugees, it is appropriate to raise the question of whether the Cessation Clause – as envisaged in the 1951 Convention and adopted in its entirety by the OAU Convention, without due regard for the special circumstances of the refugee situation in Africa – is applicable on the continent. It is difficult not to sympathize with the view of commentators who consider the 1951 Convention “inadequate to the peculiarities of Africa’s refugee crisis.”²⁴⁹

The 1951 Convention does not reflect the broader reasons for which refugees flee in Africa. In addition, the Guidelines and recommendations developed for the Cessation Clause generally reflect the individualized characteristics of the 1951 Convention and have often proven less than effective in assessing fundamental change in the face of civil conflict. Procedural

the worst off legally, economically and socially. The proximity to urban centres, where they seek work, draws the attention of local police. In agricultural settlements, the residents work on nearby farms as day laborers or farm leased land.

²⁴⁶ All figures are approximate. The information on the socioeconomic situation by the refugees was not disputed by CoR officials or by UNHCR staff accompanying the author.

²⁴⁷ Section 9 (b) of the Nationality Act states that those “domiciled in New Sudan for a period of ten years immediately preceding the date of application (for naturalization)” are eligible (Government of Sudan, 2003a). See also World Food Programme (2001): “[the] Government stance (is) not to allow local integration, not a viable long term solution either for Eritreans or Ethiopians.”

²⁴⁸ UNHCR (2003e). The UNHCR failed to mention that the Eritrean Cessation Declaration and procedures were abandoned on account of increasing refugee flows from that country. Almost 70,000 refugees were left without status in that screening exercise. According to Crisp (1984), “[the] UNHCR statements are misleadingly optimistic and do not always reflect reality.”

²⁴⁹ Oloka-Onyango (1991).

developments assume the availability of a refugee infrastructure, expertise and manageable refugee flows, all of which are generally absent in Africa and many parts of the South.²⁵⁰ Fitzpatrick, who has arguably conducted the most comprehensive study on the Cessation Clause, says:

[The] UNHCR can also develop additional methods of applying the ceased circumstances provisions... the traditional approach of administering Article 1 C (5) and (6) on a group basis remains too blunt an instrument for such complex refugee situation.²⁵¹

Africa has its share of “complex refugee situations”, such as the well-known and complex conflict in Somalia, Angola’s²⁵² 26-year civil war involving three liberation movements, Sierra Leone’s 11-year conflict that resulted in complete a breakdown of state structures and included several belligerents,²⁵³ Liberia’s problems,²⁵⁴ and the multinational conflict in the Democratic Republic of Congo.²⁵⁵

The most recent UNHCR Guidelines on the subject attempt to address some of the issues relating to prolonged violence and complex contexts. The 2003 Guidelines recognize that “national reconstruction ... [must] be given sufficient time” and that “peace arrangements with opposing militant group must be carefully monitored”, as well as underscore the need for the “existence of adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood.”²⁵⁶

One could argue that the OAU Convention is sufficient for the needs of Africa, considering that it recognizes both types of refugees. However, the OAU Convention does not permit any exceptions to the Cessation Clause. This is an understandable²⁵⁷ but a serious deficiency in the context of Africa. It should be remembered as well that many refugees in the South, including the caseload of concern to this paper, have lived in protracted refugee situations,²⁵⁸ some of them for almost three decades.²⁵⁹ This adds an additional element when considering a declaration of cessation. It is suggested that their many years in exile make local integration

²⁵⁰ According to Chimni (1998), the “knowledge production and dissemination functions of the organization [the UNHCR] are steered by the dominant coalition of States.” He goes on to say that the “UNHCR is an uncritical consumer of concepts and theories which support a particular (Northern) vision of the global refugee order.” The author’s intention is only to point out the cost of processing refugees in the manner suggested by academics are not available to southern states.

²⁵¹ Fitzpatrick and Boanan (2003).

²⁵² Dictionary of Wars (2003).

²⁵³ BBC (1999).

²⁵⁴ Global Security (2011).

²⁵⁵ Global Issues (2010).

²⁵⁶ UNHCR (2003c). Like Fitzpatrick, the Guidelines suggest that prima facie group determinations and temporary mass influx situations should be treated within the framework of the 1951 Convention Cessation Clause.

²⁵⁷ Given the sometimes large size of residual cases it is difficult for States, particularly poor ones, to absorb them.

²⁵⁸ See Meyer (2008). Protracted refugee situations are defined as those refugee camps or settlements with 25,000 or more refugees who have been there for five years or more.

²⁵⁹ Among them Eritreans and until 1999, Ethiopians in Sudan. According to the UNHCR there are 33 protracted situations with 5.7 million of 9.2 million refugees worldwide. 60 per cent of the world’s refugees live in protracted situations. See Crisp (2003).

the most viable and humane solution.²⁶⁰ In this regard, Hathaway says “...five years is not an unreasonable estimate of the earliest point at which repatriation may be said to be unviable from a psychosocial perspective.”²⁶¹ And Rogge adds that “for second generation refugees, such as now exist in many parts of Africa, return to their country of ‘origin’ does not always necessarily mean going ‘home.’”²⁶²

The UNHCR suggests that in the case of mass influxes, repatriation is the “most appropriate solution” but recognizes that in the case of protracted situations, this may not be possible. It advises that solutions under these circumstances are “linked to burden and responsibility sharing arrangements, most likely within the framework of a specifically tailored comprehensive approach.”²⁶³ The contours of this comprehensive approach are yet to be defined. In the meantime, both Conventions have a role to play in cessation declarations in Africa and there are steps that the UNHCR can take to assist states to declare cessations, detailed below.

- First, prior to a declaration by a state party or by the UNHCR, a survey of the caseload should be conducted to assess the views of the refugees and the size of the residual caseload.²⁶⁴ A large residual caseload nullifies the objective of the Cessation Clause in mass influxes. The assessment should include the prospects for naturalization or other arrangements for long-stay refugees.
- Second, the UNHCR should conduct information sessions with state parties clearly demarcating state obligations and the differences between standards for voluntary repatriation and standards for cessation of refugee status.
- Third, in the case of a state party declaration, the UNHCR should provide a broad range of research on country conditions from a variety of independent sources, allowing the state to assess whether country conditions have changed sufficiently for both 1951 and OAU Convention refugees to warrant a declaration. The UNHCR should confine itself to providing a neutral assessment. This would diminish the perception of a conflict of interest on the part of the UNHCR, of being both the assessor of country conditions and the decision-maker in individual procedures.
- Fourth, individual procedures should not be conducted jointly by UNHCR and the state. UNHCR’s role should be limited to logistics and supervision. In the event of individual procedures sufficient resources should be allocated to hire well-trained decision makers when there are insufficient State resources. The decision-makers should act as agents of CoR and not as representatives of the UNHCR. This would ensure that the decision to withdraw refugee status is purely a state decision and subject to appeal under domestic legislation.
- Fifth, refugee status should be retained until an appeal is heard and alternate status is arranged for long-stay rejected refugees. In the event of a state party’s withdrawal of

²⁶⁰ Meyer (2008).

²⁶¹ Hathaway (1997a).

²⁶² Rogge (2006).

²⁶³ UNHCR (2001c).

²⁶⁴ Fitzpatrick and Boanan (2003).

status prior to an appeal or a durable solution, the UNHCR should retain legal protection of former refugees. Assistance should be determined on a case-by-case basis. Finally, UNHCR should only declare a cessation of its protection once a durable solution has been found for all refugees.²⁶⁵

It is the durable solution aspect of cessation that has received welcome attention in the 2003 UNHCR Guidelines: “when interpreting the cessation clauses it is important to bear in mind the broad durable solutions context of refugee protection informing the object and purpose of these clauses.”²⁶⁶ Furthermore, the organization affirms that:

A durable solution is one that ends the problems associated with displacement and allows people to resume their normal lives in a safe environment. The international community has a shared responsibility to find lasting solutions...Assisting them with this task is one of UNHCR’s most important functions.²⁶⁷

According to scholars, the three durable solutions – repatriation, local integration, and resettlement – should be seen as a means of restoring the relationship between citizen and state.²⁶⁸ The UNHCR sees durable solutions in the same light. The Agenda for Protection, for example, reiterates that “securing durable solutions [is] one of the principle goals of protection.”²⁶⁹ Cessation, too, should be evaluated as a durable solution: “cessation of refugee status should lead to a durable solution. It should not result in people residing in a host state with an uncertain status.”²⁷⁰

For all its challenges, repatriation remains the most viable solution for the vast majority of refugees in Africa. Local integration is an unlikely solution in the South given the numbers involved. As Kibreab says: “...temporary protection [in the South] rarely translates into permanent status regardless of the amount of time that passes.”²⁷¹ As for resettlement in a third country, there is no legal obligation for state parties to resettle those other than 1951 Convention refugees. This excludes the vast majority of refugees in the South.²⁷² Cessation

²⁶⁵ According to the UNHCR, it declares cessation “mainly to “provide a legal framework for the discontinuation of UNHCR’s protection and material assistance to refugees and to promote with states of asylum concerned the provision of an alternative residence status to former refugees.” Fitzpatrick and Boanan (2003).

²⁶⁶ Statute of the Office of the United Nations High commissioner for refugees General Assembly Resolution 428 14 December 1950. Signatories to the 1951 Convention have an obligation to cooperate with UNHCR to achieve durable solutions.

²⁶⁷ UNHCR (2006b).

²⁶⁸ Gallagher (1994).

²⁶⁹ UNHCR (2003a). As early as 1989, a roundtable of refugee law experts concluded that “Solutions should not be seen as an aspect separate from protection.”

Roundtable San Remo July 1989 EC/SCP/55 Solutions to the Refugee Problem and Protection of Refugees 23 August 1989

²⁷⁰ Doebbler (2006).

²⁷¹ Kibreab (1987).

²⁷² The pre-1991 Ethiopian refugees are not “very attractive” for resettlement for several reasons. First, “they have weak refugee claims-mass influx due to extended civil conflict; 2) they do not have serious protection concerns (having developed coping mechanisms/survival skills in their long years in Sudan; 3) they are older; 4) they tend to have lower education and less employment experience...5) and they tend to have underlying health concerns due to poor conditions in Sudan.” E-mail

declarations thus prove challenging not only because of the legal and procedural issues but because repatriation of refugees is closely implicated in politics, including "... the position of the host country, the conditions in and attitude of the country of origin, the role... [of] the UNHCR, and the position of refugees' representatives and advocates."²⁷³

Host states' reasons for wanting to see refugees repatriate are generally motivated by matters of national interest, including relations between states.²⁷⁴ These interests also apply to countries of origin.²⁷⁵ Institutions are similarly driven by considerations of "self interest." Refugees, too, sometimes resist return to "preserve the value of their integrative effort."²⁷⁶

Other circumstances further complicate an evaluation of cessation declarations in Africa. First, two different types of changes in the country of origin must be assessed – those that affect individuals covered by the 1951 Convention and those that affect groups covered by the expanded definition of the OAU Convention. Second, the sustainability of return is difficult when economies and infrastructure are devastated by long-term conflict in the country of origin and their return to the host country relatively easy. Third, the protracted nature of some conflicts ensures that the number of long-stay refugees eligible for the exception to the Cessation Clause is likely to be unacceptably large to host countries. Fourth there are practical difficulties associated with the actual implementation of the cessation declarations. Refugees in Africa tend to arrive in large numbers. To deal with them, states have dispensed with individual status determination. They are accepted on a *prima facie* basis, a tool designed²⁷⁷ to deal with large numbers in emergency situations, ostensibly when "readily apparent and objective reasons" exist.²⁷⁸ However, it is not always the case that in mass influxes, the objective reasons are "readily apparent." As discussed earlier, accepting refugees on this basis in situations of mass influx complicates the individualized process of appeal to a declaration of cessation. Finally cessation assessments are further complicated by the fact that they must consider not only political factors but economic factors as well. As Klinthall states:

Political improvements are not always followed by economic security and potential return migrants need to consider both. Political and economic motives are not incompatible and therefore return migration is not an inevitable response to political improvements in country of origin.²⁷⁹

Was the cessation declaration for the pre-1991 Ethiopian refugees a success, as scholars and the UNHCR claim? Did it achieve a durable solution for refugees? Did it achieve a level of

communication with Maureen Kirkpatrick, Resettlement Officer, UNHCR, Khartoum, 2 February 2009.

²⁷³ Lang (2001).

²⁷⁴ As has been noted earlier, state reasons include demographic, economic, environmental issues, issues of aid, improving or deteriorating relations between states. See also Noll (1999).

²⁷⁵ According to Noll (1999), countries of origin sometimes resist the return of rejected refugees for the same reason as they may inhibit return of rejected asylum seekers by denying that they are their nationals or refusing to issue travel permits. Information from UNHCR staff suggest that this may be the case with the residual pre-1991 Ethiopian caseload.

²⁷⁶ Noll (1999).

²⁷⁷ Okoth-Obbo describes the *prima facie* grant of refugee status as a "managerial tool" to deal with mass influxes." Okoth-Obbo in Salomons (2001).

²⁷⁸ UNHCR (2003c). Viewing *prima facie* recognition as more than a tool to manage mass influxes is problematic as the assumption that it denotes a clear objective basis does not bear out in many mass influx situations in which refugees flee for mixed motives.

²⁷⁹ Klinthall (2005).

repatriation such that the costs expended in applying its procedures were worthwhile?²⁸⁰ As we have seen, one of the serious consequences of the declaration has been to place a significant number of former refugees in a precarious situation where their rights are especially susceptible to being violated. It is ironic that in applying the cessation provisions of the 1951 Convention, the Government of Sudan has violated the provisions of other human rights treaties applicable equally to citizens and non-citizens to which it is a party.²⁸¹

Given its prominent role in Africa, the UNHCR has a special role to play. Mertus insists that “trans-sovereign forces” must address protection needs if states fail to do so.²⁸² According to Weiner, “[i]nternational organizations are not only guided by the norms of the international conventions which created them but they are obliged to comply with norms embodied in all other international conventions.” In addition, as a norm-creating and implementing organization, the UNHCR has “a dual responsibility, strict adherence to norms in their own conduct and the responsibility of persuading governments and private bodies to conform to the norms.”²⁸³ Thousands of refugees depend on it.

Conclusion

In the preceding sections I have highlighted some of the challenges in declaring a cessation of refugee protection in Africa under the provisions of the 1951 Convention. The application of the Cessation Clause in situations where refugees flee for myriad reasons and in large numbers is mired in legal, procedural and logistical complexities. Unlike refugees seeking asylum in the North, refugees in Africa are covered by two Conventions, the 1951 Convention and the OAU Convention.

Most scholarship to date has focused on the 1951 Convention with little attention paid to the unique provisions of the OAU Convention and the characteristics of refugee flight in Africa.

²⁸⁰ Of the 30,000 Ethiopian refugees remaining in Sudan at the time of the declaration, only approximately 10,000 returned in a repatriation organized by the UNHCR. Approximately 60 per cent of those who participated in the repatriation were non-pre-991 refugees and approximately half of them returned to Sudan.

²⁸¹ Sudan is party to the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights and the Convention on the Elimination of all Forms of Racial Discrimination. UNHCR (1986b). In Weissbrodt: “almost all the rights protected by the ICCPR must be guaranteed without discrimination between citizens and non-citizens. Article 2 (3) of the economic and social Covenant allows developing countries “with due regard to human rights and their national economy”, to “determine to what extent they would guarantee the economic rights recognized in the [Economic and Social Covenant] to non-nationals.” See also UNHCR (2004) which calls for non discrimination against groups of non-citizens in access to citizenship or naturalization.

²⁸² Mertus (1998).

²⁸³ According to Weiner (1998), the UNHCR has advocated for local integration and regularizing of the status of this caseload. According to the UNHCR Protection Reports, UNHCR continued to strengthen its relations with the Aliens Police and National Security. However, as of the date of this report, despite the best efforts of the UNHCR, there does not appear to be any substantive change for the rejected Ethiopian caseload.

Mass flows make it difficult if not impossible to determine which of the Conventions apply and under what circumstances. Determining when to withdraw protection under such circumstances has generally not included an assessment of generalized violence covered by the extended definition of the OAU Convention. Until recently there has been a tendency to view the end of protection through the lens of the 1951 Convention. As a result, declarations of cessation have sometimes been made when the situation in the country of origin is still volatile. In addition assessments of change have tended to focus on change at the national level. As has been described in this paper, simmering discontent between numerous rival political and ethnic groups lingers beneath the surface in many newly “liberated” countries. Besides political factors, there are economic considerations that affect the return of refugees. Protracted internal conflicts devastate infrastructure and the means of livelihood. In the current haste to repatriate refugees, it is easy to ignore the factors that can make repatriation unsustainable.

In section three, I pointed out that the ability to deliver due process in individualized procedures is seriously hampered by the scale of such operations and the shortage of resources. Lack of expertise among decision makers, inadequate interpretation and logistical challenges all make delivery of fair procedures difficult. Perhaps the most perplexing issue is what to do with the large number of refugees who have forged strong ties to their country of asylum over many years of exile. The OAU Convention does not allow for exceptions to its Cessation Clause; the 1951 Convention does. Compounding this already complex situation is the influence of the Statute of the UNHCR with its own Cessation Clause that includes a broader exception. The paper concludes with a description of the unintended consequences of ill-conceived cessation declarations – many refugees have been left in legal limbo, their present troublesome and their future uncertain. The paper has spent considerable time exploring the role of the UNHCR in cessation declarations. This is so because in the South, the organization carries the load of protecting refugees in under-resourced states and its influence affects the actions of states. However, its prominence can also blur the line not only between its lower standard of voluntary repatriation and the higher threshold of fundamental change, but more importantly, obscures the separate obligations of states.

While some scholars may suggest that the 1951 Convention is unsuitable for the peculiarities of Africa, this is not the suggestion of this paper. The basic premise of this paper is that the 1951 Convention *on its own* is inadequate to address the issues that arise in cessation declarations in the context of Africa. The 1951 Convention has been the basis of standard-setting internationally for over fifty years, of proven use in all contexts. Discarding it risks marginalizing African refugees even further, as other state parties may reduce or withdraw their burden-sharing responsibilities. The answer lies in giving due regard to both Conventions when a declaration of cessation is made in Africa. It is essential that refugees covered by the broader OAU Convention Definition be given due regard when assessing change in country conditions and that the exceptions provided for in the 1951 Convention is applied to all refugees thereby ensuring that the African Convention becomes the true “regional complement” of its international counterpart and that African refugees are adequately protected.

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Annex 1

Country of Origin	Date	Nature of Fundamental Change
Sudan	12.07.1973	Settlement of civil conflict
Mozambique	14.11.1975	Independence
Guinea-Bissau	01.12.1975	Independence
Sao Tome	16.08.1976	Independence
Cape Verde	16.08.1976	Independence
Angola	15.06.1979	Independence
Equatorial Guinea	16.07.1980	Regime change / democratization
Zimbabwe	14.01.1981	Independence
Argentina	13.11.1984	Regime change / democratization
Uruguay	07.11.1985	Regime change / democratization
Poland	15.11.1991	Regime change / democratization
Czechoslovakia	15.11.1991	Regime change / democratization
Hungary	15.11.1991	Regime change / democratization
Chile	28.03.1994	Regime change / democratization
Namibia	18.04.1995	Independence
South Africa	18.04.1995	Regime change / democratization
Mozambique	31.12.1996	Settlement of civil conflict
Malawi	31.12.1996	Regime change / democratization
Bulgaria	01.10.1997	Regime change / democratization
Romania	01.10.1997	Regime change / democratization
Ethiopia	23.09.1999	Regime change / democratization
Eritrea	18.02.2002	Settlement of civil conflict
East Timor	20.12.2002	Independence
Tajikistan	07.12.2005	Settlement of civil conflict
Sierra Leone	02.06.2008	Settlement of civil conflict