

# Applying the ‘Ceased Circumstances’ Cessation Clause: More Politics than Law?

Georgia Cole\*

## ABSTRACT

Drawing on a detailed history of the ‘ceased circumstances’ cessation clause that was invoked for Eritrean refugees in 2002, this article highlights why the starting point for any analysis of the application of article 1C(5) of the 1951 Convention relating to the Status of Refugees must focus as much on politics as on law. This is not only because of the impossibility of insulating States and the United Nations High Commissioner for Refugees (UNHCR) from the political pressures that surround any determination of ‘ceased circumstances’ in a particular country, but also because the very standards on which such a determination rests are inherently relational, circumstantial, and political. Despite guidelines on the application of the clause promoting an ‘objective and verifiable’ approach, they rest on assessments of a ‘functioning’ government and ‘effective’ protection, of acceptable standards of human rights, and of the ‘best interests’ of refugees, all of which are geographically and historically contingent. The article thus argues that focusing on the legal standards that ostensibly underpin any invocation of article 1C(5) may perpetuate the fallacy that these standards can ever be objectively determined and, in focusing attention on how to better clarify these thresholds and conditions, this approach may, in certain instances, divert attention from confronting the political pressures that govern the application of the clause.

## 1. INTRODUCTION

Article 1C of the 1951 Convention relating to the Status of Refugees (Refugee Convention)<sup>1</sup> contains an exhaustive list of ways in which refugee status can end because ‘it is no longer necessary or justified.’<sup>2</sup> For those involved in the drafting and the early years of the Convention’s application, this list was intended to ensure that individuals should not live under, or be entitled to,

\* Chancellor’s Fellow, School of Social and Political Sciences, University of Edinburgh, Scotland, United Kingdom. Email: [Georgia.cole@ed.ac.uk](mailto:Georgia.cole@ed.ac.uk). The arguments in this article build on the author’s doctoral thesis and a chapter contributed to *The Oxford Handbook of International Refugee Law*, both of which are cited below. The author wishes to thank the two anonymous reviewers who provided such helpful comments for sharpening this article. Its remaining weaknesses are the author’s alone.

1 Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).  
2 United Nations High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/ENG/REV.4 (1979, reissued 2019) (Handbook) 29.

the surrogate protection of another State indefinitely.<sup>3</sup> There are commonly, if somewhat simplistically,<sup>4</sup> two routes by which refugee status may end: article 1C(1)–(4) are seen as responding to the actions of refugees themselves, for example, through their voluntary re-availment of the protection of their country of origin, whereas article 1C(5) and (6) are argued to respond to an objective change in the conditions in refugees' countries of origin that means they may no longer require international protection. Article 1C(5) and (6) are thus commonly referred to as the 'ceased circumstances' cessation clauses (or even more simply by the United Nations High Commissioner for Refugees (UNHCR) as 'the cessation clause/s' or 'cessation' in materials discussing their applicability and implementation),<sup>5</sup> and ensure that the Convention 'shall cease to apply' to an individual fulfilling the definition of a refugee as laid out in article 1A if '[h]e can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality'.<sup>6</sup> The bottom line is that if there is no longer a reason for an individual to fear persecution, meaning that their reasons for being unable or unwilling to avail themselves of the protection of their country of origin have disappeared, countries of asylum and UNHCR should no longer carry responsibility for providing them with protection as refugees.

There are numerous unresolved legal issues concerning the 'ceased circumstances' cessation clause, particularly with regard to how decisions are, or could be, made about its invocation and the factors relevant to this. In the former category are ongoing discussions about which actors are able to provide protection in countries of origin, with a particular focus on the extent to which the presence of non-State actors with effective control over State territories is sufficient to justify the invocation of article 1C(5).<sup>7</sup> This feeds into broader, continuing debates among academics, lawyers, governments, and supranational bodies as to which factors are relevant when assessing the applicability of article 1C(5): for instance, whether it is only necessary that the conditions or actions that caused a refugee's initial persecution and flight have ceased in order to invoke cessation (as the Australian government has argued),<sup>8</sup> or whether the restoration of broader human rights is necessary, either to prevent 'further political unrest',<sup>9</sup> or as part of determining that 'effective protection' has been restored.<sup>10</sup> There are also concerted academic attempts to restrain what Maria O'Sullivan predicts will be States' enthusiasm for 'an increased interest in utilising cessation as a mechanism to compel refugees to return to their country of origin'.<sup>11</sup> This is already seen in States' greater consideration of whether they can apply cessation to individuals who have originated from, or could be sent to, specific parts of the country of

3 UNHCR Standing Committee, 'Note on the Cessation Clause', UN doc EC/47/SC/CRP.30 (30 May 1997) para 4.

4 See Georgia Cole, 'Cessation' in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Publishing 2021) 1031.

5 For example, see UNHCR, 'Guidelines on International Protection No 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)', HCR/GIP/03/03 (10 February 2003), in which UNHCR repeatedly refers to 'Cessation under Article 1C(5) and 1C(6)' as simply 'cessation'. Similarly, in UNHCR, 'Applicability of the "Ceased Circumstances" Cessation Clauses to Eritrean Refugees Who Flew Their Country as a Result of the War of Independence which Ended in June 1991 or as a Result of the Border Conflict between Ethiopia and Eritrea which Ended in June 2000' (18 February 2002) <<https://www.refworld.org/docid/4165729f4.html>> accessed 12 February 2014, UNHCR refers to the application of art 1C(5) and (6) to Eritrean refugees in para 11 as the 'cessation clause enter[ing] into force'. While art 1C(1)–(6) of the Refugee Convention are thus all technically cessation clauses, this article follows established practice from UNHCR documents by using 'the cessation clause' and 'cessation' to refer to the specific application of art 1C(5) and (6).

6 Refugee Convention (n 1) art 1C(5).

7 Maria O'Sullivan, 'Acting the Part: Can Non-State Entities Provide Protection under International Refugee Law?' (2012) 24 *International Journal of Refugee Law* 85; Roger Errera, 'Cessation and Assessment of New Circumstances: A Comment on *Abdulla*, CJEU, 2 March 2010' (2011) 23 *International Journal of Refugee Law* 521, 528.

8 John Vrachnas, 'The Operation and Scope of Article 1C(5) of the United Nations Convention relating to the Status of Refugees' (2005) 1 *Journal of Migration and Refugee Issues* 51.

9 UNHCR, 'The Cessation Clauses: Guidelines on Their Application' (26 April 1999) para 28.

10 Maria O'Sullivan, *Refugee Law and Durability of Protection: Temporary Residence and Cessation of Status* (Routledge 2019); James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, Cambridge University Publishing 2014) 464.

11 O'Sullivan (n 10) 1.

origin in which conditions are understood to be safer than the human rights situation in other parts of the country. O'Sullivan cautions that such a move rests on the same flawed logic as the internal flight alternative,<sup>12</sup> while UNHCR argues that '[r]efugee status can only come to an end if the basis for persecution is removed without the precondition that the refugee has to return to specific safe parts of the country in order to be free from persecution.'<sup>13</sup>

The issue that forms the crux of this article, however, and that is analysed further below, is that even if these and other legal issues pertaining to the application of article 1C(5) could be decisively resolved, the application of the 'ceased circumstances' cessation clause will always be an intensely political process. UNHCR may, for example, have attempted to articulate the 'objective and verifiable' conditions that must have 'ceased to exist' in order to justify the clause's invocation,<sup>14</sup> but the organization's guidelines surrounding the conditions required to justify applying article 1C(5) to refugees contain standards that remain relatively open to interpretation and yet closed to the political complexity of interpreting them. UNHCR's early attempts to define these conditions provided that cessation should only be invoked if there are 'fundamental changes in the country of origin which can be assumed to remove the basis of the fear of persecution', meaning that State protection must be restored in a way that specifically addresses the reasons that caused the individuals to leave initially.<sup>15</sup> There was little in these guidelines, however, that conclusively restricted the interpretation of many of these words: 'fundamental' was vaguely defined as 'major, profound or substantial',<sup>16</sup> and the 'changes' were required to be 'durable' and 'effective'.<sup>17</sup> In terms of which human rights should be assessed as part of the 'general human rights situation'<sup>18</sup> in the country of origin, UNHCR suggested that the following 'may' be considered:

right to life and liberty and to non-discrimination, independence of the judiciary and fair and open trials which presume innocence, the upholding of various basic rights and fundamental freedoms such as the right to freedom of expression, association, peaceful assembly, movement and access to courts, and the rule of law generally.<sup>19</sup>

Even the most recent edition of UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* stresses that '[t]here is no requirement that the standards of human rights achieved must be exemplary. What matters is that significant improvements have been made.'<sup>20</sup>

From the outset, then, the exact scope and content of the 'general human rights' situation that would be required in order to invoke cessation in the country of origin has evolved in UNHCR's guidance from being exclusively 'objectively' defined to resting on the more geographically and historically contingent idea of 'significant improvement'. Determining whether cessation should be applied to a given population now relies on States and UNHCR asking relational questions that draw on historical knowledge of what came before refugees' flight, as well as political expectations of what constitutes progress and 'improvement' in any given context. The thresholds for factors including 'effective' and 'available' State protection, 'respect for the right to life

12 *ibid* 124.

13 UNHCR Handbook (n 2) 103.

14 UNHCR Executive Committee Conclusion No 69 (XLIII), 'Cessation of Status' (1992).

15 UNHCR, 'The Cessation Clauses: Guidelines' (n 9) para 25.

16 *ibid*.

17 UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.3 (1979, reissued 2011).

18 UNHCR, 'ExCom Conclusion No 69' (n 14).

19 UNHCR, 'Note on Cessation Clauses', UN doc EC/47/SC/CRP.30 (30 May 1997) para 23.

20 UNHCR Handbook (n 2) 103.

and liberty', and 'functioning government'<sup>21</sup> upon which cessation rests are thus assessed relative to the country's perceived history and anticipated trajectory, both of which are frequently contested by governments, residents, and refugees, even when external monitoring and United Nations (UN) consultancy reports present an ostensibly more impartial picture. On the one hand, it could be argued that it is unrealistic, and perhaps inappropriate, to expect that threshold to be fully standardized. UNHCR indeed states that it cannot wait for perfect conditions in countries of origin before promoting repatriation or cessation, not least because refugees themselves rarely wait for a potentially unattainable standard to be met before they return.<sup>22</sup> On the other hand, establishing that the threshold for invoking article 1C(5) has been met entails a projection by actors other than the affected refugees themselves of what is understood to be an acceptable long-term human rights situation for certain citizens in certain parts of the world, with differences in acceptable standards of protection undoubtedly reflecting contested racialized, colonial, and postcolonial ideals of a 'functioning' State. As this article subsequently demonstrates, assessing whether this threshold of 'significant improvement' has been met can thus never be either apolitical or objective.

Beyond that, this article shows how decision making concerning the invocation of article 1C(5) is, and can become, heavily conditioned by broader political processes and priorities. In an article commissioned by UNHCR for an expert roundtable meeting on the application of the 'ceased circumstances' cessation clauses held in 2001, Joan Fitzpatrick concurred that the termination of refugee status depends on a number of factors other than legal standards, such as 'immigration enforcement priorities, [refugees'] social and legal assimilation and political attitudes towards long-resident migrants',<sup>23</sup> all of which affect where the line of acceptable, but not 'exemplary', standards is drawn. For Rafael Bonoan, who was involved in the same review process, the application of a cessation clause could easily be understood by States as serving far more pragmatic political functions: 'Declarations of cessation signal that governments are working to address abuses of the institution of asylum, and greater flexibility toward the use of the "ceased circumstances" provisions on the part of UNHCR can help demonstrate support for such efforts.'<sup>24</sup> He thus saw the potential for cessation to be used as a punitive tool, applied by States to rectify abuses of asylum, as opposed to its intended function as an assessment tool that, through discussions between governments, UNHCR, and refugee communities, can be used to determine the appropriate endpoint of refugee status.

Two decades on from UNHCR's expert roundtable, this article reflects on the extent to which the application of article 1C(5) needs to be approached by lawyers, academics, and governments as mediated as much by politics as by law. In contrast to the author's chapter in *The Oxford Handbook of International Refugee Law*, which put politics aside to focus on the legal questions relevant to the interpretation and implementation of article 1C,<sup>25</sup> this article brings politics resolutely back in, arguing that both the wording and function of article 1C(5) make it critical to foreground political questions when seeking to understand and interpret it. This article also adds to recent empirical work on the application of article 1C(5), with its strong focus

21 UNHCR, 'Guidelines on International Protection No 3' (n 5) 103, 102.

22 Michael Barnett, 'UNHCR and the Ethics of Repatriation' (2001) 10 *Forced Migration Review* 31.

23 Joan Fitzpatrick, 'Current Issues in Cessation of Protection under Article 1C of the 1951 Refugee Convention and Article I.4 of the 1969 OAU Convention' (Paper commissioned by UNHCR and the Carnegie Endowment for International Peace as a background paper for an expert roundtable 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, UNHCR 2001) para 3.

24 Rafael Bonoan, 'When Is International Protection No Longer Necessary? The "Ceased Circumstances" Provisions of the Cessation Clauses: Principles and UNHCR Practice, 1973–1999' (Working Paper No 8 prepared for UNHCR's 'Global Consultations on International Protection/Second Track, Lisbon Expert Roundtable', 3–4 May 2001) para 58.

25 Cole (n 4).

on the case of Rwandan refugees,<sup>26</sup> by detailing a case study that has received almost no attention: the application of the 'ceased circumstances' cessation clause to Eritrean refugees that was announced by UNHCR in 2002. As in the Rwandan case,<sup>27</sup> a detailed historical analysis of the application of article 1C(5) to a particular refugee population,<sup>28</sup> in this case Eritreans, provides a way in which to systematically trace how the political priorities of States and UNHCR drive decision making relating to its implementation, as well as how the vagaries of the legal frameworks that inform the application of article 1C(5) enable this. This is particularly important given how decisions to apply article 1C(5) have been used by States and UNHCR to justify other pillars of their comprehensive strategies for ending protracted refugee situations, without having a clear basis in – or even in direct contradiction of – international refugee law. These include these actors using cessation as a justification for promoting that refugees return to their countries of origin because article 1C(5) has either been invoked or is under discussion, despite the invocation of article 1C(5) having no automatic relationship to return movements, as well as host States rejecting asylum requests from any citizens originating from a country of origin for which cessation has been applied or is under consideration, even when the terms of article 1C(5) in those cases do not take in new claimants' reasons for seeking international protection.<sup>29</sup>

The article concludes by discussing why it is so important to explore the political functions of article 1C(5) and, to some extent, international refugee law more broadly, alongside legal questions about the provision's wording and applicability. It outlines why this matters for garnering a more accurate understanding of how and why cessation comes to be applied in particular contexts, and, through this, for enhancing UNHCR's accountability in this process as it positions itself somewhat precariously as both arbiter and enactor of article 1C(5). In addition, beyond this, the article argues that approaching the study of cessation primarily through a legal lens can lead to the suggestion that what is needed to prevent its misapplication is the improvement, expansion, or tightening of the guidelines that inform its use, which potentially distracts from more relevant political questions about the application of article 1C(5) that may improve the overall oversight and accountability of this area of international refugee law. This article instead suggests that the inherently relational and circumstantial nature of these guidelines renders them largely incapable of restricting the impact of politics on how they come to be interpreted, notwithstanding the acute role that different political agendas will always play in driving decision making concerning the application of article 1C(5).

## 2. THE CESSATION CLAUSE FOR ERITREAN REFUGEES

During the author's research into the decision-making processes that surrounded the 2002 application of article 1C(5) to Eritrean refugees, it became clear that there was an almost complete

26 Georgia Cole, 'Beyond the Politics of Labelling: Exploring the Cessation Clauses for Rwandan and Eritrean Refugees through Semiotics' (DPhil thesis, University of Oxford 2016); Lindsey N Kingston, 'Bringing Rwandan Refugees "Home": The Cessation Clause, Statelessness, and Forced Repatriation' (2017) 29 *International Journal of Refugee Law* 417; Kelly A Yotebieng, Jennifer L Syvertsen, and Paschal Kum Awah, 'Cessation Clauses, Uncertain Futures and Wellbeing among Rwandan Urban Refugees in Cameroon' (2019) 32 *Journal of Refugee Studies* 436; Kelly E McMillan, 'Uganda's Invocation of Cessation regarding Its Rwandan Refugee Caseload: Lessons for International Protection' (2012) 24 *International Journal of Refugee Law* 231; Andrew S Sniderman, 'Explaining Delayed Cessation: A Case Study of Rwandan Refugees in Zimbabwe' (2015) 27 *International Journal of Refugee Law* 607.

27 McMillan (n 26).

28 The history of the application of art 1C(5) to Eritrean refugees was reconstructed through interviews conducted between 2013 and 2016 with government representatives, UNHCR officials, and other parties involved in this process. All interviews were approved by the Central University Research Ethics Committee at the University of Oxford, and all participants provided oral informed consent for the interviews to be recorded and used in future academic publications. Participants were either interviewed in person in Kampala, Kigali, Asmara, or Geneva, or on Skype. Interviews were supplemented by extensive archival research at the Ministry of Labour and Human Welfare in Asmara, Eritrea; the Ministry of Disaster Management and Refugee Affairs in Kigali, Rwanda; and with UNHCR officials in Geneva, Switzerland, and by using UNHCR material available online.

29 Cole (n 26).



lack of awareness among UNHCR officials, from offices in East Africa through to Geneva, that cessation had been invoked in this case. This lack of awareness among UNHCR officials of the contentious history of the 2002 'ceased circumstances' cessation clause for Eritrean refugees was unexpected for several reasons, not least because there were reportedly 317,900 refugees originating from Eritrea at the time of the clause's invocation, with over 305,000 of these individuals residing in Sudan.<sup>30</sup> For this event to have been so hazy in UNHCR's institutional memory, if not almost completely erased, was puzzling. To more recent officials in UNHCR, there were also several reasons why it seemed inconceivable that the organization would have supported the cancellation of the refugee status of these individuals in 2002. First, Eritrea was not then a party to any of the legal frameworks that protect refugees or to most of the other major international treaties.<sup>31</sup> Its constitution-building process had been suspended some years earlier, casting doubt upon any positive assessment concerning the development of 'national institutions for human rights protection.' In its guidelines at the time, UNHCR nonetheless considered the development of these institutions as a key indicator of the 'fundamental change' needed for article 1C(5) to be considered applicable.<sup>32</sup>

Secondly, and somewhat relatedly, the timing of this announcement seemed surprising. Following a referendum to determine Eritrea's future, the country had achieved *de jure* independence in 1993. The period directly following this, until the country again descended into war with Ethiopia in 1998, was one of relative peace and security, with widespread optimism about Eritrea's political and economic future.<sup>33</sup> There was nonetheless almost no discussion in the 1990s about whether to cancel the status of over 420,000 Eritreans then residing in Sudan.<sup>34</sup> Yet, cessation was invoked comparatively quickly after the ceasefire in hostilities with Ethiopia in 2000. This was despite a marked deterioration in human rights conditions within Eritrea from September 2001 onwards as government-instigated repression increased.<sup>35</sup> Amnesty International thus briefly stated concern in 2002 'that the recent announcement of cessation of refugee status for Eritrean refugees sends a confusing message about conditions in Eritrea.'<sup>36</sup> There was, however, little coverage of the deteriorating situation other than this, either in the international media or by UNHCR, which also produced almost no supportive documentation to justify its decision to promote the invocation of article 1C(5). Furthermore, evidence suggests that the two other major stakeholders in the negotiations over its applicability – namely the governments of Eritrea and Sudan – were only marginally concerned with pushing this process through.

This article therefore argues that UNHCR was the main driver of these events for reasons largely unrelated to legal guidelines. This is despite UNHCR's Executive Committee of the High Commissioner's Programme (ExCom) Conclusion No 69 clarifying that UNHCR 'should be appropriately involved' in the application of cessation, for example, by recommending that

30 UNHCR, 'UNHCR Statistical Yearbook 2002', Annex 1 (2 September 2004) <<https://www.unhcr.org/413598454.html>> accessed 12 April 2014.

31 Amnesty International, "'You have no right to ask": Government Resists Scrutiny on Human Rights' (2004) <<https://www.amnesty.org/en/documents/AFR64/003/2004/en/>> accessed 10 November 2021.

32 UNHCR, 'Note on Cessation Clauses' (n 19) para 23.

33 Lucia McSpadden, 'Contradictions and Control in Repatriation: Negotiations for the Return of 500,000 Eritrean Refugees' in Richard Black and Khalid Koser (eds), *The End of the Refugee Cycle? Refugee Repatriation and Reconstruction* (Berghahn Books 1999); Amare Tekle, 'International Relations in the Horn of Africa (1991–96)' (1996) 23 *Review of African Political Economy* 499.

34 UNHCR, 'Statistical Yearbook 2002' (n 30) Table A.7.

35 Gaim Kibreab, 'The Eritrean National Service: A Missed Opportunity' in Citizens for Democratic Rights in Eritrea (eds), 'Taking on Current Political Issues of Eritrea: Proceedings from CDRiE's Conference, 11 January 2009, and CDRiE's Symposium, 9 January 2010' <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1664873&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1664873&download=yes)> accessed 10 May 2014; Amnesty International (n 31).

36 Amnesty International, 'Malta: The Government Should Suspend Deportations of Eritreans' (11 October 2002) <<https://www.amnesty.org.uk/press-releases/malta-government-should-suspend-deportations-eritreans>> accessed 19 November 2021.

cessation be considered in relation to particular refugee populations or by providing an indicative timeline for its invocation, but that its application 'rests exclusively with the Contracting States'.<sup>37</sup> At the time, UNHCR also recommended that in order to confirm that any changes in the country of origin were sufficiently 'durable' and 'effective'<sup>38</sup> to justify invoking article 1C(5), at least 12 months<sup>39</sup> should have elapsed since the relevant changes had occurred. In this case, UNHCR's public deliberations about the declaration of cessation were occurring even before the conflict between Ethiopia and Eritrea was formally resolved in December 2000, making it almost impossible to evidence that 'stable' and 'durable' change could have occurred. When UNHCR issued its note on the potential application of article 1C(5) to this caseload in February 2002,<sup>40</sup> although 12 months may have elapsed, the successful consolidation of peace between the warring neighbours was far from certain. When deliberations began, the population of Eritrean refugees was comparable to populations such as the 353,700 Croats displaced in the 1991–95 conflict (for whom UNHCR did not recommend article 1C(5) be applied until 2014), or the 266,900 Liberian refugees displaced between 1989 and 2003 (for whom UNHCR did not recommend article 1C(5) be applied until 2012).<sup>41</sup> Thus UNHCR's support for the process did not appear to be based exclusively upon the numbers of refugees involved. Given all this, why then did the organization focus so doggedly on this caseload? And how did it justify recommending a cessation clause that did not necessarily fulfil its own criterion of 'fundamental, stable and durable' change?<sup>42</sup>

## 2.1 Context to the invocation of article 1C(5)

In the case of the cessation clause for Eritrean refugees, the political and economic milieu in which article 1C(5) was invoked must be seen as both context and cause for UNHCR's behaviour, with three main factors converging to result in its recommendation that article 1C(5) be invoked. These concern the organization's relationships with the Eritrean government, with authorities in Sudan, and with its donor States.

First then, the relationship between the Government of Eritrea and UNHCR in the decade after Eritrean independence had been turbulent, and UNHCR saw the cessation clause as a possible route to repairing it. For the most part, breakdowns in the relationship related to how each party had conceptualized and facilitated repatriation: as a short-term process focused solely on the physical return of refugees, or as a long-term development-oriented approach in which repatriation was seen as one component in a more expansive framework of return operations.<sup>43</sup> Shortly after independence, for example, UNHCR had been pushing for the repatriation of Eritrean refugees from Sudan at a time when the Eritrean government was trying to mount a widespread socio-economic recovery plan, which it was concerned would be undermined by large-scale repatriation.<sup>44</sup> At the time, UNHCR nonetheless insisted that repatriation was not always 'likely to be under ideal conditions. In many it will be dogged by political insecurity

37 UNHCR, 'ExCom Conclusion No 69' (n 14).

38 UNHCR Handbook (2011) (n 17).

39 UNHCR does not provide an indicative timeline in the most recent edition of the Handbook (n 2) 102.

40 UNHCR, 'Applicability of the "Ceased Circumstances" Cessation Causes to Eritrean Refugees' (n 5).

41 Sulaiman Momodou, 'Surge in Returns This Year as End of Refugee Status for Liberians Nears' (UNHCR, 26 June 2012) <<https://www.refworld.org/docid/4fec44002.html>> accessed 12 October 2014; UNHCR, 'Note on International Protection', UN doc EC/65/SC/CRP.10 (6 June 2014).

42 UNHCR, 'ExCom Conclusion No 69' (n 14).

43 McSpadden (n 33).

44 Elias Habte-Selassie, 'Homecoming in Eritrea: Challenges and Constraints' in Tim Allen (ed), *In Search of Cool Ground: War, Flight and Homecoming in Northeast Africa* (James Currey 1996); Gaim Kibreab, 'Left in Limbo: Prospects for Repatriation of Eritrean Refugees from the Sudan and Responses of the International Donor Community' in Allen (ed).

and economic uncertainty<sup>45</sup> and accused the Eritrean government of actively trying to prevent the return of its population. The Provisional Government of Eritrea (PGE) reiterated that 'adequate funds had not yet been made available for mass repatriation' and defended its right not to have individuals return to unsuitable conditions.<sup>46</sup> The discussions about repatriation that followed Eritrea's successful independence referendum in April 1993 were thus overseen not by UNHCR, but by the UN Department of Humanitarian Affairs, as the PGE sought to minimize contact with UNHCR.

When Eritrea's flagship programme for returning the 340,000 refugees from Sudan – the Program for Refugee Reintegration and Rehabilitation of Resettlement Areas in Eritrea (PROFERI) – failed to gain significant financial backing during a UN pledging conference in 1993, the relationship was further strained. In the absence of any satisfactory explanation for this outcome, individuals from the People's Front for Democracy and Justice (PFDJ), Eritrea's ruling party, conflated the international community's apathy with 'sabotage attempts' and a 'big conspiracy against Eritrea not to stand on its [own] feet'.<sup>47</sup> As Teclmichael (Rosso) Wolde-Giorgis, the former Director of Refugee Affairs at the Eritrean Relief and Refugee Commission (ERREC), stated when reflecting on these failures in the late 1990s: 'The lesson seems clear, the needs that arise from devastation caused by war are not sufficient to qualify for outside assistance. Aid is not given based on demonstrated necessity, or even the capacity of using it properly. It is usually guided by donor priorities, whatever they may be'.<sup>48</sup> The head of UNHCR in Eritrea at the time, Mr Arnulf Torbjornsen, conceded that the funding shortfall was the result of politics, not a mandate issue. In response to a question as to whether the UNHCR office in Eritrea had done enough in the repatriation and resettlement of Eritrean refugees, Mr Torbjornsen stated:

UNHCR has not been able to do what we liked to do. Because we don't have enough funds from donor governments. Actually the scope of our activity is limited by the awareness and good will of donor governments. Fortunately for Eritrea, there is peace and stability now, but this has [been] shown to be counterproductive when it comes to awareness and understanding of the needs of Eritrea. CNN today goes to Rwanda, Burundi, Liberia, Somalia and focus is no longer on Eritrea even though Eritrea deserves attention, because of its important role in creating regional peace and prosperity.<sup>49</sup>

UNHCR's standing in Eritrea did not markedly improve during the 1990s as it became caught up in regional challenges that left it largely incapacitated, including hostilities between Sudan and Eritrea. The organization's officials were expelled from Eritrea on multiple occasions, including for what the Eritrean government 'saw as UNHCR's undue pressure on reviving the stalemated repatriation of Eritrean refugees from eastern Sudan'.<sup>50</sup> The Eritrean government blamed UNHCR for perpetuating the protracted refugee situation in Sudan because of officials

45 UN General Assembly (UNGA), 'Opening Statement by the United Nations High Commissioner for Refugees to the Executive Committee of the High Commissioner's Programme at Its Forty-Sixth Session', Addendum to the Report of the Executive Committee of the Programme of the UNHCR on the Work of Its Forty-Sixth Session, Report of the UNHCR, Fiftieth Session of the UN GA (1 November 1995) <<https://www.un.org/documents/ga/docs/50/plenary/a50-12add1.htm>> accessed 12 June 2015.

46 Kibreab (n 44).

47 Interviews with a former Ambassador and Permanent Representative to the UN for Eritrea; and a former member of the Commission for Eritrean Refugee Affairs (CERA) (Asmara, Eritrea, June 2014).

48 Teclmichael Wolde-Giorgis, 'The Challenge of Reintegrating Returnees and Ex-Combatants' in Martin Doornbos and Alemseged Tesfai (eds), *Post-Conflict Eritrea: Prospects for Reconstruction and Development* (Red Sea Press 1999) 55–100.

49 'Refugees: Projects, Prospects' *Eritrea Profile* (Asmara, 8 July 1995) 2(17).

50 Kris Janowski, 'Eritrea: UNHCR to Resume Work', UNHCR Briefing Note (5 January 2000) <<https://www.unhcr.org/uk/news/briefing/2000/1/3ae6b81f92/eritrea-unhcr-resume-work.html>> accessed 13 December 2021.



who have interest in the continuation of the question of the refugees without reaching a solution for safeguarding their interests',<sup>51</sup> and claimed that the organization was partially responsible for the deterioration in bilateral relations between the Eritrean and Sudanese authorities. Reflecting on their experiences in the Horn of Africa during this period, a UNHCR representative unsurprisingly stated that there came to be a 'negative synergy between their [the Government of Eritrea's] huge disappointment and a sense that UNHCR was not trustworthy'.<sup>52</sup> By 2000, UNHCR was thus looking for ways to rebuild its relationship with the Eritrean government.

The second factor conditioning UNHCR's behaviour vis-à-vis Eritrean refugees was the cost of its operations in Sudan. UNHCR officials who were involved in the inception and invocation of article 1C(5) admitted that the 'ceased circumstances' cessation clause was part of a broader strategy to discipline the Sudanese government. Throughout the 1990s, the amount of money invested in Sudan's Commissioner for Refugees was suggested to have been exorbitant and UNHCR was consequently looking for a way to reduce its expenditure. In 1996, the Chief of Mission for Eritrea, Mr Torbjornsen, was quoted as saying that: 'We [UNHCR] created a monster in Sudan ... We still support 2,000 jobs in the refugee business there, and there are vested interests in keeping the Eritrean refugees. If they repatriate, their refugee empire will collapse. We have to take a lot of responsibility for creating the situation in Sudan.'<sup>53</sup> As one UNHCR official explained, '[m]any hundreds, if not thousands, of civil servants depended on the program and over the decades of UNHCR's involvement in Sudan there had grown up, and remains, a large bureaucratic establishment that depends heavily on foreign aid and particularly UNHCR funding'.<sup>54</sup> From 2001, UNHCR had a new High Commissioner at the helm, looking to begin his tenure with bold, decisive leadership that quickly delivered change. The cessation clause was seen as a route to force the Sudanese authorities to alter their stance towards these refugees so that UNHCR did not continue to fund the vast refugee infrastructure in Eastern Sudan indefinitely.

Even UNHCR's officials, however, recognized that this was a far-fetched aspiration. Changing Sudan's attitude towards providing local integration as a durable solution for Eritrean refugees was seen as particularly ambitious. In 2002, UNHCR stated that '[t]here are legal obstacles to local integration of refugees in Sudan. It is nearly impossible for refugees to fulfil the requirements for naturalisation, which require a formal renunciation of original citizenship in one's country of origin.'<sup>55</sup> UNHCR had indeed failed to lobby the Sudanese government to address the naturalization 'problem' three years earlier in the context of applying the cessation clause to Ethiopian refugees who had fled Ethiopia before 1991. Over 95 per cent of Ethiopians in Sudan affected by article 1C(5) thus asked for continuing protection, primarily because of socio-economic concerns and a realization that the only way to remain in Sudan legally was through refugee status. Nonetheless, in the end, many were left without documentation.<sup>56</sup> The Sudanese government also supposedly tried hard to frustrate the application of article 1C(5) to Ethiopian refugees because of 'fears about the loss of international financial assistance'.<sup>57</sup> As one UNHCR official later reflected, the organization's greatest failure was that it never convinced

51 'No Coexistence with the NIF Regime: President Isaias' *Eritrea Profile* (11 April 1998) 5(5).

52 Interview (via Skype) with a senior expatriate UNHCR official who oversaw the organization's strategy and policy relating to the cessation clause for Eritrean refugees and the negotiations around cessation (October 2015).

53 Jennie Street, 'ERITREA-POPULATION: Refugees Caught in Political Deadlock' (*IPS Correspondents*, 18 July 1996) <<http://www.ipsnews.net/1996/07/Eritrea-population-refugees-caught-in-political-deadlock/>> accessed 14 December 2021.

54 Interview (n 52).

55 UNHCR, 'UNHCR Global Resettlement Needs 2002' (Annual Tripartite Consultations on Resettlement, 18–19 June 2002, Geneva) 10 <<https://www.refworld.org/docid/3defa05e4.html>> accessed 7 April 2014.

56 *ibid.*

57 Bonoan (n 24) para 37.

the Sudanese authorities to provide local integration or alternative legal statuses to any of the refugees.<sup>58</sup>

The third main driver of the cessation clause at this time was UNHCR's anticipation that it would appease donor States. The organization wanted to convey to its funders that this was not a 'double-billing arrangement'; that donors would not be expected to continue paying for camps in Sudan and repatriation in Eritrea as separate ventures, without a clearly articulated mechanism that linked the two.<sup>59</sup> It was also known that refugees, sensibly, were capitalizing on the opportunities for organized repatriation to Eritrea only to then return to the camps in Sudan to gain the resources available there, thus increasing costs that UNHCR did not want to fund. UNHCR hoped that taking steps to end the protracted exile of Eritrean refugees at a conducive moment in Eritrea and Sudan's histories would ingratiate the organization with its donors, whose patience for supporting this refugee caseload into its fifth decade seemed limited. This rationale thus aligns with James Hathaway's suggestion that article 1C(5) came back onto the policy agenda in the 1990s not only because of 'fundamental changes' in many political systems after the end of the Cold War, but also because UNHCR was anxious to 'poin[t] to its success in bringing refugee status to an end'.<sup>60</sup>

## 2.2 Justifying article 1C(5) in a 'window' of fundamental and durable change

When the bilateral situation between Eritrea and Sudan improved around 2000, UNHCR acted quickly. Cessation was indeed first mentioned in 1999, when Eritrea and Ethiopia were still at war and the western lowlands of Eritrea (where most of the refugees came from, and where they would be expected to return) constituted the epicentre of this conflict. At the 14th meeting of its Executive Committee, UNHCR nonetheless stated that:

Referring to the concern expressed by some delegations that UNHCR was considering applying the cessation clause to Ethiopian and Eritrean refugees residing in the Sudan, [the Director of the Africa Bureau] explained that UNHCR faced a dilemma since the initial cause of flight had disappeared and the need for international protection could no longer be justified. Such a step would only be carried out, however, following consultations with all parties concerned.<sup>61</sup>

A year later, a UNHCR delegation headed by the Deputy Commissioner, Mr Søren Jessen-Petersen, arrived in Eritrea for a working visit aimed at reinvigorating dialogue on the return of Eritrean refugees from Sudan. Eritrea's President, Isaias Afewerki, stressed during this visit in January 2000 that the normalization of relations between Sudan and Eritrea would facilitate the process of repatriating Eritrean refugees from Sudan, and UNHCR reiterated its commitment to assist.<sup>62</sup> Aware of the volatility of these periods of goodwill, UNHCR technical teams quickly began to consult with senior representatives of ERREC. Despite the situation of continuing war with Ethiopia, by the end of April 2000 tripartite repatriation agreements had been signed between Eritrea, Sudan, and UNHCR for the voluntary repatriation of approximately 160,000 Eritrean refugees before the rainy season began. The first batch of returnees were to cross the Eritrean border in May 2000. Unfortunately, however, the Ethiopia–Eritrea conflict precluded

58 Interview with a UNHCR official who was in Sudan during negotiations for both the Ethiopian and Eritrean cessation clauses (Geneva, September 2014).

59 Interview (n 52).

60 James C Hathaway, 'Refugee Solutions, or Solutions to Refugeehood?' (2007) 24 *Refuge: Canada's Journal on Refugees* 3, 6.

61 UNGA, *Report of the Fourteenth Meeting of the Standing Committee (9–11 February 1999)*, UN doc A/AC.96/913 (7 July 1999) para 17.

62 'President Receives UNHCR Delegation' *Eritrea Profile* (29 January 2000) 6(47).

the operation from proceeding as planned. One hundred thousand new refugees, many of them Eritreans who had only just returned, were instead displaced into Sudan.<sup>63</sup>

The fighting was short-lived, and not hugely destructive, and the PFDJ sought to promote repatriation of the newly displaced individuals as soon as possible. At a Tripartite Meeting on 14 July 2000, the PFDJ stated that it 'would like the refugees home promptly and in an orderly manner to engage themselves in the reconstruction of their country'.<sup>64</sup> It was generally felt that the 'voluntary repatriation program to Eritrea should take advantage of the diplomatic and humanitarian window of opportunity that now exists ... without further delay'.<sup>65</sup> At this time, some politicians were airing their views as to how the country could be better governed, and refugees were spontaneously returning after the latest round of violence. Reflecting on that period, Gaim Kibreab stated that 'between 2000 and 2001, the country experienced a short-lived and unprecedented degree of freedom of press, speech and expression';<sup>66</sup> Simon Weldehaimanot noted that a 'window of democracy' appeared to have opened within the country.<sup>67</sup> This 'window' was also enhanced by the improved rapport between UNHCR and the PFDJ, which UNHCR and other UN institutions saw as an opportunity to make amends for its failures in the mid-1990s. UNHCR's 2002 Country Operations Plan stated that:

Co-operation through the provision of humanitarian aid to mixed populations of returnees and IDPs, UNHCR's commitment to solving the long-standing Eritrean refugee situation in the region, as well as UNHCR's determination in providing adequate protection to the refugee caseload in Eritrea have re-built lost confidence and credibility of UNHCR within the country.<sup>68</sup>

This was despite the fact that UNHCR and the PFDJ had once again failed to secure donor support for these repatriation operations, forcing UNHCR to 'provide start-up funds for the programme from its reserve'.<sup>69</sup>

However, conditions for return did not reach UNHCR's standards for the invocation of article 1C(S). An information leaflet intended for Eritrean refugees in Sudan, for example, stated that 'most areas of return are quite safe. However, there is significant risk from mines and unexploded ordnance in certain areas along the Ethiopian–Eritrean border where fighting recently took place'.<sup>70</sup> This was the area from which most of the refugees were displaced. ERREC nonetheless requested that the question 'Are the areas of return still mined?' be removed prior to the

63 'Opening Statement by Acting Commissioner for Refugees, Mohamed Ahmed Hussein Abdul/Aleem, Sudan, to the Seventh Meeting of the Tripartite Repatriation Commission' (Geneva, 21 and 22 June 2002). Accessed at the Ministry of Labour and Human Welfare (MoLHW), Asmara, Eritrea, 2014.

64 'Opening Speech to the Tripartite Meeting between ERREC, Sudanese Refugee Commission and UNHCR' (Mai Serwa, Asmara, 14 July 2000). Accessed at MoLHW, Asmara, 2014; 'Facilitated Voluntary Repatriation of Eritrean Refugees who arrived in Sudan as a result of events occurring on or after 12th May 2000. Record of the Tripartite Meeting between the Government of the State of Eritrea, the Government of the Republic of Sudan and UNHCR (Asmara, 14 July 2000)'. Accessed at MoLHW, Asmara, 2014.

65 US Committee for Refugees and Immigrants (USCRI), '30 Year Exile Will End If Refugees Finally Get Help', cited in *Eritrea Profile* (4 August 2001) 8(22).

66 Gaim Kibreab, 'Some Critical Reflection on the Language Policy of the Eritrean Government' in *Citizens for Democratic Rights in Eritrea* (eds) (n 35) 114.

67 Simon Weldehaimanot, 'Sectarian Political Parties in Eritrea: From Human Rights Perspective' in *Citizens for Democratic Rights in Eritrea* (eds) (n 35) 24.

68 UNHCR, 'UNHCR Country Operations Plan 2002 – Eritrea' (1 July 2001) 3 <<https://www.refworld.org/docid/3b666db22.html>> accessed 13 April 2014.

69 'Joint Statement: Resumption of the Voluntary Repatriation of Eritrean Refugees from the Sudan', issued by the Government of the Republic of the Sudan, the Government of the State of Eritrea, and UNHCR (Khartoum, 22 March 2001) <<https://reliefweb.int/report/ritrea/joint-statement-resumption-voluntary-repatriation-eritrea-refugees-sudan>> accessed 12 December 2021.

70 There were an estimated 1.5 million mines and 3 million unexploded ordnances in the country, causing significant hazards to returnees and UNHCR officials. UNHCR, 'UNHCR Country Operations Plan 2003 – Eritrea' (1 September 2002) <<https://www.refworld.org/docid/3da2e4194.html>> accessed 4 March 2014.

document's distribution.<sup>71</sup> Full access to the areas where returnees were expected was also only available to the International Committee of the Red Cross and Médecins Sans Frontières.<sup>72</sup> This was, in part, because tensions between Eritrea and Ethiopia were not resolved. The Temporary Security Zone between Eritrea and Ethiopia had not been effectively demilitarized, and the Eritrean government continued to accuse Ethiopian troops of causing massive destruction, looting, rape, mutilation, and civilian disappearances in the areas under their occupation, casting into doubt whether 'fundamental changes ... which can be assumed to remove the basis of the fear of persecution' had indeed occurred in the country.<sup>73</sup>

UNHCR and the governments in Sudan and Eritrea nonetheless continued to publicly acknowledge changed circumstances within Eritrea, and to allude to the possible application of the cessation clause. In her closing remarks to the 2001 Tripartite Repatriation Commission Meeting in Khartoum, the Commissioner of ERREC reiterated the Eritrean authorities' view that 'the Eritreans who currently find themselves in the Sudan are no longer refugees as such, but rather citizens of Eritrea awaiting their return home.'<sup>74</sup> A few months later, at the Fifth Tripartite Meeting between UNHCR, the Government of Eritrea, and the Government of Sudan, UNHCR's Regional Director for the East and Horn of Africa and the Great Lakes Region, Wairimu Karago, stated that:

After years of war, drought and massive internal displacement, Eritrea is going through a period of national recovery which, in one way or another, affects the majority of its population. It is only right that Eritrean refugees returning from Sudan become part of this process rather sooner than later. The reasons that forced Eritrean refugees into exile in Sudan and many other countries have ceased to exist and a further prolonged stay in exile is thus not only uncalled for and unjustified, but also not in the interest of the refugees themselves.<sup>75</sup>

She clarified that '[i]t is therefore incumbent upon UNHCR to consider the application of the ceased circumstances cessation clause for Eritrean refugees to take account of this fact.'<sup>76</sup>

Here, it can be seen that prevailing views on refugees' responsibilities and 'interests' – particularly in regard to the roles they should play in the early recovery and national reconstruction – were being couched in the language of 'facts' in order to pave the way for the application of article 1C(5) to Eritrean refugees. This attitude reflected a wider change in how refugees were understood in the agenda for post-conflict reconstruction and complemented emergent narratives about the importance of quick repatriation operations for ensuring refugees' economic, political, and social assimilation.<sup>77</sup> It also served the interests of UNHCR, which, at the time, saw clear synergies between encouraging repatriation through invoking the cessation clause and mending its relationship with the Eritrean government. As Ms Karago commented in March 2001:

71 'Voluntary Repatriation of Eritrean Refugees from the Sudan and Their Reintegration in Eritrea. Conclusions of the Meeting of the Tripartite Repatriation Commission comprising the Government of the State of Eritrea, the Government of the Republic of Sudan, and the Office of the United Nations High Commissioner for Refugees' (Nairobi, Kenya, 14 and 15 September 2001). Accessed at MoLHW, Asmara, 2014.

72 'In Support of Returnee IDPs: Early Phase' *Eritrea Profile* (17 March 2001) 8(2).

73 UNHCR Handbook (n 2) 32.

74 'Voluntary Repatriation of Eritrean Refugees from the Sudan and Their Reintegration in Eritrea. Conclusions of the Meeting of the Tripartite Repatriation Commission Comprising the Government of the Republic of Sudan, the Government of the State of Eritrea and UNHCR' (Khartoum, Sudan, 22 March 2001) <<https://www.refworld.org/docid/3ee749627.html>> accessed 2 February 2014.

75 'Closing Remarks by Ms Wairimu Karago, UNHCR Regional Director for the East and Horn of Africa to the Meeting of the Tripartite Repatriation Commission' (Nairobi, Kenya, 14 September 2001). Accessed at MoLHW, Asmara, 2014.

76 *ibid.*

77 USCRI, *Getting Home Is Only Half the Challenge: Refugee Reintegration in War-Ravaged Eritrea* (1 August 2001) 34 <<https://www.refworld.org/docid/3bc19092d.html>> accessed 12 December 2021.

As you would all agree with me, this region needs success stories and actions that lead to peace and stability. As long as hundreds of thousands of citizens of this region remain in exile due to instability and insecurity, peace and prosperity cannot prevail. In this regard, the return of Eritrean refugees from Sudan would be a move in the right direction.<sup>78</sup>

In an appeal to PFDJ sensitivities, UNHCR advocated for the 'attitude change of all stakeholders involved' in these operations. This included the 'returnees', who, UNHCR cautioned 'will need to learn that continuous external support from the international community and UNHCR in particular will not be as it were [sic] in the country of asylum. Thus, part of the assistance sought will be used in sensitising returnees to take responsibility for themselves and their communities.'<sup>79</sup> Echoing the attitude towards refugees in the late 1990s, UNHCR hoped that encouraging refugees to return would 'contribute to the general post-war reconstruction efforts for Eritrea ... by bringing all the Eritrean people to begin reconstruction and reconciliation efforts at the same time.'<sup>80</sup> Normative shifts in what was seen to be in refugees' 'best interests', at least in this part of the world, were thus clearly informing legal decision making about ceasing their status.

As one UNHCR official explained, UNHCR also hoped that affirming its support for Eritrea and the return of its refugees 'could maybe buy good will from the authorities that would help on other aspects.'<sup>81</sup> They noted that there was an 'overarching belief' that 'we needed to try to support the Eritrean authorities, and they were not at the position they're at now, and we should be supportive by declaring cessation and that would also lead them to being more open and accommodating to people coming back.'<sup>82</sup> It was argued that this was 'a moment in Eritrean history which if [UNHCR] could bring in positive developments ... these could have a positive effect on other changes within the country as, for the first time within its development, the country seemed like it was opening up and reaching out to the international aid community.'<sup>83</sup> In this light, the cessation clause was conceived of as a concession by the UN system that might usher in 'fundamental changes' in Eritrea as opposed to responding to changes that had already occurred. Such an assessment also rested on the fact that UNHCR's guidelines focus on the assumed magnitude of change and 'improvement' as much as on the attainment of particular fixed standards of human rights, with the change in Eritrea being relative to its recent past and only bringing it to the beginning of 'opening up and reaching out'.

On 18 February 2002, UNHCR issued a note on the 'Applicability of the "Ceased Circumstances" Cessation Clauses to Eritrean Refugees.'<sup>84</sup> The document referenced positive developments in Eritrea, including the PFDJ's encouraging attitude towards welcoming back refugees and the promising reception conditions for these returnees. It noted that 'there have been no known reports of reprisals or persecution perpetuated by the Government of the State of Eritrea against returnees',<sup>85</sup> a point that glossed over the fact that monitoring activities were tightly controlled. The document declared that refugee status would be considered ceased by UNHCR as at 31 December 2002, and that all Eritreans wishing to be considered for exemption from the application of article 1C(5) should come forward by this date. The announcement was clear, however, that 'the "ceased circumstances" cessation clauses do not apply to any refugee who might have fled Eritrea for reasons other than the war of Independence or the border

78 'Voluntary Repatriation: Conclusions of the Meeting of the Tripartite Repatriation Commission' (n 74).

79 'Social and Economic Reintegration of Eritrean Returnees: Project Proposal for Eight Sectors to Be Presented to Donors for Funding, 2001–2003' (prepared by UNHCR Asmara and ERREC, undated). Accessed at MoLHW, Asmara, 2014.

80 *ibid.*

81 Interview (via Skype) with an expatriate UNHCR official who worked as a protection officer in Eritrea during the cessation clause negotiations until mid-2002 (November 2014).

82 *ibid.*

83 Interview (n 52).

84 UNHCR, 'Applicability of the "Ceased Circumstances" Cessation Clauses to Eritrean Refugees' (n 5).

85 *ibid* para 2.



conflict with Ethiopia.<sup>86</sup> On 8 May 2002, UNHCR's Eritrea office then issued a *note verbale* to various ministries in the Eritrean government, UN agencies, and international organizations that it had 'the honor to attach herewith the application of the "ceased circumstances" cessation clauses to Eritrean refugees who fled their country as a result of the war of independence which ended in June 1991, or as a result of the border conflict between Ethiopia and Eritrea which ended in June 2000'. By this time, 'the Eritrean refugees in the Sudan constitute[d] UNHCR's most protracted large-scale refugee caseload in the world.'<sup>87</sup>

The ostensibly technocratic, objective, and advisory nature of this recommendation was quickly cast into doubt, however, by its less than warm reception by the two main governments affected. Contrary to UNHCR's mandated predominantly supervisory role when it comes to invoking cessation,<sup>88</sup> and its claim in the announcement of the 'ceased circumstances' cessation clause that it was '[u]ltimately ... the responsibility of the Government of the country of asylum to determine the modalities for the application' of article 1C(5),<sup>89</sup> the 2002 document simultaneously stressed the timeline that the organization had already decided upon and that the countries affected should follow to meet the December deadline. UNHCR clarified that the 'measures envisaged in the plan of action should be able to be implemented in a flexible and phased manner' and that '[f]actors critical to the success of implementation include agreement on implementation procedures and timeframes among States, UNHCR, NGOs and refugees',<sup>90</sup> but the organization appeared to have interpreted 'appropriate involvement' liberally. At the Seventh Tripartite Meeting, held in Geneva in June 2002, the Sudanese delegation made its frustration with this situation clear:

The application of the Cessation Clause requires further study and evaluation to pinpoint the negative and positive sides of it, and the real obstacles in the way of smooth and safe repatriation. We should also refer here that such a country, as the Sudan, which hosted thousands of refugees for a long span of 35 years has not been consulted, or even notified, of the intention of UNHCR to declare the Cessation Clause.<sup>91</sup>

This was not the first time, nor the last, that countries objected to UNHCR's recommendation of cessation. Following UNHCR's 2014 recommendation of the application of article 1C(5) to Croatian refugees displaced by the 1991–95 conflict, the Government of Serbia sent UNHCR two *notes verbales* expressing disagreement with the UNHCR recommendation. Later, in response to the First Progress Report, the Government of Serbia sent a further letter to UNHCR 'to reiterate its objection that cessation on the ground of the ceased circumstances had been prematurely applied.'<sup>92</sup> When UNHCR announced the cessation clause for Rwandan refugees, the Ugandan government was similarly displeased, and privately expressed multiple reasons for its dissatisfaction with the announcement of the clause to UNHCR. While it did not dispute that the original reasons that had caused this caseload of Rwandan refugees to flee had ceased, the Ugandan government, like many of its regional neighbours and the affected refugees themselves,

86 *ibid* para 11.

87 'UNHCR Country Operations Plan 2003 – Eritrea' (n 70) 2.

88 UNHCR, 'Discussion Note on the Application of the "Ceased Circumstances" Cessation Clauses in the 1951 Convention', UN doc EC/SCP/1992/CRP.1 (20 December 1991) <<https://www.unhcr.org/publications/discussion-note-application-ceased-circumstances-cessation-clauses-1951-convention>> accessed 30 June 2023.

89 UNHCR, 'Applicability of the "Ceased Circumstances" Cessation Clauses to Eritrean Refugees' (n 5) para 7.

90 *ibid* para 18.

91 'Opening Statement by Mohamed Ahmed Hussein Abdul/Aleem, Sudan' (n 63).

92 UNHCR, 'Third Progress Report on the Implementation of the Durable Solutions Process (Sarajevo Process) for Refugees from Croatia Displaced by the 91–95 Conflict, including Cessation of Refugee Status' (25 August 2016) fn 15 <<https://www.refworld.org/docid/57c409fd4.html>> accessed 12 February 2019.

strongly contested the suggestion that effective protection was now available.<sup>93</sup> While it felt unable to publicly oppose this process, the government adopted a *de facto* policy of 'punching holes in the cessation clause'.<sup>94</sup> These examples suggest a recurrent procedural breakdown, with States unsure what weight UNHCR's recommendations for article 1C(5) actually hold, as well as institutional overreach by UNHCR. On multiple occasions, the organization appears to have promoted its guidance in ways that make it seem that States must justify why they wish to 'opt out' of UNHCR's timeframes and guidance, rather than to decide independently whether, and to what extent, to adopt them.

In the case of the cessation clause for Eritrean refugees, UNHCR was aware that a communication breakdown had occurred, particularly between itself and the Sudanese government. UNHCR conceded that its effectively unilateral decision, made between UNHCR Headquarters in Geneva and its field offices, was not adequately discussed with the relevant parties beforehand. This did not temper UNHCR's enthusiasm for the invocation of article 1C(5), but UNHCR's Director of the Africa Bureau did apologize to the Sudanese delegation in a Tripartite Meeting in June 2002: 'Allow me to take this opportunity to also express my regret to the Government of Sudan, for any information gap that may have arisen during the process of declaring the cessation clause of the Eritrean refugees. This was quite inadvertent. I wish to therefore reassure the Sudanese Government that we, in UNHCR, will always consider you as a valuable partner'.<sup>95</sup> As discussed above, however, the suggestion that the communication gap was 'inadvertent' was not strictly true. Since negotiating with the regime in Sudan was considered sensitive and difficult, UNHCR needed a mechanism to force the Sudanese regime to change its practices and provide the refugees held 'hostage' with opportunities to access durable solutions.<sup>96</sup> UNHCR intentionally announced its recommendation that the cessation clause be invoked for Eritrean refugees – made without external consultation – in order to bind the Sudanese authorities to this course of action, while offering them some financial concessions explicitly as 'an exit and future links strategy'.<sup>97</sup>

Nevertheless, none of the tripartite agreements concerning the cessation clause, nor the agendas of the meetings during which they were agreed upon, contained any detailed discussion of how cessation would be operationalized. In the late 1990s and early 2000s, UNHCR did not appear to have reliable statistics on how many Eritreans were in Sudan, where they resided, or what their interest in repatriation or local integration was likely to be. In 2002, reports suggested that there were approximately 90,000 Eritrean refugees living in camps in Eastern Sudan, but potentially 350,000 urban refugees of various nationalities in Sudan. It was not clear how the invocation of article 1C(5) would apply to urban refugees, with their unknown numbers, locations, and preferences for exemption, return, or remaining *in situ*.<sup>98</sup> It was not until 1 August 2002 that UNHCR began conducting a registration programme for the voluntary repatriation of urban-based Eritreans in Sudan, whom it believed numbered in the hundreds of thousands. Considering this uncertainty, and the five months allowed for completion of the registration

93 Cole (n 26).

94 Interview with a Minister in the Government of Uganda (Kampala, Uganda, November 2013).

95 'Opening Statement by Mr David Lambo, UNHCR Director of the Africa Bureau, to the Seventh Meeting of the Tripartite Repatriation Commission of the Governments of the Republic of Sudan, the State of Eritrea, and UNHCR' (Geneva, 21 and 22 June 2002). Accessed at MoLHW, Asmara, 2014.

96 Interview with an expatriate UNHCR official who worked in Eritrea from 2000 until after cessation was declared in 2002 (Geneva, September 2014).

97 UNHCR, 'UNHCR Country Operations Plan 2003 – Sudan' (1 September 2002) 3 <<https://www.refworld.org/docid/3da2e4e44.html>> accessed 20 April 2014.

98 'UNHCR Faces Problem to Return Eritrean Refugees from Sudan' (*PanaPress*, 9 November 2002) <<http://www.panapress.com/UNHCR-faces-problem-to-returnEritrean-refugees-from-Sudan-12-468182-101-lang2-index.html>> accessed 12 March 2014.

exercise prior to the recommended cancellation of their status,<sup>99</sup> this seemed a late stage in any comprehensive strategy at which to be undertaking such a significant task. The procedures designed to accompany a declaration of article 1C(5) – which include screenings of the entire caseload to determine who will be affected by the application of the clause, exemption interviews for those wishing to contest the loss of their status, appeals hearings for those who wish to challenge the outcomes of the exemption process, and the subsequent decisions – were also poorly articulated.<sup>100</sup> Cessation should not progress, however, without the thorough implementation of these procedures; refugees otherwise risk being removed to a country where they face a continuing risk of persecution, or even of being rendered stateless in the country of asylum if they are stripped of refugee status but have no effective citizenship on which to draw.

Evidence suggests that exemption procedures in Sudan were nonetheless never sufficiently resourced to be able to provide refugees with effective recourse to continuing protection. A report issued by UNHCR in 2003 stated that 28,000 of the camp-based refugees whom it had registered in Sudan had applied for an exemption. While 40 per cent of applications were reported as successful,<sup>101</sup> anecdotal evidence from UNHCR officials working in Sudan at the time suggests that the procedures for determining whether people had an ongoing protection need were financially and logistically overwhelmed. With the system inundated, the quality of interviews reportedly deteriorated to such an extent that UNHCR protection officers found it almost impossible to determine whether refugees did indeed have ongoing protection needs. Furthermore, 'new' Eritrean refugees were seeking asylum in Sudan while the cessation clause was being implemented. Considering the high recognition rates during the refugee status determination process for these new arrivals, eligibility teams in Sudan concluded that there was little point in carrying out exemption interviews for the 'old' caseload affected by article 1C(5) because that group would likely all be found to have either 'compelling reasons arising out of previous persecution for refusing' to avail themselves of the Eritrean government's protection<sup>102</sup> or new protection concerns, and thus there was little reason to attempt to implement the cessation clause.<sup>103</sup> UNHCR staff were left frustrated that the Government of Sudan had engineered a way to re-register many 'old' caseload refugees as belonging to the post-2000 caseload, and thus to request more funds for the protection of this group. To the Eritrean government, the fact that the Sudanese government's stalling behaviour was being permitted by UNHCR, and that there did not appear to be a plan in place to cancel Eritreans' refugee status,<sup>104</sup> was proof once again of UNHCR's incompetence and biases. It appeared to undermine precisely the action that UNHCR had intended cessation to induce, much to the confusion of the Eritrean government.

### 2.3 From war to generalized human rights abuses?

The situation in Sudan, however, was not the only impediment to the smooth implementation of the cessation clause, both in the lead-up to and after UNHCR's announcement. The human

99 UNHCR, 'Sudan: Registration of Urban Eritreans to Begin', UNHCR Briefing Note (30 July 2002) <<https://www.unhcr.org/news/briefing/2002/7/3d467c8b9/sudan-registration-urban-eritreans-begin.html>> accessed 12 March 2015.

100 Interview (n 52).

101 Khalid Abdu Dahab, 'Relocated Eritrean Refugees Find a Second Home in Sudan' (*UNHCR News*, 12 August 2003) <<https://www.unhcr.org/3f38e93d2.html>> accessed 10 March 2015.

102 Refugee Convention (n 1) art 1C(5) para 2.

103 Interview (via Skype) with a UNHCR official, based in East Africa to coordinate regional refugee status determination procedures, who worked in the UNHCR Sudan office during the cessation clause negotiations for Eritrean refugees (October 2014); interview (n 96); interview with an expatriate protection officer working at UNHCR Eritrea (Asmara, Eritrea, April 2014).

104 Interview with an original member of the Eritrean Relief Association (ERA), who subsequently became the leader of ERREC (Asmara, Eritrea, May 2014). 'ERREC Press Release: The Unwanted and Unacceptable Movement of Eritrean Refugees' *Eritrea Profile* (2 November 2002) 9(35).

rights situation in Eritrea had been a cause for concern throughout the 1990s,<sup>105</sup> and during the period when UNHCR was debating the application of article 1C(5), reports cast doubt on any declaration that would implicitly sanction the return of Eritrean refugees to the country after their status was ceased. From human rights, security, and subsistence perspectives, the situation was widely cited as not being stable enough for the large-scale return and reintegration of individuals. For example, in a letter to ERREC in October 2001, the Chief of Mission of UNHCR Asmara wrote that 'most of [the] refugees are returning to areas severely affected by war or drought – or both – and with limited absorption capacity in terms of essential infrastructure and basic social services.'<sup>106</sup> Even the PFDJ acknowledged that there were over 370,000 war-affected individuals, with more than 210,000 of them also suffering from the effects of drought, and a lack of food and subsistence resources.<sup>107</sup> In 2001, the World Food Programme brought emergency food aid into Eritrea to support 800,000 people, mainly in the areas suggested as ready for returnees.<sup>108</sup> The UN Security Council expressed concern that this humanitarian situation might affect long-term stability in Eritrea, noting 'the prevailing drought and worsening humanitarian situation in Ethiopia and Eritrea and the implications this could have for the peace process.'<sup>109</sup> The Council cited incursions across the southern border of the Temporary Security Zone, which had been set up as a demilitarized buffer zone between Eritrea and Ethiopia, and the planting of anti-tank mines in areas where returnees were expected. Notably, discussions about cessation continued alongside these worsening signs, despite the fact that UNHCR had long promoted a strict interpretation of the application of article 1C(5) 'motivated by the need to provide refugees with the assurance that their status will not be subject to constant review in the light of temporary changes – not of a fundamental character – in the situation prevailing in their country of origin.'<sup>110</sup>

Donor States' support for Eritrea was also being reassessed in the early 2000s as more reports of the PFDJ's increasingly repressive behaviour surfaced. In August 2001, for example, several students from the University of Asmara died after being imprisoned for refusing to participate in the PFDJ's Mandatory Summer Work Programmes. Following this incident, there was a much-publicized series of shutdowns that occurred in late 2001, which included the arrest and detention incommunicado of prominent politicians and independent journalists for criticizing the PFDJ's handling of the war with Ethiopia. Some UNHCR officials nonetheless admitted being 'fooled' at the time into thinking that the changes happening in Eritrea during this period were fundamental, durable, and would ultimately be positive for the future of Eritrea. They were persuaded by the country's veneer as a State that fulfilled particular ideals, including proclaimed

105 Although illustrating the media's relative openness during this period, a report by James McKinley Jr, republished in the *Eritrea Profile* in 1996, discussed the other side of the celebratory rhetoric surrounding the government's performance in the early days of independence: the round-ups of impoverished people from the streets to live in government-controlled spaces; the shooting of disabled former fighters during a protest over the PFDJ's treatment of them since independence; and the anger among those being told to work without any remuneration. James C McKinley Jr, 'New York Times Report – Eritrea: African Success Story Being Written' *Eritrea Profile* (15 June 1996) 3(14). The PFDJ unapologetically punished groups, such as Jehovah's Witnesses, whom they perceived to be undermining their nation-building project. 'Statement on Jehovah's Witnesses' *Eritrea Profile* (4 March 1995) 1(51). Asylum claims by Eritreans therefore increased in the 1990s. UNHCR noted that 'the number of Eritrean refugees in Sudan, which had decreased from 500,000 in 1991 to 282,000 in 1995, increased again to 342,000 in 1998 as a result of growing human rights problems in their country of origin'. Guido Ambroso, Jeff Crisp, and Nivene Albert, 'No Turning Back: A Review of UNHCR's Response to the Protracted Refugee Situation in Eastern Sudan', UNHCR Policy Development and Evaluation Service, PDES/2011/12 (November 2011) para 19 <<https://www.unhcr.org/4eb3e5ea9.pdf>> accessed 15 December 2021.

106 Tahir Ali, Chief of Mission, UNHCR Asmara, letter to Madam Commissioner Hiwot Zemichael, ERREC, on 'Reintegration Assistance to Returnees and Returnee-Receiving Areas: A Review of Plans in Key Sectors' (16 October 2001). Accessed at the MoLHW, Asmara, 2014.

107 'Averting Calamity' *Eritrea Profile* (7 October 2000) 7(31).

108 'First Relief Food Ship Arrives in Assab' *Eritrea Profile* (8 December 2000) 7(40).

109 UN Security Council, Resolution 1466 (2003) on the Situation between Ethiopia and Eritrea (14 March 2003) UN doc S/RES/1466 (2003) para 15 <<https://www.refworld.org/docid/3f45dbdf.html>> accessed 2 April 2014.

110 UNHCR, 'Discussion Note' (n 88) para 5.

low levels of corruption within the government; the hard-working nature of Eritrean citizens who were prepared to sacrifice their salaries to rebuild the country through largely unpaid public works schemes; clean, peaceful, almost crime-free streets; and the country's reputation as the 'Switzerland of Africa'.<sup>111</sup> Importantly, however, these 'ideals of Statehood' had no straightforward or automatic relationship to either the availability of protection or the absence of persecution, with both clearly being key factors to be assessed before invoking article 1C(5). Even the difficulties experienced by local UNHCR officials – travel permits being rescinded, being arbitrarily arrested during field visits, and, on occasion, being instructed to discontinue their employment with UNHCR – were dismissed by some as isolated 'incidents'<sup>112</sup> or 'hiccups'<sup>113</sup> that did not signal institutionalized repression.

#### 2.4 Article 1C(5): its impacts and aftermath

The need to reconcile these reports with UNHCR's position, however, became less pressing as the relationship between the regimes in Asmara and Khartoum worsened over the course of 2002. The Sudanese government accused the Eritrean regime of instigating violent clashes in Eastern Sudan and providing crucial military support to the Sudan People's Liberation Movement/Army. The PFDJ denied any involvement<sup>114</sup> and accused the Sudanese government of behaviour that was 'tantamount to a declaration of war'.<sup>115</sup> On the final day of UNHCR's annual ExCom Meeting in 2002, where optimism had been relatively high about return operations and Eritrea's capacity to implement such sizeable projects,<sup>116</sup> the border between the two countries was closed, and ERREC staff who were part of a joint information and registration campaign with the Sudanese Commissioner for Refugees and UNHCR were expelled from Sudan, forcing all repatriation projects to stop temporarily.<sup>117</sup> By this point, the Sudanese authorities had supposedly started relocating Eritrean refugees in the Kassala region further inland from the border, thus renegeing on agreed plans for their repatriation.<sup>118</sup>

It was not until 2004, however, that UNHCR released a more official position on the human rights situation within Eritrea and shifted its internal policy on cessation. UNHCR noted that, since 2002, the PFDJ had failed to uphold human rights, particularly those of political opposition movements and draft evaders, and essential personal freedoms were no longer being respected. UNHCR recognized that developments within the country had 'changed the climate for donor support in Eritrea, and a number of major donors [had] rescinded aid commitments and/or put on hold further development assistance plans'.<sup>119</sup> Alongside reports of the forced conscription of returnees and restrictions on UNHCR's monitoring operations in the country, UNHCR acknowledged that, 'after some limited returns, the rapid deterioration of human rights in Eritrea rendered the implementation of the cessation clause impossible. A non-return advisory policy was issued and the screening exercise [was] halted'.<sup>120</sup> The implementation of

111 Interview (n 96).

112 Interview (n 81).

113 Interview (October 2014) (n 103).

114 'Khartoum's Accusation against Eritrea Baseless and Naked Lie, Mr Ali Seid Underlines' *Eritrea Profile* (12 October 2002) 9(32).

115 'Statement of the Eritrean Foreign Ministry' *Eritrea Profile* (12 October 2002) 9(32).

116 UNGA, *Report of the Twenty-Fifth Meeting of the Standing Committee* (26 September 2002), presented at ExCom's 53rd Session, UN doc A/AC.96/971 (2 October 2002) <<https://www.unhcr.org/3da17e6c4.html>> accessed 12 April 2014.

117 UNGA, *Strengthening of the Coordination of Humanitarian and Disaster Relief Assistance of the United Nations, including Special Economic Assistance: Special Economic Assistance to Individual Countries or Regions. Humanitarian Assistance to the Sudan, Report of the Secretary-General*, UN doc A/58/225 (6 August 2003) 17 <<https://www.refworld.org/docid/403b13210.html>> accessed 12 April 2014.

118 'Govt of Sudan Escalating Detention of Innocent Eritreans' *Eritrea Profile* (30 November 2002) 9(39); 'ERREC Press Release' (n 104).

119 'UNHCR Country Operations Plan 2003 – Eritrea' (n 70) 3.

120 UNHCR, 'Protracted Refugee Situations: High Commissioner's Initiative' (December 2008) 14 <<https://www.unhcr.org/4937de6f2.pdf>> accessed 14 March 2015.



the cessation clause was unofficially suspended in 2004 after the Eighth Tripartite Meeting between UNHCR and the two governments, during which the timeline for the operation was again pushed back,<sup>121</sup> before it was ultimately and quietly abandoned.

In 2008, the application of the 'ceased circumstances' cessation clause to Eritrean refugees was formally shelved. That year, UNHCR began a registration process in Khartoum that would, in its words, 'most importantly ... translate into reconfirmed refugee status for nearly 70,000 Eritreans who lost it under the cessation clause.'<sup>122</sup> The UNHCR Representative for Sudan stated that this registration exercise would enable the organization to 'be in a better position to reinstate those who had lost their refugee status but deserve it back.'<sup>123</sup> This was particularly important for those Eritreans who, as a result of the suspension of the screening process mentioned above, had 'found themselves with no documentation conferring their legal status in Sudan and [who] continue to live in camps, settlements and urban areas, unable to return to their country of origin.'<sup>124</sup> In the year after UNHCR invoked article 1C(5) for Eritrean refugees, the number of Eritreans in Sudan had indeed reduced by around 200,000 refugees to leave 108,251 Eritrean refugees officially residing there in 2003,<sup>125</sup> although it was never clear how many of these 200,000 individuals had been excluded from UNHCR's statistics but remained in the same physical spaces without any legal protections. New guidelines were issued that explicitly 'supersede[d] the Declaration of cessation of the refugee status of Eritrean refugees issued in 2002'<sup>126</sup> and outlined that 'UNHCR considers that most Eritreans fleeing their country should be considered as refugees.'<sup>127</sup> As the situation in the country developed from 2002 onwards, individuals in UNHCR admitted that discussions about the cessation clause and its implementation 'just fizzled out' until it was rejected.<sup>128</sup> Attention was not given to its successful implementation because, to the extent that a plan had ever been formulated, it was being subtly shelved.<sup>129</sup>

Given the clear protection implications of a cessation clause that, however innocuously, simply 'fizzles out', questions nonetheless remain as to why UNHCR allowed this to happen. Even though the three parties had barely implemented the cessation clause in practice, Eritrean refugees in Sudan responded as if the cancellation of their status was imminent. Amnesty International reported that:

the fact that the declared cessation was partial and did not cover all Eritrean refugees – numbering over 300,000 – was not clearly communicated by UNHCR, even though UNHCR recognised that there were new flows of Eritrean refugees to Sudan and elsewhere. The cessation created considerable insecurity among Eritrean refugees in Sudan.<sup>130</sup>

121 'Voluntary Repatriation of Eritrean Refugees from Sudan and Their Reintegration in Eritrea: Conclusions of the Eighth Meeting of the Tripartite Repatriation Commission of the Government of the Republic of Sudan, the Government of the State of Eritrea and the Office of the United Nations High Commissioner for Refugees' (Geneva, 14 and 15 April 2004). Accessed at MoLHW, Asmara, 2014.

122 UNHCR, 'Refugee Resettlement: Performance Outcomes 2007 and Global Projections 2009' (30 June 2008) 25 <<https://www.refworld.org/docid/492aa0572.html>> accessed 12 June 2015.

123 *ibid* 24.

124 UNHCR, 'Protracted Refugee Situations' (n 120) 14.

125 UNHCR, 'UNHCR Statistical Yearbook 2005', 'Eritrea' (5 August 2007) <<https://www.unhcr.org/cgi-bin/texis/vtx/page?docid=4641837911>> accessed 12 June 2015.

126 UNHCR, 'Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea' (April 2009) 4 <<https://www.refworld.org/docid/49de06122.html>> accessed 12 April 2015.

127 *ibid* 10.

128 Interview (n 81).

129 *ibid*.

130 Amnesty International (n 31) 32.

A retrospective UN report analysing the implementation of the cessation clause similarly conceded that 'not enough thought' was given to the provisions that would be necessary for refugees after the implementation of the clause, with the result that most of the refugees in Sudan headed 'for the main towns in search of work and stability', because 'no equitable alternatives were created'.<sup>131</sup> This meant years of insecurity for refugees until UNHCR began reinstating their status from 2008 onwards.

Precedent suggests that UNHCR could have justified the suspension of the application of the cessation clause sooner without resorting to the controversial option of raising the deteriorating human rights conditions within Eritrea. In Mozambique, for example, the signing of a peace accord in 1992 between the Mozambique government and the RENAMO rebel movement, followed by successful elections in 1993, resulted in UNHCR suggesting that it might be appropriate to apply article 1C(5) in this context. A study by UNHCR in 1995, however, found that other conditions within the country – conditions that were similarly cause for concern in Eritrea, but that were glossed over or de-emphasized – made that moment inopportune for return. Areas were still plagued by landmines, there was insufficient land available for cultivation, and the supply of food was insufficient to support the population and returnees. Heeding its own advice, UNHCR delayed the invocation of the 'ceased circumstances' cessation clause until November 1996.<sup>132</sup> Protection concerns beyond direct persecution can, therefore, be relevant for UNHCR's decision making.

In this example concerning Eritrean refugees, UNHCR, however, clearly did not feel that it could or should formally supersede the plans for cessation in the early 2000s. UNHCR officials commented that 'in terms of a judgement call as to whether it was the right moment to get back a lot of people to Eritrea in reasonably good, acceptable conditions, material as well as legal', the timing for cessation in 2002 seemed ideal.<sup>133</sup> Alongside breaking the deadlock with the Sudanese authorities and improving their relationship with the PFDJ, this hunch, rather than safety concerns, was the compelling argument on which the invocation of the cessation clause was first taken forward.<sup>134</sup> As one senior UNHCR official stated in an interview reflecting on these events, 'from the protection point of view, we never thought that cessation would be a solution'.<sup>135</sup> In response to a question concerning whether the political significance of this protracted refugee situation had trumped the organization's protection mandate in informing decision making around the application of article 1C(5), the official stated 'they did, whether they should do is another point'. Publicly reneging on its commitment to the cessation clause may have made sense if legal standards and guidelines were being followed at the time, and the refugee – as a figure deserving of international protection – had occupied centre stage in the decision making; neither was the case. For UNHCR, there were multiple institutional pressures dictating that a slow atrophy of cessation was preferable to the early, public recognition that the clause's application had most likely never been truly appropriate or legally justifiable. There was little hope that local integration, voluntary repatriation, or third-country resettlement would provide solutions for this caseload given the half-hearted commitment of all the actors to the implementation of the clause. The hope instead was that if article 1C(5) could remain in place, with minimal disruption for refugees but some change in UNHCR's relationship with the Sudanese and Eritrean authorities, then the process of invoking the cessation clause would have served its purpose.

131 UN Human Rights Committee, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Fourth Periodic Reports of States Parties: Sudan, 21 September 2012', UN doc CCPR/C/SDN/4 (16 October 2012) para 123 <<https://www.refworld.org/docid/5264ec5e4.html>> accessed 14 April 2015.

132 Bonoan (n 24) para 58.

133 Interview (n 52).

134 *ibid.*

135 Interview (n 81).

Detailed accounts of other situations in which UNHCR recommended that the 'ceased circumstances' cessation clause be invoked reveal similar dynamics.<sup>136</sup> For UNHCR, the promotion of article 1C(5) can be a way to reduce the caseloads under its protection and to reassure host and donor States that asylum is not 'a backdoor to immigration'<sup>137</sup> and that their responsibilities towards refugees are not indefinite. For countries of origin, the application of article 1C(5) to exiled populations can provide a means to expedite the return of citizens and to prove the 'fundamental character' of political changes in the country. This was the case for the cessation clause for Rwandan refugees. The Rwandan government saw cessation as a route both to constrain dissidents in exile and to end Rwanda's reputation as a refugee-producing country, and tirelessly lobbied UNHCR and countries of asylum to invoke it.<sup>138</sup> For host States, article 1C(5) can serve multiple functions as it factors into the complex political economy of hosting refugees, which may inform anything from a supportive to a subversive attitude towards invocation of the clause.

### 3. CONCLUSIONS

One way to have analysed the case study above would have been to assess the extent to which the decision to apply article 1C(5) to Eritrean refugees conformed to relevant UNHCR guidelines and handbooks. Such an approach would have methodically revealed that few of the criteria that UNHCR specifies *should* be met to invoke article 1C(5) were definitively satisfied in Eritrea in the early 2000s. Approaching the analysis in this way, however, would have revealed little that UNHCR and the governments concerned did not already know at the time. From incidences of State-orchestrated repression to the prevalence of unexploded ordnance in areas of return, from the continuing militarization of the Eritrea–Ethiopia border to the fragility of the rekindled relationship between Sudan and Eritrea, and from the PFDJ's dismissal of repatriation in the mid-1990s to its embrace of return in the wake of even greater national devastation, little about the situation in Eritrea supported an assessment of 'stable' and 'durable' change.

Scrutinizing the legal appropriateness of applying cessation in contexts that UNHCR itself has doubts about may also distract academic attention from interrogating other features of article 1C(5) that exert an at least equal influence on its application, and that must be similarly confronted in efforts to avoid its misuse. First, it may perpetuate the impression given by official tripartite documentation on the invocation of article 1C(5) that assessments of 'ceased circumstances' in countries of origin do – or can ever – occur exclusively through tick-box exercises of 'objective'<sup>139</sup> and easily 'verifiable' criteria. In practice, decisions concerning whether to invoke article 1C(5) are ultimately decisions about the core and contested tenets of 'functioning government', 'real peace', 'genuine reconciliation', and the 'general human rights situation' in a country,<sup>140</sup> including a State's capacity or willingness to make 'effective' protection 'available', and the appropriateness or urgency of addressing particular situations of protracted displacement. As this article's detailed case study of the cessation clause for Eritrean refugees has shown, this entire exercise is then conditioned by the political priorities of the main actors involved, who are likely acutely aware of the political significance of this process. Speaking about the cessation clause for Rwandan refugees in 2012, for example, the Rwandan Minister of Foreign Affairs stated that UNHCR's support for cessation amounted to 'a stamp of approval'

136 McMillan (n 26).

137 Fitzpatrick (n 23) para 2.

138 Fahamu, 'Rwanda: Cessation of Refugee Status Is Unwarranted: Memorandum of Fact and Law' (*Fahamu Refugee Legal Aid Newsletter*, 22 September 2011) <<http://www.refugeelegalaidinformation.org/sites/srlan/files/fileuploads/Memo%20of%20Fact%20and%20Law.pdf>> accessed 10 May 2012.

139 UNHCR, 'Guidelines on International Protection No 3' (n 5) 7.

140 *ibid* 4–5.

for Rwanda's domestic politics.<sup>141</sup> States and UNHCR are thus entangled in the broader political wrangling that informs this assessment, not least because the public act of invoking a 'ceased circumstances' cessation clause sends a powerful signal to either refute or affirm the fundamental nature of change in a country.

Analysing article 1C(5) without centring this inseparability of legal processes from their political contexts risks perpetuating a dangerous short circuit in UNHCR's involvement in this process.<sup>142</sup> UNHCR states that 'appropriate information' must be consulted to determine whether there have been 'fundamental, stable and durable' changes in the country of origin; such information must be obtained 'from relevant specialized bodies, including particularly UNHCR.'<sup>143</sup> In the context of UNHCR using cessation as a tool for placating governments in countries of origin and asylum, however, or as a justification for encouraging the mass return of protracted refugee populations, this enables the organization to justify the endpoint of refugee protection when it deems it politically expedient to do so, while triangulating this recommendation against its own internally generated sources of knowledge about the nature of the relevant changes. As Oliver Bakewell argues, in the case of UNHCR discharging a role as a provider of both humanitarian assistance and legal protection, '[w]here refugees feel that their rights are being infringed in some way by the system ... they have few avenues for appeal when the very agency which is supposed to provide protection is co-ordinating the programmes they object to.'<sup>144</sup> A similar argument may be made in contexts where UNHCR recommends, promotes, justifies, and implements a 'ceased circumstances' cessation clause.

More pivotal than this point, however, is that the guidelines for applying article 1C(5) necessitate decisions about what constitutes 'fundamental, stable and durable' change,<sup>145</sup> which are inherently relational, circumstantial, and hence political standards and decisions. They reflect geographically and historically contingent ideas, including of acceptable standards of human rights, of 'relative political and economic stability',<sup>146</sup> and of the best 'interests' of refugees, as evidenced in the quotations above from UNHCR officials. Through their appeal to adopt a future- and solutions-oriented approach, against which Barbara Harrell-Bond long cautioned,<sup>147</sup> the guidelines encourage predictions about a country's political trajectory and the anticipated responses of refugees. In the Eritrean situation, for example, UNHCR was fixated on a 'window of opportunity' that it felt existed for establishing durable solutions for Eritrean refugees, which was a 'window' precisely because of UNHCR's uncertainty about how long relatively stable conditions within Eritrea would hold. This interpretation was led by officials in Geneva, whose assessments of the suitability of invoking cessation were driven by organizational histories, donor priorities, and normative assumptions about both what was best for Eritrean refugees and what role these particular refugees should play in State-building processes in order 'to take responsibility for themselves and their communities'. All these factors are liable to be interpreted differently by different individuals in different offices, across caseloads, and over time. To a large degree, this concern could be levelled against the application of any dimension of international refugee law; shifting interpretations will, often rightly, follow the emergence of new knowledge and ways of thinking. Nonetheless, it is argued here that because politically, historically, and geographically subjective judgments about 'effective protection', 'relative political and economic

141 Quoted in 'Rwanda: UNHCR Invokes Cessation Clause' (*All Africa*, 5 January 2012).

142 Cole (n 4).

143 UNHCR, 'ExCom Conclusion No 69' (n 14).

144 Oliver Bakewell, 'Refugee Aid and Protection in Rural Africa: Working in Parallel or Cross-Purposes?' (2002) 21(1/2) *Refugee Survey Quarterly* 237.

145 UNHCR, 'ExCom Conclusion No 69' (n 14).

146 UNHCR, 'The Cessation Clauses: Guidelines' (n 9) para 28.

147 Barbara Harrell-Bond, 'Repatriation: Under What Conditions Is It the Most Desirable Solution for Refugees? An Agenda for Research' (1989) 32 *African Studies Review* 1, 57.

stability', and what constitutes 'significant improvements' in the general human rights situation in a country are so central to decision making about the applicability of article 1C(5) – and are, in effect, subjective assessments of the core dimensions of a 'functioning' State, this warrants particular, and further, attention.

Secondly, adopting a doctrinal approach to understanding article 1C(5) in case studies such as the cessation clauses for Eritrean or Rwandan refugees involves importing an approach to scrutinizing international refugee law that is of limited explanatory benefit in contexts where the process is not necessarily governed by interpretive questions.<sup>148</sup> From the very inception of the cessation clause for Rwandan refugees, for example, there was compelling evidence to refute the suggestion that effective protection was available for Rwandan citizens, let alone for returning refugees. The Rwandan ruling party's ideals and aspirations of 'peace, stability and development' were nonetheless used by UNHCR to justify its support for the process,<sup>149</sup> despite the fact that, once again, none of these factors is a guarantee against persecution. Much as in the Eritrean case, UNHCR persevered with the invocation of article 1C(5), despite knowing that the legal justification for doing so was flawed. Any ongoing analyses or post-mortems about how the various legal standards go unmet in these and similar contexts will thus fail to make sense without a corresponding effort to answer *why* actors nonetheless continue to pursue the application of the clause. Importantly, this will inevitably focus more attention on the political functions of international refugee law, rather than on its wording and form.

Finally, and relatedly, framing discussions about article 1C(5) in terms of legality naturally leads to the idea that refining and tightening UNHCR's guidelines on cessation may be the key to solving abuses or misapplications of this process. In taking up this task, however, there is a risk of falling into the rabbit hole of determining how to articulate and measure 'objective and verifiable' standards for article 1C(5), and how to resolve other definitional conundrums, while de-emphasizing or overshadowing the central and irreducible role that politics plays in its application. In some ways, this lets UNHCR and governments 'off the hook' for their enabling behaviour in this regard. UNHCR can then continue to debate, promote, and defend progressive interpretations of international refugee law in courts and academic commentaries, while in countries where tens of thousands of refugees are being directly affected by the application of article 1C(5), its support for this process may be being intentionally and inappropriately driven by the sort of delicate political balancing acts discussed in this article. Without centring these dynamics in our analyses, efforts to prevent article 1C(5) from being primarily a tool of international diplomacy, with all the associated negative repercussions for refugees, will thus prove unlikely to prevent abuses of the 'ceased circumstances' cessation clauses like those detailed above.

148 This approach can also perpetuate the idea that Europe, where many of the court cases contesting the definitional standards informing the applicability of art 1C(5) occur, is the crucible and epicentre of 'good practice' when it comes to interpreting the Refugee Convention; where standards are set that other States should follow. This can lead to promising State practices from cases such as that above being overlooked in discussions about how to expand refugee protection. In the United Kingdom case of *R (Hoxha) v Special Adjudicator*, for example, UNHCR guidelines were drawn upon to try to establish whether or not para 2 of art 1C(5) on exemption from the cessation of refugee status should be respected beyond art 1A(1) refugees. These guidelines drew on practice in 'significant countries of asylum such as Belgium, Canada, France, Germany, South Africa, Switzerland, the Netherlands and the United States'. UNHCR, 'The Applicability of the "Compelling Reasons" Exception to Cessation for Refugees and Asylum-Seekers' (2004), cited in *R (Hoxha) v Special Adjudicator* [2005] 1 WLR 1063, [2005] UKHL 19, para 79. Notably, the guidelines did not draw on the fact that a few years earlier the Sudanese government had, at least in principle, followed UNHCR's insistence that exemption 'reflects a more general humanitarian principle, which could also be applied to refugees other than statutory refugees' (UNHCR Handbook (n 2) para 136) by offering exemption to Eritrean refugees affected by cessation.

149 'Joint Communique on the Occasion of the Visit of Antonio Guterres' (Kigali, 19 October 2009). Accessed at the Ministry of Disaster Management and Refugee Affairs (MIDIMAR) Archives, Kigali, Rwanda (December 2013).