

UNHCR NOTE

We would be very pleased to receive comments on this paper from those who will not be able to participate in the Roundtable. Comments should be sent to Ms. Kate Jastram, Senior Legal Officer, preferably via e-mail at jastram@unhcr.ch or by fax on +41-22-739-7354.

15/1-02

Current Issues in Cessation of Protection Under Article 1C of the 1951 Refugee Convention and Article I.4 of the 1969 OAU Convention¹

Joan Fitzpatrick, Jeffrey & Susan Brotman Professor, University of Washington

I. Introduction

1. Cessation of refugee protection is a subject of confusion mixed with heightened interest among states, refugees and the United Nations High Commissioner for Refugees (UNHCR). Article 1C of the 1951 Convention relating to the Status of Refugees (1951 Convention) and Article I.4 of the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) set out a multifaceted framework for termination of refugee status. Yet, the treaty texts do not address many of the salient contemporary issues concerning termination of international protection.

2. The cessation clauses were long neglected as a subject of refugee law. In recent years, several developments have combined to increase interest in their interpretation and application. These factors include democratization in some formerly repressive states; concern to prevent asylum from becoming a backdoor to immigration; experiments with temporary protection; stress upon repatriation as the optimal durable solution to displacement; and difficult dilemmas posed by repatriation to situations of conflict, danger and instability. Roughly coincident with the end of the Cold War, in 1991 the Executive Committee highlighted cessation, resulting in the following year in Executive Committee Conclusion No. 69 (XLIII), which provides important guidance on the •ceased circumstances• cessation clauses in Article 1C(5) and Article 1C(6).² As concern

¹This paper was commissioned by UNHCR and the Carnegie Endowment for International Peace as a background paper for an expert roundtable discussion on cessation as part of the Global Consultations on International Protection in the context of the 50th anniversary of the 1951 Convention relating to the Status of Refugees.

²The term •ceased circumstances• denotes a change in conditions in the state of origin that

among states and UNHCR shifted to mass influx later in the 1990s, UNHCR produced a Note on the Cessation Clauses in 1997³ and Guidelines on the application of the cessation clauses in 1999.⁴ This paper draws upon the *Handbook*, Conclusion No. 69 (XLIII), the 1997 Note and the 1999 Guidelines, and suggests some potential revisions in UNHCR interpretive guidance for states.

3. The cessation clauses attempt to define when refugee protection is **no longer** needed. Article 1C of the 1951 Convention literally applies only to the formal termination of previously granted refugee status. Article 1C has been incorporated into some national asylum laws, especially those enacted within the past decade.⁵ Unfortunately, these statutes sometimes combine cessation provisions with others concerning revocation (cancellation) of refugee status on grounds of fraudulent procurement, exclusion under Article 1F and expulsion under Article 33(2). Similar confusion characterizes statutes in some African states implementing Article I.4 of the OAU Convention. This paper suggests that the better practice is to treat cessation separately, and not to combine it with provisions concerning persons •undeserving• of protection. Distinct treatment of cessation in national law facilitates careful attention to procedural fairness and to compelling circumstances that justify non-return.

4. Renewed interest in cessation does not appear to have resulted in measurably more frequent formal termination of Convention refugee status. Whether previously recognized refugees face termination of status depends upon immigration enforcement priorities, their social and legal assimilation and political attitudes toward long-resident migrants. However, the world events that sparked new attention to cessation have also affected a significant number of initial claims to refugee status. Issues that arise in cessation, such as whether re-availment of national protection and changed political conditions in the state of origin negate a continuing fear of persecution, also arise during initial status determination. This is true in all asylum states, not just those that establish a rebuttable presumption of continuing well-founded fear upon proof of past persecution. Eventful delay often occurs between the time of a refugee's flight and the time his or her asylum claim is decided, especially where status determination systems are backlogged. The refugee's post-flight conduct and recent political developments in the state of persecution may become the premise either for a cessation order or for denial of refugee status. The important differences between cessation of protection and denial of initial claims, especially with respect to procedural issues such as burden of proof, are noted in paras. 54 and 58-62.

5. In UNHCR's view, time-limited grants of Convention refugee status would be incompatible with the Convention. Such measures significantly burden refugees by requiring them to repeatedly prove their continued eligibility for protection. Cessation presupposes open-ended

eliminates the persecutory causes that formed the basis of the refugee's claim to international protection.

³Note on the Cessation Clauses, UN Doc. EC/47/SC/CRP.30 (1997).

⁴UNHCR/IOM/17/99, UNHCR/FOM/17/99 (1999).

⁵The author conducted a survey of the legislation of thirty-eight states that had explicit cessation provisions. This survey was not exhaustive, and was conducted primarily in the REFworld CD-ROM, January 1999 edition.

grants of refugee status until a defined set of events has occurred, either specific to the refugee or relating to conditions in the state of origin. This paper suggests that the burden of proof as to the prerequisites for cessation must be borne by the state of refuge, and not by the refugee.

6. Three aspects of formal cessation demand special attention and development: (1) objective and reliable assessment of the criteria for cessation and their applicability to the individual in question; (2) procedural fairness to insure that the risk of persecution has actually been eliminated by the refugee's own conduct or by political change; and (3) exceptions for persons presenting compelling reasons, aside from fear of present or future persecution, to be given a positive status that would preserve rights enjoyed as a refugee and that would prevent involuntary repatriation. This paper proposes substantive and procedural standards to insure that cessation is not ordered in the absence of a solid empirical foundation determined through fair processes, or in circumstances that result in unjustified human suffering. The linkages between cessation and other topics under discussion in the second and third tracks are also noted.⁶
7. Section II of this paper includes detailed findings concerning the interpretation and application to recognized refugees of the cessation clauses of the 1951 and OAU Conventions.
8. Section III addresses the duration of group-based protection in situations of mass influx. Article I.4 of the OAU Convention anticipates the termination of both individual and group-based protection. As UNHCR has noted,⁷ group protection may also be extended (and later, logically, terminated) under the 1951 Convention.
9. These findings of the paper are summarized in Section IV, which also identifies specific topics for discussion during the expert roundtable.
10. It should be emphasized that cessation of individual or group-based status does not automatically result in repatriation. The refugee may obtain another lawful status in the state of refuge or in a third state in some instances. Cessation thus should not be viewed as a device to trigger automatic return. While refugees cannot be involuntarily repatriated prior to proper cessation, the application of the cessation clauses should be treated as an issue separate from standards for repatriation.
11. When UNHCR invokes the cessation clauses of its Statute, the effects are felt by a number of persons defined primarily by nationality and time of flight. This paper notes the

⁶In the second track, these issues include exclusion, *non-refoulement*, internal flight alternative and the supervisory mechanism. In the third track, these issues include mass influx, voluntary repatriation and asylum processes (especially return of persons not in need of international protection, safe country of origin, and complementary forms of protection).

⁷Protection of Refugees in Mass Influx Situations: Overall Protection Framework, UN Doc. EC/GC/01/4 paras. 6-7 (2001).

interrelationships between cessation of refugee status by states pursuant to the 1951 and OAU Conventions and cessation of UNHCR's protection role under the Statute.⁸

12. The expert roundtable presents an opportunity to suggest model legislation and administrative procedures for those states concerned with formal cessation. The findings of this study on substantive and procedural matters relating to cessation can form the basis for these model standards.

II. Cessation of Refugee Status under the 1951 and OAU Conventions: Textual, Policy and Administrative Challenges

13. Refugee status is premised upon a lack of national protection against present or future persecution or danger, and the resulting need for international protection. Thus, it is logical to anticipate cessation if risk is eliminated. Article 1C of the 1951 Refugee Convention considers two general situations: (1) action by refugees to obtain protection in the state of origin or another state, by re-availment of protection, re-acquisition of nationality, naturalization or voluntary return (Article 1C(1-4)); and (2) under the "ceased circumstances" clauses, the impact of general political change on the refugee's fear or unwillingness to return (Article 1C(5-6)). Article 1.4 of the OAU Convention tracks the 1951 text, adding two criteria: commission of a serious non-political crime outside the state of refuge (Article 1.4(f)) and serious infringement of the purposes and objectives of the Convention (Article 1.4(g)).⁹ A pending proposal from the European Commission concerning withdrawal of refugee status also unfortunately associates cessation with revocation of the refugee status of those ineligible.¹⁰

14. Article 1C of the 1951 Convention and Article 1.4 of the OAU Convention do not appear on their face to be unduly complex. As Conclusion No. 69 (XLI) of the Executive Committee notes, "application of the cessation clause(s) ... rests exclusively with the Contracting States," but states are urged to consider UNHCR advice and information and to respect its supervisory role under Article 35.¹¹ The expert roundtable offers a valuable opportunity to provide suggestions for substantive interpretation and procedural guidelines that will clarify the appropriate application

⁸Statute of the Office of the United Nations High Commissioner for Refugees, 14 Dec. 1950, Article 6(A)(ii)(a-f).

⁹Article 1.5 of the OAU Convention contains exclusion clauses roughly parallel to those in Article 1F of the 1951 Convention, and Article 3 of the OAU Convention prohibits subversive activities by refugees. With respect to the latter, see paras. 42-44.

¹⁰Commission of the European Communities, Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM(2000) 578 final, 20 September 2000, Article 26. The Proposal combines "withdrawal" (cessation) with "cancellation" (revocation on grounds of fraudulent procurement). The association of these two concepts risks confusion and unfair stigma for refugees whose personal situations or states of origin have altered.

¹¹Conclusion No. 69 (XLI) on Cessation of Status, second preambular para. (1992).

of the cessation clauses. Perhaps most importantly, the necessity to construe the cessation clauses narrowly deserves re-emphasis, because of the potential that genuine refugees will be exposed to risk if protection is prematurely terminated.¹²

A. Actions by Recognized Refugees

15. With respect to Article 1C(1-4) of the 1951 Refugee Convention (and the parallel Article I.4(a-d) of the OAU Convention), the elements of **voluntariness, intent and effective protection** are crucial, and require careful analysis of the individual's motivations and assessment of the *bona fides* and capacities of state authorities. The paucity of relevant state practice has prevented the development of detailed standards concerning the application of these clauses. This paper suggests that procedural mechanisms requiring states to prove the elimination of persecutory risk prior to cessation will protect against unfounded termination of refugee status. Situations arising under Article 1C(1-4) and Article I.4(a-d) are often characterized by ambiguity; granting the benefit of the doubt to refugees is consistent with the refugee conventions' protective goals. Article I.4(f) and Article I.4(g) are essentially expulsion provisions and require separate analysis. They may be applied to refugees who face undiminished, or even heightened, fear of persecution or danger in their state of origin.

16. Matters relating to passports or other dealings with diplomatic representatives of the state of origin, acquisition of nationality in third states and re-establishment in the state of origin all pose contemporary policy issues.

17. Perhaps the least problematic cessation scenario is naturalization in the state of refuge.¹³ This alteration in legal status may occur without formal cessation.¹⁴ Following naturalization,

¹²UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status*, para. 116 (1979), cautions that the cessation clauses "are negative in character...[,] exhaustively enumerated [and] ... should therefore be interpreted restrictively"

¹³National law sometimes makes specific provision for this development, for example in Austria (Federal Law Concerning the Granting of Asylum, 1997, Article 14(5)); Bulgaria (Ordinance for granting and regulating the refugee status, Article 14(4)); and Ghana (Refugee Act 1992, Part IV, Article 16(b)).

¹⁴For example, under U.S. law "asylees" (persons recognized as refugees through a process initiated at the border or inside the United States) and "refugees" (persons admitted from a foreign state to the United States on the basis of a fear of persecution) may apply to adjust their status to that of lawful permanent residents after a period of one year. 8 U.S.C. §§ 1101(a)(42), 1157-1159. Once they adjust, they no longer possess legal status as asylees or refugees. However, they may remain eligible for certain social benefits that are not available to other lawful permanent residents. 8 U.S.C. §§ 1613(b)(1), 1622(b)(1), 1641. Thus, adjustment of status operates as cessation, but without any examination of the grounds set out in Article 1C and frequently under circumstances where those grounds do not apply. Asylees must in fact prove that they continue to meet the statutory definition of refugee in order to obtain adjustment. 8 U.S.C. §§ 1101(a)(42)(A), 1159(b)(3). Denial of an application for adjustment of status, on

former refugees may engage, without adverse consequence, in activities (such as frequent visits or part-time residence in the state of origin) that previously might have resulted in cessation of their refugee status under Article 1C(1) or Article 1C(4). Acquisition of another residence permit in the state of refuge may also result in the termination of refugee status.¹⁵ However, this situation poses dangers where the permit may be revoked and repatriation ordered without inquiry into the availability of effective protection in the state of origin.

1. Re-availment of national protection

18. Acquisition or renewal of a passport from the state of origin may raise questions about the refugees' continued need for international protection, and is addressed in paras. 49-50 and 120-125 of the *Handbook* and in the 1999 UNHCR Guidelines.¹⁶ Such acts may create false impressions, especially where the reasons for flight remain undiminished. Collateral reasons (such as a demand by the state of refuge that the refugee obtain travel documents, or a desire to travel for family reunification) may predominate over a subjective intent to re-avail oneself of national protection. A renewed passport may not always permit re-entry into the state of origin, as was true of some Chilean refugees under orders of banishment. In such cases, cessation would be both inappropriate and ineffectual in securing repatriation. Especially in light of the extensive use of carrier sanctions, possession of a passport may be a modern necessity that does not signal a desired link to the state of origin.¹⁷ This may be true whether the passport is obtained to facilitate flight from the state of origin or after obtaining refuge, especially where alternative travel documents are not available or the refugee is unaware of how to procure them.¹⁸ Genuine refugees may not possess the same fear of consular authorities in their state of refuge that they have toward other officials in the state of origin.¹⁹

grounds that an asylee has ceased to satisfy the refugee definition, could theoretically provide U.S. authorities with an opportunity to terminate the indefinite grant of asylum by invoking procedures under 8 U.S.C. • 1158(c), but this does not appear to happen to any discernable degree. After a period of lawful permanent residence, former asylees and refugees may become eligible to naturalize. 8 U.S.C. •• 1159, 1427. UNHCR's Note on the Cessation Clauses, *supra* note 1 paras. 15-16, observes that in both the cessation and status determination contexts, whether a refugee has the full rights and benefits of a national of the state of refuge should be assessed prior to cessation or initial denial of refugee status premised upon Article 1C(3).

¹⁵For example, the Czech Republic Act no. 498 of November 1990 Concerning Refugees, Sec. 14(b) provides for cancellation of refugee status where the refugee has been granted permanent residence.

¹⁶*Supra* note 4 paras. 6-11.

¹⁷James Hathaway, *The Law of Refugee Status* 192 (1991).

¹⁸Article 28 of the 1951 Convention and Article 6 of the OAU Convention provide for the issuance of travel documents by asylum states.

¹⁹Atle Grahl-Madsen, *The Status of Refugees in International Law* 379 (1966).

19. Para. 119 of the *Handbook* sets out an appropriate analytic framework, identifying three essential factors for analysis of cases arising under Article 1C(1): **voluntariness, intent and actual re-availment**. Other contact with state of origin diplomatic missions should also be analyzed under this framework.²⁰

20. Authorities in the state of refuge should bear the burden of proving the essential elements of voluntariness, intent and actual re-availment prior to cessation of refugee status under Article 1C(1). Unlike Article 1C(3), Article 1C(1) anticipates that return to the state of origin may result from its application.²¹ The stakes are thus high for a recognized refugee who has had contact with diplomatic representatives of the state of origin. Proof of the act can permissibly impose an obligation on the refugee to explain his or her conduct, because voluntariness and intent are largely unknowable without the testimony of the individual concerned. The refugee may also possess crucial evidence pertaining to the availability (or not) of effective national protection in the state of origin.

21. *Handbook* para. 121 states that where a refugee has obtained or renewed a passport it can •be presumed that he intends to avail himself of the protection of the country of his nationality. • Para. 122 similarly refers to •absence of proof to the contrary• in relation to a presumption of intent to re-avail oneself of national protection. It should be clarified that, while the refugee may reasonably be expected to explain his conduct • and indeed that he is entitled to notice and a fair hearing prior to cessation • states initiating cessation procedures against recognized Convention refugees should bear the burden of proving re-availment. The benefit of the doubt must be given to the refugee, consistently with the restrictive interpretation appropriate to the cessation clauses.²² A refusal to explain ambiguous conduct may justify adverse inferences against the

²⁰For example, a choice by a refugee to marry at the diplomatic mission of his state of origin, rather than before officials of the state of refuge, should not result in automatic cessation. The surrounding circumstances, including the person's knowledge of the existence of alternatives and the degree of attachment to the state of origin, should be explored. *Handbook* para. 120 offers the example of a refugee who must contact officials of the state of origin in order to obtain a legally recognizable divorce. Again, the intent of the refugee and actual availability of national protection from the state of origin should predominate in the analysis whether refugee protection should be terminated as a consequence of such acts.

²¹The same is true of the other two cessation grounds relating to personal conduct, Article 1C(2) and Article 1C(4). However, cessation of refugee status is not necessarily linked to repatriation under any of the cessation grounds. Refugees subject to cessation may qualify for residence in the state of refuge or a third state on some other basis.

²²Even where acquisition of passports or other post-flight contact with state of origin authorities is raised as an issue during initial refugee status determination, the benefit of the doubt may be extended to the applicant because it is often difficult to determine with any accuracy what the intent of the individual was and how likely it is that effective national protection will be available if the application is denied and the asylum seeker is returned to the state of origin.

refugee, but the burden of proof that Article 1C(1) or Article 1.4(a) applies should remain on the state of refuge.

22. The fact that third states have abstractly acknowledged the national protection role of the state of origin by permitting a refugee to travel on its passport should not suffice to establish re-availment of national protection. The state seeking to impose cessation of refugee status must prove that the refugee in question intended to avail himself of national protection and that effective protection is in fact available from the state of origin. Thus, if the refugee sought assistance from consular authorities of the state of origin on his travels, and in fact received such protection, re-availment could be established.

23. Many cases involving post-flight contact between refugees and diplomatic authorities of the state of origin will be characterized by ambiguity. The burden should be placed on the state of refuge to prove that persecutory risk has actually ceased. The refugee's voluntary acts, intent and attitudes may be considered, but they cannot predominate over political reality. The cessation clauses should not be transformed into a trap for the unwary or a penalty for risky or naive conduct. On the other hand, it is dubious to assert that acts such as renewal of passports are not "voluntary", even if required by the asylum state.²³ The reason why cessation is inappropriate in such cases is because the refugee's act does not provide reliable proof that effective national protection is now available.

24. Where persecutory risk has ceased, and the refugee by his own conduct indicates awareness of this new reality, cessation is appropriate. Whether repatriation is the appropriate sequel to cessation depends upon a number of other factors, including whether compelling circumstances justify the grant of a secure legal status, as noted in paras. 68-83.

2. *Re-acquisition of nationality*

25. Re-acquisition of nationality under Article 1C(2) and Article 1.4(b) has a contemporary relevance, in light of statelessness resulting from the breakup of states. *Handbook* paras. 126-128 stress voluntariness, but the refugee's intent and the availability of effective protection may also be relevant. Unlike re-availment of national protection, re-acquisition of nationality may be initiated by the state of origin rather than by the refugee, where a nationality law of broad application is adopted. The same scenario may occur under Article 1C(3) where a third state adopts nationality legislation potentially applicable to a recognized refugee.

26. *Handbook* para. 128 suggests that nationality must be "expressly or impliedly accepted" before cessation under Article 1C(2) would be appropriate. The UNHCR Guidelines on the application of cessation clauses similarly suggest that "the mere possibility of re-acquiring the lost nationality by exercising a right of option [is not] sufficient to put an end to refugee status."²⁴ These interpretations are consistent with the requirement that the refugee "voluntarily" re-acquire

²³ Guidelines, *supra* note 4 para. 9.

²⁴ *Supra* note 4 para. 14.

his lost nationality. *Handbook* para. 128 places a burden on refugees to signal their rejection of an offer of restored nationality, if they have knowledge that it will operate automatically unless they opt out. However, authorities in the state of refuge should also consider whether the refugee will enjoy effective national protection (and thus may safely be deprived of international protection) prior to applying cessation under Article 1C(2).²⁵

27. Where a refugee has the option of re-acquiring a lost nationality (whether the loss was due to state disintegration or punitive expatriation), and he declines to do so (because he prefers to build a new life in the state of refuge, or he fears that return to his state of origin may be traumatic or that political conditions might worsen there), Article 1C(2) does not permit cessation. The element of voluntary re-acquisition is absent. Where the refugee has not acquired a new nationality in the state of refuge or in a third state, Article 1C(3) is also inapplicable. However, if the persecutory regime in the state of origin has been supplanted by a democratic one, the state of refuge may be inclined to order cessation under Article 1C(6) (ceased circumstances for a stateless person). Following cessation under Article 1C(6), the state of refuge may pursue repatriation of the former refugee to the state of origin.

28. A refugee has a right to return to his or her own country, under human rights norms.²⁶ This right should not be seen as imposing an obligation, especially for those who have been forced to flee from persecution and have been subjected to expatriation. The voluntariness element of Article 1C(2) suggests that refugees do not have a duty to facilitate their repatriation by re-acquiring a lost nationality they no longer desire to possess. As a practical matter, cessation under Article 1C(6) may not be followed by repatriation if a stateless refugee refuses to comply with the administrative protocol for re-acquisition of the nationality of the state of origin. The legal status of stateless persons experiencing cessation under Article 1C(6) could thus become undesirably irregular, if they cannot be repatriated or sent to a third state, and they are ineligible for complementary protection or the human rights bars to expulsion.

29. On the other hand, the availability of effective protection predominates as a determinative factor over personal acts and intents under the "ceased circumstances" clauses, including Article 1C(6). Reluctance to return to a state of habitual residence stemming from reasons of "personal convenience" is not a basis to avoid cessation of UNHCR protection under Article 6(A)(f) of the UNHCR Statute. Even more pointedly, Principle 1(e) of the Constitution of the International Refugee Organization asserts that protection should be withdrawn from refugees who "prefer idleness to facing the hardships of helping in the reconstruction of their countries, or ... persons who intend to settle in other countries for purely economic reasons" These precursor instruments do not control the interpretation of the 1951 Convention or the OAU Convention, but they are suggestive. Thus, where a refugee refuses to re-acquire a lost nationality, but the state of

²⁵Grahl-Madsen, *supra* note 19 at 394-395, suggests that placing the burden on the refugee to opt out of such nationality legislation is inappropriate. The process of re-acquisition of nationality by operation of law is sometimes referred to as "redintegration". *Id.*

²⁶Universal Declaration of Human Rights Article 13(2), International Covenant on Civil and Political Rights Article 12(4).

origin will accept his return and persecutory risks have been eliminated, cessation under Article 1C(6) might be imposed. However, where the state of origin (and former state of nationality) will not accept the refugee's return, cessation under Article 1C(6) should be avoided, even if persecutory risk no longer exists, because the consequence may be continued residence in the state of refuge without lawful status.

3. Acquisition of a new nationality

30. Issues relating to acquisition of a new nationality under Article 1C(3) are addressed in paras. 129-132 of the *Handbook*. As noted above in para. 17, naturalization in the state of refuge poses the fewest risks but may involve informal or implicit cessation rather than a formal process with the procedural protections recommended in paras. 63-67 below. Cases in which the refugee has taken up residence and naturalized in a third state may be treated similarly,²⁷ but some opportunity to contest the evidence of naturalization and to establish a need for continuing international protection should be provided.

31. Article 1C(3) includes no explicit requirement of voluntariness. Its application hinges upon the fact that a new nationality has been acquired and a finding that effective national protection is now available. Traditional examples include women who automatically acquire their husband's nationality upon marriage, even though they do not wish it and have taken no steps to acquire it other than the marriage itself. These cases are questionable under modern human rights norms, including prohibitions on gender-based discrimination. UNHCR properly cautions that cessation should not be ordered if there is no genuine link between the refugee and the third state conferring its nationality by operation of law, drawing upon basic principles of international law.²⁸

32. Article 1C(3) may prove especially troublesome where the third state is a successor state to the refugee's state of origin, and the refugee involuntarily acquires its nationality through passage of a general law. Article 1C(2) envisions that a refugee may avoid cessation simply by refusing the restoration of nationality. Article 1C(3) might be read to permit cessation and presumably deportation to the successor state, if authorities in the state of refuge are satisfied that the refugee will enjoy effective protection there. Fair processes, including granting the benefit of the doubt to the refugee, are essential to prevent cessation from resulting in exposure to

²⁷The Commission of the European Communities suggests in its Explanatory Memorandum concerning its Proposal for a Council Directive on minimum standards, *supra* note 9 at 22, that where a refugee has re-established himself in the state of origin (the Article 1C(4) situation), procedural guarantees such as notice and hearing may be dispensed with in imposing cessation. Arguably, the same argument could be made with respect to Article 1C(3) cases. However, the burden should be on status determination officials to show that notice and fair hearing are "impossible", in the terms of draft Article 26(3). If authorities have evidence that the refugee has taken up residence in a third state (or the state of origin) they may be able to provide notice of planned cessation and to provide the refugee an opportunity to return and to present evidence that the cessation grounds do not actually apply.

²⁸Guidelines, *supra* note 4 para. 17.

persecution in the successor state. Just as with ceased circumstances cessation, political conditions in a successor state may be unstable. In assessing whether the refugee will enjoy protection in a successor state, status determination officials should inquire whether the nationality law reflects political change that is fundamental, durable and effective.²⁹ The benefit of the doubt should be extended to the refugee, especially where he or she belongs to a racial, ethnic, political or social group that comprises a minority of the successor state population, and this minority status is asserted as an explanation for resisting acquisition of the new nationality.

33. Tension may exist between the impulse to impose cessation and respect for Article 34. This tension is resolved in those Article 1C(3) cases where the refugee naturalizes in the state of refuge • both provisions are simultaneously respected, and the refugee gains durable protection against persecution in the state of origin. The historical willingness of asylum states to naturalize or to grant other durable legal status to recognized refugees created the sometimes criticized "exilic bias" of the refugee regime. The expert roundtable presents an opportunity for policy makers to explore whether or not that bias has dissipated, and whether significant resources will now be devoted to the application of the cessation clauses. Some concern has been expressed that asylum not become a backdoor to immigration. However, this fear may be directed at asylum seekers who do not present valid claims to protection. Article 34 and the social and economic guarantees of the refugee treaties strongly suggest that integration of recognized refugees is desirable. The possibility of cessation does not negate or contradict in any way the suitability of local integration as a durable solution.

34. Time-limited refugee status, with a requirement that status be renewed within a time-frame shorter than that necessary to qualify for naturalization, could seriously undermine refugee protection. Fair application of the cessation clauses in a time of political instability is extremely difficult, and refugees should not bear the burden of repeatedly proving their fear of persecution. Time-limited refugee status is incompatible with Article 1C and Article 1.4. Recognized refugees enjoy the benefit of the doubt, and the authorities in the state of refuge unequivocally bear the burden of proving that effective protection is now available in the state of persecution as a condition for termination of refugee status.

35. Enjoyment of the economic and social rights of the refugee conventions facilitates adaptation of the refugee to the asylum state's culture and values, making repatriation a potential hardship, especially after a lengthy exile. Thus, reconciling Article 1C to Articles 12-30 poses dilemmas for asylum states and for UNHCR. Future discussions concerning protection of refugees in mass influx, return of persons not in need of international protection, standards for reception and treatment of asylum seekers and complementary forms of protection should make reference to the tension between the termination of international protection and the provisions of Article 12-30 and 34 that encourage assimilation of refugees.

4. Re-establishment

²⁹See paras. 45-62 below.

36. Paras. 133-134 of the *Handbook* address Article 1C(4) in spare terms. What constitutes re-establishment in the state of origin has taken on increasing contemporary importance, as refugees participate in organized repatriations into situations of instability and danger. New outflows or repeated flight may result.³⁰ While Article 1C(4) turns on the actions and intentions of the individual refugee, the potential volatility of the political situation and the danger of continuing persecutory risk are also important factors that cause application of this provision to resemble that of the ceased circumstances clauses in some respects.

37. As Grahl-Madsen notes, refugee status could logically terminate upon re-establishment in the state of origin, simply because one no longer meets the criterion in Article 1A(2) of being outside one's country of origin.³¹ However, automatic termination as a penalty for any physical return to the state of persecution is inappropriate. Article 1C(4) requires proof that return is voluntary, and re-establishment denotes both a subjective reaffiliation as well as an objectively durable presence.

38. Cases in which cessation is inappropriate include those involving no voluntary choice by the refugee (deportation, extradition, kidnapping or unexpected travel routes by transport services). Similarly, where a refugee anticipates a brief visit that was prolonged for reasons beyond his control (most obviously, where he is imprisoned in the state of persecution), cessation is inapplicable.

39. A murkier group of cases involve brief but repeated visits by a refugee to the state of origin, with no adverse consequences. These visits may be for family, political or economic reasons, or a combination thereof. So long as the visits are of short duration and the refugee's primary residence remains in the asylum state, invocation of Article 1C(4) is inappropriate. Under Article 1C(5), the focus is placed upon the nature of political change and its impact upon the refugee's previously proven risk of persecution. The fact that the individual or other refugees have visited without suffering harm may be relevant evidence that general conditions have improved, but a broader inquiry is required under the ceased circumstances cessation clauses.

40. Article 1C(4) should not be invoked unless the refugee has shifted his primary residence to the state of persecution, with an intent to do so. Refugees may choose such a path even where the risk of persecution has not been reliably eliminated. Re-establishment in the state of origin poses serious difficulties for the asylum state to perform its international protection role,

³⁰For example, Sweden has recently attracted Bosnian asylum seekers who have either been repatriated by other states (specifically Germany and Switzerland that have terminated temporary protection for Bosnians and deny asylum applications on the premise of internal flight alternative), despite the fact that they cannot return safely to their own homes in Republika Srpska, or who have been displaced from temporary housing in Bosnia by other repatriated refugees and who similarly cannot return to their original homes. •Sweden Has Become Attractive for Bosnians•, Migration News Sheet, No. 215/2001-2 at 15 (February 2001).

³¹*Supra* note 19 at 370-371 (•If he abandons his flight and goes home, it is only natural that he ceases to be considered a refugee.•).

difficulties that it is possible to overcome where the refugee maintains a primary residence in the asylum state and makes only brief visits to the state of persecution. Where Article 1C(4) has been invoked and the choice to re-establish goes badly for the former refugee (in that he or she is again at risk of persecution), new flight permits the filing of a new claim to refugee status, and the prior persecution can be considered as evidence in favor of the claim. Alternatively, if the refugee returns to the former asylum state, refugee status could be revived in an accelerated procedure.

41. Because the political situation in refugees' states of origin is so frequently volatile, asylum states should factor delay into the process for invoking Article 1C(4).³² The practice of "assessment visits" envisions that refugees may physically return to their state of origin for the purpose of gathering information that will enable them to make a reasoned choice concerning voluntary repatriation. Such visits clearly provide no basis for immediate application of Article 1C(4). An "escape clause" for repatriated refugees, granting repatriation assistance but extending or renewing refugee status if an attempt at re-establishment fails for valid reasons, is highly desirable and may encourage voluntary repatriation. Formal cessation should be suspended until the durability and safety of re-establishment can be determined. Delay in cessation under Article 1C(4) is consistent with the normal sequence of events of flight • status determination • recognition • voluntary repatriation • cessation.

42. Although structurally treated as cessation clauses, OAU Convention Article I.4(f) and Article I.4(g) functionally impose expulsion. Little could be discerned by the author regarding state practice, aside from the occasional incorporation of these provisions in national law.³³ Article I.4(f) imposes cessation where the refugee commits a serious non-political crime in another state after his recognition as a refugee. This provision seems quite anomalous as a ground for cessation, and imports a concept borrowed from the exclusion clauses (with an alteration in the timing of the crime). It appears designed to strip refugee status from the "undeserving", and perhaps also to reduce tension among OAU states by facilitating removal of criminal elements enjoying residence as refugees. It is doubtful that return to persecution or serious danger is the optimal response to such criminal activity, especially if the refugee has been duly punished by the state where the crime was committed.

43. Article I.4(g) is perhaps best interpreted as an implementation measure for the rule of conduct imposed by Article 3 of the OAU Convention, prohibiting subversive activities against other OAU states. Article 3 appears to envision direct control by the asylum state of certain activities by refugees (through criminalization and other limits on violent or expressive activities). Article I.4(g) would permit cessation of refugee status as a consequence of this prohibited conduct.

³² As noted in paras. 49 and 55, ceased circumstances cessation should also not be invoked precipitously, but only after the durability of change indicates that international protection is no longer needed.

³³ For example, Liberia's Refugee 1993, Section 3(5)(f); and Tanzania's Refugees Act 1998, Article 3(f) and (g).

44. The terminology of Article I.4(g) is reminiscent of exclusion concepts, such as those reflected in Article I.5(c) and I.5(d), which suffer from vagueness and should be given a narrow interpretation. The operation of Article I.4(g), however, resembles that of expulsion, with some differences. While the references to national security in 1951 Convention Articles 32(1) and 33(2) pertain to the security of the asylum state, the concern of OAU Convention Article 3 is the security of other states. And expulsion under 1951 Convention Articles 32 and 33 does not entail cessation of refugee status, but simply loss of protection against *refoulement*. Moreover, it should be stressed that persons subject to cessation under Article 1.4(f-g) may be entitled to the human rights bars to *refoulement*.

B. "Ceased Circumstances" Cessation

45. The political volatility of refugee-generating states in the post-Cold War era heightened interest in Article 1C(5-6), the focus of Executive Committee Conclusion No. 69 (XLIII) of 1992. Ceased circumstances cessation poses serious difficulties, particularly in regard to: (1) assessment of "fundamental, durable and effective" change in the state of origin; (2) fair process; (3) provision for exceptions to cessation or to return; and (4) the feasibility of involuntary return after lengthy protection.

1. Assessment of conditions in the state of persecution

46. Because asylum states do not appear to have frequently applied Article 1C(5) to recognized refugees in recent years,³⁴ the process for assessing changed circumstances remains underdeveloped. The quantum and relevance of evidence of changed conditions are not specified with precision. Executive Committee Conclusion No. 69 (XLIII) and the 1997 Note on the Cessation Clauses identify some relevant indicators of "fundamental, durable, and effective" change³⁵:

- democratic elections
- significant reforms to the legal and social structure
- amnesties
- repeal of oppressive laws
- dismantling of repressive security forces
- general respect for human rights, with special regard to:
 - the right to life
 - liberty of persons

³⁴When invoking the cessation clauses in Article 6 of the UNHCR Statute, UNHCR has advised asylum states that, in its opinion, cessation under Article 1C(5) and Article 1C(6) is also appropriate for the same group of refugees. See, for example, the memorandum on the Applicability of the Cessation Clauses to Refugees from Chile, UNHCR/IOM/31/94, UNHCR/FOM/31/94 para. 6 (1994) (noting that while asylum states must decide the applicability of the cessation clauses to refugees they have recognized, UNHCR has a supervisory role to guide their compliance with Executive Committee Conclusion No. 69 (XLIII)).

³⁵Note on the Cessation Clauses, *supra* note 4 para. 19.

- non-discrimination
- freedom of expression, assembly and association
- fair trial, independence of the judiciary and access to courts
- a functioning governing authority and basic administration
- infrastructure sufficient to support basic livelihood
- basic physical security

This list could be expanded to include other human rights norms (such as the prohibition on torture and cruel, inhuman and degrading treatment or punishment; freedom of religion; or the right to form independent trade unions) whose violation may occur in the course of persecution. Standards for voluntary repatriation and withdrawal of temporary protection envision a similar examination of the general human rights situation in the state of origin, with a focus upon the prospects for return in safety and with dignity.³⁶

47. Where an asylum state initiates ceased circumstances cessation against a recognized refugee, the sources of evidence upon which it draws should be broad and should include information from its foreign ministry, from other diplomatic sources, from non-governmental organizations, from specialized bodies (especially UNHCR), from scholars and from the press. This point is stressed in Executive Committee Conclusion No. 69 (XLIII)³⁷ and in UNHCR's Guidelines.³⁸ Because a fair hearing should be provided, the refugee may introduce general evidence from similar sources, as well as evidence concerning his or her own situation, such as personal testimony and testimony or letters from friends and family members.

48. Executive Conclusion No. 69 (XLIII) and the Guidelines allude to UNHCR's supervisory role under Article 35 of the 1951 Convention in discussing evaluation of changed conditions, but they do not clearly state what is to happen when the asylum state's assessment diverges from UNHCR's. The 1951 and OAU Conventions delegate implementation of the cessation clauses, along with other criteria of eligibility for protection, to the states parties. Where UNHCR has decided to apply the cessation clauses of its Statute to a group of refugees, it is appropriate for states of refuge to apply the cessation clauses to the same group, assuming fair processes and appropriate exceptions are provided. Where UNHCR has not yet acted, states considering cessation should consult with UNHCR concerning conditions in the state of origin and the relevance of any change to the risks of persecution or violence that provoked the flight. Both UNHCR and asylum states may delay cessation for a period following voluntary return, as the durability of change is evaluated.

³⁶UNHCR, Handbook: Voluntary Repatriation: International Protection, Chapter 2.2, 2.4 (1996); Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It, UN Doc. EC/47/SC/CRP.27, para. 4(n)(1997); Joan Fitzpatrick, Temporary Protection of Refugees: Elements of a Formalized Regime, 94 American Journal of International Law 279, 300-302 (2000).

³⁷*Supra* note 12 para. (b).

³⁸*Supra* note 4 para. 35.

49. Asylum states should not precipitously impose ceased circumstances cessation in potentially volatile situations. Because predictions of the consequences of political change often prove overly optimistic, national law should make provision for assessment visits by refugees contemplating voluntary repatriation and •escape clauses• for returned refugees who face renewed persecution or severe privation following return. These •escape clauses• might take the form of delay for a set period between return and formal cessation of refugee status or other lawful residence, and accelerated procedures for revival of refugee status upon return flight.

50. Executive Committee Conclusion No. 69 (XLIII) suggests that the •general human rights situation• be assessed prior to application of Article 1C(5) or Article 1C(6), but notes that •the particular cause of fear of persecution• is also relevant.³⁹ Whether the ceased circumstances clauses have to do with groups or individuals is a complex question, and UNHCR's existing guidance is potentially misleading.⁴⁰ UNHCR formally ceases its protection role with respect to groups defined in terms of nationality and flight. In doing so, it makes provision for individuals who deserve continued international protection, in a process it denotes •reconsideration•, described in para. 53. This paper suggests that individual grants of refugee status may only be terminated under the ceased circumstances clauses pursuant to an individualized procedure, with notice, hearing or interview, a neutral decision-maker and burden of proof upon the authorities of the state of refuge. The focus must be upon whether political change has so reduced the persecutory risk that the refugee no longer has a well-founded fear and thus may be repatriated.

51. The texts of 1951 Convention Article 1C(5-6) and OAU Convention Article I.4(e) have a distinctly individualized aspect. They refer, not to general political or human rights conditions, but to •the circumstances in connection with which he has been recognized as a refugee•, and to individual attitudes and conduct (•[h]e can no longer ... refuse to avail himself of the protection [of the state of nationality or habitual residence]•). Where an asylum state applies the ceased circumstances clauses to a recognized refugee, an individual process (with guarantees of fairness outlined in paras. 63-67) is required. Evidence of general political and human rights conditions is relevant, but the focus must be upon the causes of the individual's flight, whether post-flight change has eliminated the risk of persecution and whether effective protection from the state of nationality or habitual residence is now actually available. Only if such conditions exist is it unreasonable for the refugee to refuse protection from the state of nationality or habitual residence, and to insist upon continued international protection. The individualized hearing also provides an opportunity to determine whether the refugee is eligible for an exception from cessation, for complementary protection or for another legal status in the state of refuge (see paras. 68-83).

³⁹*Supra* note 12 para. (a).

⁴⁰This guidance is contained in *Handbook* paras. 135-139; Executive Committee Conclusion No. 69 (XLIII), *supra* note 12; the Note on the Cessation Clauses, *supra* note 3; the Guidelines on the Cessation Clauses, *supra* note 4; in specific memoranda concerning application of the cessation clauses of the Statute; and in advice given in particular cases.

52. When UNHCR applies the cessation clauses of its Statute,⁴¹ its focus is on terminating its protection role for a nationality group. UNHCR makes a decision that is applied to each member of the group, with appropriate variations (for example, concerning repatriation assistance).

53. UNHCR refers to a •rebuttable presumption•⁴² that the risk of persecution has ceased, and to the possibility that individual members of the group might seek •reconsideration• of their cases, during which they may present evidence that they face a continuing risk.⁴³ It should be stressed that three distinct situations exist: (1) where UNHCR applies the cessation clauses of its Statute; (2) where cessation is applied by an asylum state to a recognized refugee; and (3) where a state terminates group-based protection (group refugee status, complementary protection under a broadened refugee definition or temporary protection). Whether cessation comes before or after an individual hearing, and where the burden of proof concerning continued risk should be placed, will vary among these situations.

54. The burden of proof concerning fundamental changed circumstances, when cessation is applied to a recognized refugee, is on the authorities.⁴⁴ In contrast, where changed political conditions figure in an initial refugee status determination procedure under Article 1A(2) (for example, where it appears that intervening events in the state of persecution have eliminated the applicant's risk), the burden of proof of continuing fear is generally placed on the applicant.⁴⁵ When group-based refugee status or complementary protection is terminated, the onus may be placed on resistant individuals to seek a hearing to establish (for the first time) their individualized risk of persecution. When temporary protection is withdrawn on the basis of improved conditions in the state of origin, individuals must be given access (which may have been suspended as to them for a period of time) to the refugee status determination process prior to their repatriation.⁴⁶ The asylum applicant generally bears the burden of proof. When UNHCR invokes cessation of

⁴¹These instances have included refugees from Mozambique (14 November 1975), Guinea-Bissau (1 December 1975), Sao Tome (16 August 1976), Angola (15 June 1979), Zimbabwe (14 January 1981), Argentina (13 November 1984), Uruguay (7 November 1985), Poland (15 November 1991), Czechoslovakia (15 November 1991), Hungary (15 November 1991), Chile (28 March 1994), Namibia (18 April 1995), South Africa (18 April 1995), Malawi (31 December 1996), Mozambique (31 December 1996) and Ethiopia (23 September 1999).

⁴²Guidelines on the application of the cessation clauses, *supra* note 4 para. 33.

⁴³See, for example, para. 5 of the memorandum concerning Applicability of the Cessation Clauses to Refugees from Chile, *supra* note 35.

⁴⁴Guy Goodwin-Gill, *The Refugee in International Law* 87 (2d ed. 1996).

⁴⁵As explained in paras. 60-61, certain asylum states such as the United States may sometimes grant refugee status on the basis of past persecution.

⁴⁶UNHCR Progress Report, *supra* note 36, para. 4(p); Commission of the European Communities, Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, COM(2000) 303 final, 24 May 2000, Articles 3(1), 16, 18.

its protection role under Statute Article 6, it normally gives members of the nationality group a chance to show that cessation does not apply to them.

55. No minimum length of time elapsing between the commencement of change and formal cessation has been established. UNHCR has suggested that a period of twelve to eighteen months should elapse, drawing upon its experience of cessation under the Statute.⁴⁷ Indeed, UNHCR generally declines to apply cessation under its Statute until four or five years have elapsed.⁴⁸ UNHCR has suggested that democratic change is generally more durable and suitable to rapid cessation, but this is merely a factor and not a rule.⁴⁹

56. Religious and ethnic minorities may experience lingering hostility and discrimination, despite a formal change of regime through free elections. Where cessation is applied by an asylum state to a recognized refugee, the focus should be on the particular circumstances that provoked flight, with general political developments providing background for this assessment. Indeed, the exception for statutory refugees from fascist regimes was partly intended to make provision for the social reality that formal regime change does not necessarily erase deep-seated prejudices, nor eliminate the risk that persecution will continue at the hands of rogue officials and non-state actors.⁵⁰ Where general political developments do not eliminate an individual's fear of persecution, cessation is improper regardless of whether the refugee qualifies for an exception or some alternate form of international protection or durable status. The person's refugee status remains intact and he or she continues to enjoy the benefits of that status undisturbed.

57. Political change, whether democratic or violent, may simply substitute a new risk of persecution for a recognized refugee. From an administrative perspective, it makes little sense to expend substantial resources to impose cessation and subsequently to adjudicate a new claim to protection. UNHCR asserts that cessation is improper in this context (citing the situation of Afghanistan),⁵¹ and this is true in the sense that cessation followed by deportation to the state of origin violates the refugee conventions where the individual has a well-founded fear of persecution (whether the fear is of long standing or new). But this results from reading the

⁴⁷Note on the Cessation Clauses, *supra* note 3 para. 21 (noting that this suggested time frame was not included in Executive Committee Conclusion No. 69 (XLIII)).

⁴⁸*Id.*

⁴⁹*Id.* para. 22.

⁵⁰Grahl-Madsen, *supra* note 19 at 410:

What the drafters of the Convention had in mind was the situation of refugees from Germany and Austria, who were unwilling to return to the scene of the atrocities which they and their kin had experienced, or to avail themselves of the protection of a country which had treated them so badly. The fact was appreciated that the persons in question might have developed a certain distrust of the country itself and a disinclination to be associated with it as its national.

On exceptions generally, see paras. 68-83 below.

⁵¹Note on the Cessation Clauses, *supra* note 3 para. 20.

ceased circumstances cessation clauses together with the inclusion clauses, rather than from a literal reading of the ceased circumstances clauses alone. It would be bad practice to expend resources on formal cessation simply to extend refugee status on new grounds. Such empty rituals expose refugees to •unnecessary review• discouraged by Executive Committee Conclusion No. 69 (XLIII).⁵² But such action may not amount to a breach of the refugee conventions, if the refugee continues to enjoy appropriate international protection when his new claim is granted.

58. Serious difficulty and confusion arise where elements usually associated with cessation figure during refugee status determination. State practice is disparate concerning situations where circumstances change between the time of a refugee's flight and the time an initial application for refugee status is adjudicated. In some asylum states that have little actual experience with true cessation, the volume of recent cases involving changed circumstances between flight and initial adjudication is extensive.⁵³ One disturbing development is the allocation of asylum claims to an accelerated procedure, when presented by nationals of a state under a declaration of •cessation•.⁵⁴ The purpose of assessment of country conditions is similar in actual cessation and during initial status determination, as it may determine whether the person has a right to remain in the asylum state. The focus of the inquiry is whether political and social changes are fundamental, durable and effective in eliminating the well-founded fear of persecution possessed by the refugee or asylum seeker at the time of flight. Indeed, because a determination of refugee status is merely declaratory, an order of cessation is essentially formal. Whether or not a person is a refugee depends upon whether in reality he or she meets the treaty definition, which encompasses not just the inclusion but the cessation and exclusion clauses.

⁵²*Supra* note 12 fourth preambular para.

⁵³The cases cited by James Hathaway, *supra* note 17 at 199-205, generally arise in the initial status determination context. Grahl-Madsen's earlier treatise, *supra* note 19, includes references to many actual cases of cessation involving refugees who had fled fascist regimes in the mid-twentieth century. The Immigration and Refugee Board of Canada issued guidelines in September 1992 on Change in Circumstances in a Refugee Claimant's Country of Origin • Suggested Framework of Analysis. See also cases analyzed by the author of this paper in Joan Fitzpatrick, The End of Protection: Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection, 13 Georgetown Immigration Law Journal 343, 356-363 (1999). A search of REFworld for cases referring to cessation concepts yielded a number of cases concerning initial status determination.

⁵⁴Under the Law on Entry and Residence of Aliens and Right to Asylum of 11 May 1998, French authorities have subjected a growing number of asylum seekers to accelerated procedures on the basis that their state of origin is subject to a declaration of cessation. 2,225 asylum applicants were so treated in 1998 and 2,232 on provisional figures for 1999. Patrick Delouvin, The Evolution of Asylum in France, 13 Journal of Refugee Studies 61, 65-66 (2000). Many of the affected are Romanian. Under the accelerated procedures, the applicant may have insufficient time to gather evidence, consideration by authorities may be cursory and without an interview, and deportation is not suspended during appeal. *Id.* at 66.

59. But while this analysis is valid as an abstract matter, national practice suggests that a great deal of confusion exists between cessation proper and the application of cessation concepts during initial status determination. UNHCR could constructively dissipate this confusion by stressing the important procedural differences posed by these two distinct situations. In particular, the term cessation should be restricted to the termination of status for recognized refugees. The timing of application of the various components of the refugee definition will vary, with inclusion preferably preceding exclusion and cessation figuring only in a procedure later than and distinct from initial status determination.

60. The asylum state bears the onus of initiation and the burden of proof where cessation is applied to a recognized refugee. In the distinct context of initial status determination, state practice varies on the point whether evidence of past persecution creates a presumption of continued well-founded fear, shifting the burden from the applicant to the authorities to prove a fundamental change in circumstances in the state of persecution and its relevance to the applicant.⁵⁵ The majority practice appears to regard the refugee definition as exclusively forward looking, requiring the asylum seeker to bear the burden of proving that he or she has a well-founded fear of persecution and to rebut the significance of allegedly fundamental changes in the state of origin. Some states funnel asylum claims by nationals from states subject to a "cessation" declaration to an accelerated process, creating a serious risk of error and unfairness.⁵⁶

61. A separate issue is whether compelling reasons arising out of past persecution justify the continuation of refugee status as an exception to cessation, or whether some alternate protection should be provided to those whose return to the state of origin would cause significant hardship. The proviso of Article 1C(5) envisions the nonapplicability of cessation and thus the continuation of refugee status. In some states, an initial grant of refugee status may be premised upon past persecution. Victims of past persecution and others presenting compelling reasons to resist repatriation do often, as Executive Committee Conclusion No. 69 (XLIII) recommends, receive continued or alternate protection. These exceptions are examined in paras. 68-83.

⁵⁵The United States is a noteworthy example of a state that sometimes grants asylum or *non-refoulement* (withholding of removal) on the basis of past persecution. The circumstances under which asylum will be granted in the absence of a continued risk of persecution are the subject of recently revised regulations at 8 C.F.R. •• 208.13 and 208.16. Essentially, these regulations create a presumption of continuing persecution that the immigration authorities may rebut by proof of a fundamental change in circumstances that eliminates the original well-founded fear or by proof that the applicant has a reasonable internal flight alternative. The applicant bears the burden of proof concerning a well-founded fear of persecution that arises following fundamental political change (for example, in the Afghan situation where one persecutor is replaced by another). However, asylum may also be granted under 8 C.F.R. • 208.13(b)(1)(iii) if the applicant demonstrates an unwillingness to return arising out of the severity of past persecution or a reasonable possibility that he or she may suffer "other serious harm" upon repatriation.

⁵⁶See *supra* note 54.

62. As UNHCR has noted, the safe country of origin concept is not congruent with cessation.⁵⁷ The safe country of origin concept may be raised by states of refuge during initial status determination. While it may involve an assessment of general conditions in the state of origin, it is not linked to change (as are the ceased circumstances cessation clauses). Nor is it applicable to recognized refugees.

2. Fair Processes

63. The process for cessation of refugee status should be as formal as the process for grant of status, given the stakes for the individual. This is true both where the refugees own conduct causes the asylum state to initiate cessation (1951 Convention Article 1C(1-4) and OAU Convention Article I.4(a-d)), or where general political change raises the possibility that the refugees fear of persecution is no longer well-founded (1951 Convention Article 1C(5-6) and OAU Convention Article I.4(e)). This discussion of procedural issues thus applies both to Part II.A and II.B of this paper. It is presented here, because the greatest interest and confusion currently surround ceased circumstances cessation.

64. The minimal requirements of fair cessation process are notice to appear, provided in a language understandable by the refugee; a neutral decision-maker; a hearing or interview at which the refugee may present evidence of continued eligibility for refugee status and rebut or explain evidence that one of the cessation grounds applies; interpretation during the interview, if necessary; an opportunity to seek either a continuation of refugee status or alternative relief where compelling reasons exist to avoid repatriation or where the refugee qualifies for another lawful status; and the possibility of appeal. Refugees should be spared "frequent review" of their continued eligibility, as this may undermine their "sense of security, which international protection is intended to provide".⁵⁸

65. The burden of proof should be placed upon the asylum state authorities where the cessation clauses are applied to an individual recognized refugee. This allocation is justified because of the importance of the refugees settled expectations of protection, and because the authorities may have greater access to relevant information, especially in ceased circumstances cases.

66. Notice of intent to apply the cessation clauses should be communicated to individual recognized refugees and a hearing or interview should be provided, wherever feasible. The draft Council Directive on minimum asylum standards, presented in September 2000 by the EU Commission, suggests that procedural minima may be derogated from "in cases [of withdrawal or refugee status] where it is impossible for the determining authority to comply"⁵⁹ Where a

⁵⁷Note on the cessation clauses, *supra* note 3 para. 7.

⁵⁸*Handbook*, *supra* note 13 para. 135.

⁵⁹*Supra* note 11 Article 26(3). The Explanatory Memorandum, in the author's view, gives an overly expansive reading to this derogation clause, with regard to Article 1C(4) cases:

refugee is reliably believed to have re-established himself in the state of origin but his address cannot be determined, genuine "impossibility" may exist. Where a refugee has naturalized in the state of origin or has applied for and received a residence permit, knowing that by operation of law acquisition of these legal benefits terminates his refugee status, then the procedural formalities may be dispensed with. However, in other cases, such as where the authorities can determine the refugee's location in the state of origin or where the refugee is believed to have re-acquired his nationality or acquired the nationality of a third state, notice and hearing should be provided. There may be serious ambiguity concerning voluntariness, intent and effective protection in such cases, and imposition of cessation without a solid factual grounding is improper. The restrictive interpretation of the cessation clauses demands that an opportunity to contest their applicability be provided unless genuinely impossible.

67. The allocation of the burden of proof may vary in other circumstances where cessation concepts figure. Two other cessation-related situations may arise: (1) cessation of group-based refugee status, with provision for individualized reconsideration of claims of continued persecutory risk; and (2) withdrawal of temporary protection, with provision for access to the refugee status determination process. In these settings, repatriation should be suspended until resistant individuals have been given an opportunity to establish that they are entitled to international protection because of their particular situation. This situation may involve a specific well-founded fear of persecution, eligibility for exceptions to cessation or eligibility for complementary protection or other lawful status. In the context of group declarations of cessation, it can be fair to impose the burden of initiative upon resistant individuals to seek reconsideration of their status.⁶⁰

3. *Exceptions and their relevance to complementary protection*

68. Where political conditions in the state of origin have been fundamentally transformed, refugees may eagerly embrace an opportunity to return to a democratic and non-persecutory homeland. Cessation in such cases is a formality. But not all refugees whose states of origin have experienced political change will regard repatriation as an appropriate durable solution. 1951 Convention Article 1C(5) and Article 1C(6) refer to "compelling reasons arising out of previous persecution for refusing to return" to the country of nationality or habitual residence. OAU

[The procedural provisions in Articles 7 and 8] are impossible to implement ... when the person in question has voluntarily re-established himself in the country where persecution was feared. Then these guarantees appear unnecessary and are in fact impossible to carry out.

This observation is true only as to refugees who disappear without a trace back to their countries of origin, not to the typical re-establishment case where ambiguous conduct is involved and the refugee's whereabouts are known to the asylum state authorities. Especially where the refugee is making an assessment visit or is attempting re-establishment into a volatile situation, possibly with repatriation assistance from the asylum state, cessation should not be ordered mechanically. Cessation should be applied only upon an individual determination, which may need to be delayed until the durability of attempted re-establishment can be fairly judged.

⁶⁰Executive Committee Conclusion No. 69, *supra* note 12 para. (d).

Convention Article 1.4(e) includes no similar exception clause. While Article V.1 provides that "[t]he essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will", persons subject to Article 1.4(e) cessation no longer qualify as refugees.

69. The textual inadequacies of Article 1C(5) and Article 1C(6) concerning residual cases are glaring and even perverse, in Guy Goodwin-Gill's description.⁶¹ While Article 1C(5) and Article 1C(6) recognize that refugees who resist repatriation for "compelling reasons arising out of previous persecution" have a valid claim to remain in the asylum state, this relief is limited to statutory refugees defined in Article 1A(1), rather than Convention refugees under Article 1A(2). The proviso envisions continuation of refugee status (i.e., non-cessation). The severity of persecution that the victims of fascism had suffered was known to the drafters.⁶² Statutory refugees comprised the majority of those covered initially by the 1951 Convention, but present day concerns relate to Convention refugees.

70. Practice and principle support the recognition of exceptions to cessation for Convention refugees. Executive Committee Conclusion No. 69 suggests relief for two groups: (1) "persons who have compelling reasons arising out of previous persecution for refusing to re-avail themselves of the protection of their country" and (2) "persons who cannot be expected to leave the country of asylum, due to a long stay in that country resulting in strong family, social and economic links there".⁶³ Executive Committee Conclusion No. 69 does not mandate that the proper solution is to continue refugee status (in other words, that formal cessation not be imposed). Instead, it calls upon states to "seriously consider an appropriate status" for such residual cases, which could include continuation of refugee status.⁶⁴

71. Three distinct issues are posed: (1) whether exceptions from cessation should be defined only in terms of severity of past persecution; (2) if not, how to define additional categories (e.g., persons facing other serious danger if repatriated, persons with family ties in the state of refuge, persons with special vulnerabilities, and persons who would suffer serious privation or economic loss if deported); and (3) what relief should be accorded to members of these various groups (i.e., whether the exception is to formal cessation or give rise to a claim to some other lawful status and protection against involuntary repatriation).

72. *Handbook* para. 136 argues that the exception for statutory refugees reflects a "more general humanitarian principle" for egregious cases of past persecution involving Article 1A(2) refugees. The UNHCR Guidelines correctly observe that "there is nothing to prevent [the exception] being applied on humanitarian grounds to other than statutory refugees."⁶⁵

⁶¹Goodwin-Gill, *supra* note 44 at 87.

⁶²See note 50.

⁶³*Supra* note 12 para. (e).

⁶⁴*Id.*

⁶⁵Guidelines, *supra* note 4 para. 31.

73. •Compelling reasons arising out of past persecution• is an interesting phrase subject to several possible interpretations. At the least, it appears to cover victims with post-traumatic stress whose forced return could trigger debilitating flashbacks. This was one of the concerns (perhaps in less scientific terms) that the 1951 Convention drafters had for statutory refugees. There was also sensitivity that repatriated refugees might suffer secondary trauma as a result of family members' past egregious persecution.⁶⁶

74. Where there is a foreseeable risk that persecution may be renewed because the changed circumstances are not verifiably fundamental, durable and effective, the criteria for ceased circumstances cessation do not exist. No exception is necessary; refugee status continues and cannot lawfully be terminated. In an actual cessation case, the burden of proof is on the asylum state and the refugee receives the benefit of the doubt. In cases where changed circumstances are raised during initial status determination, state practice differs as to whether proof of past persecution creates a presumption of continuing persecution and shifts the burden of proof from the applicant, on whom it normally rests.⁶⁷ Where there are new and unrelated risks of persecution in the transformed state, cessation may be technically legal but administratively wasteful in that refugee status must be recognized anew and repatriation would contravene the prohibition on *refoulement*.⁶⁸

75. As noted before, there is a paucity of contemporary state practice of cessation of individual refugee status under 1951 Convention Article 1C(5) or Article 1C(6). However, national statutes implementing the cessation clauses do sometimes make provision for exceptions concerning severe past persecution.⁶⁹ These statutes appear to envision the continuation of refugee status despite the absence of a continuing risk of persecution. In sum, many asylum states do comply with the humanitarian recommendations of Executive Committee Conclusion No. 69 (XLIII) para. (e).

76. UNHCR has seen its role as involving not simply the cessation of its protection under the Statute, but also as providing instruction to asylum states hosting refugees of the nationality in question. The relevant textual exception in the Statute is much broader than those contained in Articles 1C(5) and 1C(6) • persons who present •grounds other than personal convenience for continuing to refuse• repatriation, •[r]easons of a purely economic character• being excluded.⁷⁰ Thus, traumatized individuals, persons with family ties in the state of refuge and especially vulnerable persons may be spared cessation of UNHCR protection.⁷¹ The Statute does not limit

⁶⁶*Supra* note 50.

⁶⁷See paras. 60-61.

⁶⁸See para. 57.

⁶⁹Examples include Germany, Ireland, Slovak Republic, Ghana, Liberia, Malawi, Zimbabwe, Azerbaijan, Lithuania, Canada and the United States.

⁷⁰Statute, *supra* note 7 Article 6(e).

⁷¹Grahl-Madsen suggests that some economic-related reasons may suffice, because it

this exception to refugees as defined in Article 1A(1) of the 1951 Convention, but also extends it to all refugees subject to UNHCR protection.

77. In the 1996 cessation of protection for refugees from Malawi and Mozambique, UNHCR suggested the following:⁷²

(a) that asylum state authorities should endeavor to avoid unnecessary individual hardship that would result from loss of residence and disruption of integration.

(b) that asylum states should consider new arrangements for those persons who cannot be expected to leave the country of asylum due to long stay ... resulting in family, social or economic links there. Such arrangements may include the granting of legal immigrant status or naturalization.

(c) that UNHCR field offices should grant reconsideration under the Statute to: (1) persons with a continuing well-founded fear of persecution, and (2) persons who have compelling reasons arising out of previous persecution to refuse to re-avail themselves of protection of their country of origin.

It should be noted that UNHCR interprets the exceptions under the Statute to be consistent with those recommended to be applied by asylum states under Article 1C(5) and Article 1C(6).

78. The term "compelling reasons arising out of previous persecution" is sometimes construed as requiring a focus on the severity of the persecution.⁷³ But, logically, the refugees' development of family and other ties to the state of refuge and alienation from the state of origin also arise out of past persecution, in the sense that persecution caused his displacement. The framers of the 1951 Convention, in their solicitude for statutory refugees, appear to have considered these broader psycho-social factors, and the human effects of long displacement.

79. States should be encouraged to codify exceptions to cessation, and to specify with clarity the various grounds of eligibility. These provisions should be included not only in the cessation legislation proper, but also in provisions concerning initial status determination for the benefit of those whose circumstances have changed since flight so as to eliminate their well-founded fear of persecution but who, for various reasons, should be spared deportation to the state of origin and granted a secure legal status.

80. One model of relief is the continuation (or initial grant) of refugee status for persons who lack a well-founded fear of persecution because their situation falls within one of the cessation

cannot be fairly called "personal convenience" to resist return to a state "where one has no abode, no vocation, and nothing else which formerly bound oneself to that country." *Supra* note 19 at 408.

⁷² Applicability of the Cessation Clauses to refugees from the Republics of Malawi and Mozambique, UNHCR, Geneva, 31 December 1996, paras.6-8.

⁷³ Terms such as "atrocious", "egregious" or "appalling" are sometimes used. *Handbook* para. 136; Canadian guidelines, *supra* note 53; Fitzpatrick, *supra* note 53 at 361.

grounds, but who are victims of severe past persecution or who face other serious danger if removed to the state of origin.⁷⁴ Such persons retain or acquire the legal status of refugees.

81. Another option is to provide complementary protection, what Executive Committee Conclusion No. 69 (XLIII) para. (e) refers to as "an appropriate status". Those eligible for such complementary protection might include victims of severe past persecution; persons facing other dangers in the state of origin; persons with family ties in the state of refuge; vulnerable persons, such as the aged, unaccompanied children, women victimized by gender-based violence who would be ostracized at home, and the disabled; and persons who would face serious privation if repatriated. Some of these types of complementary protection have an international law underpinning, such as *non-refoulement* for persons meeting a broadened refugee definition; persons facing a serious risk of torture or cruel, inhuman or degrading treatment or punishment; and persons whose right to family life would be infringed without proper justification.⁷⁵ State practice on complementary protection is quite disparate,⁷⁶ and it has generally not been developed with cessation of refugee status in mind.

82. Where the cessation clauses are applied, the better practice is to grant relief under an appropriate exception, if the person is eligible, during the same proceeding. Models for good practice can be derived from examples such as grants of refugee status on the basis of past persecution during initial status determination, incorporation of *non-refoulement* obligations under human rights treaties into refugee status determination processes and fair procedures for grants of humanitarian leave to remain. Unfortunately, the initial proposal for harmonization of refugee procedures (both grant and withdrawal of refugee status) in the EU fails to address complementary protection.⁷⁷

83. Where the refugee is able to secure a residence permit because of the passage of time or family ties, the purposes of a cessation exception may be accomplished (that is, the individual is spared the hardship of return to the state of persecution and enjoys benefits equivalent to those as a refugee). However, refugee status should not terminate if the residence permit could be quickly

⁷⁴U.S. law follows this model. *Supra* note 53.

⁷⁵Prominent among the human rights bars to *refoulement* or provisions that may prevent deportation are Article 3 of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; Articles 3 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Articles 7 and 17 of the International Covenant on Civil and Political Rights; and Articles 5 and 11 of the American Convention on Human Rights.

⁷⁶See European Council on Refugees and Exiles, Complementary/Subsidiary Forms of Protection in the EU States, April 1999; European Council on Refugees and Exiles, Position on Complementary Protection, September 2000; UNHCR, Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime, UN Doc. EC/50/SC/CRP.18 (2000).

⁷⁷*Supra* note 11.

revoked and the refugee involuntarily repatriated without consideration of continuing risks or hardship.

4. Feasibility of involuntary return

84. Asylum policy in the developed democracies must now be framed in the consciousness that virulent anti-immigrant sentiment exists in some political quarters. Interest in more frequent application of the cessation clauses may be intended to appease restrictionists who insist that asylum not be a backdoor to immigration. However, states of asylum are mandated by Article 34 to facilitate the integration of recognized refugees. Quick removal of failed asylum seekers is a question different than return of those who have proved their eligibility for international protection.

85. Whether restrictionist sentiment will result in prioritization of the cessation process for recognized Convention refugees is dubious. The best assimilated and long-resident refugees are an unlikely target for public discontent and enforcement resources. The administrative costs of instituting proceedings against refugees before they have acquired some alternate durable legal status, the obligation to prove that general changed circumstances enable safe return for the individual refugee, and the probability that safe conditions may independently induce voluntary return, combine to deprioritize this type of control measure. The difficulties states have faced in removing failed asylum seekers suggest that cessation is even less likely to result in automatic return.⁷⁸

III. Withdrawal of Temporary Protection

86. Where group-based temporary protection (TP) has been extended to a mass influx of persons, withdrawal of protection may be justified by analogy to the ceased circumstances clauses. Under the OAU Convention those menaced by generalized violence may qualify for refugee status. Application of Article I.4 to persons within the broadened refugee definition may be appropriate, whether the basis for cessation stems from the refugee's own actions or from ceased circumstances.

87. The process for group-based cessation requires clarification. Sufficient evidence of changed circumstances must be available, and it must be determined who bears the burden of proof. In recent practice, individual states have withdrawn temporary protection at different times, creating an impression that the assessment process is not determined by objective criteria. The EU is considering a proposal that would establish a collective mechanism for introducing and terminating temporary protection.⁷⁹ That proposal envisions that information received from

⁷⁸See Gregor Noll, *Rejected Asylum Seekers: The Problem of Return*, in *Migration and Development* 267 (Reginald Appleyard ed. 1999).

⁷⁹Proposal on TP, *supra* note 46.

member states, the European Commission, UNHCR and •other organisations concerned• will be considered in these decisions, which will be taken by a qualified majority of the Council.⁸⁰

88. Access to the Convention refugee status determination process is sometimes suspended while persons enjoy TP, although state practice varies. When TP is terminated because of general changed conditions in the state of origin, an opportunity to file applications for refugee status and complementary protection, including the human rights bars to *refoulement*, should be provided.⁸¹ Asylum states tend to regularize the residence of TP beneficiaries after the passage of time. Where group-based refugee status (rather than TP) has been granted, individualized assessment of the inapplicability of cessation must be provided, as noted in para. 54.

89. The most difficult of residual TP cases may be those where the right to family life is potentially impaired or where economic hardship will result from repatriation. If such grounds categorically prevent repatriation, public support for generous temporary protection in response to mass influx may erode.⁸²

90. Mass expulsion of aliens is forbidden by human rights law. This norm must be considered when group-based withdrawal of temporary protection is followed by mass involuntary repatriation. At the least, nondiscrimination norms should be respected and residual claims given fair hearing.

91. Where refugee camps are militarized, the reluctance of refugees to repatriate voluntarily may result from intimidation and misinformation, rather than fear of actual conditions in the state of origin. The application of OAU Convention Article 1.4(g) and Article 3 could be appropriate in some circumstances against the militarized elements.⁸³

IV. Conclusions and Suggested Topics for Discussion

⁸⁰*Id.* Articles 5(2)(c), 6(2).

⁸¹The EU proposal insures access to refugee status determination no later than the end of TP, whose maximum duration is limited to two years. *Id.* Articles 4, 16. The proposal also requires member states to •consider any compelling humanitarian reasons which may make return impossible or unrealistic in specific cases.• *Id.* Article 20.

⁸²See Fitzpatrick, Temporary Protection, *supra* note 36.

⁸³Article 3 itself should be interpreted narrowly in order to prevent violations of refugees' freedom of expression. The Overview of Key Conclusions/Recommendations of the UNHCR Regional Symposium on Maintaining the Civilian and Humanitarian Character of Asylum, Refugee Status, Camps and other Locations, 26-27 February 2001, Pretoria, South Africa, suggested the following useful list of impermissible activities: (a) propaganda for war, (b) incitement to imminent violence, and (c) hate speech. Suggested responses to such activities included informing refugees of their obligations under international law, working regionally to stem subversive influences and promoting democracy and peace in the region.

92. Conclusions are set out in numbered paragraphs, while suggested topics for discussion are noted by bullet points.

93. State practice concerning cessation remains relatively sparse, but national law and emerging regional standards do make provision for cessation under the 1951 and OAU Conventions.

- Separate provision should be made in national law and in regional standards for the treatment of cessation of recognized refugee status. Matters such as revocation for fraudulent procurement, exclusion and expulsion should be addressed separately.
- The differences between cessation proper and denial of refugee status because post-flight developments have undermined an asylum claim should be emphasized. The tendency of asylum states to apply cessation concepts during initial status determination creates confusion that may undermine the development of clear and fair substantive and procedural standards for cessation.

94. With respect to cessation premised upon changes in personal circumstances under 1951 Convention Article 1C(1-4) and OAU Convention Article I.4(a-d), the key criteria are **voluntariness, intent and effective protection.**

95. Concerning re-availing of national protection (generally, acquisition or renewal of a passport, other contact with state of origin diplomatic and consular authorities or travel to third states on a state of origin passport), it is suggested that the refugee's conduct will generally be •voluntary•. The focus should instead be placed upon the refugee's •intent•, to determine if he or she has signaled a desire to re-establish a formal link to the state of persecution. The refugee's ignorance of alternatives (such as asylum state travel documents, possibilities to marry or divorce without resort to state of origin officials, etc.) is relevant to intent. An objective inquiry into the prospects that the state of persecution will now provide effective protection is also necessary. Cases of physical return or renewed residence in the state of origin are better analyzed under 1951 Convention Article 1C(4) and OAU Article I.4(d) (voluntary re-establishment in the state of origin), rather than under Articles 1C(1) or I.4(a).

96. Previous UNHCR guidance (specifically *Handbook* paras. 121-122) suggests that conduct such as acquisition or renewal of a state of origin passport creates a presumption of intent to re-avail oneself of national protection. This phrasing is unfortunate, as it may suggest that the burden of proof concerning the inapplicability of cessation is on the refugee. This paper stresses throughout that the asylum state bears the burden of proving the applicability of the cessation ground(s) to the individual recognized refugee. Because conduct and conditions are so frequently ambiguous or uncertain, refugees should be given the benefit of the doubt in cessation matters. Refugees should receive notice and a hearing or interview prior to cessation, unless it is genuinely impossible to locate them or they have obtained another secure status in the asylum state (citizenship or durable residence with rights at least equivalent to those enjoyed as a refugee) and cessation is a mere formality. During cessation proceedings, refugees may be required to explain ambiguous conduct, and adverse inferences may be drawn from unreasonable silence or non-cooperation. But the asylum state should bear the burden of proof.

- With respect to re-availment of protection under Article 1C(1) and Article I.4(a), the key issues for discussion are: (1) who bears the burden of proof on voluntariness, intent and effective protection, and (2) whether acquisition or renewal of passports should be taken to suggest re-availment of national protection in an era of high concern for smuggling and false documents, and (3) whether instances of long-term or brief return to the state of origin should be examined only for re-establishment under Article 1C(4) and Article I.4(d), rather than re-availment of protection, to avoid confusion.

97. The three criteria of voluntariness, intent and effective protection also govern application of Article 1C(2) and Article I.4(b), relating to re-acquisition of nationality. Where the restoration of nationality occurs as a result of conduct initiated by the refugee, the analysis is very similar to that in cases involving re-availment of protection. Where •redintegration• (restoration of nationality through action or legislation initiated by the state of origin) occurs, careful analysis of the situation is required. Voluntariness is crucial, as a refugee may not be stripped of international protection if he or she refuses to re-acquire the lost nationality of the persecuting state. *Handbook* para. 128 suggests that where refugees are given the choice to opt out of general nationality-restoration measures, cessation may be applied if they fail to act. Such a categorical approach is not justified, because an inquiry into the third element, the likelihood that the state will actually provide effective protection, is also necessary.

- Whether refugees who fail to opt out of programs for restoration of nationality should be regarded as having voluntarily re-acquired their nationality.

98. While Article 1C(2) applies only where the refugee has voluntarily re-acquired nationality, Article 1C(6) appears to permit cessation where a stateless refugee could return in safety to a former state of habitual residence owing to changed political circumstances, but refuses voluntarily to do so. The paper suggests that Article 1C(6) cessation should be avoided unless the state of origin will accept the return of its former nationals and provide them effective protection. Otherwise, stateless refugees experiencing loss of refugee status, but who cannot be repatriated, might be forced to remain in the asylum state in an irregular status.

99. The least problematic cessation scenario is acquisition of the nationality of the state of refuge, as provided for in Article 1C(3) and Article I.4(c). The refugee enjoys legal rights at least equivalent to those guaranteed by the refugee conventions and is secure against forced return to the state of persecution. In many cases, the grant of naturalization will result in cessation of refugee status without the necessity of a separate and formal cessation proceeding. Where a non-refugee residence permit, rather than citizenship, is granted, a similar automatic loss of refugee status may result. In this second situation, states must be cautious to insure that legal rights at least equivalent to those guaranteed by the refugee conventions are conferred with the residence permit in order to justify automatic cessation. If this is not the case, refugee status should be maintained until the conclusion of a formal cessation proceeding and a finding that one of the cessation grounds applies to the individual.

- Whether automatic cessation of refugee status should occur as a result of naturalization in the state of refuge or as a result of a grant of another type of residence permit. In the latter

situation, whether additional measures are necessary to prevent revocation of the permit and potential return to persecution or other hardship.

100. Acquisition of third state nationality is also envisioned as a basis for cessation under Article 1C(3) and Article I.4(c). Again, where legal rights at least equivalent to those enjoyed as a refugee and security against forced return to the state of persecution accompany the acquisition of the third state nationality, cessation may be imposed. Article 1C(3) and Article I.4(c) notably do not include a requirement of voluntariness. In situations where nationality is conferred without specific application by the refugee, asylum states must engage in three inquiries prior to the imposition of cessation: (1) whether effective protection is available from the new state of nationality, (2) whether there is a genuine and effective link between that state and the new citizen, and (3) whether the nationality law itself contravenes human rights norms, for example prohibitions on gender discrimination.

101. Where the new state of nationality is a successor state to the state of persecution, inquiries into the prospects for effective protection are crucial and automatic cessation would pose unacceptable risks. Because conditions in the successor state may be unstable, the benefit of the doubt should be given to the refugee who resists acquisition of successor state nationality. Fair hearings will assure that, for example, members of racial, ethnic and religious minorities are not forcibly sent to a successor state willing to confer its nationality by operation of law but unlikely to offer effective protection.

- Whether cessation based on acquisition of third state nationality should be conditioned on an inquiry into (1) the availability of effective protection, (2) the existence of a genuine and effective link between the refugee and the new state of nationality, and (3) the compatibility of the third state nationality law with human rights norms.

102. The risk that country conditions may be volatile is present in many cases involving re-establishment in the state of origin under Article 1C(4) and Article I.4(d). The paper suggests that fair proceedings, granting the benefit of the doubt to refugees and built-in delay in application of the cessation clauses are appropriate. Prospects for sustainable voluntary repatriation are enhanced where refugees have the option to undertake assessment visits or to attempt re-establishment into uncertain conditions, without having to forfeit their refugee status upon departure. The elements of voluntariness, intent and effective protection are vital in re-establishment cases. Re-establishment denotes transfer of primary residence with a subjective reaffiliation to the state of origin, rather than brief visits.

- Whether delay should be built into cessation procedures relating to re-establishment in the state of origin, so as to accommodate assessment visits and voluntary repatriation into uncertain conditions, and whether procedures for accelerated revival of refugee status should be made available where an attempt at re-establishment fails.

103. • Article I.4(f) and (g) of the OAU Convention are treated structurally as cessation clauses but they operate functionally as expulsion clauses because they apply without regard to the cessation of the risks of persecution or violence in the state of origin. Aside from their formal incorporation into national asylum statutes in some African states, little was learned about the

application of these clauses during this study. Article I.4(f) (commission of a serious non-political crime in a third state following grant of refugee status) appears to be intended to deter abuse of asylum by criminal elements. However, return to persecution appears an ill-suited response, especially where the refugee has been duly punished by the state in which the crime was committed. Where the refugee has escaped punishment, extradition to the third state is preferable to forced repatriation to a unchanged risk of persecution or other violence giving rise to refugee status under the OAU Convention. Moreover, refugees may be entitled to the human rights bars to expulsion. Article I.4(g) should be given a narrow interpretation as a vehicle to implement the Article 3 ban on subversive activities against other OAU states.

- Whether state practice under Article I.4(f) of the OAU Convention has indicated problems resulting from its mix of expulsion and cessation concepts.
- Whether Article I.4(g) of the OAU Convention is generally treated as a means to implement the anti-subversion norm of Article 3, and whether restrictive criteria can be developed in order to accommodate refugees' freedom of expression.

104. Ceased circumstances cessation has attracted renewed attention during a period of rapid political change in many refugee-generating states. Application of the ceased circumstances cessation clauses in Article 1C(5-6) and Article I.4(e) does not hinge upon voluntariness or intent. Instead, application requires an objective inquiry into the availability of effective protection in the state of former persecution. The paucity of state practice in terminating individual grants of refugee status appears to persist, even though many asylum statutes (including those enacted or amended in recent years) specifically incorporate the ceased circumstances cessation grounds.

•Practice• involving reference to fundamental political change has nevertheless proliferated in the context of initial status determination. This creates difficulty and confusion, since the burden of proof of continuing well-founded fear is generally placed upon the asylum applicant during initial status determination, while the asylum state should bear the burden of proof of fundamental, durable and effective change when terminating refugee status.

105. Procedural fairness in ceased circumstances cessation is vital. Fair process should include:
- notice,
 - hearing or interview,
 - a neutral decision-maker,
 - examination of evidence from a wide range of sources,
 - consideration of potential threats to the refugees' fundamental rights,
 - burden of proof on the asylum state
 - particularized inquiry into the relevance of changed conditions to the refugees' personal situation,
 - delay for purposes of assessing the durability of change.

106. A general finding of changed circumstances in the state of origin does not justify a blanket pronouncement of cessation, shifting the burden to individual recognized refugees to seek reconsideration of their claims and an opportunity to prove that they face a continuing risk of persecution or that they qualify for an exception. Only where refugee status has been granted on a group basis may it be terminated on such a basis, and only where procedures exist to permit

individuals to establish continued eligibility for international protection either as refugees or as candidates for some other lawful status or complementary protection.

107. Where a new persecutor has displaced the old in the state of origin, it is theoretically permissible to cease refugee status and provide a new status determination procedure. Termination of refugee status is inappropriate unless an immediate grant of new status is provided. Such refugees continue to be entitled to international protection, by virtue of the new risk. To terminate an existing grant of refugee status, simply to issue that status anew, is administratively wasteful and should be discouraged. Where the change in circumstances occurs between the time of flight and the time of initial status determination, a different set of issues is posed. These have to do primarily with the differences between those states (a majority) in which the refugee definition is entirely forward-looking and those that establish a presumption of continuing well-founded fear upon proof of past persecution.

108. Where post-flight change of circumstances figures in initial status determination, some states have announced "cessation" orders for applicants of certain nationalities. The result is transfer of cases to an accelerated procedure disadvantageous to the applicant (presumption against persecution, lack of suspensive effect during appeal, etc.). This misuse of the cessation concept should be discouraged. Functionally, these measures resemble the controversial "safe country of origin" concept, which also may place genuine refugees at risk and add unnecessary complexity to the status determination process.

109. Other states establish a presumption of continuing fear of persecution upon proof of past persecution. This may have the effect of shifting the burden of proof concerning the relevance of post-flight change in circumstances from the asylum applicant to the asylum state officials. In such cases, asylum may be granted if the applicant has suffered severe past persecution or has reason to fear other serious harm. These are not actual cessation cases, but this practice illustrates two welcome policies that should be encouraged in cessation: (1) placement of the burden of proof on the existence and relevance of changed circumstances in the state of origin on the asylum state officials, giving the refugee/asylum applicant the benefit of the doubt in these uncertain situations; and (2) explicit statutory provision for exceptional cases, with relief commensurate to that enjoyed as a refugee.

- What procedures should be used to assess political conditions in the state of origin in order to determine if fundamental, durable and effective change has occurred under Article 1C(5-6) and Article I.4(e), including sources of evidence and UNHCR's role in the assessment
- What procedural protections should apply during cessation, and whether these include at a minimum: notice, hearing or interview, neutral decision-maker, examination of evidence from a wide range of sources, allocation of the burden of proof to the state of refuge, delay to determine durability of change, and determination of eligibility for exceptions or complementary protection.

110. On exceptions generally, state practice does provide support for UNHCR's assertion of a broader humanitarian principle in *Handbook* para. 136 and in Executive Committee Conclusion No. 69 (XLIII). However, practice is not consistent and may be informal. Moreover, there is no agreement whether the relief should involve continuation of refugee status, rather than a different

type of residence permit or even naturalization. Those eligible for exceptions may include: (1) persons who would suffer severe trauma by being forced to return to the scene of severe past persecution of themselves or a family member; (2) persons who would suffer other serious harm such as non-persecutory violations of human rights (especially those entitled to the human rights bars to expulsion); (3) persons with special vulnerabilities whose survival in the state of origin would be difficult, such as unaccompanied children, traumatized women, the elderly and the disabled; (4) persons with close family ties in the state of refuge and (5) persons whose repatriation would result in serious financial loss. The last category is the most problematic.

111. States should be encouraged to codify exceptions and to integrate an approval process into the cessation procedure. Those suffering severe past persecution or the prospect of return to serious human rights violations should receive relief equivalent to refugee status, in substance if not in name. Those with special vulnerabilities, family ties or risk of economic loss should be treated humanely and not be forced into a quasi-legal status, but treatment as refugees may not be necessary.

112. UNHCR, when invoking cessation under Article 6 of its Statute, attempts to set examples for asylum states hosting the same groups of refugees. The exceptions in Article 6(e) of the Statute are relatively broad • persons who present • grounds other than personal convenience • (not including • purely economic • reasons) for refusing repatriation.

- What classes of refugees subject to cessation should be spared involuntary repatriation (those with severe past persecution to themselves or family members; those who face other serious harm or who are eligible for the human rights bars to *refoulement*; persons with special vulnerabilities such as unaccompanied children, traumatized women, the elderly and the disabled; persons with close family ties in the state of refuge; and persons whose repatriation would result in serious financial loss), and what types of relief such persons should enjoy.

113. The disinclination of asylum states to apply the cessation clauses to recognized refugees has persisted despite renewed interest in the concept and its statutory codification in some states. The expert roundtable could helpfully explore the reasons for this disinclination and whether new developments portend a shift toward more frequent application. Attitudes toward the link between asylum and immigration and toward the desirability of full integration of non-citizen residents will shape cessation practice, and thus trends in these political matters in asylum states deserve discussion. Because cessation concepts figure frequently in two other distinct contexts, initial status determination and cessation of UNHCR protection under its Statute, the expert roundtable offers an opportunity to distinguish those situations, substantively and procedurally, from cessation by asylum states.

- Whether public and state attitudes favor greater application of the cessation clauses to recognized refugees, and, if so, how facilitation of naturalization under Article 34 and local integration as a durable solution can still be advanced.

114. The incentives for an asylum state to terminate refugee protection, with or without a solid factual basis, may be heightened where it is heavily burdened by a mass influx. Details concerning individuals in a mass influx may be largely unknown to asylum state authorities, and thus harm

may result from generalizations concerning changed conditions. An acute need exists to refine substantive benchmarks for withdrawal of protection, to establish an objective and preferably collective process for assessing relevant political and/or social change, and to provide continued protection to individuals facing persecution and to other vulnerable persons.

- Whether group-based cessation (termination of group-based refugee status, cessation of UNHCR protection role, withdrawal of temporary protection) requires different procedures than cessation of individual recognized refugee status.

