



**VOLUNTARY REPATRIATION PERSPECTIVES FROM THE GREAT
LAKES REGION: KENYA, TANZANIA AND UGANDA**

BY

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LIST OF ACRONYMS

ACHPR	African Charter on Human and People's Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
CAT	International Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OAU	Organization of African Unity
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees

TABLE OF CONTENTS

ACKNOWLEDGEMENTS	ii
LIST OF ACRONYMS	iii
EXECUTIVE SUMMARY	1
INTRODUCTION	3
CHAPTER ONE: THE CONCEPTUAL, LEGAL AND NORMATIVE FRAMEWORK ON VOLUNTARY REPATRIATION	8
1.2 Voluntary Repatriation and Refugee Protection	10
1.3 Human Rights and Voluntary Repatriation	12
1.3.1 Voluntary Repatriation under International Law	12
1.3.2 Voluntary repatriation under Regional Law	15
1.3.3 The Legal and Policy Framework on Voluntary Repatriation in Kenya, Uganda and Tanzania	17
1.3.4 Soft Law	24
1.4 Conditions of Voluntary Repatriation	25
1.4.1 Formal repatriation agreement	26
1.4.2 Voluntariness	27
1.4.2.1 Conditions in the Country of Origin	28
1.4.2.2 Fundamental Changes	29
1.4.2.3 Safety (Return in Safety)	30
1.4.2.4 Conditions in the Country of Asylum	31
1.4.2.5 Free and informed choice to return & participation in Returns decision /processes	31
1.4.3 Return with dignity	32
1.5 Institutional Framework on Voluntary Repatriation	33
CHAPTER TWO: COMPARATIVE ANALYSIS OF VOLUNTARY REPATRIATION FROM KENYA, UGANDA, AND TANZANIA	35
2.1 Introduction	35
2.1.1 Kenya	35
2.1.2 Tanzania	36
2.1.3 Uganda	37
2.2 Voluntary Repatriation of Somalis from Kenya	38
2.2.1 Special Agreement	38
2.2.2 Conditions in the Country of Origin	39
2.2.3 Conditions in the Country of Asylum	40
2.3 Voluntary Repatriation from Tanzania	42
2.3.1 Special Agreement	42
2.3.2 Conditions in the Country of Origin (Burundi)	42
2.3.3 Conditions in the Country of asylum (Tanzania)	43
2.4 Voluntary Repatriation from Uganda	44

2.4.1 Special Agreement.....	44
2.4.2 Conditions in the Country Origin (South Sudan)	45
2.4.3 Conditions in the Country of Asylum.....	47
2.5 Conclusion	48
CHAPTER THREE: CONCLUSION & RECOMMENDATIONS.....	49
3.1 The research recommends a Human Rights Based Approach to Voluntary Repatriation.....	49
3.2 Exploring Alternative Solutions	51
3.3 Ensure threshold for Cessation of refugee status and Promotion of Return are met.....	52
3.4 Making a case for Systematic Returnee Monitoring.....	52
3.5 Underscoring Voluntariness.....	53
BIBLIOGRAPHY	54

EXECUTIVE SUMMARY

This paper is a comparative study of voluntary repatriation practices in Kenya, Tanzania and Uganda from 1997 to 2018. The paper seeks to understand the legal and policy frameworks and practical considerations that inform and drive repatriation projects in the three countries. This thesis examines how voluntary repatriation projects in the selected countries are in keeping with the threshold laid down by law. It also examines the practice in light of UNHCR guidelines that complement the legal framework.

The thesis establishes the normative framework on repatriation and explores the legal provisions on repatriation at the international and national levels. It highlights the conditions necessary for voluntary repatriation and proceeds to examine the practices in each of the three countries: Kenya, Uganda and Tanzania. To identify points of convergence in practice as well as good practices surrounding repatriation, the thesis utilizes a comparative approach. The analysis is aimed at identifying areas for reform in as far as ensuring sound refugee protection in the quest for durable solutions.

The analysis concludes that although Kenya, Uganda and Tanzania are signatories to the Refugee Convention as well as the OAU Convention and have enacted domestic laws on refugee protection, these laws have not been implemented to the latter. Voluntariness in repatriation exercises has not been fully achieved and as such these organised returns are fraught with human right violations, fall short of the threshold set by law and in some instances have amounted to refoulement.

The thesis recommends the adoption of comprehensive repatriation programmes that are informed by human rights based approach to refugee protection. The thesis posits that refugees should participate in making their own return decisions

or seeking alternative options. The research recommends the setting up of Quadripartite Commissions to replace Tripartite Arrangements between countries of origin, country of asylum and UNHCR. As the fourth estate, refugees would proactively engage in the returns process and guarantee voluntariness. The research advances alternative options for refugees who do not wish to repatriate mobility for labour reasons and cross-border mobility arrangements for refugees where naturalization is not feasible. The thesis further recommends that UNHCR and countries intending to invoke cessation clauses must ensure the threshold has been met. The thesis in conclusion underscores the significance of voluntariness in repatriation efforts and acknowledges the inherent potential of states to respect human rights and uphold refugee protection.

INTRODUCTION

The Great Lakes Region has been the epicentre of refugee flows since 1950¹ with 81% of the refugees having been produced and received within the region¹. The region has experienced many armed conflicts, many of which are protracted, resulting in massive displacement of populations across international borders induced by a multitude of factors ranging from colonial legacies of divide and rule, contested identities, weaknesses of states to perform its functions effectively and post colonial national building challenges². Currently, Kenya, Tanzania and Uganda host over 2,000,000 asylum seekers and refugees for all of whom a durable solution must be sought. For these refugees, voluntary repatriation is arguably the most preferred durable solution to resettlement and local integration particularly when feasible³.

Over the years, these three countries, which are signatories to the Convention on the Status of Refugees, OAU Convention Governing Specific Aspects of the Refugee Problem in Africa which are the standard setting instruments governing refugees,⁴ have each repatriated refugees to their countries of origin and continue to do so. Kenya has so far repatriated 73,943⁵ Somali refugees and continues to repatriate the remainder of Somali refugees who constitute 58% of Kenya's total refugee population, which stands at 489,239⁶. Tanzania on the other hand repatriated

¹ World Bank, Forced Migration in the Great Lakes Region, 2015 available at <https://openknowledge.worldbank.org/handle/10986/21708> (accessed on 26th November 2017)

² Supra note 3 p. 9

³ UNHCR Executive Committee Conclusion No. 89, "Conclusion on International Protection" (2000), at Preamble, available at <http://www.unhcr.org/protection/globalconsult/3b9388e94/89-li-conclusion-international-protection-2000-unhcr-excom-meeting.html> (Accessed on 30th November 2017)

⁴ Convention relating to the Status of Refugees, 1951; 1967 Protocol, OAU Convention Governing Specific Aspects of Refugee Problems in Africa.

⁵ <http://www.unhcr.org/ke/figures-at-a-glance> (accessed on 29th November 2017)

⁶ Ibid Statistics from December 2014 to 3rd November 2017

an estimated 500,000 Rwandan refugees since 1996⁷ and 390,000 Burundi refugees to Burundi between 2002-2009⁸. Tanzania is presently laying down modalities for repatriating 12,000 Burundians before the end of 2017⁹ and will inevitably facilitate durable solutions for the remaining 255,714¹⁰. Owing to mass refugee flows from South Sudan, Uganda is host to 1, 326, 750 refugees.¹¹ Uganda like Kenya and Tanzania has similarly repatriated refugees to Rwanda¹² and Southern Sudan¹³. Where voluntary repatriation is viable and strategic to resolving a refugee situation, it must be undertaken voluntarily, conducted in safety and dignity¹⁴ in accordance with the governing legal framework.¹⁵ The repatriation exercise is often organised and based on terms of a Tripartite Agreements signed between UNHCR, hosting Country and the Country of Origin. The terms of this Agreement must meet the requirement for voluntariness.

Although ‘there is no published research data on voluntary repatriation in Africa which could be used to test the assumptions which govern current policies and practices of governments and international agencies,’¹⁶ this study contends that to

⁷ "Repatriation of Rwandan refugees living in Tanzania." *Reliefweb*. January 10, 2003. <https://reliefweb.int/report/united-republic-tanzania/repatriation-rwandan-refugees-living-tanzania> (accessed November 23, 2017).

⁸ Eveline Wolfcarius. "Repatriation of 1972 Burundian refugees from Tanzania enters final phase." *UNHCR*. April 24, 2009. <https://www.unhcr.org/news/latest/2009/4/49f1bf072/repatriation-1972-burundian-refugees-tanzania-enters-final-phase.html> (accessed April 27, 2017).

⁹ UNHCR. "Burundi Situation." *UNHCR*. August 2017. <https://data2.unhcr.org/en/documents/download/60128> (accessed November 18, 2017).

¹⁰ UNHCR. "Burundi Situation." *UNHCR*. August 2017. <https://data2.unhcr.org/en/documents/download/60128> (accessed November 18, 2017).

¹¹ UNHCR. "UNHCR Uganda Factsheet - July 2017." *Reliefweb*. August 4, 2017. <https://reliefweb.int/report/uganda/unhcr-uganda-factsheet-july-2017> (accessed December 10, 2017).

¹² HRW. "Uganda/Rwanda: Halt Forced Returns of Refugees." *Human Rights Watch*. July 17, 2010. <https://www.hrw.org/news/2010/07/17/uganda/rwanda-halt-forced-returns-refugees> (accessed November 16, 2017).

¹³ Hélène Caux. "UNHCR-assisted refugee repatriation to South Sudan tops 100,000." *UNHCR*. March 28, 2008. <https://www.unhcr.org/news/latest/2008/3/47ed0cfb4/unhcr-assisted-refugee-repatriation-south-sudan-tops-100000.html> (accessed July 29, 2017).

¹⁴ UNHCR, Handbook for Repatriation and Reintegration Activities cap 3.1

¹⁵ Convention relating to the Status of Refugees, 1951; 1967 Protocol, OAU Convention Governing Specific Aspects of Refugee Problems in Africa.

¹⁶ Barbara Harrell-Bond, 'Repatriation: Under What Conditions is it the Most Desirable Solution for Refugees? An Agenda for Research', *African Studies Review* (Vol 32, 1989) pp. 41-69 at p.43

varying degrees, repatriation exercises within the Great Lakes have been fraught with human rights abuses and carried out in circumstances that undermine voluntariness of the returns process and subject refugees to risk of persecution¹⁷ upon return to their countries of origin.

Assessing Repatriation projects has once again become critical in the wake of adoption of hostile refugee policies by States in a move that is tantamount to enforced returns. Kenya has for instance adopted a compulsory encampment policy and increased securitization of the asylum process particularly with regard to Somali refugees support this assumption.

Government of Kenya's threats to close refugee camps in Kenya in a move to expedite returns to Somalia are definitive of coerced returns.¹⁸ Presently, Kenya is repatriating Somali Refugees to Somalia contrary to credible reports that the situation in Somalia is not amenable to returns¹⁹. While Tanzania's refugee policy is relatively better as demonstrated by Tanzania's naturalisation of 162,000 Burundian refugees,²⁰ repatriations of Burundians from the country have been termed by some as coercive.²¹ Uganda on the other hand has model human rights oriented laws on refugees²² and provides opportunities for refugees to rebuilt themselves. The repatriation of South Sudanese in 2007 was by and large voluntary²³. Uganda has maintained its open door

¹⁷ UNHCR Position on Returns to Southern and Central Somalia (Update 1), May 2016 para 4 available at <http://www.refworld.org/pdfid/573de9fe4.pdf> (accessed on 23 September 2017)

¹⁸ Kenya National Commission of Human Rights, Legal Advice Centre T/A Kituo Cha Sheria V The Attorney General of Kenya & Ors Constitutional Petition no 227 of 2016

¹⁹ Bill Frelick. "Kenya: Involuntary Refugee Returns to Somalia." *Human Rights Watch*. September 14, 2016. <https://www.hrw.org/news/2016/09/14/kenya-involuntary-refugee-returns-somalia> (accessed July 30, 2017).

²⁰ UNHCR. "Tanzania naturalises first group of 1972 Burundian refugees." *UNHCR*. August 7, 2009. <https://www.unhcr.org/news/briefing/2009/8/4a7c001f9/tanzania-naturalises-first-group-1972-burundian-refugees.html> (accessed December 7, 2017).

²¹ "XI. The Return of Refugees from Tanzania." *Human Rights Watch*. 2003. <https://www.hrw.org/reports/2003/burundi1203/11.htm> (accessed November 15, 2017).

²² The Refugees Act 2006, The Refugee Regulations 2010

²³ Millicent Mutuli. "Sudanese repatriation from Uganda gathers pace." *UNHCR*. August 17, 2007. <https://www.unhcr.org/news/latest/2007/8/46c5c2194/sudanese-repatriation-uganda-gathers-pace.html> (accessed November 26, 2017).

policy and continues to host South Sudanese refugees fleeing from renewed conflict.²⁴ Although the repatriation of Rwandese refugees from Uganda was considered by some as involuntary²⁵, the delay in invoking the cessation clause signposts Uganda's commitment not to return Rwandese refugees to a country where their lives would be at risk. Definitively, the cessation clause is to be invoked by 31st December 2017²⁶. How Uganda treats Rwandans who will apply to be exempted from the blanket cessation will determine whether Uganda is a true safe haven for refugees as it has recently come to be known.

This research paper is a comparative study of voluntary repatriation practices in Kenya, Tanzania and Uganda. In so doing, it seeks to understand the legal and policy frameworks and practical considerations that inform and drive repatriation projects in the three countries. The key question is how voluntary these repatriation projects are. The focus will be repatriation projects conducted by the three countries from 1997 to 2018. The thesis proceeds to answer these questions by outlining the obligations that accrue to states parties to refugee conventions with specific regard to voluntary repatriation and whether Kenya, Tanzania and Uganda meet the threshold.

The research will primarily focus on secondary sources such as domestic, regional and international legislation, policies, case law, texts, journal articles and internet-based sources, UNHCR and NGO briefs. Heavy reliance on secondary sources is acknowledged as a major limitation due to possibility of misrepresentation, misconstruction or information being spent over time and change of circumstances.

²⁴ Robinson, Catherine. "South Sudanese refugees in Uganda now exceed 1 million." *UNHCR*. August 17, 2017. <https://www.unhcr.org/news/stories/2017/8/59915f604/south-sudanese-refugees-uganda-exceed-1-million.html> (accessed November 23, 2017).

²⁵ IRIN. "Rwanda: More returnees to head home from Uganda." *Refworld*. November 4, 2010. <https://www.refworld.org/docid/4cd91d541e.html> (accessed November 25, 2017).

²⁶ UNHCR. "UNHCR, African host countries agree on final steps to resolve Rwandan refugee situation." *UNHCR*. September 30, 2016. <https://www.unhcr.org/news/press/2016/9/57f20dd54/unhcr-african-host-countries-agree-final-steps-resolve-rwandan-refugee.html> (accessed December 8, 2017)

Interviews with affected refugees, UNHCR, Government Officials and NGO workers would have validated the findings of this research. To temper this shortcoming, the research will draw on personal knowledge and experience working with asylum seekers and refugees in Kenya and Uganda respectively. The study therefore should be understood within the context within which it is conducted.

This thesis is divided into three chapters. The first chapter examines the conceptual, legal and normative framework on voluntary repatriation and the obligations that flow from them. The chapter also looks at the extent to which these are reflected in domestic laws within the countries under study. The chapter further addresses the institutional framework in place to guide repatriation of refugees to their countries of origin specifically the role of the UNHCR is explored. Chapter two examines state practice of voluntary repatriation in the three jurisdictions: Kenya, Tanzania and Uganda and assesses the extent to which these countries comply with the established legal norms and human rights standards to ensure repatriations are voluntary, and conducted in safety and dignity. The Chapter also discusses the challenges and achievements in the repatriation processes in these countries and draws on best practices to guide future repatriation efforts. Chapter three will entail a general conclusion and recommendations, which include call for the adoption of human rights' based approach in voluntary repatriation processes.

CHAPTER ONE: THE CONCEPTUAL, LEGAL AND NORMATIVE FRAMEWORK ON VOLUNTARY REPATRIATION

Article 1 of the Convention Relating to the Status of Refugees (hereinafter referred to as The 1951 Convention) defines a refugee as “any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it”²⁷. An expanded refugee definition is provided for in The Convention Governing Specific Aspects of the Refugee Problem, 1969 hereinafter referred to as OAU Convention). It defines a refugee to also include ‘every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality’²⁸.

The term voluntary repatriation is not explicitly defined in any human right instrument though it is referred to implicitly. The Council of the European Union defines repatriation as “the assisted or independent departure to the country of return based on the will of the returnee and his/her informed decision to return”[...]“carried out in conformity with obligations deriving from applicable international instruments.”²⁹

²⁷ Article 1(A)(2) of the Convention Relating to the Status of Refugees, 1951

²⁸ Article 1(2) of the Convention Governing Specific Aspects of the Refugee Problem in Africa, 1969

²⁹ Council of the European Union, 12 October 2005, 2683rd Council Meeting, *conclusions on justice and home affairs*, Luxembourg, <http://www.europarl.europa.eu/oeil/resume.jsp?id=5247082&eventId=915645&backToCaller=NO&language=en> [Accessed 01/12/2017], para. 1 & 3.

As a durable solution, voluntary repatriation arises where a refugee voluntarily re-establishes³⁰ him/herself in his/ her country of origin or re-avails themselves of the national protection of the country of origin³¹ thereby bringing an end to their refugee status. Where there have been fundamental changes of circumstances in the refugees' country of origin, such that the reason for their flight no longer exists, cessation can be invoked³². In which case, individuals previously possessing refugee status would have to return to their countries of origin unless exempted from the operation of the cessation clause or seek alternative migration status in their country of residence. To this end, there have been arguments for drawing distinctions between repatriation and voluntary repatriation.

Repatriation therefore refers to the state's conventional right to return former refugees once fundamental changes have occurred in the country of origin sufficient to invoke cessation of refugee status. Once this has occurred, individuals can be returned forcefully in disregard of voluntariness, which requirement becomes immaterial at the time.³³ This concept is also referred to as mandatory or imposed return. In this study, the terms repatriation and return shall be used interchangeably. Spontaneous returns are a form of repatriation, instigated by the refugee or groups of refugees and lacks features of an organised repatriation characteristic of planned voluntary repatriation³⁴. It is normally conducted in the absence of a repatriation programme, without the permission or involvement of governments of the country of origin and the country of asylum and without any monitoring or assistance³⁵. Such returns are however conducted 'without a decisive political event such as national

³⁰ Article 1C(4) of the Refugee Convention, Article 4(a) OAU Convention

³¹ Article 1C (1) of the Refugee Convention

³² Article 1C(5)

³³ James Hathaway, *The Rights of Refugees under International Law* (Cambridge, Cambridge University Press, 2005) p. 929

³⁴ B.S. Chimni, *International Refugee Law, A Reader* (Sage Publications, 2000). P.336

³⁵ Ibid at 375

independence, without any change in regime or the conditions that originally caused flight'³⁶. Where it is conducted in the absence of coercion, such spontaneous repatriation will be self-regulating as much as it is refugee induced even if it takes place in situations of continued risk. Spontaneous returns are beyond the scope of this research. This study therefore will focus on voluntary repatriation specifically organized or assisted repatriations within the framework of tripartite agreements facilitated by UNHCR between countries of asylum and origin.

Returnee; A returnee is a former refugee or internally displaced person who returns to their country or area of origin, whether spontaneously or in an organized manner.

1.2 Voluntary Repatriation and Refugee Protection

Voluntary repatriation is one of the three durable solutions available to refugees. The other durable solutions are resettlement to third countries and local integration. Globally, voluntary repatriation rose to prominence in the 1980's as the preferred durable solution.³⁷ The UNGA endorsed it as the ideal solution to refugee problems.³⁸ The shift to repatriation was largely due to lack of burden sharing and donor fatigue.³⁹ This was particularly the case in third world countries where majority of refugees are hosted with minimal support from donors or developed countries⁴⁰. With dwindling resettlement quotas to western states and an increased reluctance in

³⁶ Barry N. Stein and Fred C. Cuny, 'Repatriation under conflict', World Refugee Survey 1991 p.15-21 cited in B.S Chimni, International Refugee Law, A Reader p.374

³⁷ Vincent Chetail, 'Voluntary Repatriation in Public International Law: Concepts and Contents' [2004] 23(3) Refugee Survey Quarterly p.12

³⁸ UN Doc. A/RES/39/169(1994); UN Doc. A/res.50/152(1995), UN Doc. A/res/51/75(1996), UN Doc. A/Res./52/103(1997)

³⁹ Vincent Chetail, 'Voluntary Repatriation in Public International Law: Concepts and Contents' [2004] 23(3) Refugee Survey Quarterly p.12

⁴⁰ BS Chimni, 'Legal and Policy Issues relating to UNHCR's involvement in the Protection, Facilitation or Encouragement of Voluntary Repatriation' [1993] UNHCR Round table consultations on voluntary repatriation at p.4

protecting asylum space, refugee hosting states similarly began to re-consider protracted refugee presence in those states⁴¹.

In Africa, voluntary repatriation became prominent in the 1960's and 1970's and was regarded as a 'quintessentially African Solution to refugee exodus, largely outside the cold war framework.'⁴² Many of these repatriation exercises were within the context of decolonization in Algeria, Mozambique and Angola as well as after resolution of civil wars in Uganda, Ethiopia and Chad⁴³. Fundamental circumstances had preceded majority of these repatriations therefore voluntariness of the exercises was unquestionable. However, as many refugee-hosting countries resorted to repatriation as a means of bringing to an end to the refugee problem, "the question of voluntariness and its function as protection against refoulement became difficult to identify in many repatriation practices"⁴⁴.

Refugees own agency in deciding whether to return home or not is in most instances unclear. Harrell bond remarks, 'it is common sense to believe that the best place for refugees is home'⁴⁵ but questions this very assumption where conditions for return have not changed. Return decisions made in ignorance of conditions in the country of return or with inadequate information raise more questions on the character of the repatriation.

It is imperative that the voluntary nature of repatriation is maintained to ensure "an inherent safeguard against forced return"⁴⁶. The notion of refugee protection

⁴¹ Katy Long, Point of No Return Chapter 5 p.g 88 cited in Fiddian-Qasmiyeh, E., et al, *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford, Oxford University Press 2014)

⁴² Ibid Chapter 5 Para 4.1

⁴³ Katy Long, Point of No Return Chapter 5 Para 4.1 cited in Fiddian-Qasmiyeh, E., et al, *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford, Oxford University Press 2014)

⁴⁴ Ibid at 41

⁴⁵ Barbara Harrell-Bond, Repatriation: Under What Conditions Is it the Most desirable Solution for Refugees? An Agenda for Research [1989]32(1) African Studies Review 42-69

⁴⁶ G.S Goodwin Gill, *The Refugee in International Law*, 2nd ed, Oxford University Press, 1996 p.274

therefore should not be compromised by states seeking to rid themselves of refugee populations through flawed repatriation exercises.

1.3 Human Rights and Voluntary Repatriation

The right to return is the human right dimension upon which voluntary repatriation is based. The Universal Declaration of Human Rights provides that everyone has the right to leave any country, including his own and to return to his country⁴⁷. This presupposes on the country of origin the duty to re- admit its nationals (Guy Goodwin Roman 8). The International Covenant on Civil and Political Rights⁴⁸ as well as the International Convention on the Elimination of All forms of Racial Discrimination⁴⁹ contain similar provisions. With respect to children and their parents, the Convention on the Rights of the Child affirms the right of such children and their parents to return to their countries of origin⁵⁰. Human rights therefore sets the minimum threshold for the treatment of refugees in countries of refuge and the basis upon which repatriation projects are to be undertaken therefore protecting refugees fundamental rights and freedoms from violation.

1.3.1 Voluntary Repatriation under International Law

The Convention on the Status of Refugees does not make directly mention voluntary repatriation except in reference to cessation of refugee status⁵¹ and from the prohibition of refoulement by implication.⁵² In essence, as long as a person is still recognised as a refugee, protection from forced return applies to them. When a refugee re-avails herself or himself of the protection of their country of nationality or

⁴⁷ Article 13(2) of the UDHR, see also

⁴⁸ Article 12 ICCPR

⁴⁹ Article 5(d)(ii) CERD

⁵⁰ Article 10(2) CRC

⁵¹ Article 1(C) of the Convention

⁵² Article 33(1) of the Convention relating to the Status of Refugees, 1951

voluntary re-establishment in that country⁵³ the need for international protection will no longer exist. Further, where there has been fundamental change of circumstances in connection with which refugees fled from their countries of nationality and were consequently granted refugee status, cessation can be invoked since the need for international protection will have ceased to exist⁵⁴. The Convention prohibits the return of refugees to a country where their lives or rights would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion.⁵⁵ This prohibition is the embodiment of the humanitarian essence of the Convention⁵⁶. Conversely, the Convention limits this protection to refugees other than those who constitute a danger to national security to the hosting country, or who having been convicted by a final judgment for a particularly serious crime, is a danger to the community of the host country⁵⁷. In general terms, non-refoulement is so fundamental that it has been proscribed by general human rights treaties such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁵⁸ (CAT), the European Convention on Human Rights⁵⁹ (ECHR) as interpreted by the European Court of Human Rights (ECtHR) and the International Covenant on Civil and Political Rights.⁶⁰ (ICCPR). UN Human Rights Committee has construed this particular obligation under ICCPR to engage non-refoulement⁶¹. Under international customary law, the prohibition of torture and in this context of refoulement where the individual is under general human rights framework has evolved into *jus cogens* thus making freedom from refoulement an absolute right from

⁵³ Article 1(C)(1)(4) of the Convention on the Status of Refugees

⁵⁴ Article 1(C) (5) of the Convention on the Status of Refugees, 1951

⁵⁵ Ibid

⁵⁶ Lauterpacht and Daniel Bethlehem, The Scope and content of the Principle of non- refoulement p. 107

⁵⁷ Article 33(2) of the Refugee Convention

⁵⁸ Article 3(1) of the Convention

⁵⁹ Article 3 of the Convention

⁶⁰ Article 7 of the Covenant

⁶¹ General Comment no 20(1992)

which no derogation is permitted⁶². It is contended that the express prohibition of reservation of Article 33 on non- refoulement demonstrates this position⁶³.

Non-refoulement creates a negative obligation on the State not to return persons to harm. In general human rights law, this obligation is absolute. Therefore the legal context of the removal is immaterial⁶⁴. While the law is specific on instances of direct removal, it remains to be determined whether indirect “actions of a state such as deprivation of basic needs making it impossible to stay” and ultimately compelling refugees to return would fall under the ambit of refoulement⁶⁵.

Apart from the prohibition of refoulement, several instruments explicitly provide for the right to return. The International Covenant on Civil and Political rights, The Convention on the Elimination of Racial Discrimination (CERD) and the Convention on the Rights of the Child similarly contain express provisions on the right to return to one’s country.⁶⁶ The right to return can similarly be imputed from the inclusion of re-availment⁶⁷ and re-establishment⁶⁸ of a refugee in his or her county of origin, which circumstances lead to cessation of refugee status. These provisions presuppose some form of repatriation but do not give any indication as to whether it is organised or spontaneous. More importantly, the provisions do not address the voluntary nature of the repatriations. James Hathaway relying on the fundamental changes doctrine contends that where cessation has been invoked, it becomes immaterial whether the repatriation is voluntary or coerced either way⁶⁹. These persons will no longer be in need of international protection.

⁶² Saadi V Italy, Lauterpacht p.107

⁶³ Article 42(1) of the Refugee Convention

⁶⁴ Kees Wouters, International Legal Standards for the Protection from Refoulement. P. 29

⁶⁵ Ibid

⁶⁶ Article 12(4) of the International Covenant on Civil and Political Rights, 1966, Article 5(d)(ii) CERD, Article 10(2) of CRC

⁶⁷ Article 1 C (1) of the Refugee Convention

⁶⁸ Article 1C(4) of the Refugee Convention

⁶⁹ Supra note 34

Fundamental change of circumstances that lead to cessation and non-refoulement provisions have arguably been seen as reinforcing the nexus between safety, voluntariness and refugee status⁷⁰. While it is agreed that repatriation can be undertaken against the wishes of the refugee where return areas are adjudged as safe, legal provisions have not adequately addressed how safety should be assessed and determined.

1.3.2 Voluntary repatriation under Regional Law

The OAU Convention is complementary to the Refugee Convention⁷¹ but is a specific framework for refugee rights and conditions in the African context. The Convention expressly stipulates that the “voluntary character of repatriation” must be observed in all cases and prohibits the repatriation that is contrary to a refugee’s will⁷². The import of the provision in part is, the protection of refugees from return to territories where their lives, physical integrity or liberty would be threatened⁷³ extends to non-refugees particularly where cessation clauses have come into effect. Specific mention of the refugees however appears to permit repatriation whose character may not be voluntary with regard to former refugees whose refugee status has come to end⁷⁴. The Convention further enjoins both the countries origin and asylum to “make adequate arrangements for the safe return of refugees who request repatriation⁷⁵.” It obligates the country of origin to facilitate reintegration of the returnees and guarantees their protection from prosecution or sanctions arising out of departure and subsequent return, “for any reason that give rise to refugee situations”⁷⁶. The

⁷⁰ Katy Long, Chapter 1, Point of No Return pg. 41

⁷¹ Preamble Para 10, OAU Convention

⁷² Article V(1) of the OAU Convention Governing Specific Aspects of Refugee Problems in Africa, 1969

⁷³ Article II(3) of the Convention

⁷⁴ Hathaway James, The Right of States to repatriate former refugees,

⁷⁵ Article V (2) of the OAU Convention Governing Specific Aspects of Refugee Problems in Africa, 1969

⁷⁶ Article V (3) and (4) of the OAU Convention

Convention further recognises in addition to the roles played by the country of origin and asylum in returns assistance, that of voluntary agencies, international and intergovernmental organization⁷⁷. Christiano d' Orsi however, argues that read separately, the Convention is silent over the possibility of involuntary repatriation for persons upon whom cessation clause has been invoked⁷⁸.

OAU Convention however while addressing organised repatriations does not mention spontaneous repatriation. The Convention only envisages situations of organised return where conditions in the country of origin are amenable to return. It therefore addresses the return process itself. This however does not give indications as to "optimal conditions for promotion of repatriation" and how to determine the existence of such conditions⁷⁹. Saul Takahashi emphasizes the need for change of circumstances in the country of origin that would justify the invocation of cessation clause as a condition precedent for voluntary repatriation.⁸⁰ Okoth Obbo questions how and what criteria would be applied in assessing conditions of return and how to guarantee impartiality, independence and objectivity⁸¹.

Apart from the OAU Convention, the right to return is similarly protected under the African Charter on Human and People's Rights⁸². The Convention however stipulates legitimate aims such as national security, law and order, public health or morality upon which the right to leave or return to one's country may be restricted⁸³. The OAU Convention was framed in such a manner as to evade refugees' political

⁷⁷ Article V (5) of the OAU Convention.

⁷⁸ Cristiano D'Orsi, *Asylum Seeker and Refugee Protection in Sub Saharan Africa* p. 243

⁷⁹ Supra note 44

⁸⁰ Saul Takahashi, "The UNHCR Handbook on Voluntary Repatriation", Vol 9, No. 4, *International Journal of Refugee Law*, 593(1997)

⁸¹ Supra note 56

⁸² Article 12(2) of the African charter on Human and People's Rights

⁸³ Ibid

claims by providing voluntary repatriation as a ‘means of reconstituting the status quo ante and protecting the State⁸⁴,

The Treaty for the Establishment of the East African Community calls for the establishment of common mechanisms for the management of refugees⁸⁵. but fails to provide concrete guidance on repatriation initiatives.

1.3.3 The Legal and Policy Framework on Voluntary Repatriation in Kenya, Uganda and Tanzania

Kenya acceded to the Convention relating to the Status of Refugees on 16th May 1966 and the 1967 Protocol relating to the Status of Refugees on 13th November 1981.⁸⁶ Kenya is also a signatory to the OAU Convention governing Specific Aspects of Refugee Problems⁸⁷ and has enacted the Refugees Act⁸⁸ to provide a framework for the management of refugees. The Constitution of Kenya, which is the supreme law, does not contain an express provision on refugees but provides that general rules of international law and treaties or Conventions entered into by Kenya form part of the law of Kenya⁸⁹. Chapter four of the Constitution protects the rights of all person within Kenya thereof protects refugees.

Apart from these core instruments that are refugee-specific, Kenya has also ratified other human rights instruments that emphasize the protection of refugees. Kenya for instance is Party to the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR),

⁸⁴ Katy Long, Point of No Return chapter 5 pg 11/36

⁸⁵ Article 124(4)& (5)

⁸⁶ Convention Relating to the Status of Refugees, 1951 and its Protocol, 1967 Date of Accession 16th May 1966, Accession to Protocol 13th Nov 1981. Available at <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>(accessed on 16th January 2017)

⁸⁷ Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969 signed on 10th Sept 1969, ratified on 23rd June 1992. Available at <http://www.achpr.org/instruments/refugee-convention/ratification/>(accessed on 16th January 2017)

⁸⁸ The Refugees Act no 13 of 2006 & The Refugees Regulations, 2009 Laws of Kenya available at http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/RefugeeAct_No13of2006.pdf (accessed on 16th January 2017)

⁸⁹ Article 2(5) and (6) of the Constitution of the Republic of Kenya, 2010

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child, African Charter on the Rights and Welfare of the Child (ACRWC) and the African Charter on Human and Peoples Rights. (ACHPR)⁹⁰.

Kenya's Refugee Act retains the definition of refugee as provided for under the Convention on the Status of Refugees whom the Act terms as statutory refugees⁹¹ and the OAU Convention on the Specific Aspects of Refugee Problems in Africa. Persons fleeing persecution based on the grounds laid down in the OAU convention are referred to under the Refugee Act as prima facie refugees⁹².

The Refugees Act does not contain an express provision on voluntary repatriation but prohibits refoulement. Section 18 of the Act provides; No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or to subjected any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country where—

- (a) the person may be subject to persecution on account of race, religion, nationality, membership of a particular social group or political opinion; or
- (b) the person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of that country.

Also relevant to this research, the Act provides for cessation of refugee status. Upon invocation of a cessation clause, refugees can be returned to their countries of

⁹⁰ Kenya's Treaty Ratification List
https://lib.ohchr.org/HRBodies/UPR/Documents/Session8/KE/KSC_UPR_KEN_S08_2010_KenyaStakeholdersCoalitionforUPR_Annex3.pdf

⁹¹ Section 3(1)(a) & (b)

⁹² Section 3(2)

origin for they will no longer be in need of surrogate protection. The Act provides that where circumstances under which a person was recognized a refugee have ceased, such a person's refugee status will come to an end unless there are compelling reasons stemming from previous persecution that would continue despite general change of circumstances⁹³. Cessation would also occur where a person re-avails themselves of the protection of their nationality, reacquires nationality previously lost, voluntarily re-establishes themselves in the country which they fled for fear of persecution⁹⁴.

Kenya's main policy framework, Kenya Vision 2030 reiterates the Country's commitment to the enjoyment of the Bill of rights which bind all organs and persons and makes special reference to refugees whose rights must be protected⁹⁵. Kenya has made pledges to improve the situation of refugees in the country. The adoption of the New York Declaration and the implementation of the CRRF signposts better protection for refugees and repatriations that are voluntary in character conducted in conditions of safety and dignity.

Uganda has been lauded for its open door policy to the admission of refugees and progressive refugee laws in the world⁹⁶. Uganda is a party to the Convention on the Status of Refugees having acceded to the instrument on 27th September 1976⁹⁷ and subsequently to the Protocol. Uganda is also party to the AU Convention that

⁹³ Section 5(e)

⁹⁴ Section 5(a)-(d)

⁹⁵ Sessional Paper No. 10 of 2012 On Kenya Vision 2030' 158

⁹⁶ "Uganda National Action Plan to Implement the Global Compact on Refugees and Its Comprehensive Refugee Response Framework (CRRf)." *Global Compact Refugees*. March 2019. <https://globalcompactrefugees.org/sites/default/files/2019-12/Uganda%20National%20Action%20Plan%20for%20GCR%20implementation%20%282019%20revision%29.pdf> (accessed December 27, 2019).

⁹⁷ United Nations. "2 . Convention relating to the Status of Refugees." *United Nations Treaty Collection*. April 22, 1954. https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en (accessed November 16, 2017).

was ratified on 24th July 1987⁹⁸. It is therefore under international obligations to protect, promote and fulfil human rights standards enshrined in the instruments and it must do so in good faith. The Constitution of Uganda restates its commitment to respect international law and its treaty obligations⁹⁹. Uganda is also party to several regional human rights instruments such as ICCPR, ICESCR, CAT and African Charter of Human and Peoples Rights, which reinforce its commitment to the protection of rights of all persons' refugees, included¹⁰⁰. The Country has further domesticated both international and regional human rights instruments thus enabling their enforceability in Uganda. It enacted a law specific to the protection of refugees and establishing institutions to handle refugee matters. The Refugees Act, 2006 sets the legal framework on refugees in Uganda and enjoins institutions created under the Act to be guided by international Conventions on refugees¹⁰¹. There are a number of regulations that supplement the law particularly The Refugees Regulations of 2010. This law maintains the expanded definition of refugees as provided for under the OAU Convention and broadens it further by include failure to conform to gender discriminatory practices as a ground for persecution¹⁰².

The Act recognises voluntary repatriation as a durable solution and calls for support for any refugee that wishes to return to be facilitated to do so. Section 46(1) of the Act provides; "A recognised refugee who voluntarily wishes to be repatriated shall express his or her wish in writing to the Commissioner (for Refugees) who shall

⁹⁸ AU. "List of Countries which have Signed, Ratified/Acceded to the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa." *African Union*. May 16, 2019. <https://au.int/sites/default/files/treaties/36400-sl-OAU%20Convention%20Governing%20the%20Specific%20Aspects%20of%20Refugee%20Problems%20in%20Africa.pdf> (accessed June 25, 2019).

⁹⁹ Objective 28 of National Objectives & Directive Principles of State Policy of the Constitution of the Republic of Uganda, 1995 as amended

¹⁰⁰ Ratification Status for Uganda available at https://tbinetnet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=182&Lang=EN

¹⁰¹ Section 37 of the Refugees Act, 2006 Law of Uganda

¹⁰² Section 4(d) of The Refugees Act, 2006 Law of Uganda

in consultation with the UNHCR cause arrangements to be made for the repatriation of that refugee”.

The Act does not adequately delve into the preconditions that should be in place for repatriation to take place other than the refugee’s decision to repatriate voluntarily. The Act further prohibits the return of refugees to any country where they may be persecuted based on any conventional ground or their life, person or liberty would be threatened¹⁰³. Non-refoulement principle is provided for under Article 42, which provides

No person shall be refused entry into Uganda, expelled, extradited or returned from Uganda to any other country or subjected to any similar measures if, as a result of such refusal, expulsion, return or other measure, that person is compelled to return to or remain in a country where-

he or she may be subjected to persecution on account of race, religion, sex, nationality, membership of a particular social group or political opinion or his or her life, person or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or in the whole of that country.

Uganda’s Refugee Act provides for the rights of refugees within Uganda, which include the right to remain in the Country. The Act also stipulates circumstances, which bring refugee status to an end. The law states for cessation of refugee status where a person has re-availed himself of the protection of their country of nationality, surrenders their refugee status, acquires their nationality having lost it previously and more importantly for this research, where ‘circumstances in connection with which they were recognised as refugees have ceased to exist¹⁰⁴’.

In September 2016, Uganda adopted the New York Declaration for Refugees and Migrants¹⁰⁵. The UNGA made critical declarations with regard to voluntary

¹⁰³ Section 42(a)&(b) of the Refugees Act, 2006 Law of Uganda

¹⁰⁴ Section 6(1)(a)-(e) of The Refugees Act, 2006 Laws of Uganda

¹⁰⁵ UNGA, ‘New York Declaration for Refugees and Migrants’

repatriation as a durable solution. It expressly recognised the right to return to one's own country and emphasised the voluntary nature of returns. In the aftermath of this declaration, Uganda continued to improve refugees' protection environment and adopted a Comprehensive Refugee Response Framework in January 2018 to strengthen its support to refugees including expansion of durable solution and complimentary pathways¹⁰⁶. Uganda pledged to expand other solutions for refugees to build refugees resilience and skills as part of enabling reintegration upon return to their countries of origin¹⁰⁷.

Tanzania acceded to the Convention and the Protocol on the Status of Refugees on 12th May 1964 and 1968 respectively¹⁰⁸. It also ratified OAU Convention on 10th January 1975¹⁰⁹. These ratifications placed an obligation on Tanzania to observe human rights standards and principles required of states parties and the obligation to domesticate the provisions of these Conventions. The Supreme law of Tanzania is the Constitution. The Constitution as Amended incorporates a bill of rights, which applies to all persons in Tanzania, which includes refugees within its territory¹¹⁰.

<<http://www.unhcr.org/57e39d987.pdf#zoom=95>> accessed 27 November 2018.

¹⁰⁶ "Uganda National Action Plan to Implement the Global Compact on Refugees and Its Comprehensive Refugee Response Framework (CRRf)." *Global Compact Refugees*. March 2019. <https://globalcompactrefugees.org/sites/default/files/2019-12/Uganda%20National%20Action%20Plan%20for%20GCR%20implementation%20%282019%20revision%29.pdf> (accessed December 27, 2019).

¹⁰⁷ "Uganda National Action Plan to Implement the Global Compact on Refugees and Its Comprehensive Refugee Response Framework (CRRf)." *Global Compact Refugees*. March 2019. <https://globalcompactrefugees.org/sites/default/files/2019-12/Uganda%20National%20Action%20Plan%20for%20GCR%20implementation%20%282019%20revision%29.pdf> (accessed December 27, 2019).

¹⁰⁸ Ratification Status for Tanzania https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=186&Lang=EN

¹⁰⁹ AU. "List of Countries which have Signed, Ratified/Acceded to the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa." *African Union*. May 16, 2019. <https://au.int/sites/default/files/treaties/36400-sl-OAU%20Convention%20Governing%20the%20Specific%20Aspects%20of%20Refugee%20Problems%20in%20Africa.pdf> (accessed June 25, 2019).

¹¹⁰ "The Constitution of the United Republic of Tanzania." *Constitution Net*. http://constitutionnet.org/sites/default/files/tanzania_constitution_1998.pdf. (accessed November 8, 2017)

The domestic law on refugees in Tanzania is the Refugees Act, 1998. This Act recognises refugees right to return to their countries of nationality¹¹¹.

Section 34 (1) of the Act states; An asylum seeker or refugee shall have right at any time to return voluntarily to the country of his nationality or from which he entered Tanzania and any action or omission intended to prevent or restrict or which has the effect of preventing or restricting any asylum seeker or refugee from voluntary repatriation except in the due process of the law is hereby prohibited.

This provision however does not lay down safeguards that need to be in place other than the refugees' intention to return to their country of nationality voluntarily. The National Refugee Policy, 2003 reaffirms the idealisation of voluntary repatriation as the preferable durable solution of the three solutions; resettlement and local integration¹¹². In fact, Tanzania's Refugee Act is silent on local integration. The Policy enjoins the international community to support peace processes in the countries of origin to ensure the countries are safe for return¹¹³. Noteworthy, the Act also provides for the deportation of refugees who are deemed dangerous to national security or who have ceased to be refugees¹¹⁴.

Like Kenya and Uganda, Tanzania has also ratified core human rights Conventions, which offer additional protection from forced returns. These Conventions include ICCPR, ACHPR, CRC and CEDAW but is yet to ratify the Convention Against Torture, which prohibits refoulement in absolute terms¹¹⁵. While Tanzania has a legal framework for the management of Refugees, its commitment to

¹¹¹ Section 34(1)

¹¹² Para.14 of the Policy

¹¹³ Para.14 of the Policy

¹¹⁴ Section 28(1)(a)(ii)

¹¹⁵ Ratification Status for Tanzania
https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=186&Lang=EN

refugee protection is questionable considering its withdrawal from the Comprehensive Refugee Response Framework in January 2018¹¹⁶.

1.3.4 Soft Law

There are several soft laws that contain a framework for repatriation. The Universal Declaration of Human Rights provides broadly for the right to leave, and return to one's country of origin¹¹⁷.

Cartagena Declaration states that the voluntary and individual character of repatriation must be observed and requires that the exercise be conducted under conditions of absolute safety in the refugees' country of origin or residence.¹¹⁸

New York Declaration for Refugees and Migrants further reiterates the right of everyone to leave any country including his own and to return to his or her country¹¹⁹ and it further obligates states to readmit its returning nationals without delay.¹²⁰ The Declaration underscores the need for safety, dignity, human rights and fundamental freedoms to be protected by states and affirms states obligations to "cooperate closely to ensure safe, orderly and regular migration including return and re-admission"¹²¹.

The Nairobi Declaration also underscores the need for safety and dignity in voluntary return of Somali refugees as part of the comprehensive regional approach to address protracted displacement of Somali¹²²

¹¹⁶ <https://reliefweb.int/report/united-republic-tanzania/tanzania-comprehensive-refugee-response-framework-withdrawal-eeas-dg>

¹¹⁷ Article 13(2) of the Declaration

¹¹⁸ Conclusion 12, Cartagena declaration

¹¹⁹ Conclusion 42 of the New York Declaration for Refugees and Migrants; UNGA Resolution A/Res/71/1 available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/1&referer=http://refugeesmigrants.un.org/new-york-declaration-refugees-and-migrants-ares711&Lang=E (Accessed on 9th of February 2018)

¹²⁰ Ibid

¹²¹ Conclusion 41

¹²² Nairobi Declaration on Durable Solutions for Somali Refugees and Reintegration of Returnees in Somalia, 25th March 2017

UNHCR's Executive Committee conclusions have been instrumental in forming the "most decisive and important enhancements of voluntary repatriation policy and soft law"¹²³ Excom conclusions stress the voluntary character of repatriation¹²⁴ and underscore the need for refugee involvement in repatriation decisions particularly in collecting information with regards to the return process¹²⁵. The right to return is generally provided for by several laws as highlighted in this study though with glaring omissions particularly on how to determine voluntariness¹²⁶. Promotion of repatriation and the degree to which such is permitted in repatriation projects can jeopardise the very refugees for whom legal safeguards are designed to protect. Measures such as closure of camps or reduction of food rations can be undertaken under the guise of promotion of voluntary repatriation.¹²⁷ It has also been argued that the conduct of repatriation projects heavily relies on interstate agreements and the international community thereby removing agency from refugees in terms of taking meaningful part in decisions pertaining to the course and nature of returns and overlooking their agency role in reintegration such as socio-economic rehabilitation.¹²⁸

1.4 Conditions of Voluntary Repatriation

The 1969 OAU Convention requires the voluntary character of repatriation to be respected and places an obligation on the country of origin and country of asylum to create conditions for a voluntary safe and dignified return of refugees¹²⁹. As

¹²³ Ibid note 44

¹²⁴ UNHCR Conclusion no 18 Voluntary Repatriation, (31st Session, 1980) and Conclusion no 40(XXXVI), Voluntary Repatriation, (36th session, 1985), (UNHCR 2005:28-9 Conclusion no 18 A, C)

¹²⁵ UNHCR 2005:28-9, Conclusion No 18(E)

¹²⁶ Katy Long, The Point of No Return. Chapter 5 P. 23 of 36 Katy Long, Point of No Return Chapter 5 P.23 of 36 cited in Fiddian-Qasmiyeh, E., et al, *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford, Oxford University Press 2014)

¹²⁷ Ibid

¹²⁸ Supra note 126

¹²⁹ Article V(1)-(5)

highlighted previously, The Convention on the Status of Refugees does not offer guidance with respect to repatriation. Despite setting out the conditions for return, the Convention does not elaborate the criteria for assessing conditions of repatriation. The lack of minimum thresholds poses a risk to the safety and dignity of refugees in return processes.

UNHCR Handbook reaffirms voluntariness as a precondition for repatriation coupled with safety and dignity.¹³⁰ The Handbook provides that repatriation should be promoted ‘when a careful assessment of the situation in the COO shows that the conditions of ‘safety and dignity’ can be met.¹³¹ it must be objectively safe to return and the return must have prospects of sustainability¹³². The country of origin must guarantee safety of returnees by making assurances for the same.¹³³ To ensure these safeguards are adhered to, the UNHCR must also have access to refugees and returnees¹³⁴.

1.4.1 Formal repatriation agreement

The statute of the UNHCR provides for special agreements to be entered into between governments, both countries of asylum and origin, and UNHCR before voluntary repatriation takes place¹³⁵. In practice, these arrangements are tripartite as highlighted but UNHCR may enter into bilateral agreements or memorandum of understanding with the countries of origin and asylum indicating the parties’ respective commitments to the process.¹³⁶ These special arrangements ‘emphasize the voluntary nature of repatriation and the modalities of return in terms of safety and

¹³⁰ UNHCR Handbook at Chapter 3.1

¹³¹ Ibid

¹³² Ibid

¹³³ Ibid

¹³⁴ Ibid

¹³⁵ Article 8(b) of the Statute of the UNHCR.

¹³⁶ Marjoleine Zieck, ‘Voluntary Repatriation’ at 38.

dignity and allocate the detail the responsibilities of each of the parties to them'¹³⁷. While the country of asylum undertakes to coordinate returns, the country of origin is obligated to ensure 'refugees return without fear of harassment, intimidation, persecution, discrimination, prosecution or any other punitive measures'¹³⁸. It is also duty bound to ensure 'returnees have access to land for settlement or use' and facilitating restitution of property¹³⁹. The UNHCR, which is guaranteed unhindered access to refugees and returnees, plays a critical role of monitoring the repatriation exercise¹⁴⁰.

In this study, all the countries under comparison; Kenya, Uganda and Tanzania carried out repatriation within the framework of special agreements. What is however in contention is the extent to which refugees were involved in the formulation of these agreements. While the importance of special agreements has been underscored, it has also been argued that these tripartite agreements are slow to execute and 'do not reflect the refugees own pace and criteria to go home'¹⁴¹. They also lack an enforcement mechanism, which is a major pitfall.

1.4.2 Voluntariness

The principle of voluntariness is the foundation of international protection with respect to the return of refugees and a corollary of the non-refoulement principle¹⁴². It finds expression in the 1969 OAU Convention, which explicitly provides that the voluntary character of repatriations must be respected. The Convention places an obligation upon the Country of asylum and the Country of Origin to coordinate for safe orderly returns but also falls short of laying down a guideline to guide the

¹³⁷ Ibid.

¹³⁸ Marjoleine Zieck, 'Voluntary Repatriation' at 39

¹³⁹ Ibid

¹⁴⁰ UNHCR Handbook on Voluntary Repatriation Cap 3.1

¹⁴¹ Barry Stein and Frederick Cuny, 'Refugee Repatriation during Conflict: Protection and Post-Return Assistance' [1994] 4(3) Development in Practice 177.

¹⁴² UNHCR Handbook on Voluntary Repatriation Cap 2.3

process. The UNHCR therefore fills the gap in its Handbook on Voluntary Repatriation. The Handbook instructs that voluntariness, as a principle, has to be ‘viewed in relation to both the conditions in the country of origin (calling for an informed decision) and the situation in the country of asylum (permitting a free choice)’¹⁴³. In assessing the practice of voluntary repatriation in the three countries: Kenya, Uganda and Tanzania, the thesis will examine both country of origin and asylum conditions, and make a determination whether refugees in those circumstances made informed decisions and were permitted actual free choice on whether to repatriate or not.

1.4.2.1 Conditions in the Country of Origin

Return decisions are predicated on conditions in the country of origin yet limited research exists in this area. The most important question in repatriations is ‘when is it safe for refugees to return to their pre-persecution or pre-conflict homes?’¹⁴⁴ The Convention on the Status of Refugees did not set out the criteria and guidelines for voluntary repatriation. The OAU Convention elaborates that the country of origin must collaborate with the country of asylum to facilitate safe returns in a voluntary manner, make assurances for non-penalization of returnees and ensure reintegration but it does not adequately address when is it safe to return¹⁴⁵. The UNHCR requires a careful assessment of conditions in the country of origin before it can promote repatriation. Repatriation should be conducted in safety and dignity, the change in conditions must be stable and durable, and the decision to return must be

¹⁴³ UNHCR Handbook on Voluntary Repatriation Cap 2.3

¹⁴⁴ Abuya, Edwin Odhiambo, “From Here to Where? Refugees Living in Protracted Situations in Africa.” Chapter in *Human Security and Non-Citizens: Law, Policy and International Affairs*, edited by Alice Edwards and Carla Ferstman, 125-165 at 156. Cambridge: Cambridge University Press, 2010.

¹⁴⁵ Article V(1)-(5) OAU Convention Governing Specific Aspects of the Refugee Problem in Africa, 1969

done voluntarily¹⁴⁶. Overall, the pull factors to return must override the push factors in the country of asylum for the return decision to have been made voluntarily¹⁴⁷.

1.4.2.2 Fundamental Changes

Fundamental changes per UNHCR refer to changes in the country of origin, which remove the basis of the fear of persecution¹⁴⁸. Hathaway writes that these changes must be of such a significant nature and must have occurred genuinely to ‘address the causes of displacement which led to the recognition of refugee status.’¹⁴⁹ Takahashi similarly opines that for voluntary repatriation to be promoted, fundamental change of circumstances must be of such a level as to justify invocation of the cessation clause¹⁵⁰. These changes may take the form of regime change or end of war/hostilities marked with ‘long term and durable peace’¹⁵¹.

For UNHCR however, voluntary repatriation can be undertaken at a lower threshold of change especially where the repatriation is voluntary and where the change is gradually leading to stabilization¹⁵². The improvement in general human rights situation in the country must be effective and durable and not transitory in nature¹⁵³. Hathaway observes further that these fundamental and durable reforms must also have dependable protection consequences¹⁵⁴. He argues and I agree that whereas the Refugee Convention provision on fundamental changes does not lay down the threshold for determining whether changes in a particular country are

¹⁴⁶ UNHCR Handbook on Voluntary Repatriation

¹⁴⁷ UNHCR Handbook on Voluntary Repatriation Cap 2.3

¹⁴⁸ UNH CR Handbook on Voluntary Repatriation Cap 2.2

¹⁴⁹ UNHCR, “Ceased Circumstances Guidelines,” at Para.10 cited in James Hathaway, *The Right of States* p. 924

¹⁵⁰ Abuya, Edwin Odhiambo, “From Here to Where? Refugees Living in Protracted Situations in Africa.” Chapter in *Human Security and Non-Citizens: Law, Policy and International Affairs*, edited by Alice Edwards and Carla Ferstman, 125-165 at 156. Cambridge: Cambridge University Press, 2010.

¹⁵¹ Ibid

¹⁵² UNHCR Handbook on Voluntary Repatriation Cap 2.2

¹⁵³ Takahashi, S. (1997), *The UNHCR Handbook on Voluntary Repatriation: The Emphasis of Return over Protection*. *International Journal of Refugee Law*, 9(4), 593–612 at 602

¹⁵⁴ James Hathaway, *The Right of States* p. 925

“fundamental” for invoking repatriation, it allows states to divest themselves from responsibility where they deem the receiving state as viable to protect its citizens¹⁵⁵.

1.4.2.3 Safety (Return in Safety)

Linked with the concept of fundamental circumstances is the requirement for safety. Refugees intending to return must be assured of safety prior to the return, during the process and post return. These entail legal, physical and material safety¹⁵⁶. UNHCR sets it as a pre-condition for return. Physical security relates to protection from armed attacks and is associated with whether fundamental changes have occurred in the country such as res-establishment of rule of law if it had broken down. Legal safety involves amnesties and public assurances that returnees will be physically safe, not be subjected to discrimination, persecution or punishment on return to their country of origin¹⁵⁷. Bradley on this issue contends that ‘a fair returns process should restore a connection of duties and rights between the returnees and their government’¹⁵⁸. She further calls for ‘minimum conditions of respect for human rights and safety’ to be adhered to.¹⁵⁹ Material security here relates to access to land or means of livelihood¹⁶⁰. Returns to areas with strained basic amenities breed tension and are a potential source of conflict between returnees and those that stayed¹⁶¹. For prospective returnees, the opportunity to undertake ‘Go and See Visits’ should be facilitated to inform them of the actual conditions in the areas of return¹⁶². As put

¹⁵⁵ James Hathaway, *The Meaning of Repatriation* [1997] 9(4) *International Journal of Refugee Law* 551-554 at 551 Article 1C paras.(1) and (4) of the 1951 Refugee Convention.

¹⁵⁶ UNHCR Handbook on Voluntary Repatriation cap 2.4

¹⁵⁷ UNHCR Handbook on Voluntary Repatriation cap 2.4

¹⁵⁸ Megan Bradley, 'Back to Basics: The Conditions of Just Refugee Returns' [2008] 21(3) *Journal of Refugee Studies* 285-304.

¹⁵⁹ Megan Bradley, 'Back to Basics: The Conditions of Just Refugee Returns' [2008] 21(3) *Journal of Refugee Studies* 285-304.

¹⁶⁰ UNHCR Handbook on Voluntary Repatriation cap 2.4

¹⁶¹ Lisa Schlein, 'Voluntary Repatriation of Somali Refugee Begins', available at <http://www.voanews.com/content/voluntary-repatriation-of-somali-refugees-moving-ahead/2903925.html> (06 Aug 2015), accessed on 11/04/2018.

¹⁶² UNHCR, EXCOM Conclusion No.18 (XXXI)- 1980.

forward in rational choice theory, ‘in choosing between alternative actions, a person will choose the one which the value of the output is greater’¹⁶³. Where refugees perceive return to be beneficial and to outweigh the cost of remaining in the host country, they will opt to repatriate. The challenge with ascertaining the conditions in the country of origin however lies in access to accurate, upto date information. In this thesis, return in safety will be discussed together with voluntariness given the role of conditions in the country of origin in influencing return decisions.

1.4.2.4 Conditions in the Country of Asylum

To determine whether return decision has been made voluntarily, there are a number of indicators that must be taken into consideration. Has there been pressure on the refugee from the host state whether material, political or other forms of coercion that would negate their free choice? Instances of coercion include reduction of essential services or rationing of supplies, relocation to a hostile area and ‘encouraging anti-refugee sentiments among local population’¹⁶⁴.

The ‘absence of any physical, psychological, or material pressure’ is what leads to voluntariness in its true sense. Where food is rationed and refugees subjected to a hostile environment from the locals, these will interfere with their objective assessment of the situation and influence their decision to return.

1.4.2.5 Free and informed choice to return & participation in Returns decision /processes

Refugees’ decision to return should be made freely¹⁶⁵. The assessment of conditions in the country of origin and asylum are critical in determining whether the

¹⁶³ George Homans, *Foundations of Social Theory* (Cambridge University Press 1961) 27. Also, George Casper Homans and Charles P. Curtis, *An Introduction to Pareto, His Sociology* (New York Publishers 1974) 43.

¹⁶⁴ Saul Takahashi, “The UNHCR Handbook on Voluntary Repatriation”, Vol 9, No. 4, *International Journal of Refugee Law*, 593(1997)

¹⁶⁵ Article V(5) of the OAU Convention

decision to return is informed and the refugee has indeed exercised free will¹⁶⁶. To this end, Takahashi argues that it's the subjective will of the refugee to return to his country of origin that is paramount and not the objective to which the refugee is returning¹⁶⁷.

Therefore, such a decision should be based upon careful evaluation of all the information provided by the duty bearers in a repatriation project: UNHCR, COO and COA. Refugees also have the right to participate in matters affecting them is recognised by UNHCR including finding a durable solution¹⁶⁸. Studies show that refugees will only participate in a repatriation project if furnished with accurate, up-to-date and objective conditions about their country of origin¹⁶⁹. The practice however is that refugees are usually excluded in matters thus relegating their role to simply 'confirm and approve those decisions'¹⁷⁰. In most repatriation negotiations, refugees are excluded from the bipartite or tripartite process, and their assent to the return passive. Political leadership and authorities make return decisions, and refugees expected to accept, despite the fact that their agency is questionable and they may not necessarily be representing the interests of refugees.¹⁷¹

1.4.3 Return with dignity

The UNHCR Handbook on Voluntary Repatriation provides that returns must be conducted in a manner that accords respect to the returnees, respects the principle of family unity by ensuring that families are not separated arbitrarily and all the

¹⁶⁶ UNHCR Handbook on Voluntary Repatriation Cap 2.3

¹⁶⁷ Saul Takahashi, "The UNHCR Handbook on Voluntary Repatriation", Vol 9, No. 4, International Journal of Refugee Law, 593(1997)

¹⁶⁸ UNHCR Handbook on Voluntary Repatriation Cap 3.1

¹⁶⁹ Khalid Koser, 'Information and Repatriation: The Case of Mozambican Refugees in Malawi' [1997] 10(1) Journal of Refugee Studies 1-2.

¹⁷⁰ Agata Bialczyk, 'Voluntary Repatriation and the Case of Afghanistan: A Critical Examination' [2008] Working Paper (46) Refugee Studies Centre 25.

¹⁷¹ B.S Chimni, From Resettlement to Repatriation P. 10

fundamental rights of the returnees are restored¹⁷². This element will not be discussed separately but as a reinforcing the concept of voluntariness.

1.5 Institutional Framework on Voluntary Repatriation

UNHCR plays a cardinal role in the repatriation of refugees. The Statute of the Office of the UNHCR enjoins the Agency to assist governments of the country of origin and country of asylum and private organisations to facilitate the voluntary repatriation of refugees¹⁷³. The UNHCR is also obligated to promote voluntary repatriation where achievable¹⁷⁴. Excom conclusions make it clear that the basis for UNHCR's engagement in repatriation is their voluntary character and they must be conducted in safety and dignity¹⁷⁵. In reconciliatory cases, the UNHCR becomes involved in repatriation that follow political settlements and are conducted where complete safety conditions for repatriation have not been achieved but the repatriation serves as a planned effort to contribute to bringing about such conditions¹⁷⁶. In recent years however, increased pressure from donors and host countries has resulted in the UNHCR being "called upon to certify returns secured through questionable practices as being voluntary"¹⁷⁷. Is the UNHCR ultimately responsible to refugees who are the rights holders in such instances or to its member states? Should UNHCR adhere to the principles guiding voluntary repatriation strictly or should it accept the reality that States want repatriation even where the conditions are not amenable to return?¹⁷⁸

This ties in with the question of who determines whether voluntary repatriation is feasible in a given situation and how is this assessment done. Although UNHCR has

¹⁷² UNHCR Handbook on Voluntary Repatriation cap 2.4

¹⁷³ General Assembly Resolution 428(V) of 14th December 1950.

¹⁷⁴ 1985 Conclusion on Voluntary Repatriation

¹⁷⁵ UNHCR, Executive Committee Conclusion no 18(1980), EXCOM Conclusion no 40(1985)

¹⁷⁶ UNHCR, The State of the World's Refugees: In search of Solutions, OUP, New York, 1995, pp.106-107

¹⁷⁷ Chimni B.S International Refugee Law A Reader P.334

¹⁷⁸ Chimni B.S International Refugee Law A Reader335

the mandate of promoting voluntary repatriation where feasible and appropriate¹⁷⁹, the process is undermined by inadequate guidance.

UNHCR Handbook on Voluntary Repatriation stresses the importance of respecting refugee's right to return to their country of origin where they express a strong desire to do so. To this end, the UNHCR may facilitate such return even where objectively; it does not consider the intended return safe¹⁸⁰. This however raises another question as to whether there is a particular manner of verifying voluntariness of repatriation exercises. This is especially problematic in instances where undue influence informs the refugees return decision even in the face of heightened risk.

UNHCR's position on return has remained that they must be voluntary. A review of voluntary repatriation practices across the globe indicates that repatriations are done under precarious conditions¹⁸¹. UNHCR has acknowledged that "a large proportion of the world's recent returnees have repatriated under some form of duress"¹⁸². In many of these situations, the UNHCR is "torn between the urge to stick to the spirit of international instruments and the need to find a viable solution in an environment increasingly hostile to refugees"¹⁸³. To find middle ground, there has been concession for the standard of voluntary repatriation to be context specific¹⁸⁴. Such differentiation may lead neglect of some cases and ensuing forced returns.¹⁸⁵

¹⁷⁹ 1985 ExCom conclusion on Voluntary Repatriation

¹⁸⁰ UNHCR Handbook on Voluntary Repatriation P. 17-18

¹⁸¹ UNHCR, *The State of the World's Refugees: A Humanitarian Agenda* (Oxford: Oxford University Press, 1997), p. 147.

¹⁸² UNHCR, *The State of the World's Refugees: A Humanitarian Agenda* (Oxford: Oxford University Press, 1997), p. 147.

¹⁸³ Joel Boutroue, *Missed Opportunities: The Role of the International Community in the Return of the Rwandan Refugees from Eastern Zaire*, Working Paper No. 1 (Boston: Massachusetts Institute of Technology, June 1998), p. 20. Cited in B.S Chimni from Resettlement to Repatriation

¹⁸⁴ B.S Chimni from Resettlement to Repatriation P.9

¹⁸⁵ B.S Chimni from Resettlement to Repatriation P.9

CHAPTER TWO: COMPARATIVE ANALYSIS OF VOLUNTARY REPATRIATION FROM KENYA, UGANDA, AND TANZANIA

2.1 Introduction

2.1.1 Kenya

In November 2013, UNHCR, the government of Kenya and the Somali government signed a tripartite agreement to repatriate Somali refugees in Kenya to Somalia.¹⁸⁶ Since December 2014, UNHCR has supported a voluntary repatriation programme for Somali refugees under this framework. The Tripartite Agreement lapsed at the end of 2016, but voluntary repatriation of Somali refugees has continued since then.¹⁸⁷ The majority of Somali refugees in Kenya reside in the Dadaab refugee camp in the Garissa county of North East Kenya. 210,038 refugees reside in Daadab, the majority being of Somali origin who have been in protracted displacement.¹⁸⁸

In spite of humanitarian assistance being provided for decades, most refugees depend on rationed aid with no or extremely restricted opportunities to access education, work, and eventually become self-reliant. Tensions with local communities are present, fuelled by a perception of unfair treatment and neglect of the Somali caseload.

Since 2014, UNHCR has facilitated the voluntary repatriation of 79,113 refugees from Daadab to Somalia.¹⁸⁹ Nonetheless, a significant number of the repatriated refugees returned to Daadab, leading to a spike in the number of unregistered refugees in the camp.

Security and livelihood conditions in Somalia have remained poor, so voluntary repatriation has not been attractive. Recent assessments conducted by NRC

¹⁸⁶ "Tripartite Agreement between the Government of the Republic of Kenya, the Government of the Federal Republic of Somalia and the United Nations High Commissioner for Refugees Governing the Voluntary Repatriation of Somali Refugees Living in Kenya 2013." Agreement, 2013.

¹⁸⁷ Ibid

¹⁸⁸ ReDSS. "Dadaab solutions paper." *Regional DSS*. July 2019. <https://regionaldss.org/wp-content/uploads/2019/07/ReDSS-Dadaab-solutions-paper-April-2019.pdf> (accessed November 21, 2019).

¹⁸⁹ Ibid.

with Impact Initiatives in Dadaab has revealed that 46 percent of the population have no future return intentions and a further 36 percent would only consider return if there was a substantial change in the situation in Somalia (access to services, humanitarian situation, and security context).¹⁹⁰ The majority of refugees who arrived at Dadaab from 2011 and onwards have already opted to return as they have stronger networks that can help them on return. Therefore, one of the reasons for refugees still in Dadaab not to return is in part due to their lack of familial and wider support. This needs to be taken into account in any planning, integrating host community relations and social integration as a core part of (re) integration strategies. It is critical to ensure that persons with specific protection needs receive adequate support. Furthermore, these are currently 13,281 unregistered asylum seekers in Dadaab, dependent on the support of family/networks and, without recourse to any authorities, at risk of exploitation.¹⁹¹ Any returns process must consider them. Similarly, there are a significant number of Kenyan Somalis who are receiving assistance in Dadaab whose futures must be explored.

2.1.2 Tanzania

Tanzania first received an estimated 300,000 Burundian refugees in 1972 following political unrest and genocide involving the Hutu and Tutsi.¹⁹² With each outbreak of violence erupting, a new wave of immigrants entered Tanzania for asylum. In 1993, The 1993 tribal clash led to another wave of refugees entering the Republic of Tanzania settling in nine different settlement camps in the north-western

¹⁹⁰ ReDSS. "Dadaab solutions paper." *Regional DSS*. July 2019. <https://regionaldss.org/wp-content/uploads/2019/07/ReDSS-Dadaab-solutions-paper-April-2019.pdf> (accessed November 21, 2019).

¹⁹¹ Ibid

¹⁹² Harild, Niels, Asger Christensen, and Roger Zetter. 2015. *Triggers, constraints, and lessons on addressing the development challenges of forced displacement*. Washington: World Bank Group. <http://documents1.worldbank.org/curated/en/542611468188337350/pdf/99618-WP-PUBLIC-Box393206B-Sustainable-Refugee-Return-15Sept-WEB-PUBLIC.pdf>, 98

part of the country¹⁹³. From 1961-2000, Tanzania is reported to have practiced open door policy towards the admission of refugees and expatriates in general however this trend changed progressively over time.¹⁹⁴ The first wave of voluntary return movement occurred in 1993 following regime change in Burundi through election of president and perceived peace. His assassination three Months later sparked tribal clashes and another wave of refugee flows.¹⁹⁵ The number of registered refugees in the Republic of Tanzania skyrocketed from two hundred and ninety-two thousand one hundred in 1992 to eight hundred and eighty-three thousand three hundred in 1994.¹⁹⁶

2.1.3 Uganda

Uganda has an open-door policy and as such has hosted refugees since 1940's. Uganda has participated in several returns processes notably the repatriation of Rwandans displaced between 1959-1998 following a Tripartite Agreement entered into by the Governments of Rwanda, Uganda and UNHCR in 2003. In this instance, cessation clauses based on Article 1(C) (5) of the Convention on the Status of Refugees were invoked to the effect that the circumstances under which Rwandan refugees admitted into Uganda during the period in question had ceased to exist. Uganda similarly repatriated South Sudanese refugees in 2010 under the auspices of

¹⁹³ Ibid

¹⁹⁴ Norwegian Refugee Council. 2017. *A Review of the Legal Framework Relating to the Proposed Closure of the Dadaab Refugee camp and Repatriation of Somali Refugees*. Thomson Reuters Foundation. <https://www.nrc.no/globalassets/pdf/reports/a-review-of-the-legal-framework-relating-to-the-proposed-closure-of-the-dadaab-refugee-camp-and-repatriation-of-somali-refugees/2017-dadaab-camp-closure-report.pdf>, 63

¹⁹⁵ Norwegian Refugee Council. 2017. *A Review of the Legal Framework Relating to the Proposed Closure of the Dadaab Refugee camp and Repatriation of Somali Refugees*. Thomson Reuters Foundation. <https://www.nrc.no/globalassets/pdf/reports/a-review-of-the-legal-framework-relating-to-the-proposed-closure-of-the-dadaab-refugee-camp-and-repatriation-of-somali-refugees/2017-dadaab-camp-closure-report.pdf>, 63

¹⁹⁶ Norwegian Refugee Council. 2017. *A Review of the Legal Framework Relating to the Proposed Closure of the Dadaab Refugee camp and Repatriation of Somali Refugees*. Thomson Reuters Foundation. <https://www.nrc.no/globalassets/pdf/reports/a-review-of-the-legal-framework-relating-to-the-proposed-closure-of-the-dadaab-refugee-camp-and-repatriation-of-somali-refugees/2017-dadaab-camp-closure-report.pdf>, 63

UNHCR.¹⁹⁷ These repatriations highlighted several issues that inform this study as shall be discussed hereafter.

2.2 Voluntary Repatriation of Somalis from Kenya

2.2.1 Special Agreement

Voluntary repatriation of refugees occurs based on a given set of pre-conditions. In the context of the Somali refugees in Kenya, there must be an exclusive agreement between the countries involved and the UNCHR. Currently, there is a pre-existing tripartite agreement between the UNHCR, Government of Kenya (GOK) and the Federal Government of Somalia (FGS) which has been in force since 2013.¹⁹⁸ The nexus of the agreement was to provide a legal framework for the safe and dignified repatriation of Somali refugees from Kenya and their reintegration in Somalia¹⁹⁹. Under the agreement and in line with the Refugee Conventions, refugees were to return voluntarily from Kenya to Somalia²⁰⁰. The agreement however has an underlying flaw for failing to enlist the participation of the Somali refugees in the Tripartite Commission²⁰¹. Given the fact that they are the main stakeholders in this context, lack of their inclusion and participation in matters affecting them in the design and planning phase highlights key human rights concern. Although Article 4(5) of the Tripartite Agreement leaves room for refugee representatives to attend their meetings in an observer or advisory capacity, this does not adequate representation. With regards to their obligations, the tripartite agreement does not provide penalties for non-compliance by signatories but refers the matter for

¹⁹⁷ Repatriation of Refugees gathers pace <https://www.thenewhumanitarian.org/fr/node/236720>

¹⁹⁸ Tripartite Agreement available at <https://somalianews.files.wordpress.com/2013/11/tripartite-agreement-with-kenya-somalia-and-unhcr-2013.pdf> (Accessed on 16th January 2017)

¹⁹⁹ Ibid Article 2.

²⁰⁰ Article 2 and Preamble at (j) of the Tripartite Agreement

²⁰¹ Article 3 of the tripartite agreement.

negotiation²⁰². This sets the stage for violation of the terms of the agreement and deviation from the repatriation process.

2.2.2 Conditions in the Country of Origin

Since the 1990s, Somalia has faced a relentless period of political instability and a deteriorating economic situation. At the same time, the situation has been compounded by high levels of insecurity orchestrated by different groups that are determined to take political power. The general security situation in Mogadishu and regions of southern and central Somalia remains volatile²⁰³. Civilians are severely affected by conflict-related violence, widespread sexual and gender based violence against women and children, forced recruitment of children, and large scale displacement²⁰⁴. This notwithstanding, refugees have been returned to Kismayo, Mogadishu, Luuq and other parts of South Central regions of Somalia with the vast majority having been returned in the past three months²⁰⁵ in violation of the non-refoulement principle which is the cornerstone of refugee protection. This principle which, prohibits States from returning persons to countries where they would face persecution is enshrined in the Convention relating to the Status of Refugees²⁰⁶ OAU Convention²⁰⁷, Convention Against Torture²⁰⁸ and Kenya's Refugees Act²⁰⁹. Return to areas that are considered insecure flies in the face of voluntariness. Although the

²⁰² Article 28 of the Agreement

²⁰³ UN Security Council, *Report of the Secretary-General on Somalia*, 8 January 2016, S/2016/27, available at: <http://www.refworld.org/docid/5698a0b64.html> [accessed on 23 January 2017] para 12

²⁰⁴ UNHCR Position on Returns to Southern and Central Somalia (Update 1), May 2016 para 4 available at <http://www.refworld.org/pdfid/573de9fe4.pdf> (accessed on 23 January 2017)

²⁰⁵ For Breakdown of returnees and areas of return, see <http://www.unhcr.org/ke/wp-content/uploads/sites/2/2017/01/Voluntary-Repatriation-Analysis-13-January-2017.pdf> (accessed on 24th January 2017)

²⁰⁶ Article 33 of the Convention on the Status of Refugees, 1951; see Article 7 of the International Covenant on Civil & Political Rights, 1966

²⁰⁷ Article 2(3) of the OAU Convention. See also Article 5 African Charter on Human and People's Rights

²⁰⁸ Article 3(1) of the Convention Against Torture and other Cruel, inhuman or Degrading Treatment or Punishment.

²⁰⁹ Section 18 of the Refugees Act, 2006

Government is adamant that Somali refugees have not been returned to unsafe areas, the number of unregistered asylum seekers formerly repatriated indicates otherwise.

2.2.3 Conditions in the Country of Asylum

Kenya's treatment of Somali refugees is wanting. The community is targeted collectively due to perceived links with terrorists and discriminated against as evidenced by arrests, detention, round ups during security operations²¹⁰ and forced evictions²¹¹ of Somali refugees from urban centres and their eventual forced encampment prior to repatriation.²¹² These acts are discriminatory contrary to the Convention on the Elimination of all Forms of Racial Discrimination²¹³ and the Convention Relating to the Status of Refugees.²¹⁴ These acts create fear and negatively affect individuals free choice to repatriate.

Threats to close Daadab refugee camp where the vast majority of refugees are from Somalia equally amounts to coercion. On several occasions, the government of Kenya set time frames to close Dadaab as early as November 2016²¹⁵ (with a maximum six month extension) by implication and set a timeframe for the repatriation of Somalis²¹⁶. Such threats undermined the voluntariness of the repatriation process. In *Kenya National Commission on Human Rights & Ors v The*

²¹⁰ Kenya: End Abusive Round-Ups available at <https://www.hrw.org/news/2014/05/12/kenya-end-abusive-round-ups> accessed (26 January 2017) Arrests infringed on their right to personal liberty (deprivation of freedom arbitrarily and detention without trial guaranteed by Article 29(a)&(b) Constitution of Kenya, 2010.

²¹¹ Article 11(1) of the International Covenant on Economic, Social and Cultural Rights, provides for the right to adequate housing. This right was violated during forced evictions from urban centres.

²¹² Forced encampment violated freedom of movement enshrined under Article 26 of the Convention on the Status of Refugees read together with Section 16 of Kenya's Refugee Act, 2006.

²¹³ Convention on the Elimination of all Forms of Racial Discrimination 1966 available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> (accessed on 18th January 2017)

²¹⁴ Article 3 of the Convention relating to the Status of Refugees, 1951 prohibits discrimination on the basis of race, religion or country of origin.

²¹⁵ Supra note 10

²¹⁶ Kenya announces Dadaab refugee camp will close by November available at <http://www.bbc.com/news/world-africa-36418604> (accessed on 23rd January 2017) Deadline was extended by six months. See <https://www.standardmedia.co.ke/article/2000223669/kenya-s-dadaab-refugee-camp-closure-deadline-extended-by-six-months-after-request-by-unhcr-cs-nkaissery-says> (accessed on 26 January 2017)

AG & Ors²¹⁷ Court declared the attempted closure and coercion of Somali refugees to return as unconstitutional and a violation of the principle of non-refoulement. The camp is still in operation and repatriations ongoing.

An anti-refugee climate exists in Kenya as evidenced by hostile and inflammatory statements of public officials calling on Somali's to "go home"²¹⁸. The camp authorities effected food rations for refugees and floated an assistance package of 400 USD to those willing to return but forfeiture deportees.²¹⁹ Furthermore, Kenya refuses to offer local integration to Somali refugees therefore leaving repatriation as the only option. The pressure from discriminative social and political environment coupled with economic hardship influence return decisions.

In the context of Somali refugees, return decisions were made with limited information on the conditions in the areas of return and country of origin in general. This violates the refugees right to receive information.²²⁰ The Tripartite agreement also guaranteed the provision of objective, accurate and timely information on conditions in the country of origin²²¹. However, the key actor in collecting these information, UNHCR admits to facing challenges in collecting information in areas with military offensive and border areas.

Under these circumstances, return decisions are neither rational, objective nor informed. This demonstrates a violation of the right to information and supports the position that the repatriation of Somalis is riddled with physical, psychological, and material pressure.²²²

²¹⁷ Constitutional Petition no 227 of 2016 High Court of Kenya

²¹⁸ Supra note 4

²¹⁹ Supra note 8

²²⁰ Article 19(2) of the International Covenant on Civil and Political Rights, 1966. See also Article 5(4) of the OAU Convention Governing Specific Aspects of the Refugee Problems In Africa, 1969

²²¹ Article 10(2) of the Tripartite Agreement

²²² Presence of which the Handbook on Repatriation & Reintegration states would negate the voluntary nature of repatriation. See Chapter 3.1,

Admittedly Kenya has legitimate national security concerns but forced return of Somalis is not a viable solution.

2.3 Voluntary Repatriation from Tanzania

2.3.1 Special Agreement

The protection and the welfare of the Burundi refugees in Tanzania are dependent on the terms and conditions of the agreement between the two nations, *ab initio*. Tanzania has also entered into a number of Tripartite arrangements with the Government of Burundi and the UNHCR for the repatriation of Burundian refugees in 2001, 2017 and 2018. A key tenet of these repatriation agreements is voluntariness. However, Tanzania in violation of the obligation arising under the Refugee Conventions its signatory to, entered into bilateral arrangements with Burundi to repatriate Burundians without their consent²²³.

2.3.2 Conditions in the Country of Origin (Burundi)

The segment ascertains whether political and legal conditions in Burundi are favorable for the Burundian refugees to return to their homeland. Despite the enforcement of the Tripartite treaty, the country still struggles with violence linked to political movements. Burundi's peace process has been fragile for some years. Owing to this fact, despite a Tripartite Agreement being in place, UNHCR sought not to promote repatriation but only facilitate at the insistence of the refugee and to particular areas of return²²⁴.

Insecurity is rife in Burundi orchestrated by militia groups such as the Imbonerakure which is accused of "killings, disappearances, arbitrary arrests and detentions, acts of torture and ill-treatment and rape against actual or alleged political

²²³ <https://www.amnesty.org/en/latest/news/2019/09/tanzania-confidential-document-shows-forced-repatriation-of-burundi-refugees-imminent/>

²²⁴ UNHCR policy ON return to Burundi

opposition members with impunity.”²²⁵ The situation is adverse due to poor politics and intensifies in the runner up to elections. For instance, in 2015, President Pierre Nkunrunziza publicly declared his desire to retain presidential power for the third term, which was a breach of constitution in the view of many residents.²²⁶ As a result, political unrest manifested displacing thousands.

The return and reintegration program back to Burundi faces innumerable challenges such as scarcity of money and land on which to settle returnees. Therefore, imperatively, the situation in Burundi does not attract voluntary returnees from Tanzania.

2.3.3 Conditions in the Country of asylum (Tanzania)

Despite the yearly amendment of the Tripartite Agreement, the Republic of Tanzania has not been faithful to the obligations and provisions of the treaty. Numerous reports show that the voluntary aspect of the repatriation does not exist.²²⁷ There have been credible reports of round ups of Burundians from refugee camps threatened with denunciation by their state and compelled to return without the involvement or facilitation of the UNHCR.²²⁸

Burundian refugees in Tanzania face arrests and detention, threatened deportations and other forms of police brutality.²²⁹ The government also intensified expulsion of persons whom it considered illegal immigrants but their status was

²²⁵ Canada: Immigration and Refugee Board of Canada. "Burundi: The Imbonerakure, including their activities and their ties to the authorities, specifically with the Bujumbura police; whether they are able to find a person in all parts of the country and abroad or prevent a person from exiting the country." *Refworld*. February 22, 2018. <https://www.refworld.org/docid/5acf833c7.html> (accessed November 8, 2017).

²²⁶ Human Rights Watch, Campaigns Amid Clampdowns, <https://www.hrw.org/news/2020/04/27/burundi-campaigns-begin-amid-clampdown>

²²⁷ HRW. 2019. "Tanzania: Burundians Pressured into Leaving." *Human Rights Watch*. December 12. Accessed December 29, 2019. <https://www.hrw.org/news/2019/12/12/tanzania-burundians-pressured-leaving>

²²⁸ HRW. 2019. "Tanzania: Burundians Pressured into Leaving." *Human Rights Watch*. December 12. Accessed Dec 29, 2019 <https://www.hrw.org/news/2019/12/12/tanzania-burundians-pressured-leaving>.

²²⁹ LERRN-Working paper no. 5 on Tanzania

unclear²³⁰. This change in attitude has been cumulative and attributed to Tanzania's unwillingness to expend substantial resources on refugees. Further the National policy framework in Tanzania prioritizes repatriation as opposed to the other durable solution and calls for the establishment of safer areas of return in the event that the situation in the country of origin does not normalize²³¹.

The government of Tanzania also resorts to closure of camps and markets in a bid to compel Burundians to repatriate²³². Limiting freedom of movement, access to markets and associated activities has the effect of creating economic and material pressure on the refugees²³³. This is coupled with poor conditions of living and shortage of food. In terms of exploring alternative durable solutions, Tanzania has been progressive in as far as naturalisation is concerned. Tanzania naturalised 162,000 Burundians out of those who sought asylum in 1972²³⁴.

In conclusion, a review of voluntary practice exercises in Tanzania reveal that return decisions of Burundians are largely involuntary and not reflective of the international obligations which flow from Refugee Conventions to which Tanzania is a party.

2.4 Voluntary Repatriation from Uganda

2.4.1 Special Agreement

The summit held in March 2006 between UNHCR and the governments of Sudan and Uganda sees the voluntary return of South Sudanese refugees to their country of origin. The tripartite agreement establishes a legal framework required to coordinate,

²³⁰ Tanzania: Expelled Burundians are illegal immigrants available at <https://reliefweb.int/report/burundi/tanzania-expelled-burundians-are-illegal-immigrants-go>

²³¹ Para 15 of the National Refugee Policy

²³² LERRN-Working paper no. 5 on Tanzania

²³³ Rutinwa, Bonventure, Identifying Gaps in Protection Capacity Tanzania, UNHCR Report available at <https://www.refworld.org/pdfid/472896f50.pdf>

²³⁴ Tanzania naturalizes first group of 1972 Burundian Refugees available at <https://www.unhcr.org/news/briefing/2009/8/4a7c001f9/tanzania-naturalises-first-group-1972-burundian-refugees.html>

manage, and facilitate the voluntary departure of refugees who desire to return. Furthermore, the tripartite commission consented to conduct resource mobilization to fund repatriation and rehabilitation.

2.4.2 Conditions in the Country Origin (South Sudan)

In this segment, the research will consider the repatriation of South Sudanese from Uganda to South Sudan in 2010 and as a point of reference Rwanda's invocation of the cessation clause.

The political atmosphere in South Sudan's political atmosphere has remained volatile despite many peace processes volatile. Whereas fundamental changes had occurred in the country to warrant the promotion of repatriation, these changes were not durable. After the approval of the Comprehensive Peace Agreement, many refugees returned to South Sudan only most of them to come back to Uganda after the breakout of civil war in December 2013.²³⁵ With respect to Sudan, the repatriation is now considered a peace building initiative given the many cross border movements between Uganda and Sudan of refugees fleeing, returning and making circular movements²³⁶. In a report, some South Sudanese refugee respondents highlighted several reasons why they disregard repatriation. Firstly, high insecurity in Protection of Civilian sites reigns among the most common justifications for the respondents.²³⁷ Many people in the settlement camps fear for their wellness due to ethnic targeting in the areas they fled. Furthermore, rampant incidents of sexual violence committed

²³⁵ Norwegian Refugee Council. 2017. *A Review of the Legal Framework Relating to the Proposed Closure of the Dadaab Refugee camp and Repatriation of Somali Refugees*. Thomson Reuters Foundation. <https://www.nrc.no/globalassets/pdf/reports/a-review-of-the-legal-framework-relating-to-the-proposed-closure-of-the-dadaab-refugee-camp-and-repatriation-of-somali-refugees/2017-dadaab-camp-closure-report.pdf>, 68

²³⁶ Katy Long, *The Point of No Return* Oxford University Press p 141

²³⁷ FMR International Advisors. 2019. *Forced Migration Review: Return Voluntary, Safe, Dignified, and Durable?* Oxford: Refugee Studies Centre of the Oxford Department of International Development, University of Oxford. <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/return/return.pdf>, 5

upon women and girls discourage returns.²³⁸ Secondly, devastation and seizure of homes and belongings make it hard for many South Sudanese refugees to voluntarily return home.²³⁹ During the warfare, the destruction of properties was massive in addition to repossession of homes. For example, the dominant tribe in South Sudan, Dinka, controlled the Juba region.²⁴⁰ Therefore, minority tribes found it difficult to return to their homes.

Lastly, the absence of essential services and livelihood opportunities in South Sudan makes it difficult for the refugee to return home. Inadequate preparation of the government of South Sudan sees that the allocated zones lack essentials for the sustenance of livelihood.²⁴¹ These coupled with insecurity render the conditions in South Sudan not amenable to return.

In the context of Rwanda, cessation clause is yet to be invoked which will lead to end of refugee status for the affected population²⁴². In spite of judicial reforms in Rwanda, the government is still repressive and intolerant of opposition²⁴³. Arbitrary arrests, detention, extrajudicial killings and enforced disappearances orchestrated by

²³⁸ FMR International Advisors. 2019. *Forced Migration Review: Return Voluntary, Safe, Dignified, and Durable?* Oxford: Refugee Studies Centre of the Oxford Department of International Development, University of Oxford. <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/return/return.pdf>, 5

²³⁹ FMR International Advisors. 2019. *Forced Migration Review: Return Voluntary, Safe, Dignified, and Durable?* Oxford: Refugee Studies Centre of the Oxford Department of International Development, University of Oxford. <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/return/return.pdf>, 5

²⁴⁰ FMR International Advisors. 2019. *Forced Migration Review: Return Voluntary, Safe, Dignified, and Durable?* Oxford: Refugee Studies Centre of the Oxford Department of International Development, University of Oxford. <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/return/return.pdf>, 5

²⁴¹ FMR International Advisors. 2019. *Forced Migration Review: Return Voluntary, Safe, Dignified, and Durable?* Oxford: Refugee Studies Centre of the Oxford Department of International Development, University of Oxford. <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/return/return.pdf>, 6

²⁴² Ending of refugee status for Rwandans approaching available at <https://www.unhcr.org/51cd7df06.html> (cessation clause for Rwandans has not taken effect)

²⁴³ Grant, A. (2015). Quiet Insecurity and Quiet Agency in Post-Genocide Rwanda. *Etnofoor* <https://doi.org/10.17863/CAM.27540>

security agents or with their acquiesce are prevalent²⁴⁴. These conditions are not tenable for return particularly for persons whose fled due to political opinion.

2.4.3 Conditions in the Country of Asylum

Uganda has a very progressive legal and policy framework that embraces alternative to camps to settle refugees, freedom of movement²⁴⁵ and offer good reintegration schemes to refugees. Refugees can self-settle as long as they can support themselves. That is mostly the case with urban refugees. Settlement based refugees are settled on parcels of land where they cultivate. Uganda's law allows refugees to engage in gainful employment in the country, which enables refugees to meet their needs²⁴⁶. That said, Uganda has so far not naturalised any refugee despite having a legal provision to that effect²⁴⁷. This formed the thrust of the Petitioners case in *Centre for Public Interest Litigation & Salima Namusobya V. The Attorney General of Uganda*.²⁴⁸ It remains to be tested whether Uganda will live upto its intentional obligations and pledges to further improve refugee protection environment in Uganda.

The repatriation efforts of Rwandan refugees from Uganda however reveal abuse of rights and return to insecurity and repressive government²⁴⁹. Ugandan Police is accused of rounding up 1, 700 immigrants within Nakivale and Kyaka camps under the guise of food distribution, informed them of negative decisions of their asylum applications and mandated them to leave for Rwanda on waiting buses²⁵⁰. UNHCR

²⁴⁴ Human Rights Watch, "All Thieves must be killed", Extrajudicial Executions in Western Rwanda at Grant, A. (2015). *Quiet Insecurity and Quiet Agency in Post-Genocide Rwanda*. *Etnofoor* <https://doi.org/10.17863/CAM.27540>

²⁴⁵ Section 30 of the Refugees Act, 2006

²⁴⁶ Section 29(e)(vi) of the Act

²⁴⁷ Section 45 of the Refugees Act, 2006

²⁴⁸ Uganda Constitutional Petition no 34 of 2010

²⁴⁹ Human Rights Watch, Uganda/ Rwanda: Halt Forced Returns of Refugees available at <https://www.hrw.org/news/2010/07/17/uganda/rwanda-halt-forced-returns-refugees>

²⁵⁰ Ibid

distanced itself from the forced return and condemned Uganda for the flagrant violation of the principles of refugee protection²⁵¹.

2.5 Conclusion

The three countries under investigation have each undertaken organised repatriation projects from the 1990's to 2018. In the repatriation efforts examined, there has been violation of the voluntariness principle to varying degrees. The forced return of Rwandans from Uganda discussed above signifies that a Country with stellar laws and track record in refugee protection can still fall short and should equally strive to uphold minimum standards applicable in the context of repatriation. While Tanzania's record on the treatment of Burundians is of concern, the same country explored naturalisation as an alternative durable solution to return. The repatriation of Somalis from Kenya has similarly been fraught with abuses that go to the core of voluntariness and violates states obligations to refugees but inherently, the potential to learn good practices and commit to respect human rights standards remains.

²⁵¹ UNHCR, UNHCR condemns forced return of 1,700 Rwandans from Uganda available at <https://www.unhcr.org/news/latest/2010/7/4c406edb6/unhcr-condemns-forced-return-1700-rwandans-uganda.html>

CHAPTER THREE: CONCLUSION & RECOMMENDATIONS

The research set out to ascertain whether the concept of voluntariness in voluntary repatriations of refugees in Kenya, Uganda and Tanzania is respected in line with the legal framework on repatriations as well. It established that although all the three countries are signatories to the Convention on the Status of Refugee, the OAU Convention on Aspects of the Refugee Problems in Africa and have each enacted a domestic law governing refugees that contain safeguards against refoulement, the implementation of these laws in practice remain problematic. Voluntary repatriation exercises were fraught with abuses of the principle of voluntariness, which undermined the returns process. The research also found that the current framework on repatriation does not accord adequate attention to making a comprehensive assessment of conditions in the country of origin before commencing repatriation projects. The framework mainly focuses on the repatriation itself and incorporates human rights safeguards during the process but does not adequately deal with feasibility of returns in countries of origin. Repatriation exercises in Kenya, Uganda and Tanzania support this position.

3.1 The research recommends a Human Rights Based Approach to Voluntary Repatriation

The essence of a rights-based approach to refugee protection is to ensure that refugees are rights holders entitled to a ‘certain standard of treatment’²⁵². They are able to claim those rights and duty bearers meet their obligations²⁵³. The HRBA recognises refugees as ‘responsible actors who ought to participate in making

²⁵² Michael Posner and Deirdre Clancy, ‘A Human Rights-Based Approach to Refugee Assistance’ (2005) 25 Human Rights First< http://www.humanrightsfirst.org/intl_refugees/regions/approach_refugess.pdf>. Protracted Displacement 4.

²⁵³ Statement of common understanding on the human rights-based approach adopted at the inter-agency workshop on a human rights-based approach in the context of UN reform, 3 -5 May 2003. Available at www.unicef.org/sowc04/files/AnnexB.pdf (accessed 12 November 2018).

decisions that affect their lives' including returns decisions²⁵⁴. This is increasingly important due to government policies and practices as evidenced in the repatriation projects undertaken in Kenya, Uganda and Tanzania, which constrain the enjoyment human rights of refugees albeit to a varying extent.²⁵⁵

Voluntary repatriation programmes must meet minimum standards laid down in the OAU Convention and the framework laid down by the UNHCR in order for them not to be in violation of the non-refoulement principle. For returns to meet the threshold of voluntariness, refugees must be involved in decision-making where repatriation projects have been deemed feasible. This research found that refugee involvement in repatriation exercises was still wanting. On this matter, Bradley states, 'the fact that the refugees are the ones repatriating and have not be involved in the decision of whether or not to repatriate calls for their inclusion.'²⁵⁶

Refugees should be involved in the design and planning of repatriation processes in order to allow for proactive engagement with the returns process. Refugees should be consulted on modalities, strategies, logistical arrangements and any other pertinent issue and their views incorporated in an agreement guiding the repatriation process. The commissions should be keen to take into consideration views and wishes of women, children and extremely vulnerable individuals who may be under-represented. This research found that currently, organized repatriations are guided by Tripartite Agreements between the Government of the host country, the Government of the country of origin and the UNHCR where conditions are deemed

²⁵⁴ Michael Posner and Deirdre Clancy, 'A Human Rights-Based Approach to Refugee Assistance' (2005) 25 Human Rights First< http://www.humanrightsfirst.org/intl_refugees/regions/approach_refugess.pdf>. Protracted Displacement 4.

²⁵⁵ UNHCR, 'Operational Protection in Camps and Settlements: A Reference Guide of Good Practices in the Protection of Refugees and Other Persons of Concern' 17 <<http://www.refworld.org/pdfid/44b381994.pdf>> accessed 12 December 2018.

²⁵⁶ Megan Bradley, 'Back to Basics: The Conditions of Just Refugee Returns' [2008] 21(3) Journal of Refugee Studies 285-304 at 290

feasible for return. Refugee representation through agency is questionable and may not necessarily serve the interest of refugees. To address this matter, this research proposes that Quadripartite commissions including refugees, as stakeholders should replace these Tripartite Arrangements.

Refugees should be provided with accurate, up-to-date information on conditions in the country of origin. Refugees make the decision to flee from persecution and should therefore make a free, and voluntary decision on whether to return to their country of origin as affirmed by the rational choice theory. The theory posits that refugees have choices and when confronted with a situation will make a decision whose benefit far outweighs the cost. Such a decision would be made based on accurate, up-to-date information on the conditions in the country of origin. The Tripartite agreements upon which all the organized repatriations are based require the Governments of the host country, countries of origin and the UNHCR to provide accurate and objective information on the prevailing circumstances in the countries of origin²⁵⁷.

3.2 Exploring Alternative Solutions

There is need to rethink the prioritisation of voluntary repatriation over local integration and resettlement as durable solutions. This research affirms Chimni's observation that idealizing repatriation as the preferable as opposed to local integration and resettlement has 'helped legitimize measures which compel a refugee to repatriate²⁵⁸.' There is need to consider other innovative approaches that go beyond the traditional durable solutions such as 'labor mobility, freedom of movement and cross border mobility arrangements for refugees.'²⁵⁹ Refugees' contribution to

²⁵⁷ For instance, Article 15(1) of the Tripartite Agreement between Kenya, Somalia and UNHCR.

²⁵⁸ BS Chimni, 'From Resettlement to Involuntary Repatriation' at 59

²⁵⁹ Jeff Crisp and Katy Long, Safe and Voluntary Refugee Repatriation: from principle to practice. *Journal on Migration and Human Security*, Vol 4 Issue 3(2016) pp 141-147 at 146.

economies of the countries hosting them is no longer in contestation.²⁶⁰ The respective governments can issue alternative status to refugees in instances where naturalization is not viable. These statuses include permanent residency (as foreign nationals) and issuance of work permits for refugees who do not wish to return particularly those whose displacement has been protracted.

3.3 Ensure threshold for Cessation of refugee status and Promotion of Return are met

Promotion of return projects should be reviewed particularly where conditions are not amenable to return. Where a country seeking to invoke the cessation clause, UNHCR and partners must ensure that the thresholds for the invocation have been met. Where fundamental changes in the country of origin warrant cessation, duration spent in the host country should be taken into consideration as excepting the application of the clause. This should particularly be the case for second and third generation refugees facing return. For this class of refugees, repatriation may not be homecoming for them as understood by refugees who were born and established linkages with their country of origin. For these categories of refugees they have little or no connection to their countries of origin having been born and raised in their countries of asylum. Other durable solutions may be viable options.

3.4 Making a case for Systematic Returnee Monitoring

The involvement of refugees in monitoring voluntariness and safety of returns processes should be enhanced. Additionally, the UNHCR should intensify monitoring of returnees after repatriation. Relatedly, “Go and see” visits, which are intended to inform prospective returnees on the conditions in the country of origin, should be

²⁶⁰ Alexander Betts et al, *Refugee Economies: Rethinking Popular Assumptions*, Oxford Refugee Studies Centre, 2014 available at <https://www.rsc.ox.ac.uk/files/files-1/refugee-economies-2014.pdf>

followed by “Come and tell” visits. In this latter visits, repatriated refugees would be able to share experiences with refugees in the country of asylum which experiences would assist the refugees make an informed decision on whether to return or not.

3.5 Underscoring Voluntariness

For voluntary repatriation to be lasting and sustainable, it must adhere to the principles of voluntariness, safety and dignity. Return decisions must be made freely and undertaken in situations that are amenable to repatriation. Where voluntariness of a particular repatriation exercise is questionable, UNHCR should not engage in such operations on account of pressure from host countries or donor states. In instances where refugees feel pressured to return, the international community should not remain passive.

It is proposed that countries should adopt comprehensive repatriation programmes reflective of International, regional and national laws governing repatriation. The three countries under review Kenya, Uganda and Tanzania have each respected refugee rights to varying degrees. Repatriation exercises in these countries have been fraught with violations of the voluntariness principle (to differing extents) but its acknowledged that these countries have the potential to adhere to the human rights standards and sound principles of refugee protection.

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