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*This is the text of a lecture delivered by James C. Hathaway in London in October 2006 to mark the twenty-fifth anniversary of the founding of Jesuit Refugee Service. The lecture was sponsored jointly by the Centre for the Study of Human Rights, London School of Economics; the Heythrop Institute for Religion, Ethics, and Public Life; and Jesuit Refugee Service (UK).*

# Refugee Solutions, or Solutions to Refugeehood?

JAMES C. HATHAWAY

Writing in the *International Journal of Law and Psychiatry*, Fleur Johns recently indicted international refugee law – the ostensible source of refugee rights and solutions – as being instead “a producer of... pathology.” She writes:

The Refugee Convention classifies refugees as “problem[s]” and “cause[s] of tension” and works towards resolving these “problem[s]” and “tension[s].” .. Yet where... lies the “problem” to be cured by recourse to international refugee law and lawyers? Does it reside in the wars, famines and political conflicts that... drive people from their countries of nationality? Does it reside in the trauma of border-transgressions to which refugees are subject...? Does it reside in the callousness of governments and judges, or the xenophobia of the constituencies that support them? [Or] [d]oes it rest as much... with international refugee law’s tendency to insist upon the normality of stable and enduring national attachments; [and] its innate preference for limited, fear-laden divergences therefrom?<sup>1</sup>

There is an urgent need, Dr. Johns contends, for “... international refugee lawyers... [to] take a moment to question the pre-eminence of the therapeutic mode in their professional work and its role in sustaining a prescriptive normality that tends to diagnose the refugee as flawed and requiring correction...”<sup>2</sup> She concludes,

Might our instruments and strategies of cure be tainted by the very drives against which we supposedly labor in the international refugee law field? Might insistence that international refugee law has or should have therapeutic, corrective effects comprise part of the problem towards which it ostensibly directs those curative efforts?<sup>3</sup>

My first instinct was to contest Dr. Johns’s charge. As part of international law, created and managed by states, the refugee law regime of necessity achieves humanitarian good in the margins of a more fundamental commitment to

preserve state interests. This is not only a description of the ground reality, but may in fact be a source of strength: refugee law persists in large measure *because* governments have a self-interest in its retention. And more specifically, is it really such a bad thing, in a world in which sovereign power still matters, to commit ourselves to enabling refugees – that is, persons disfranchised from their own state – somehow to secure either a new national attachment, or be restored to that with their country of origin? In practical terms, is that not a critical means of restoring dignity and self-determination?

Yet as I reflected more on Dr. Johns’s argument, I recognized that much of her charge is sound if directed not at international refugee law as authentically conceived, but rather at the *distortion* of refugee law that has emerged from recent interstate and, in particular, agency reinterpretations of refugee law.

The argument I wish to make is that a legal regime which is in truth fundamentally oriented to the promotion of *autonomy* of refugees *has* been “pathologized” to focus instead on finding cures to refugeehood. A regime which was *actually* established to guarantee refugees lives in dignity until and unless either the cause of their flight is firmly eradicated or *the refugee himself or herself* chooses to pursue some alternative solution to their disfranchisement has now become a regime which labours nearly single-mindedly to design and implement top-down solutions which “fix the refugee problem.”

In short, we increasingly see a regime oriented not to the facilitation of “refugee solutions,” but instead to the implementation of “solutions to refugeehood.”

## ***The Fallacy of “Solutions”***

To begin, I wish to be clear that I am not opposed to the notion of “solutions” as such. Solutions, at least for those who want them, are of course good things. But refugee protection, despite much rhetoric from the United Nations

High Commissioner for Refugees (UNHCR) since the mid-1990s to the contrary,<sup>4</sup> is not primarily about looking for solutions. Refugee protection is instead fundamentally oriented to creating conditions of independence and dignity which enable *refugees themselves* to decide how *they* wish to cope with their predicaments. It is about ensuring autonomy, not about the pursuit of externally conceived “fixes.”

Increasingly, though, there is impatience with the duty simply to honour the rights of persons who are Convention refugees. The focus of much contemporary discourse is instead on the importance of defining and pursuing so-called “durable solutions” to refugee flight.<sup>5</sup> The main goal of a refugee protection regime oriented towards “durable solutions” is effectively to find a way to bring refugee status to an end – whether by means of return to the country of origin, resettlement elsewhere, or naturalization in the host country.

Indeed, those who focus on achieving durable solutions increasingly regard respect for refugee rights as little more than a “second best” option, to be pursued only until a durable solution can be implemented. UNHCR’s Executive Committee, for example, has endorsed a conclusion “[r]ecognizing the need for Governments, UNHCR and the international community to continue to respond to the asylum and assistance needs of refugees *until durable solutions are found* [emphasis added].”<sup>6</sup> This position is in line with the view once expressed by a senior official of the UNHCR that

protection should be seen as a temporary holding arrangement between the departure and return to the original community, or as a bridge between one community and another. Legal protection is the formal structure of that temporary holding arrangement or bridge.<sup>7</sup>

Despite the technical accuracy of the view that protection is a duty which inheres only for the duration of risk, that duty may be inadvertently degraded by referring to it as simply an “arrangement or bridge” rather than as a legitimate alternative to the pursuit of a “durable solution” to refugee status. This very simple notion – that the recognition and honouring of refugee rights is itself a fully respectable, indeed often quite a desirable response to involuntary migration – can too easily be eclipsed by the rush to locate and implement so-called “durable solutions.”<sup>8</sup>

In contrast to this emphasis on the pursuit of durable solutions, the Refugee Convention gives priority to allowing refugees to make their own decisions about how best to respond to their predicament. As a non-governmental commentator astutely observed, one of the strengths of the refugee rights regime is that it eschews “the false notion of

‘durable solutions’ to refugee problems, especially as refugees [may] have no idea as to how long they are likely to stay in a particular country.”<sup>9</sup> Rather than propelling refugees towards some means of ending their stay abroad, the Refugee Convention emphasizes the right of refugees to take the time they need to decide when and if they wish to pursue a durable solution.

In some cases, refugees will choose not to pursue any solution right away, but will prefer simply to establish a reasonably normal life in the state party where they sought protection. This is a valid alternative, which may not lawfully be interfered with by either governments or international agencies. Because refugee rights inhere as the result of the individual’s predicament and consequent status – rather than as a result of any formal process of status adjudication – they provide refugees with a critical, self-executing arsenal of entitlements which may be invoked in any of the state parties to the Refugee Convention. They afford refugees a real measure of autonomy and security to devise the solutions which they judge most suited to their own circumstances and ambitions, and to vary those decisions over time.

Yet when the focus is on the pursuit of “solutions” rather than on respect for refugee rights as such, the drive is fundamentally to re-establish systemic homeostasis, which means that any conflicting priorities of refugees themselves are secondary, if relevant at all.

Nowhere can this risk be seen more clearly than in the context of the so-called “voluntary repatriation” framework.

### “Voluntary Repatriation”

As we all know, there is strong support for regarding repatriation as the best solution to refugeehood. UNHCR’s Executive Committee, for example, has “not[ed] that [while] voluntary repatriation, local integration and resettlement are the traditional durable solutions for refugees, . . . voluntary repatriation is *the preferred solution*, when feasible [emphasis added].”<sup>10</sup> As the language of the Executive Committee makes clear, support is not normally expressed for “repatriation” as a solution to refugeehood, but rather for “voluntary repatriation.”<sup>11</sup> Which sounds nice, right? Wrong.

On closer examination, the routine use of this “voluntary repatriation” terminology can be seen to be problematic. While anchored in the language of the UNHCR Statute,<sup>12</sup> and hence logically taken into account in determining what sorts of role *the agency* can take on,<sup>13</sup> the rights of state parties to the Refugee Convention are quite differently conceived.<sup>14</sup> The Convention allows governments to bring refugee status to an end only when there has been either

“voluntary re-establishment” (not repatriation) or when there has been a “fundamental change of circumstances” in the country of origin which justifies the cessation of refugee status (not when UNHCR decides that the moment is right to promote “voluntary repatriation”).

To be clear, there are only two relevant, Convention-based means of bringing refugee status to an end.

On the one hand, it may be the case that a person who is a refugee – that is, who continues to be objectively at risk of being persecuted – nonetheless decides to go back to the country where that risk exists. In so doing, the refugee is simply exercising the right of every person to return to his or her own country.<sup>15</sup> Refugee status may come to an end if – but only if – the voluntary return amounts to re-establishment in the country of origin.<sup>16</sup> Re-establishment is not the same as return or repatriation. Simply put, the refugee who *returns* only loses his or her refugee status once a durable, ongoing presence in the home country is established. Up to that point, she remains a refugee and is legally entitled to go back to the asylum country and to resume refugee protection there if things do not work out as hoped in the country of origin.<sup>17</sup>

The alternative solution to refugeehood allows the government of a state party to terminate refugee status and require the return of a former refugee to his or her country of origin where there has been a “fundamental change of circumstances”<sup>18</sup> that is significant and substantively relevant; which change is enduring; and which results in the practical and dependable delivery of “protection” in the home country.<sup>19</sup> If – and only if – these demanding criteria are met, return need not be voluntary<sup>20</sup> so long as it is carried out in a rights-regarding way.<sup>21</sup>

Where do these notions of “voluntary re-establishment” and “cessation due to a fundamental change of circumstances” tie in to UNHCR’s favoured notion of “voluntary repatriation”? In principle, “voluntary repatriation” should really just define a UNHCR-based support mechanism to either of these Convention-based options. If a refugee wants to go home with a view to re-establishing himself or herself there, or if a government has validly terminated refugee status based on a “fundamental change of circumstances” there, then UNHCR as an agency is empowered to facilitate “voluntary repatriation” to the country of origin.<sup>22</sup>

In fact, particularly in the less developed world, “voluntary repatriation” has insinuated itself into the Convention-based rights regime, and has in practice become something of a substitute for either “voluntary re-establishment” or for “cessation due to a fundamental change of circumstances.” In the result, refugees who choose to “test the waters” by return to their country of origin find that they are deemed to have lost their status by reason of “voluntary

repatriation” even though the durability of stay required by the “voluntary re-establishment” test has in no way been met.

Even more seriously, governments in much of the political South erroneously assert the right to terminate refugee status on the grounds that UNHCR is promoting the “voluntary repatriation” of a given refugee population – even though the demanding criteria for cessation due to a fundamental change of circumstances could in no sense be satisfied. One might have hoped that states relying on the UNHCR “voluntary repatriation” standard would simply inject a volition requirement into their examination of whether refugee status can lawfully be withdrawn due to a fundamental change of circumstances in the country of origin. This “best of all worlds” option – the risk has clearly gone away, *and* this refugee is willing to go home – has not materialized. Instead, the pattern is for governments in most of the less-developed world to take UNHCR involvement in a given repatriation effort – relying on its agency-based “voluntary repatriation” standard – as a sufficient basis in and of itself for the termination of their own duty to protect the refugees in question, with no real attention being paid to the actual legal criteria for cessation of status (much less to volition). These governments simply end refugee status for groups of refugees based on the legally irrelevant fact that UNHCR is facilitating that group’s voluntary repatriation.<sup>23</sup>

In each of these ways, then, the “voluntary repatriation” language – which sounds positive, rights-regarding, autonomy-affirming – is, in practice, being relied upon to deny refugee rights.

Sometimes this superficial reliance on the fact of an ongoing UNHCR “voluntary repatriation” effort is no more than a completely disingenuous ploy to justify a government’s involuntary repatriation initiatives. In an extreme case, the Tanzanian government invoked UNHCR voluntary repatriation efforts as justification for its own decision in December 1996 that “all Rwandese refugees in Tanzania are expected to return home by 31 December 1996.”<sup>24</sup> This announcement, said to have been “endorsed and co-signed by the UNHCR,”<sup>25</sup> resulted in the return of more than 500,000 refugees within the month.<sup>26</sup> Yet the criteria for lawful cessation of refugee status could not possibly have been met in the circumstances: fair trials were only beginning in Rwanda, disappearances and deliberate killings were continuing there, and there was no reason whatever to believe that Rwanda could meet the basic needs of the returning refugees.<sup>27</sup>

As bad as it is for governments disingenuously to invoke UNHCR “voluntary repatriation” efforts as authority for their own less-than-voluntary return initiatives, there is a

second – and in my view more pernicious – dimension to the problematic reliance on “voluntary repatriation” standards in lieu of true Convention cessation criteria. As the “supporting role” played by UNHCR in the unlawful repatriation of Rwandans from Tanzania suggests, the risks which flow from reliance on the “voluntary repatriation” paradigm may not be simply the consequence of host state manipulation. Reliance on the “voluntary repatriation” alternative to the real, Convention-based cessation standard is also prevalent as the result of institutional over-reaching by UNHCR itself.

UNHCR has now taken positions which suggest that governments *should* be guided by its institutional decisions about when to pursue repatriation in deciding when refugees should go home. Indeed, such deference is now said by UNHCR to be part of the “responsibilities of the host country.”<sup>28</sup> Thus, in 2002 UNHCR announced that it had received “assurances [from] the Tanzanian and Rwandan governments that security in Rwanda *had improved* [emphasis added],”<sup>29</sup> and sanctioned the voluntary repatriation of the remaining 20,000 Rwandan refugees living in Tanzania.<sup>30</sup> Yet even the spokesperson for a partner agency participating in the ensuing government-orchestrated “voluntary” repatriation conceded that the repatriation actually conducted by Tanzania relied upon an “impetus” in the form of “verbal pressure”<sup>31</sup> – in particular, a firm year-end deadline for the refugees’ departure.<sup>32</sup> In at least some instances, officials implementing the program used brute force to compel even long-term Rwandan residents to leave the country.<sup>33</sup>

Indeed, against the backdrop of UNHCR calls for repatriation, even host governments firmly committed to protection may on occasion feel under pressure to acquiesce in the agency’s repatriation plans. For example, Zambia raised concerns about the risks posed by land mines for Angolan refugees slated for repatriation by UNHCR, but was reportedly lobbied by UNHCR to acquiesce in the return. The agency sought to reassure Zambia that even though many areas were “heavily mined . . . [w]ith the funding UNHCR has received, we will be expanding our presence in those areas of resettlement to ensure that people are reminded of the threat of land mines. *So the problem is addressed* (emphasis added).”<sup>34</sup>

The UNHCR’s ambition effectively to determine the issue of cessation for state parties – and to do so by reference not to Article 1(C)(5) of the Refugee Convention, but drawing on its agency-based “voluntary repatriation” standard – can be seen even more clearly in the assertion by the then-High Commissioner for Refugees during a visit to Africa in April 2003 that “Rwanda is safe for refugees in Tanzania and Uganda . . . ‘In Tanzania, we informed the

refugees that they could return to Rwanda. Some have returned, but many remain,’ he said . . . Such people, he said, were ‘*not refugees anymore*’ (emphasis added).”<sup>35</sup>

By taking such a legally unfounded, aggressive stance – not only effectively purporting to “determine” the issue of cessation under the Refugee Convention (which is *not* a UNHCR responsibility or prerogative) but to do so based not on the Convention standards, but rather on the basis of his agency’s policy predispositions – themselves often rooted in political, economic, or other concerns<sup>36</sup> – the then-High Commissioner took the distortion of refugee law by reference to agency standards to a new height. The subordination of the real requirements of the Convention – that is, whether there is a fundamental, substantively relevant, enduring, and protection-delivering change of circumstance in the country of origin – to UNHCR’s institutional preparedness to approve “voluntary repatriation” – whatever that means, on a given day – is not lawful and has proved extraordinarily dangerous on the ground.

To return to my overarching theme, the distortion of true cessation criteria by states and the UNHCR is important not only for its own sake, but because it stands as a shockingly clear example of how the current fixation with finding “solutions to refugeehood” has in practice trumped the commitment to honouring the rights of refugees as codified in the Convention. Repatriation – often not really voluntary, often not really safe, often not really warranted by international law – nonetheless delivers a “solution to refugeehood.” It thus serves the political and economic interests of host governments anxious to divest themselves of protective responsibilities. The rush to repatriation also serves the interests of the refugee agency itself, which is increasingly prone to trumpet its own value to powerful states not simply by reference to the quality of life it has secured for refugees, but instead by pointing to its success in bringing refugee status to an end.<sup>37</sup>

Compounding the problem, developed governments, with the active participation of the UNHCR, are presently engaged in efforts systematically to deem refugee status unwarranted in the political North where it can in principle be secured closer to home, *i.e.* in the political South. While refugee law is not necessarily breached by initiatives of this kind, legal standards *are* infringed if return is effected to places where “solutions to refugeehood” are pursued at the expense of refugee rights. And to be candid, one’s suspicions in this regard are aroused when the required quality of protection in destination countries is described by reference to amorphous, legally unfounded phrases such as “effective protection” – not “protection,” full stop. While the meaning of “protection” in refugee law is fairly clear – including, at a minimum, respect for the Refugee Conven-

tion's definition and rights regime – the consistent official preference for the more fungible “effective protection” label is presumably of some normative significance. In particular, does anyone seriously imagine that “effective protection” would be deemed not to exist in a country which effects repatriation with UNHCR blessing, albeit premature or unwarranted based on the cessation criteria of the Convention itself?

What, then, is the challenge for the refugee advocacy community?

First, refugee advocates today need to learn the Refugee Convention “cold,” and to understand its relationship to international human rights law more generally. In an era in which there is no more than selective ability and inclination to combat human rights abuse abroad, and in which traditional human rights law affords few immediate and self-actuating sources of relief, refugee law stands out as the single most effective, relatively autonomous remedy for those who simply cannot safely remain in their own countries. The surrogate protection of human rights required by refugee law is too valuable a tool not to be widely understood, and conscientiously implemented.

Second and related, we must refuse to buy into the propensity of states and the UNHCR to misinterpret the Convention so as to give priority to the search for “solutions to refugeehood” over “refugee solutions.” The goal of refugee law is not to pathologize refugeehood and hence single-mindedly to pursue means of “curing” that status. To the contrary, refugee law exists precisely in order to ensure that refugees enjoy true dignity and quality of life for as long as it takes them to decide for themselves how best to cope, to respond, and to rebuild their lives. That prerogative cannot be traded away by governments, by the UNHCR, or by us.

Put simply, refugee rights are not negotiable.

### Notes

1. F. E. Johns, “The Madness of Migration: Disquiet in the International Law Relating to Refugees” (2004) 27 *Int'l J. of L. & Psychiatry* 587 at 588.
2. *Ibid.*
3. *Ibid.*
4. “The limitations of... traditional solutions, coupled with the growing scale of the refugee problem and the changing nature of the international political and economic order, have prompted UNHCR to develop a new approach to the question of human displacement. This approach is proactive and preventive, rather than reactive... UNHCR's work is becoming more and more linked with a wide range of UN efforts, from political negotiations, economic and social development, to the defence of human rights and environmental protection.” S. Ogata, “Foreward” in *The State of the World's Refugees: In Search of Solutions* (Oxford: Oxford University Press, 1995) at 8–9. There is, however, reason for some optimism that the new High Commissioner's insistence on a rededication of UNHCR to the primacy of protection will reverse this trend, at least in part. The agency's current “Mission Statement,” for example, attempts to link efforts to address “refugee problems” and to pursue “solutions” with the advancement of refugee rights.
5. UNHCR is mandated by the United Nations to lead and coordinate international action for the worldwide protection of refugees and the resolution of refugee problems. UNHCR's primary purpose is to safeguard the rights and well-being of refugees. In its efforts to achieve this objective, UNHCR strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another state, and to return home voluntarily. By assisting refugees to return to their own country or to settle permanently in another country, UNHCR also seeks lasting solutions to their plight.” UNHCR, *UNHCR Global Refugee Report 2005* (2006), online: <<http://www.unhcr.org/>>.
6. UNHCR records more than fifty resolutions of the General Assembly between 1959 and 2000 which call upon states to find “durable solutions” to refugee situations; it provides by way of a “sample text” GA Res. 38/121, para. 8, which “[u]rges all States to support the High Commissioner in his efforts to find durable solutions to refugee problems, primarily through voluntary repatriation, including assistance to returnees, as appropriate, or, wherever appropriate, through integration in countries of asylum or resettlement in third countries.” UNHCR, “Durable Solutions,” online: <<http://www.unhcr.org/>>. In response to these and similar calls, including the mandate set by the Declaration of States Parties to the 1951 Refugee Convention and/or its 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/MMSP/2001/09, Dec. 13, 2001, incorporated in Executive Committee of the High Commissioner's Program, “Agenda for Protection,” UN Doc. EC/52/SC/CRP.9/Rev.1, June 26, 2002, the agency released a “Framework for Durable Solutions for Refugees and Persons of Concern” in May 2003.
7. G. Arnaout, “International Protection of Refugees' Rights” (Remarks delivered at the Training Course on International Norms and Standards in the Field of Human Rights, Moscow, 1989) [Arnaout] at 7. Arnaout was at the time the Director of the Division of Law and Doctrine of UNHCR.
8. See, for example, *ibid.* at 7: “It is not adequate to consider as a solution to the [refugee] problem . . . mere ‘self-sufficiency.’ The problem of the refugee has always been seen as de jure or de facto statelessness, and the solution to this problem, therefore, must be either the reacquiring of the normal ‘community’ benefits of the original nationality or the acquisition of a new nationality with all its normal benefits . . . Without a community, the individual is isolated, deprived and vulnerable.”
9. Comments of M. Barber of the British Refugee Council, “Final Report: Implementation of the OAU/UN Conventions and Domestic Legislation Concerning the Rights and Obligations

- of Refugees in Africa, 14–28 September 1986,” *Refugee Studies Programme*, Oxford University (1988), at 34.
10. UNHR Executive Committee Conclusion No. 89, “Conclusion on International Protection” (2000), at Preamble.
  11. See e.g. UNHCR Executive Committee Conclusions Nos. 18, “Voluntary Repatriation” (1980); 41, “General Conclusion on International Protection” (1986); 46, “General Conclusion on International Protection” (1987); 55, “General Conclusion on International Protection” (1989); 62, “Note on International Protection” (1990); 68, “General Conclusion on International Protection” (1992); 74, “General Conclusion on International Protection” (1994); 79, “General Conclusion on International Protection” (1996); 81, “General Conclusion on International Protection” (1997); 85, “Conclusion on International Protection” (1998); 87, “General Conclusion on International Protection” (1999); and 89, “Conclusion on International Protection” (2000). The Executive Committee has recently “[r]eaffirm[ed] the voluntary character of refugee repatriation, which involves the individual making a free and informed choice through, inter alia, the availability of complete, accurate and objective information on the situation in the country of origin.” UNHCR Executive Committee Conclusion No. 101, “Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees” (2004), at Preamble.
  12. “The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by . . . [a]ssisting governmental and private efforts to promote voluntary repatriation [emphasis added].” UNHCR Statute, at Art. 8(d).
  13. See e.g. UNHCR, “Handbook: Voluntary Repatriation: International Protection” (1996) [UNHCR, “Voluntary Repatriation Handbook”].
  14. See M. Barutciski, “Involuntary Repatriation when Refugee Protection Is No Longer Necessary: Moving Forward after the 48th Session of the Executive Committee,” (1998) 10(1/2) *Int’l J. Refugee L.* 236 [Barutciski] at 249: “[T]he concept of voluntary repatriation is incoherent if taken as a legally binding standard. Its value appears in terms of recommending that a State take into account the individual’s desire to return home. Although this is undoubtedly a reasonable recommendation, it cannot be a coherent legally binding standard according to international principles of refugee protection.”
  15. “No one shall be arbitrarily deprived of the right to enter his own country.” *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force 23 March 1976), at art. 12(4).
  16. “The Convention shall cease to apply to any person falling under the terms of section A if . . . [h]e has voluntarily re-established himself in the country which he left or outside [of] which he remained owing to fear of persecution.” *Convention relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 150, Can. T.S. 1969/6 (entered into force 22 April 1954) [*Refugee Convention*], at art. 1(C)(4).
  17. See generally J.C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005) [Hathaway] at c. 7.2.
  18. Refugee status is lost once the refugee can no longer claim surrogate international protection “because the circumstances in connection with which he has been recognized as a refugee have ceased to exist.” *Refugee Convention*, *supra* note 16 at art. 1(C)(5–6). “We should not lose sight of the fact that international law concerns the imposition of obligations on States. It may be in the individual’s best interest actually to remain in the host country and continue his or her life in exile, but is the State obliged to provide refuge if conditions in the country of origin have become safe within a reasonable time period? Clearly, States never agreed to such legal obligations.” Barutciski, *supra* note 14 at 245.
  19. See Hathaway, *supra* note 17 at 922–928.
  20. The situation is somewhat more ambiguous for state parties to the *Convention governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 10011 U.N.T.S. 14691 (entered into force 20 June 1974) [*OAU Refugee Convention*]. While art. I(4)(e) of this treaty is largely comparable to the right of cessation due to a fundamental change of circumstances found in the *Refugee Convention*, art. V(1) of the *OAU Refugee Convention* expressly provides that “[t]he essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will [emphasis added].” The *OAU Refugee Convention* does not make clear how this provision is to be related to the cessation clauses. On the one hand, the reference to the duty to respect the voluntary character of repatriation “in all cases” could be read to limit the right of states to repatriate even a person who is no longer a refugee by virtue of cessation of status. On the other hand, the final clause more clearly stipulates that the requirement of voluntarism may in fact be invoked only by a person who is a “refugee,” thereby excluding a (former) refugee whose status has validly ceased. If read to apply only to (present) refugees, then the OAU provision can not only be reconciled to its own cessation clauses, but also applied in consonance with art. 1(C)(4) of the *Refugee Convention*, which does require voluntary re-establishment by a person otherwise entitled to refugee status before the duty to protect him or her comes to an end. See Hathaway, *supra* note at c. 7.2.
  21. The limitations on lawful repatriation set by international human rights law are discussed in Hathaway, *ibid.* at 944–952.
  22. “The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by . . . [a]ssisting governmental and private efforts to promote voluntary repatriation.” UNHCR Statute at art. 8(c). Beyond this authority, UNHCR may engage in other repatriation activities only with the authorization of the General Assembly of the United Nations: UNHCR Statute, at art. 9. The Executive Committee of UNHCR has recently gone beyond this constraint in a modest way, calling upon the agency to “tak[e] clear public positions on the acceptability of return of persons found not to be in need of international protection”: UNHCR

Executive Committee Conclusion No. 96, "Conclusion on the Return of Persons Found Not to be in Need of International Protection" (2003), at para. (j)(ii). The reference to persons not in need of international protection refers, however, only to persons not initially entitled to recognition of Convention refugee status, rather than also to persons whose refugee status has ceased.

23. "UNHCR has organized itself to facilitate repatriation . . . As evidenced by its healthy and thoroughgoing debate over how far it could venture toward repatriation without violating refugee rights, UNHCR was no mere plaything in the hands of states, but rather had the capacity for reasoned reflection and exhibited some relative autonomy . . . But soon there developed a repatriation culture that left refugees at greater risk . . . [A] repatriation culture means that UNHCR is oriented around concepts, symbols, and discourse that elevates the desirability of repatriation, coats it in ethical luster, and makes it more likely that repatriation will occur under more permissive conditions." M. Barnett, "UNHCR and Involuntary Repatriation: Environmental Developments, the Repatriation Culture, and the Rohingya Refugees" (Paper presented at the 41st Annual Convention of the International Studies Association, Los Angeles, 14–18 March 2000), online: <<http://www.ciaonet.org/isa>>.
24. Amnesty International, "Great Lakes Region: Still in Need of Protection: Repatriation, *Refoulement* and the Safety of Refugees and the Internally Displaced," Doc. No. AFR/02/07/97 (1997) [Amnesty International] at 2.
25. "On December 5, 1996 . . . UNHCR distributed information sheets to refugees about the repatriation exercise, including the immediate suspension of economic and agricultural activities in the camps . . . During the repatriation exercise, UNHCR provided both financial and logistical assistance to the Tanzanian government." B. Whitaker, "Changing Priorities in Refugee Protection: The Rwandan Repatriation from Tanzania" (Working Paper No. 53, *New Issues in Refugee Research*, UNHCR, February 2002) at 1–2. UNHCR pronounced itself satisfied that the returns were in fact voluntary despite solid evidence to the contrary. See Amnesty International, *supra* note 24 at 2; US Committee for Refugees, *World Refugee Survey 1997* (1997) at 99–100.
26. "Initially tens of thousands of refugees fled the [Tanzanian] camps and attempted to move further into Tanzania, in the hope of reaching neighbouring countries. The Tanzanian security forces intercepted the fleeing refugees and 'redirected' them towards the Rwandese border . . . Reports now indicate that some refugees who refuse to go back are being arrested and held in a detention camp . . . Other refugees who wished to remain were undoubtedly forced back in the rush." Amnesty International, *supra* note 24 at 2. Importantly, it was only after the returns occurred that UNHCR "expressed hope that Tanzania [would] institute a screening procedure to evaluate the claims of individuals too fearful to return;" *ibid.*
27. *Ibid.* at 5–6.
28. UNHCR, "Voluntary Repatriation Handbook," *supra* note 13 at 12. Specifically, UNHCR asserts that "[t]he country of asylum should respect the leading role of UNHCR in promoting, facilitating and coordinating voluntary repatriation;" *ibid.*
29. It is noteworthy that at this time, the training of judges who would preside over the trial of persons accused of all but the highest category of genocide crimes had only been commenced. It was therefore not surprising that Rwandan refugees continued to express grave reservations about the practical efficacy of commitments to protect them from retaliation. "Focus on Rwanda Refugees in Tanzania," UN Integrated Regional Information Networks, 9 May 2002.
30. "Rwandan Refugees to Be Out by December 31," *East African* (14 October 2002).
31. "Thousands more refugees seek repatriation," UN Integrated Regional Information Networks, 9 January 2002, quoting Mark Wigley, deputy director of Norwegian People's Aid. In the context of a subsequent effort by Tanzania to repatriate refugees to Burundi, a consortium of US-based non-governmental organizations called upon the Tanzanian government to "cease placing political and psychological pressure" on the refugees to return. "NGOs Concerned over Voluntary Repatriation of Refugees," UN Integrated Regional Information Networks, 15 May 2002.
32. "In late September 2002, UNHCR and the governments of Tanzania and Rwanda convened a tripartite meeting in Geneva . . . to discuss durable solutions for refugees living in Tanzania. The officials . . . found that, inter alia, '[p]ressure exerted by the governments of Tanzania and Rwanda on Rwandan refugees living in Tanzania and on UNHCR officials in Tanzania and Rwanda played a significant role in unnecessarily hurrying the voluntary repatriation program.'" J. Frushone, "Repatriation of Rwandan Refugees Living in Tanzania," US Committee for Refugees, 10 January 2003. Indeed, "[n]ewspapers in Eastern Africa have reported that Tanzania will forcibly send 2,000 Rwandan refugees living in the camps in western Tanzania back to Rwanda. The 2,000 are those who refused to return home during the recent voluntary repatriation, citing insecurity in their home country as the reason for remaining . . . The feeling in the Tanzanian government is that there is no need for the refugees to remain because the security situation in Rwanda is now stable. Earlier this month, Tanzania's Home Affairs Minister, Mr. Omar Ramadhan Mapuri, warned that Tanzania might be forced to repatriate all the refugees living in the country if the international community does not intervene in the serious food crisis facing the refugees." (2003) 127 JRS Dispatches (28 February 2003).
33. "The President of the National Repatriation Commission . . . [said] that the move by the Tanzanian government had caught more than the evictees by surprise. 'We had not anticipated this. We asked them to stop the process for some time so that we can talk with them and work out the modalities of how it should be done' . . . [Tanzanian ambassador to Rwanda] Mwakalindile admits that the forced repatriation may not have been handled appropriately." "Forced to Go Home: Rwandan Immigrants in



Tanzania,” Internews, 15 April 2003. “The last convoy [of Rwandan refugees] to depart Tanzania carried refugees who alleged that Tanzanian authorities threatened to burn down their homes if they refused to leave the country. UNHCR insisted, however, that ‘those repatriated were refugees who had voluntarily signed up . . . to return home.’” US Committee for Refugees, *World Refugee Survey 2003* (2003) at 100.

34. “UNHCR Addresses Returnee Concerns,” UN Integrated Regional Information Networks, 14 March 2003, quoting UNHCR regional spokesperson Fidelis Swai; see also “Zambia: Plans for Return of Refugees Finalised,” *Africa News*, 17 March 2003, confirming UNHCR’s efforts to downplay Zambian concerns regarding the safety and security of conditions for return in Angola. In fact, even after UNHCR had announced that the road linking Maheba refugee settlement in Zambia with Cazombo in Angola was free of mines, “the return of more than 400 Angolan refugees . . . was postponed due to the discovery of a mine on June 10, two days before the beginning of the planned repatriation.” “Angola: Preparations for the Beginning of the Organised Repatriation of Refugees,” (2003) 135 JRS Dispatches (1 July 2003).
35. “Rwanda is safe for returning refugees, says UNHCR head,” UN Integrated Regional Information Networks, 16 April 2003.
36. As Amnesty International noted in a stinging critique of UNHCR’s decision to assist Tanzania’s December 1996 enforced repatriation of Rwandans, “[t]hat [protection] oversights were possible, were legitimized by UNHCR, and were so readily accepted by the international community speaks volumes. Does the world remain committed to protecting refugees, or do we now emphasize return, for political and

financial reasons, over safety?” Amnesty International, *supra* note 24 at 3.

37. “By the end of 2005, the global number of refugees reached an estimated 8.4 million persons, the lowest level since 1980. This constitutes a net decrease of more than one million refugees (–12%) since the beginning of 2005, when 9.5 million refugees were recorded. This is the fifth consecutive year in which the global refugee population has dropped and the second sharpest decrease since 2001. Over the five year period, the global refugee population has fallen by one third (–31%). Decreases in the refugee population are often the result of refugees having access to durable solutions, in particular voluntary repatriation... The past four years saw an almost unprecedented level of voluntary repatriation, mainly due to the return of more than 4.6 million Afghans from Pakistan and the Islamic Republic of Iran. Globally, more than six million refugees were able to return home during 2002–2005, of which 4.6 million with UNHCR assistance.” UNHCR, *2005 Global Refugee Trends* (2006) at paras. 7, 19.

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