

**RETHINKING OBLIGATIONS: A CRITICAL ANALYSIS OF REFUGEE  
CESSATION BASED ON '*CHANGED CIRCUMSTANCES*' IN KENYA**

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## **DEDICATION**

**TO THE LORD GOD ALMIGHTY FOR EVERYTHING; AND TO MY HUSBAND AND DAUGHTERS FOR THEIR ENCOURAGEMENT, SUPPORT AND UNDERSTANDING PROVIDED TO ME DURING ALL THESE YEARS OF STUDY.**

**DECLARATION**

I declare that this is my original work and has not been submitted for a degree in any other University.

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**Janet Mbithe Munywoki**

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**Date**

This project has been submitted for examination with my approval as University Supervisor.

.....

**Dr. Ibrahim Farah**

.....

**Date**

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**Janet Mbithe Munywoki**  
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## ABSTRACT

This study explores State obligations in the application of the cessation of refugee status based on '*changed circumstances*'. The study is inspired by three (3) growing concerns amongst refugees, States, United Nations, scholars in refugee studies and stakeholders namely; intensified debates by States questioning their obligations under the refugee cessation clause based on '*changed circumstances*'; the increased call by States through tripartite agreements for precipitated repatriation of refugees vis a vis the low turn-out of refugees willing to repatriate; and the growing jurisprudence challenging the application and modalities in implementing the cessation clause based on '*changed circumstances*'. Using Kenya as a case study, the study examines the reception, refugee status determination process and management of refugees. The study affirms that though repatriation based on '*changed circumstances*' in the country of origin is the best durable solution for refugees, measuring whether the changes are fundamental, durable and sustainable is often a difficult balancing act for States and the United Nations Commissioner for Refugees. In addition and due to the strict application of the Non refoulment principle, States sovereignty is threatened by the growing numbers of revoked refugees and asylum seekers. The study established that States re-organization has resulted in the adoption of new approaches in tackling forced migration by addressing social imbalances responsible for forced migration. The study finds that States review of their obligations under the refugee cessation clause based on '*changed circumstances*' are well intended and calls for concerted efforts from the United Nations and all Stakeholders. The study recommends two (2) areas in the need for further scholarly research namely; on the adopted Common Asylum Procedures and their contribution in refugee burden sharing; and on the right to asylum for rejected refugees and asylum seekers.

## **LIST OF ABBREVIATIONS**

AU - African Union

EAC - East Africa Community

EU- European Union

JRS- Jesuit Refugee Services

RSD- Refugee Status Determination

SADC- Southern Africa Development Committee

UN- United Nations

UNHCR- United Nations High Commissioner for Refugees

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## CHAPTER ONE: INTRODUCTION TO THE STUDY

More than half a decade since the 1951 International Refugee Convention was ratified by States, today the refugee problem remains a complex and constant threat to State stability. This is compounded by global changes and emerging trends relating to the free movement of people and goods, that have made States vulnerable to fighting terrorism, proliferation of small and big arms, competition over scarce resources just to mention a few. The refugee problem is as complex as the very reasons that cause refugees to flee from their own countries. Tackling the refugee puzzle needs a number of dimensions in addressing the root causes that influence people to flee in the first place. As Albertson rightly puts it, the most important problem confronting the world today is the problem of stable and permanent peace.<sup>1</sup> This has been Africa's nightmare for many decades.

Indeed in the last 50 years, Africa remains a fragile continent crowded by interstate conflicts that sadly have led to repeated and sustained mass influx of refugees. Stable and permanent peace is a delicate process heavily influenced by the democratic climate of States. This translates to good governance of citizens, strong legal frameworks, citizen engagement and participation, strong economic development, peaceful co-existence, good neighborliness and many more. In today's modern times, States are constantly reinventing themselves due to the threat to survival. The fragility of peace weakens State identities and their sense of belonging. Sadly, these vested interests have further widened the refugee puzzle making it very complicated.

The principle of Refugee burden sharing has some truth in harnessing some of the challenges stated above. This principle is grounded in States expressing Solidarity to one another and in their commitment to protecting refugees. Though well intended, the effectiveness of this principle has been a subject of debate by academia, scholars and the

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<sup>1</sup> M. Albertson, *'Peace Research – Past, Present and Future'* Vol. 6, No. 4. pp.39, 1963



United Nations in recent times. In the context of refugees, two (2) pioneering scholars in international refugee law reform, Garvey<sup>2</sup> and Coles<sup>3</sup> have spurred the interest of scholars and research experts around the world calling for a fundamental shift to traditional refugee protection to take into account modern realities.

Scholars like Hathaway<sup>4</sup> have supported these views, researched and written extensively demonstrating that indeed international refugee protection needs a revolution albeit with caution that the legitimate concerns of States must not compromise the rights of at-risk person in seeking asylum. A major concern has been the indefinite nature of refugee protection that is majorly influenced by political and economic complexities in refugee producing States. This study will analyze the concerns of States in rethinking their obligations in refugee protection. The study will narrow down to Kenya's experiences in the refugee cessation clauses.

## **1.1 Background**

The United Nations High Commissioner for Refugees (UNHCR) deals with persons of concern and is the main international agency for refugee protection. UNHCR was established on December 14, 1950 by the United Nations Assembly<sup>5</sup> for a period of 3 years from 1951 as a subsidiary organ under Article 22 of the United Nations Charter. From 1960's as the decolonization of Africa gained momentum, UNHCR grew into a refugee agency with a global mandate. At its inception, UNHCR's work was limited to legal issues, assisting governments to adopt laws and procedures to implement the 1951 UN Convention Relating to the status of refugees and its 1967 Protocol.

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<sup>2</sup> J. Garvey, 'Towards a Reformulation of International Refugee Law', *The Harvard International Law Journal*, Vol. 26, No. 2, 1985 accepted paper series

<sup>3</sup> Coles, G, 'Approaching the Refugee Problem Today', eds. G. Loescher and L.Monahan, '*Refugees and International Relations*', Oxford: Oxford University Press, 1989

<sup>4</sup> J.Hathaway, '*Reconceiving International Refugee Law*', ed. The Hague: Martinus Nijhoff Publishers,1997

<sup>5</sup> United Nations General Assembly Resolution 428 (v) of 14 December 1950

The UNHCR mandate however does not apply to two (2) category of refugees namely; refugees who are considered nationals by countries granting them asylum as was the case of the Palestinian group; and refugees who are protected under other special UN programs.<sup>6</sup> Today, UNHCR is a global operation in more than 116 countries including Kenya. Its programs and protection regimes and other policy guidelines are approved by an Executive Committee of 70 members States that meet annually at its head quarters in Geneva. A working standing group/standing committee meets annually several times a year.

The refugee title is not permanent and the same can be relinquished through an action of the individual or States where the situations that led to the recognition of the refugee status cease. The functions of UNHCR in its statute<sup>7</sup> are numerous but for the sake of this study, will adopt the protective function that calls for, *“protection through special agreements with Governments the execution of any measures to improve the situation of refugees and to reduce the numbers requiring protection”*. This way, UNHCR encourages governments using the refugee burden sharing principle to take and receive asylum seekers, issue protection when they qualify as refugees as well as in promoting safe return and re-establishment back home, provide protection through peace keeping missions, etc.

Besides the Refugee Conventions, States have found it necessary to domesticate refugee protection in national legislation as is the case of Kenya in its Constitution as well as in the Refugee Act of 2006. States have further expressed their commitment to refugee burden sharing in regional policies and declarations such as in regional treaties, declarations, agreements and pacts. Putting down legal frameworks is one thing their

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<sup>6</sup> L. Bennet, and J. Oliver, *‘International Organizations: Principles and Issues’*, 7<sup>th</sup> ed. Upper Saddle River, NJ: Prentice Hall, pp380, 2002

<sup>7</sup> Statute of the Office of the United Nations High Commissioner for Refugees, Chapter 11 Para 8-12

implementation is another. This study spells out some of the challenges that continue to question States obligations to the refugee burden.

Tripartite agreements with governments are premised on to the need to ensure continued protection and transition of refugees from refugees to naturally integrate back to their countries. In this case, States are mandated to revoke the refugee Conventions mainly through tripartite agreements involving the UNHCR and governments. The signing of tripartite agreements has become common occurrence precipitated by mounting pressure by refugee hosting States to their counterparts the refugee producing States to rebuild and resettle their citizens. Many of these repatriation exercises have however been condemned by refugees, human rights workers and organizations like Human Rights Watch.

The condemnations by these groups have especially been loudest where the selfish interest of the State has been seen to override those of the refugees in question. Being a delicate political exercise, the reintegration of refugees often involves the balancing of individual interests versus those of States hence becoming more of a political control of its citizens than a social concern of the individuals. As a result, the refugee burden sharing idea has been marred by challenges. These challenges are categorized by continued flight of refugees and asylum seekers to other countries often risking their lives in the process, strict controls at border points to dissuade illegal immigrants, arrests and intimidation to return, few countries resettling few numbers of refugees as a durable solution.

Kenya which is rated the highest refugee hosting State in Africa is no exception. Its proximity to fragile States like Somalia, Sudan and the Great Lakes region have made it inevitably a preference to many asylum seekers interstates wars. Kenya has been party to tripartite agreements to cease refugee protection. Its experiences are therefore critical in analyzing the refugee problem and enforcement of the cessation clauses.<sup>8</sup> This study therefore uses Kenya's experience, to analyze the refugee cessation clauses, their

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<sup>8</sup> *ibid.*

applicability and enforcement in current times. The study limits the scope of the study to Article 1 C (5) and (6) of the 1951 Refugee Convention; Article 1 (4) (e) of the Africa Union Convention and paragraph 6 (A) (e) of the Statute of the Office of UNHCR (herein after referred conclusively as the ('cessation clauses')).

## **1.2 Statement of the research problem**

Given the increasing number of unresolved conflicts that produce high number of refugees and returnees, the cessation clauses are subject to be questioned in their applicability and relevance. Kenya continues to host an unknown number of refugees who are neither protected nor recognized as a result of refugee revocation or denial of status. These revoked populations remain a constant security threat to the government challenging its sovereignty which essentially leaves them more vulnerable to abuse and intimidation.

The cessation clauses remain silent on the fate of the many asylum seekers who continue to trickle into the country soon after the revocation clauses. Many other refugees whose status has been revoked continue to stay on with no protection and are left vulnerable to intimidation and harassment.

The focus on Kenya's high urban refugee populations whose status has been renounced by the UNHCR and Governments was carried out as a comparative analysis to ascertain the connection between the invocation of the cessation clauses and the resulting number of high returnee flowing back to the country which goes against the principles of UNHCR mandate and international law.

A variety of case studies involving the Rwandese refugee population, including the genocide refugees of 1994 to 1999, the resulting revocation of status and tripartite agreement and repatriation plan of December 2012, the Ethiopian refugees including the old case load of the 'Mengistu' refugees, the Sudan refugees and the biggest lot the Somali refugees. This study critically examines the gaps in protection of refugees where

contracting governments invoke the cessation clauses. Challenges and consequences associated with the striking out of refugee status will also be highlighted together with the resulting impact on the fear of persecution.

The study among other things answers whether ‘*changed circumstances*’ in the country of origin’ are the best determinant of promoting repatriation as the most durable solution for refugees? What lessons can we learn today in cases where refugees have completely been unable to successfully reintegrate as anticipated? What proposals are being made in addressing the modern States concerns on their obligations in refugee protection?

### **1.3 Objectives of the study**

The broad Objective of the study is to:

- i. Critically analyze States obligations in invoking the refugee cessation clauses in current times using Kenya’s refugee experiences as a case study.

More specifically, the study looked at:

- ii. The application of Article 1 C (5) and (6) of the 1951 Refugee Convention, Article 1 (4) (e) of the AU Convention and Paragraph 6 (A) (e) of the Statute of the Office of UNHCR.
- iii. Determined whether the enforcement of tripartite agreements amounts to forcible return of refugees thereby deepening refugee vulnerability.
- iv. Identified existing gaps in the application of cessation clauses and new emerging approaches in the enforcement of refugee cessation clauses today.

### **1.4 Literature review**

The success and sustainability of voluntary repatriation is questionable. Repatriation is regarded as the most desirable durable solution provided that return is genuinely voluntary. The scenarios of the 1990’s dubbed the decade of repatriation, noted global

precipitated action by host countries to repatriate refugees back to their home countries. Interestingly, UNHCR noted that out of those repatriated, more than 9 million returned soon after between 1991 and 1996. With this alarming trend, many countries agree with Loescher and are now raising questions on the degree of voluntariness and the role of compulsion in ‘imposed return’ especially since the number of returnees has increased.<sup>9</sup>

#### **1.4.1 Understanding ‘changed circumstances’**

International refugee law is clear that the refugee title is not permanent and does come to an end. This is mainly in three (3) ways dubbed the durable solutions namely; Local integration, voluntary repatriation and resettlement. Voluntary repatriation is the most preferred solution and is given prominence by States and UNHCR in settling refugee problems. States and UNHCR are mandated to revoke refugee status cessation where there are changed circumstances in the country of origin that caused refugee plight in the first place. In Africa, the fragility of States has made it challenging in measuring ‘changed circumstances’ while invoking the refugee cessation clauses due to difficulty in measuring State competences in support of durable changes. The most difficult reason has been the ambiguous nature of refugee recognition that is tested against the two (2) refugee Conventions i.e. the 1951 Convention and the 1969 AU Convention. Where asylum seekers do not qualify for individual persecution, and especially in en-mass movements, they are granted *prima facie* refugee protection under the 1969 Convention.

In the case of Kenya, the recognition of refugee is tested against the 1951 Convention and the 1969 AU Convention which expands refugee recognition by taking cognizance of other circumstances that cause refugee migration who owing to external aggression, occupation, foreign domination or events seriously disturbing public order are compelled to leave their habitual residence to seek refuge outside their country of origin or

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<sup>9</sup> G. Loescher, ‘*The UNHCR and World Politics: A perilous path*’, Oxford: Oxford University Press 2001

nationality. Kenya has been host to refugees from neighboring countries of Somalia, Rwanda, South Sudan and Great Lakes Region under the 1969 Convention. Therefore in the same vein, it has to consider the main reasons that caused refugee flight in the first place during assessments in revoking refugee cessation clauses by subjecting claims or applications against the cessation of refugee status to the same criteria. This is where it poses a challenge.

In en-mass movements, UNHCR and other agencies mandated to provide refugee status determination tests face the challenge of ruling out real from perceived refugees falling under the 1951 Convention, those that purely fall deserve protection under the 1969 Convention or worse still those that are a hybrid of the two. Many States including Kenya have opted to widely recognize refugees under the 1969 Convention due to the spiral effects that accompany displacement mainly due to failed States. Viewed differently, this group status recognition is however disadvantageous to refugee exhibiting personalized fear of persecution.

Globally, the '*change of circumstances*' is measured in terms of developments, initiated reforms, respect of human rights amongst others. The cessation clauses, contained in the six (6) sub clauses of Article 1C of the 1951 Convention provide the framework under which refugee status may be lawfully withdrawn or ceased. The basic idea underlying cessation is that refugee status should cease when there is clearly no longer any need for international protection. Where the invocation of the 'cessation clauses' is done upharzardly, it perpetuates the cycle of vulnerability where upon return the returnees become internally displaced and when conditions worsen they return back to seek protection.

The UNHCR admits that it has not been easy in applying the cessation clauses for the reason that it is difficult to determine whether developments in a country of origin warrant the application of changed circumstances. This was demonstrated by Rafael Bonoan in

three (3) case scenarios.<sup>10</sup> First, in the case of Ethiopia, the application of the ‘ceased circumstances’ was invoked from 1993 to 1998, by UNHCR for pre-1991 Ethiopian refugees dubbed the ‘Mengistu refugees’ who fled persecution by the Mengistu regime. In 1998, a decision by the UNHCR Standing Committee extended the repatriation exercise to other Ethiopian refugees but before the process could take off, the outbreak of war between Ethiopia and Eritrea and continued political instability raised questions on the legality of lifting refugee protection for post 1991 refugee.

Secondly, as a result of the huge numbers of repatriated Ethiopian pre-1991 refugees, Ethiopia raised a concern on the lack of preparation in reception of large population of returnees, given the distraught effects of the war between Ethiopia and Eritrea. They requested a halting of the repatriation exercise. Ironically, Sudan was worried about diminished financial assistance with the Ethiopian repatriation exercise. UNHCR agreed to continued assistance to Sudan in the refugee status determination exercise and phased the repatriation exercise of Ethiopian refugees back to Ethiopia.

Thirdly, the involvement of UNHCR with States in the signing of peace accords like happened in Sudan in 1973, committed Sudan and the Liberation Movement of South Sudan to ending the civil war that had generated the displacement of people and refugees across the Eastern Africa region. On its part, UNHCR and UNDP committed to supporting in the reconstruction of the State and assistance of repatriated refugees.

The three (3) scenarios above, demonstrate measuring fundamental changes is not easy and the group application of the cessation clauses can have devastating repercussions on refugee repatriation where not considered wholesome.

The question of UNHCR reactive responses in making assessments post repatriation exercise is an indication that UNHCR needs to proactively ensure that it does constant

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<sup>10</sup> R. Bonoan, ‘*When is international protection no longer necessary? The ceased circumstances: Provisions of the cessation clauses: principles and UNHCR practice, 1973-1999*’, June 2001



assessments to pressurize States to address issues that cause refugee displacements in the first place. This way UNHCR will be using its mandate and hence widening its contribution to refugee burden sharing to encouraging State improvements to lessen the numbers seeking protection. Eiko Thielemann and Torun Dewan are proponents of this view and agree that contribution to refugee protection is principally in two (2) ways i.e. *proactively* through peacekeeping/making and *reactively* by providing protection for displaced persons.<sup>11</sup>

Following this line of thought, is Boyer who in favor of refugee burden sharing, argues that the determinant factor in refugee burden sharing is the comparative advantage that States possess. This can be measured by the kind of assistance accorded in refugee sharing obligation. This view is very practical in the case of Africa which are considered Smaller States or developing nations by the western States. They are more reactive rather than proactive in burden sharing often preferring to host refugees and in turn, receive assistance inform of foreign aid by the United Nations and humanitarian agencies Sudan presents an example above.

#### **1.4.2 Policy positions**

The devastating effects of hosting a huge number of refugees continue to trouble States. This is constantly putting threats on the burden sharing principle whereby States have over time developed strict policies and laws to dissuade and even send back illegal immigrants. Australia and Germany are some of the countries that have been in negative limelight for applying restrictive asylum measures that have soared bad relations with neighboring countries. In Africa, Tanzania joined the league of rogue States in refugee protection in December 1996 by closing Rwandese refugees hosting camps and forcibly repatriating them.

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<sup>11</sup> E. Thielemann and T.Dewan, '*Why States don't defect: Refugee Protection and Implicit Burden Sharing*'. Department of Government and European Institute, pp.1, 2006

Although more countries are now threatening to disassociate and opt out of the 1951 Convention, the reason why States including Kenya, continue to offer refugee protection even where they struggle themselves has elucidated many debates across the world. The debates on refugee burden sharing in the European Union are insightful in analyzing policy positions in relation to refugee burden sharing. Suhrke, contends that burden sharing is a public good as both the sending and receiving States benefit mutually.<sup>12</sup> In support of this view, Boyer takes this forward albeit only focusing on military support and foreign aid as the main ways that States contribute to international peace and security.<sup>13</sup> Candidly put, Rebecca Moore defines these mutual benefits as selfish interests of States, UNHCR, humanitarian organizations and the media who have portrayed the refugee as a ‘problem’ rather than ‘people with problems’ and therefore entrenched dependency and permanency of refugees.<sup>14</sup> In his view, and while agreeing with Harrell Bon, Olsen’s differs from Suhrke and Boyer by contending that the selfish interests of States are the main driving force in refugee protection. Given the realities in refugee hosting and the ongoing debates, Olsen’s theory of the exploitation of ‘Small’ States by ‘Big’ States is a reality and a revolution of refugee theories of protection cannot be over emphasized. In agreement with all the views expressed above, James Milner further propagates, focusing on confidence building of refugee hosting States and especially in the social context of State security as a major factor in addressing refugee burden sharing inequalities<sup>15</sup>. State security is one of the most threatening causes in the loss of appreciation of State refugee obligations. Succinctly put, States interests in refugee protection are a defining factor for many States.

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<sup>12</sup> A. Suhrke, ‘*Burden sharing during refugee emergencies: The logic of Collective Action versus National Action*’, pg 396-415, 1998

<sup>13</sup> M. Boyer, ‘Trading public goods in the Western Alliance system’ *Journal of Conflict Resolution* 33(4)

<sup>14</sup> R. Moore, ‘*Entrenched relations and the permanence of the long-term refugee camp situations*’ United Kingdom: Sussex Centre for Migration Research, Working Paper no. 28

<sup>15</sup> J. Milner, ‘Sharing the security burden: Towards the convergence of refugee protection and State security’ Oxford: Oxford, Refugee Studies Centre, 2000

The loss of the refugee status is stipulated in the 1951 UN refugee Convention<sup>16</sup>, the 1969 OAU Convention governing the specific Aspects of refugees in Africa<sup>17</sup> and the Statute of the Office of the United Nations High Commissioner for refugees<sup>18</sup>. These instruments group the stripping off the refugee protection into personal circumstances wherein the refugee voluntarily wishes to be under the protection of his country of origin while the ceased circumstances rest exclusively with the contracting States<sup>19</sup>. With the above understanding, this begs the question then that aren't the actions of States like Tanzania as illustrated above justified in forcible repatriation of refugees? And especially where the Country of Origin in this case Rwanda expresses support for repatriation of its citizenry back to Rwanda?

Even where States have a duty to limit the number of asylum applications for new cases and especially in group refugee status determination and in promoting of Countries of Origin as 'safe' to return, a cautionary approach is needed. In support of this view, Rudd while agreeing with James Milner on confidence building in the States on security, is quick to caution that in many instances, States have abused their obligations in refugee protection and especially through political selfishly interests where unscrupulous politicians have encouraged refugees to return home with a view of voting in general elections.<sup>20</sup>

The ambiguity in the definition of refugee protection has for the longest time being a factor to consider in the failures of States in meeting their obligations. A beginning point would be in shifting focus to addressing the root causes of refugee flight. The definition in the 1969 Convention though well intended to take into account African State conditions that cause refugee flight, creates a lacuna in its definition. Asylum seekers not befitting

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<sup>16</sup> 1951 Refugee Convention Relating to the Status of Refugees, Article 1C (5) & (6)

<sup>17</sup> Ibid: Article 1 (4) (e) & (f)

<sup>18</sup> Ibid: Paragraph 6 (A) (e) & (f)

<sup>19</sup> UNHCR ExCom Conclusion No 69 (XLIII) on Cessation of Status 1992

<sup>20</sup> L. Rudd, '*Don't Kick Refugees just to score points: Politicians who don't demonise Asylum seekers are playing with people's lives*', Australia: The Australian Journal, June 20<sup>th</sup> 2001

the 1951 Convention have usually been recognized using the 1969 Convention. The focus on the conditions in the country of asylum and not the individual as provided under the 1951 Convention is a major contributing factor in the wrong application of refugee protection.

Whilst the 1969 Convention is applauded for taking into account that many asylum seekers flee State fragility is as a result of their State failures in meeting their obligations of ineffective governance, it also creates a lacuna in its definition and especially in interpreting '*events seriously disturbing public order*'. Tamara develops this idea by stating that the 1969 Convention is bound to be challenged due to its ambiguous nature in the protection of vulnerable persons fleeing State fragility.<sup>21</sup> In her view, the measure of protection of asylum seekers under the 1961 Convention is unclear and rather ambiguous in its application.

Going by Tamara's views and given Kenya's experiences, the application of the 1969 Convention has often been granted asylum seekers fleeing State fragility, instability, drought, conflict including armed conflict to nationals of Somalia, Rwanda, Sudan, Ethiopia, Eritrea among others. This is both good and bad. Good in the sense that it is relevant in application based on the refugee causal effects that are responsible for refugee flight while the danger in this manner of protection presents a challenge in distinguishing asylum seekers befitting refugee protection and those that do not.

In support of the first argument, Hyndman's concurs that the 1951 Convention is irrelevant today as it was never intended to apply to post World War 2 unlike its counterpart the 1969 Convention, it does not recognize refugees fleeing for social and economic reasons contrary to today's refugee context where the major reasons for flight of refugees usually result from fragile States that do not meet the civil, political, economic

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<sup>21</sup> T. Woods, '*Fragile States and Protection under the 1969 African Refugee Protection*', United Kingdom: Faculty of Law, University of New South Wales.

and social reasons.<sup>22</sup> In addition, subsequent agreements i.e. the 1967 Protocol relating to the Status of refugees and the 1969 Convention have expanded the limiting definition of a refugee in the 1951 Convention to give it a universal character.

The above scenarios depict that for the refugee Conventions to work they need to be applicable to relevant times otherwise States may not feel obligated to promote refugee protection. A bigger challenge is amplified during the revocation of the refugee protection as the refugee has to demonstrate that in as much as there is sufficient fundamental, stable and durable changes in their country of origin, they still deserve protection. The challenge experiences under the 1969 Convention in its application are that, the group recognition does not clearly bring out the individual effects of repatriation back to the country of origin.

Secondly, under the 1969 Convention, a strict interpretation of the convention denies refugee of the durable solution of resettlement and naturalization. Given that in Africa it is not the practice to promote these two durable solutions, seemingly, refugees have to endure forced repatriation and in most cases continued flight into neighboring countries. Thirdly, prolonged unresolved conflicts and State fragility also have contributed to the difficulties that refugee face when they are considered for repatriation. This is because due to the passage of time, refugees become accustomed to the ways of the host country others remarrying and making a life.

Fourthly, weak legal protection frameworks where States take long to domesticate the Convention and its Protocol into their national laws, makes it challenging to protect refugees who are often left vulnerable. In addition even where domesticated, the challenge in the complimentary application of both the 1951 Convention and the 1969 Convention refugee have raised questions among researcher and academia. The language of the 1969

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<sup>22</sup> J. Hyndman '*Managing Displacement: Refugees and the Politics of Humanitarianism*', London: University of Minnesota Press pp. 8

Convention demonstrates that it operates in addition to the 1951 Convention thereby showing that the two conventions work hand in hand and the recognition of a refugee under the 1969 Convention guarantees equal rights under the 1951 Convention.

Holborn concurs with the view above by revisiting Article VIII (2) of the 1969 Convention, that states that it is the effective regional complement to the 1951 Convention and further that in the preamble of the 1967 Protocol that provides that equal status should be enjoyed by all refugees. This is well intended in that in the cases where African refugees are resettled in 3<sup>rd</sup> countries, they enjoy the same rights under the 1951 Convention. Interestingly, many African States including Kenya, which have domesticated the refugee Conventions, have considered the definitions of both the 1951 Convention and the 1969 Convention. In contributing to the debate on complementarities in both Conventions, Marina Sharpe is quick to add that the issue of complementarities is both ways and both State parties must subscribe to it in their domestic legislation.<sup>23</sup> In the case of Rwanda, to date it does not have a refugee law. This has raised questions on the authenticity of its precipitated requests to States to invoke the cessation clauses against its citizens.

In agreement with Olsen's theory of the exploitation of 'small States by the 'big States', and others further propagate the traditional reason for refugee burden is the mutual benefits that come in the form of foreign aid. This one sided view however has been tested because it fails to take into account the social costs of hosting refugees.

#### **1.4.3 Political causes of refugee flows and resulting repatriation**

In Africa, unresolved conflicts have borne the growth in the number of vulnerable persons needing protection as refugees. Refugee displacements are often linked to membership of political opinion as the leading cause of flight. Patriarchal leadership, abuse of civil and

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<sup>23</sup> S. Maina , *'The 1969 African refugee Convention: Innovations, misconceptions and Omissions'*; McGill law Journal Vol. 58 No.1

political rights, abuse of power and nepotism are some of the reasons for conflicts. Jeanes argues, in support of this view, by stating that conflicts illustrate the difference in the political integration of diverse groups in the same territorial boundaries usually associated with the desire for group autonomy.<sup>24</sup> Jeanes argument above however, fails to consider today's trends in refugee migration that of economic and social reasons. John Rogge illustrates that most refugee movements involve large populations of people fleeing catastrophic events such as famine or from government or societal effects that threatens them economically and socially.<sup>25</sup> In addition, in mass inflows, it is increasingly difficult to determine genuine refugees amongst those that are not.

This is what happened in Rwanda in the genocide favoring of Hutus by colonial Belgium against the Tutsi fueled frustration that generated to aggressive behavior and feelings of frustration. Consequently, even with the revocation of cessation clauses against Rwandese refugees many are not willing to repatriate back.

The decision to invoke the cessation clauses is by any standards often a delicate exercise that is dictated by several factors. The most preferred by the UNHCR is fundamental changes in the Country of Origin. Beth Elise Whitaker however differs with this view and states that in reality the three (3) factors of regional security, perceptions of stability in the country of origin and declining funding levels are the key determinants in refugee cessation.<sup>26</sup> Arguably, factors such as donor aid fatigue have dictated precipitated action for refugees to repatriate by the United Nations.

The dominant view of alliances are that of Harrell Bond, Roger Zetter, Mwanza and Guglielmo who concur albeit differently that States, UNHCR, humanitarian organizations and refugees themselves have used the refugee problem for financial gain. From a selfish

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<sup>24</sup> W. Jeanes, *Peace and Conflict studies: An introduction*, Aldeshot : Azar pp.61, 2000

<sup>25</sup>R. Stoddard, *A review of Refugees: a third world dilemma*, ed., John Rogge., pg 239, 1998

<sup>26</sup> B. Whitaker *Changing priorities in refugee protection*: The Rwandan repatriation from Tanzania

lens, Harrell Bond that indeed the refugee problem does secure funding, promote the dependency syndrome and seek international attention.<sup>27</sup> Mwanza concurs with entirely.<sup>28</sup> in addition, Guglielmo Verdirame adds that more often than not, political advantage is gained from stereotyping and denouncing refugees rather than respecting their dignity and finding solutions to their problems.<sup>29</sup> On the other hand, Roger Zetter finds no wrong in seeking funding so long as it is used to benefit both the host and refugee communities.<sup>30</sup> This age old practice still persists today and continues to infuse protracted refugee situations that become complex to resolve as years go by.

The role of UNHCR has not failed to feature in refugee protection. Many authors like Malki, have convincingly argued that the role of UNHCR has been compromised to taking over State responsibilities of refugee status determination and protection.<sup>31</sup> Its dependence on funds donated by governments, its dependence on State permission to set base within their territories and the fact that even when States have openly abused their obligations under the Conventions such as in Kenya where refugees have been subject to police harassment, killings, abduction etc, have made it extremely difficult for UNHCR to remain neutral.<sup>32</sup>

In June 1996, at a donor roundtable discussion in Geneva the United States and France differed in provision of donor aid to refugees where the USA was of the differing opinion that donor aided funds are more effective in long-term interventions in State reconstruction while France was of the opposing view that there was need for continued

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<sup>27</sup> E. Harrell-Bond, E. Voutira and M. Leopold, 'Counting the Refugees: gifts, givers, patrons and clients, *Journal of Refugee Studies*, Vol 5 (3/4) pp. 205-225, 1992

<sup>28</sup> A. Mwanza, ' *African refugees and human rights in host countries –The long-term demographic, environmental, economic, social & psychological impacts of Angolan refugees in Zambia* ', *Zambia*: pp50, 1995)

<sup>29</sup> V. Guglielmo, and B. Harrell Bond: ' *Rights in Exile* ' Janus Faced Humanitarianism, 2005

<sup>30</sup> R. Zetter, ' *Refugees and forced migrants as development resources* ', 1992

<sup>31</sup> L. Malki, ' *News from nowhere: Mass displacement and globalized problems of organization: Ethnography* Vol 3, No 3 pg 351-360

<sup>32</sup> L. Bartolomei, ' *Who am i? Identify and Citizenship in Kakuma Refugee Camp in Northern Kenya* ', 2003



refugee assistance, the diminished aid assistance forced many refugees to be repatriated whilst others fled into neighboring countries amidst criticism from humanitarian and human right organizations like Human Rights Watch. Rwanda has been in the limelight recently due to the call for cessation of refugee status and for refugees who have not repatriated, have been labelled defectors, killers and genocidaires.

A shift to focus on addressing root causes of refugee displacement need to address structural violence. Without addressing structural violence, caused by the nature of social institutions and policies, there will always be perceived injustices and this curbs the idea of returning back to the countries. This has not however been the case. Many returnee refugees to Rwanda have found their way back into the very countries that they repatriate from including Kenya. Constance Anthony sums up causes of refugee flight in Africa as grounded on colonialism in three (3) ways namely; radical separation, the creation of a governing class and paternalism.<sup>33</sup> Constance arguments have important political implications that if not addressed remain a vicious cycle of protracted refugee situations. Inward looking, States need to deal with internal wars that generate into displacements out of the country. Contracting countries and UNHCR therefore need to capitalize on conflict resolution mechanisms that unearth the root of the problems surrounding refugee flight.

It is not enough that the Country of Origin has set up structures in government or that, there is improved human rights situations, there is need to study the underlying issues. Three (3) scholars Oelgeschlager, Gunn and Hain give comparative arguments in emphasizing that inherent needs in humans for recognition, identity and security (psychological than physical) are non-negotiable needs where not satisfied yield in costly conflicts.<sup>34</sup> This argument however is vague as it is practically impossible for all

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<sup>33</sup> C. Anthony; 'Refugee Crisis: State building in historical perspective, 1991 pg 574

<sup>34</sup> Oelgeschlager, Gunn & Hain, '*Human Needs*', ed. Lederer, K, Cambridge MA., pp. 36, 1980

individual needs to be met. It is a balancing act usually involving critical analysis of the issues at hand and prioritization.

This view is supported by Burton who in his *needs theory* drew a distinction between negotiable and non-negotiable needs. In his view, it is more sustainable address emerging needs using legal and bargaining processes whilst altering human perceptions and making structural changes.<sup>35</sup> Africa still experiences a lot of intra-State conflicts that have persisted for long periods of time. The phenomenon is however changing in eastern Africa with the reconstruction of countries such as Somalia, Rwanda and South Sudan.

#### **1.4.4 Literature Gap**

Since the late 1990's governments have started questioning the relevancy and applicability to current realities of the 1951 UN Refugee Convention that is largely euro-centric in nature and the 1969 Convention that is broad in approach. As a result, in 2001, UNHCR initiated Global Consultations on international protection to reinvigorate the protection framework. The consultations yielded to the adoption of the Declaration of States Parties to the Convention in December 2001<sup>36</sup>. The Declaration calls on the need for governments to commit themselves to the relevance of the Refugee Conventions and protocol in line with the new guidelines. Two (2) years later, in February 2003, UNHCR issued new guidelines on the interpretation and application of the 'cessation clauses' of the 1951 UN refugee Convention.

From the foregoing, it has come out that the legal status of displaced persons from fragile states is often ambiguous complicating the process of lifting refugee protection. From the desk research into works done by researchers and the academia, a lot seems to have been done on the effect of cessation clauses based on the 1951 Convention while little is

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<sup>35</sup> J. Burton, *Violence Explained*, United Kingdom: Manchester Press, pp. 33, 1947

<sup>36</sup> United Nations High Commissioner for Refugees, 'The State of the World's Refugees: Human Displacement in the New Millennium', pp.33, 2006

available on the effects of the African refugee protection based on the AU Convention. This study will therefore using Kenya as a case study establish the gaps in applying the cessation clauses.

Further, on the systematic application of cessation clauses, the literature review has brought out the need to have a careful approach one that is rights based in revoking the cessation clauses. It has come out that individual rather than group revocation is most preferred based on lessons learnt. How about where refugees are granted group or *prima facie* recognition as has been many instances under the AU Convention? Does the same case apply to them? This study will attempt to address this.

On State obligations, who bears the burden of proof? The blanket application of the revocation clauses goes against the very principles that are prerequisite in granting refugee status. Succinctly put, the prerogative of the Contracting States, to invoke the refugee cessation clauses, lays the burden of proof to the States. This is affirmed by Hathaway who asserts that the burden of proof on ‘changed circumstances’ that are not a danger or threat to the nationals should be borne by the sending States and not the refugees. In practice however, this is not the case. Governments have taken advantage to expel refugees unfairly without the slightest justification.

‘Well founded fear’ cannot be eliminated by rigorous reforms in the home country it is more personal. On the proposals for governments to conduct re-determination interviews to ascertain the level of fear of persecution before a decision is made to promote repatriation, excuses of lack of human resources capacity has always come up, sadly Governments are not obliged to conduct these interviews as evinced in paragraph 135 of the UNHCR handbook that states clearly that the refugee status should not be subject to frequent reviews to the detriment of the status of the refugee.

The need for governments to take measures to address conflicts has been emphasized by the African Union and through regional organizations. During peer review mechanisms,

governments have made commitments to address issues that trigger war situations like insecurity, poverty and ethnicity with little success. This has resulted in unending displacements and fragile States without the much desired durable solutions. Conflict resolution and transformation has in essence become a constant bug that States have to balance. In supporting this view, Miall, advises that for as long as the root causes of conflicts especially ethnicity, discrimination and relative deprivation are not addressed, States cannot transform into peaceful coexistence through conflict resolution and reconciliation<sup>37</sup>. Therefore as much as governments invoke the provisions of the ‘cessation clause’, without fully addressing the root causes of conflicts including dealing with problems of structural violence, durable solutions will be hard to come by.

### **1.5 Justification of the study**

Refugees are persons of concern to the UNHCR and receiving governments. They are usually counted amongst the most vulnerable and hence given special consideration in care and protection by receiving States. Given the intrinsic process of refugee determination and the temporary nature of the refugee title, its revocation under ‘changed circumstances’ needs careful reproach in application to be more facilitative in addressing the vary factors that led to plight of the refugee and balancing government interests. Refugee cessation where not handled carefully leads to refugees becoming even more vulnerable than before.

Reports of cases of increased numbers of returnees upon repatriation are not new. Those returning have cited continued existence of the major factors that cause them to flee in the first place. This has led to persistent insecurity, psychological disorders as a result of continued persecution, discrimination, stigmatization, loss of identity, arrests and

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<sup>37</sup> H. Miall, O. Ramsbotham, and T. Woodhouse, ‘*Contemporary Conflict resolution: the prevention management and transformation of deaths conflicts*’, Cambridge, pp.21, 1999

detention without trial, as well as disappearances. Interestingly, cessation clauses do not make provisions on how to deal with returnees returning back into the country. This is left to the tripartite agreements between UNHCR and the receiving and sending States. Arguments that cessation clauses amount to forcible return of refugees defeat the very essence of refugee protection in facilitating durable solutions and goes against international law.

From the literature review, it has come out clearly that the ‘cessation clauses’ of the Refugee Conventions and UNHCR statute where applied are is negative in character.

Many revoked refugees stay remain stateless, without identification and in constant fear of attacks. The Constitution of Kenya recognizes the application of any Treaties and Conventions ratified by Kenya as part of national law. It calls for the application of affirmative action in the protection rights of special interest groups as refugees. On the other hand, the Refugee Act 2006 and Immigration Acts bind Kenya in providing for the protection of refugees and immigrants. Further, the Treaty establishing the East African Community, cognizant of the refugee burden calls on State parties who comprise of Kenya and Rwanda to establish common refugee management practices.

In light of the above, the application of these clauses in the context of refugees in Kenya and Eastern Africa is important in three (3) ways. Firstly, on the perception that refugees who are unable to return are the perpetrators running away from persecution; Secondly, the invocation of these clauses has led to strained relations with host communities and government due to the rising population of illegal immigrants, the rising threat of terrorism and proliferation of small arms and big arms; and finally, in recent years, these clauses have been the subject of scrutiny by Government and scholars in determining their application and relevance in international refugee protection. This study will therefore contribute to the existing body of knowledge on State obligations in refugee protection as

well as contribute in ongoing debates by UNHCR and governments on the application of cessation clauses.

## **1.6 Theoretical framework**

The literature review concurs that war results from a failure to balance power symmetrically which creates a disequilibrium that manifests itself into aggression. This proposition settles well with Rogers Gore ideology that, forced migration is epitomized by social exclusion out of a set of functioning social networks.<sup>38</sup> The concept of relative deprivation proves that political rebellion and insurrection happens when people feel frustrated that they are receiving less than their due. This forms the basis of structural violence in the policies and administrative decisions that are made by a chosen few and which adversely affect the majority.

States are made of people with a collective group identity binding diverse individuals into a people. Where human needs are not met, there is bound to be tension, suspicion and a further escalation of violence leading to conflicts. Most of the conflicts in Africa are related to unfulfilled needs that lead to threatened existence forcing the individual to run away in fear of his or her life. The Social Constructivism theory has been used by international relations authors to explain conflict from a social perspective. This theory fits well with this study in demonstrating that addressing social imbalances is more sustainable to addressing the refugee problem than merely settling on material things.

Repatriation decisions affect the refugee returnee in his home country and it is therefore important that addressing social factors are taken into consideration when invoking the 'ceased circumstances' clause. Constructivists criticize this mere observation of development agendas and the human rights are not a guarantee that the individual refugee feels safe to return home.

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<sup>38</sup> R. Gore and J. Figueiredo, *The concept of exclusion* 1995.

The literature review identified two (2) completely diverse reasons why States condone the refugee problem namely; i) as a way of shifting burden to other States and ii) as a bargaining opportunity for more resources and donor aid. Put candidly, The Constructivism theory will show that these selfish reasons of States have vested interests and are political in nature and do not seek to address the deep rooted reasons for creating inequalities that eventually cause human flight. The researcher analyzed the situation of the refugees in Kenya upon revocation of their refugee status as well as their place in the reconstruction in their home country and how this affects the decision to repatriate and settle peacefully. It will be crucial to consider the circumstances that cause continued fear of persecution of the refugee returnee. A critical examination of tripartite agreements between states will be done.

### **1.7 Research questions**

- i. Fdg Does the revocation of refugee status on the basis of ‘changed circumstances’ in the country of origin, remove the basis of personalized fear of persecution?
- ii. Are ‘changed circumstances in the country of origin’ the best determinants of promoting repatriation as the most durable solution for refugees?
- iii. Are tripartite agreements a manifestation of States vested interests or refugee concern in the revocation of refugee cessation?

### **1.8 Research methodology**

The study was qualitative in nature as an effort to investigate the shortfalls in provision of international protection once the ‘cessation clauses’ are invoked by contracting governments. These information was gathered through participant observation, directly administered semi- structured questionnaires, intensive interviews, written reports by various authors in the area of study, UNHCR documents, inter-agency communication, books, pamphlets and general publications on refugee protection.

Methods in data collection and analysis involved both primary and secondary data collection. Primary data will involve personal interviews with refugees and asylum seekers, key persons in the office of the Commissioner of Refugees, UNHCR, Non Governmental Organizations, and implementing partners. An open guided questionnaire will be used and the information gathered to assist synthesis and buttress the secondary data collected. Secondary sources were in library research in books, journals, newspapers, magazines, academic papers and articles, policy documents, original research reports, internet sources, written dissertations by past students on the area, UNHCR reports, policy documents, the Kenyan statutes on handling of refugees and asylum seekers amongst others. This data was useful in understanding the population of revoked refugees and the reasons for non repatriation.

The targeted population were the urban refugees and asylum seekers community in Nairobi, Kenyans and implementing partners. In sampling the respondents the researcher used both convenience and purposive sampling methods whereby the location of the study was in the urban refugee settlements for example in Kayole and Eastleigh in Nairobi. The purpose was to establish the category of respondents who are the asylum seekers, refugees, host community and organizations dealing with refugee matters. The validity of the many arguments for and against the cessation clauses will be tested through personalized accounts of refugees by scholars.

## **1.9 Chapter outline**

Chapter one (1) introduces the topic of study by setting out the context of the study, the scope, statement of the problem, justification, theoretical framework, literature review and literature gaps, hypothesis and methodology of study. Chapter two (2) gives a background on the refugee burden to the States highlighting changed circumstances that continue to make this a challenge. It narrows down to the Kenyan experience in critically analyzing



the invocation of cessation clauses. Chapter three (3), covers the case study. Using Kenya's experience it analyses the applicability of the cessation clauses and examines the tripartite agreements made in relation to refugees Chapter four (4), brings out key emerging issues from the study. It summarizes the study and key findings. The questionnaire used for data collection is a reference point in this Chapter. The 4<sup>th</sup> Chapter paves way for Chapter five which culminates the study by drawing recommendations and further suggestions for areas of study.

## **CHAPTER TWO: THE REFUGEE BURDEN: KENYA'S EXPERIENCES**

### **2.1 Introduction**

The first Chapter has brought out that States remain committed to refugee protection as an international obligation that binds them in the spirit of solidarity and cooperation. Consequently, States contributions to the refugee burden are at various levels depending on their comparative advantage. 'Big' States being more proactive in engaging in peacekeeping or peacemaking missions while 'small' States remaining reactive in the protection to displaced persons within their borders. The reasons why States don't defect in refugee protection and implicit burden sharing confirmed that hosting refugees unilaterally guaranteed donor aid and development.

The negative side of refugee obligations was analyzed and from the forgoing, it emerged that the refugee title is no longer temporary as continued flight of refugees movement across borders remains even greater today. Intensified repatriation, the practical relevance of refugee Conventions and State obligations under the Conventions continue to dominate UNHCR and States relations today. From the foregoing, the refugee problem is far from over. States fatigue in refugee hosting, continued State fragility, threats to internal security of refugee hosting States and unresolved underlying issues continues to challenge States obligations under refugee law.

This Chapter discusses Kenya's experiences as a refugee hosting country and review refugee patterns and practice of refugee protection. It will discuss deeply the refugee status determination process from entry to exit, the application of cessation clauses and experiences including the tripartite agreements that Kenya has acceded to with UNHCR and Countries of origin and lastly, the effects of non repatriation before concluding with a summary of emerging issues.

### **2.2 Background**

The causes of war have progressively been defined overtime as a combination of biological, social, psychological, anthropological, economical, philosophical, religious and historical factors. In Africa, all the above have contributed to refugee displacements. Kenya is a traditionally refugee hosting country since the 1970's. Its proximity and strategic placement, enables it receive asylum seekers from refugee producing countries of neighboring Ethiopia and Eritrea to the North, Tanzania to the South, Somalia to the North-West, Sudan to the North-East and Great lakes region.

The UNHCR global trends report (2011), rates Kenya as the highest refugee hosting country in Africa and is placed 5<sup>th</sup> in the world. According to the report Kenya was hosting 921, 827 persons of concern to UNHCR out of which 566,500 were refugees, 35,271 asylum seekers, 69 returnees, 300,000 internally displaced persons receiving UNHCR assistance and 20,000 stateless persons. Of these 45 – 50% are women and children.<sup>39</sup> These statistics have since gone up with the rising numbers of refugees from Ethiopia and Somali reported daily.

Kenya has been a refugee hosting country since the 1970's when it played host to refugees from Uganda displaced by political coup, Somalia refugees after the Siad Barre government was overthrown, to Sudanese refugees during the Sudan People Liberation Army/Movement struggle in Southern Sudan and to Rwandese refugees during the genocide of 1994. Refugees from the Great Lakes regions have also sought refuge in Kenya. The common and underlying denominator in all these forced migrations has been linked to State instability in the form of political economic and social reasons. Therefore reasons of famine, ethnic strife, internal wars, tyrannical rule, revolution, guerrilla warfare

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<sup>39</sup> United Nations High Commissioner for Refugees Global trends 2011; <http://www.unhcr.org/statistics/populationdatabase>

are just but a few. Forced migrations across national borders are one of the most visible consequences of political persecution and armed conflict in Africa (UNHCR)<sup>40</sup>.

The 1990's can be termed as the most challenging period in Kenya's refugee experience. The Eastern Africa region experience precipitated liberation struggle and calls for democracy that resulted in increased State instability, protracted conflicts, and violence and population displacements. In 1991-1992 for instance, Kenya received the most caseload of asylum seekers from Ethiopia when the transitional government came into power. In 1999, 20,000 more refugees were registered at the UNHCR offices joining an estimated 5,000 long term Ethiopian refugee population of 1991-1992. Inevitably, each cycle of conflict brings in different eras of refugees.

As a refugee hosting country Kenya was not spared either as internal conflicts and especially during the electoral period also brought internal conflicts and displacements. The presence of refugees fuelled conflicts and brought untold suffering amongst host communities. The lack of a legal framework for refugees and continued State avoidance and lack of assistance left little choice for UNHCR but to assume the role of Refugee status determiner and grantee. More than a decade later, the call for repatriation of refugees has been heightened albeit many refugees continue to relay individual and family persecutions such as detention and forced conscription. This is however difficult for refugees as Kenya in solidarity and in the spirit of cooperation with other States have put in tough controls to avoid the refugee burden. This paradigm shift is not only present in Africa but globally.

### **2.3 The Refugee Status Determination Process**

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<sup>40</sup> Oxford Refugees Studies Center, 'The state of world's refugees – in search of solutions' 'changing approaches to the refugee problem', Oxford: Oxford University press, 1995

Before the promulgation of Kenya's Constitution in 2010, refugees were not provided for under any special legal framework save for the Miscellaneous Amendment No. 6 of 1992 that provided for refugee protection and refugees under the Immigration Act and Alien Restriction Acts. As a dualistic State, it did not matter that Kenya is a signatory of all refugee related Conventions and basically it relied on the political will the State in national recognition of refugees. Fourteen (14) years the Miscellaneous amendment, and as a consequence of extreme pressure by civil society and the UNHCR, Kenya enacted the Refugee Act of 2006. Today, this Act is the guiding framework for refugee reception, entry, protection and regulation. In its definition of a refugee, the Act takes in word by word definitions as provided in the 1951 and 1969 Conventions. It therefore recognizes refugee displaced by political, economical and social reasons.

In Kenya, the Refugee Status Determination (RSD) process usually an intricate and lengthy exercise has largely been the forte of the UNHCR for many years. Before 1991, Kenya through an adhoc process had an eligibility committee comprising of appointed immigration officers and UNHCR as observers to determine refugee status. The immigration Act was followed which did not recognize the 1969 Convention resulting into many genuine refugees rejected and ousted from Kenya. At the time, manageable cases of refugees were received and processed without much restrictions. Refugees were allowed to mingle and were entitled to all rights applicable to Kenyans. The situation however changed post 1990. Pre-1990, Kenya hosted 14,400 refugees. Two (2) years later in 1992, following the influx of Somalia and Ethiopian refugees the number of refugees soared to a destabilizing 401,000.<sup>41</sup>

In need of emergency assistance, Kenya's surrender the entire RSD process to UNHCR and the Jesuit Refugee Services (JRS) an international Non-governmental Organization

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<sup>41</sup> United Nations High Commissioner for Refugees; *The State of the World's Refugees 2000: Fifty Years of Humanitarian Action*, Oxford University Press, pp. 311-313, 2000

working for refugees and set up refugee camps amongst them Dadaab and Kakuma camps one of the biggest and most congested in the world. This delegation of duty led completely to the usurping of its power in the RSD process. In addition, indifferences about the RSD process and JRS led to bad relations that saw the refusal by JRS in 1998 to undertake the RSD process. UNHCR therefore undertook the RSD process.

UNHCR's role of judge and jury has been heavily criticized as compromising the role of UNHCR of protector of refugees, its accountability role and transparency. In most literature, UNHCR procedural rules are unknown to many therefore citing lack of transparency and fairness. In addition, in 1997, Kenya directed various border points to be closed. This action was the lowest moment on Kenya's refugee history. Nationally corruption intensified where bribes to border police were reported, smuggling of weapons, drugs etc. Internationally, this action was by international standards viewed as an abdication on the part of government contravening the refugee Conventions. Consequently donors came in aid and many United Nations agencies were set up to provide both financial and material assistance. With the strict application of UNHCR procedures, many asylum seekers were rejected. Some appealed and were successful while others were rejected chose to stay on.

In 2006 after many consultations with government, the Refugee Act 2006 was enacted. Kenya resumed its role assisted by UNHCR under the Department of Refugee Affairs under the Ministry of Immigration and Registration of Persons. The takeover by the Department of Refugee Affairs was not welcomed by refugees many who cried foul to strict determination criteria, prolonged process, delays associated with the RSD process, lack of adequate resources and lack of appreciation in the handling of refugees. Many RSD requests were declined, many arrests made and others forcibly repatriated to their countries.

The Refugee Act 2006 repealed Section 3 of the Aliens Restriction Act that restricted the rights to entry, residence and movement. As a result previous privileges in the freedom of movement and right to work were curtailed and refugees condemned to the encampment policy, movement passes etc. consequently overcrowding of camps, insecurity, unemployment, abduction and human rights abuses soared.

Today, with the devolved governance structure, the Refugee Affairs Department under the Ministry of Interior and Coordination of National Government is slowly picking up this mandate. As the global practice, the RSD process is an intricate process usually involving a lot of vetting of individual refugees circumstances on their plight. In the African context, the 1951 Convention which is more euro-centric in its application is applied together with the 1969 Convention. These Conventions complement each other in the determination and grant of refugee protection which is usually a tedious process requiring proof of personalized fear of persecution of asylum seekers to qualify for protection.

Many considerations are put into effect while determining whether an asylum seeker meets the conditionality's set forth in these Refugee Conventions. At the individual level, it calls for understanding the personalized fear of persecution vis a vis the refugee criteria to determine protection or not while for group status refugee protection, the blanket refugee status is given in cases of group mass inflows. In Kenya, there are both individually recognized refugees and group status refugees. Once protection is granted, the refugee becomes a person of concern protected under Kenya's Refugee Act 2006.

The Refugee Act recognizes Kenya's obligation under refugee international law and is backed up by the Constitution that provides for the protection of vulnerable groups who include refugees. The Act, provides the encampment policy in the refugee designated settlements of Kakuma and Daadab as well as within the urban centers, articulates the fundamental rights of refugees which include identification, protection, reception, welfare and durable solutions. For mass inflows, *prima facie* refugee status was provided under

the 1969 Convention while for those befitting the 1951 Convention, they were individual assessed and granted UNHCR mandates.

Differences in preference attributed to the UNHCR mandate letters continue to be common the latter usually preferred recognition under the 1951 Convention status. Seemingly, individual assessments rather than group recognition has more benefits of being considered more 'genuine' than group recognition. This is interpretation of however erroneous in that though the letters are issued by UNHCR and bear its letter head, they indicate that the refugee is recognized under Kenyan law and the 1969 Convention. Secondly, that in light of durable solutions, the option of resettlement to a third country is easier processed to refugees considered with UNHCR mandate recognition under the 1951 Convention than its counterpart.

The Refugee title is not permanent and does come to an end. Of the three (3) durable solutions to the refugee problem, of naturalization, voluntary repatriation and resettlement are the most considered. The latter two (2) are the most preferred by refugees while the first is the least applied by hosting States. Voluntary repatriation considered the best can be revoked by the individual refugee or by States and UNHCR. In this case, revocation by States is through 'changed circumstances' usually depicted as fundamental, stable and durable changes in the country of origin. Lately, there has been increased preference of African refugees seeking resettlement to 3<sup>rd</sup> countries. In doing so, by citing continued persecution or inability to return back to their countries of nationality. This confirms the reason for preference to resettlement as opposed to voluntary repatriation as unresolved underlying issues of State instability and persecution where applicable.

Today, the spiral effects of refugee displacements in Eastern Africa are a common challenge to hosting States. Kenya experiences huge numbers in the movement of immigrants moving across its border towns. The heavy presence of refugees' population has become made it difficult to find durable solutions. This has led to constant fight over



diminishing resources in the host communities and therefore a constant threat to peace. Conscious of this refugee problem, many States in the west such as Australia as well as in Kenya and Tanzania have received criticism for their stringent measures in returning back 'illegal' immigrants which many critics have argued amounts to a complete disregard to the principle of non-refoulement.

The risk if States erroneously assuming that there are 'changed circumstances' in the country of origin is not easy. In fact, UNHCR has been cautious to advise States to revoke the cessation clause and has only done so in very rare cases. Repatriation of refugees assumes that there conditions in the home county are secure and that the threat of peaceful co-existence is absent. The burden of proof where ceased circumstances are revoked by the States should lie with the States and not the refugees. Furthermore, there are different eras of refugees which should be considered during the repatriation process.

'Ceased circumstances' are interpreted by contracting governments without recourse to individualized fear of persecution which is not convincing enough for refugees to voluntarily return home. The blanket revocation of refugee status cannot therefore determine vulnerabilities of refugees to warrant cessation of refugee title. Bakewell supports this ideology where he opines without knowing what a person is vulnerable to, it is impossible to know how to improve the situation.<sup>42</sup> This helps to identify those who are in a worst position and the nature of assistance they are likely to need.

All aspects of the conflict situation including conflict resolution measures, assistance once repatriated and historical aspects of the circumstances leading to the uprooting of the refugee from his home country must be considered. In the same line of thought, Mwangiri asserts that the perpetual elements of conflict which are embedded within conflicting

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<sup>42</sup> O. Bakewell, *Community Services in refugee aid programs: A critical analysis*, "new issues in Refugee research working paper No. 82, pp. 12, 2003

parties' including the psychological relationship are critical and should be addressed in conflict management<sup>43</sup>.

#### **2.4 Tripartite Agreements and their effectiveness**

According to the UNHCR, a declaration of cessation clause stipulates that a person recognized as a refugee will voluntarily return to the country of origin or apply for residence in the host country. Though these two (2) provisions do not preclude individuals to seek fresh refugee claims, it is upto to States to determine whether they qualify for continued refugee protection. To guide in the repatriation process, States and UNHCR sign tripartite agreements which are formalized roles, responsibilities that monitor the entry, the access to asylum procedures during voluntary repatriation and sustainable reintegration. Tripartite agreements between the two (2) States i.e. the receiving and sending States are the UNHCR. They form binding documents that reiterate States commitment to promoting voluntary repatriation of refugees. In the preamble recitals of the respect to the provisions of refugee Conventions, changes circumstances in the country of origin, respect to national laws on refugee protection are contained to provide legal backing for the agreements.

Kenya has been party to several tripartite arrangements between South Sudan on 12<sup>th</sup> January 2006, Ethiopia, Rwanda, and recently Somalia. Usually the tripartite agreements have been reached where there have been changes in government regimes, changes in repressive policies guaranteeing returnee protection and providence, a good record of human rights, stable economy, etc. A caution is however placed on governments and the UNHCR to determine that the changes are genuine and lasting. In many instances, even where governments convinced UNHCR to approve the invocation of the cessation clauses, a second review and feasibility study have revealed chilling findings. For example, there

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<sup>43</sup> M. Mwangiru, '*Conflict in Africa: Theory, process and institutions of management*', CCR Publication, pp. 13, 2006

have been cases of the presence of landmines found in areas considered safe for refugee resettlement.

Under international law, for a tripartite agreement to work effectively, 'changed circumstances' must be fundamental in the form of developments that completely transform the political, social and human rights situations. The challenge in this view however, is the one sided assumption that addressing political causes alleviates refugee situations and therefore the need to repatriate back to their countries which may not address the conditions that led to refugee plight in the first place. In discussing the Rwandan experience, Since the year 2002, Rwanda has put immense pressure on the UNHCR and governments including Kenya, to invoke the 'Cessation clauses' citing conditions that caused them to flee no longer exist.

Rwanda has been stated to have long term development plans, rapid nation building and relative peace and stability. In 2009, major stakeholders UNHCR, Rwanda government agreed to form a road map leading to the invocation of the cessation clause by 31<sup>st</sup> December 2011. This entailed sensitizing Rwandese to voluntary repatriate, participate in 'go – see' visits, provision of information on the conditions in Rwanda, renewed commitments to abide by international obligations such as the Universal Peer Review mechanism and defense of its human rights track record at the African Union hearing in Zambia in May 2010.

Despite these efforts few Rwandese refugees including in Kenya have availed themselves to voluntary repatriate. Many are suspicious of Rwanda Government actions while political analysts read mischief in Rwanda's insistence that only voluntary repatriation and not the other durable solutions be accorded its citizens. Worse still, Rwanda has been criticized for issuing threats that Rwandese who do not head the call to repatriate would loose their nationality beyond the year 2012. This erodes the very character of

voluntariness in repatriation as provided for under the UNHCR mandate and tripartite agreements.

The tripartite agreement existing between the UNHCR, Government of Kenya and the Republic of Rwanda since 2007 shows that though a considerable number of refugees have been repatriated, a majority remain unaccounted for in urban areas with a majority living in Nairobi City County. In this case, Rwanda was categorical that all Rwandese should repatriate back to Rwanda. The resulting effect has been retaliation, a growing number of unknown and unprotected illegal immigrants and traffic across borders for those that find it difficult to repatriate.

The Rwandan example demonstrates that the repatriation process needs careful reproach if the same is to be effective. '*changed circumstances*' denote a level of involvement into the politics of the States involved. This view is supported by various authors who argue there is a thin balance between politics and non partisanship especially in the repatriation exercises where there is an interplay of States vested interests. In the post-cold war context, Betts argues that there has been a clear correlation between donor states' earmarking of contributions to UNHCR for in-country protection and their interests in containment and security.<sup>44</sup>

This is further affirmed by Weiner<sup>45</sup> who in his succinct arguments, accuses Governments of fueling large scale populations' movements as strategies for dominating one ethnic community over the other, colonizing areas beyond borders, destabilizing another State or unbelievably influencing that State's policies.

This is what led to the genocide in Rwanda with the dominant ethnic tribes Tutsi and Hutu warring war against each other leading to many deaths, displacements and huge

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<sup>44</sup> A. Betts, '*Public Goods Theory of Provision of Refugee Protection in Regions of Origin*', working paper no.25, pp 40-63, 2005

<sup>45</sup> M. Weiner, '*Security, Stability and international Migration; International Security*' pp. 91-126 1992

population flight. The association with the current regime linked to the genocide is a major reason for the difficulties in promoting repatriation of Rwandese nationals. Interestingly, Rwanda todate does not have a refugee legal framework that affirms its obligation and commitment to protect and observe the international obligations under the refugee Conventions and Protocol. Important obligations on non-refoulement, commitment to ensuring voluntary character the decision to repatriate, ensuring access to fundamental human rights, recognition of returnees and many others.

This places Rwanda at a difficult place in terms of its responsibility to the repatriation process. UNHCR and stakeholders need to ensure that even as the call for repatriation is answered, this issues need to be addressed.

Political causes of refugee displacements dominate the reason for flight for many refugees. Intra and external conflicts between Ethiopia and Eritrea are a worrying trend that continues to repeat itself in every electioneering period. In Ethiopia, electoral violence sparks leading to flight of communities seeking asylum in Kenya. Suppression of the freedom of movement and socialization have also led to mass movements into Kenya. In the year 2001, Ethiopian refugees fled into Kenya due to human rights violations majority of whom were university students. They claimed that the Ethiopian government had brutally suppressed student groups, who protested a corrupt electoral process. They claimed they were harassed, intimidated and illegally detained many of these asylum seekers were ethnic Oromos.

The cases above demonstrate that politics has largely been a contributor of refugee movements. Unfortunately, it is not Governments alone but also the UNHCR whose mandate is non partisan has also been compelled to engage politically to influence the policies of States by linking States interests with voluntary repatriation frameworks. Looked differently, though a good idea, this approach encourages selectivity and

corresponding neglect of certain groups or situations and therefore worsening the situations.

Rwanda's continued insistence that only the voluntary repatriation be accorded to its citizenry compromises the role of UNHCR in ensuring that repatriation is free and accessible. UNHCR has also been forced into assisting in resettlement of returnees through aid in reconstruction with least measures against States to tackle underlying issues. This is left at the behest of States making it difficult for UNHCR to firmly guarantee sustainable resettlement. In acknowledging these facts, members States present at the United Nations experts Global consultations on international protection held from 3<sup>rd</sup> to 4<sup>th</sup> May 2001, summarized by way of conclusions that the 'ceased circumstances' clause has been used to transfer both administrative, and fiscal responsibility from one government entity to another and that this does not have any direct impact on the life of the individual concerned. More than a decade after that expert conference, refugee movements continue to escalate.

States have done little to eliminate violence a grave underlying factor that escalates refugee flows, The popular use of amnesty is not an end in itself, as the Rwanda case demonstrates, returnee refugees reportedly disappear upon return while other undergo continuous persecution. An in-depth review of the tripartite agreements sheds some light in this. A look at various tripartite agreements reveals that though they are binding to the parties, they lack the enforcement of law. This makes them mere gentleman's agreements that are unenforceable.

Secondly, a cross check of many tripartite agreement shows that they are open-ended in nature with no clear framework on progressive realization. Others have quoted the commitment to national laws that may not necessarily reflect the spirit and letter of the refugee Conventions and Protocol. With no clear plans for orderly, phased, safe and dignified returns, it is practically impossible for States to measure progress and impact.

Thirdly, one of the most forgotten and critical determinant to repatriation that States overlook is that with every displacement, a completely new era of refugees is produced and therefore fundamental changes occurring at specific times may not address all the underlying issues that relate to persecution. This explains the slow response to repatriation. Lastly, State relations can and do contribute to States stability both internally and externally. Spillover effects of internal wars in one country into another and not new. Partnership agreements in other sectors can address reasons that produce refugees situations. This has been experienced in States that have shared natural resources that cause conflict. Therefore the pro-activeness of States in the affairs of the other is a show of concern that can indirectly address conflicts.

The UNHCR, Sudan and Kenya tripartite agreement of January 12<sup>th</sup> 2006 can be regarded as a best case study of State mentorship and commitment to reconstruction to alleviate displacement. Kenya has beyond the tripartite voluntary repatriation agreement, also played host as mediator in the development and signing of comprehensive agreements that eventually led to a split of the North and South Sudan and later South Sudan's independence which have all contributed to State stability. In the case of Somalia, Kenya too has been played both the proactive and reactive roles in refugee burden sharing by hosting the biggest population of refugee in one of the biggest and congested refugee camps in the world.

Kenya's recent peacekeeping missions have also participated in Somalia's reconstruction. The ongoing efforts towards States reconstruction in the East and Horn of Africa provide great opportunities towards States sustainability through voluntary repatriation. This will however be possible if the current conflicts surrounding the main refugee producing countries in Kenya are addressed to alleviate the stumbling blocks in promoting sustained voluntary repatriation. A review of the tripartite voluntary repatriation agreements between States and the UNHCR is critical for widened accountability and impact.

## **2.5 The Rise of Urbanized illegal immigrants**

The impact of rejection of asylum seekers is rather unknown. In Kenya today, it is unclear who exactly is responsible for rejected asylum seekers and refugees. Even with the pressure from governments to invoke refugee cessation clauses, its application The strict interpretation of the ‘cessation clauses’ is a tedious and delicate exercise requiring utmost care as its decision affects the fate of already vulnerable persons of concern to UNHCR and African Union. Rejected Rwandese refugees live in sprawling conditions in Nairobi’s low lands of Eastland’s and Southlands have led quite lives with little scrutiny. Without access to basic necessities like health, food and access to education, many rely on well wishers for support, have started income generation activities, others have joined illegal gangs, are arrested and detained without knowledge, are abducted by fellow countrymen, are maimed and killed etc.

In Nairobi city alone, it is estimated to host more than 100,000 urban refugees with more than 350,000 living in overcrowded camps<sup>46</sup>. The Ethiopian refugee population is 2<sup>nd</sup> to the Somali population in the Kakuma refugee camp and in the capital, Nairobi. The Oromo form the largest ethnic group of Ethiopian refugees in Kenya. In the urban areas they are found in Nairobi, Eldoret and Nakuru Counties.

In Nairobi, the Oromo refugees can be found in the sprawling densely populated areas of Kayole, Umoja, Easeleign, Manjego slums, Donholm, Kaloleni and South ‘C’.

Majority live in close knit communities for the obvious reason of protection and security. Many have learned local languages and intermarried with Kenyans and at times it may not be easy to identify them. To eke a living many have embraced casual labour in construction sites, as second clothes dealers, hardware dealers, in restaurants etc. many are

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<sup>46</sup> [www.unhcr.org/cgi-bin/texis/vtx/home/opendoc](http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc)



also found shopping for humanitarian assistance for medical assistance, education, sponsorship programs for technical courses, legal assistance and even housing.

Aware about the challenges the refugees face in the urban settings and consequently the pressure by refugees and civil society organizations on the UNHCR to now provide a more expensive continued support different from the rural setting. In the year 2007, UNHCR came up with a policy on refugee protection and solutions in urban areas which policy was reviewed with the current one of 2009 seeking to provide a more complementary and supportive manner of supporting urban refugees. The policy recognized that urban areas too, are legitimate places that refugees can reside and exercise their rights to which they are entitled to. Compare to the Refugee law that only designated camps.

Oromo refugees contend that their insecurity in Kakuma refugee camp and in the urban area of Nairobi in the recent years is greater than has ever been. A research report by the Oromo Support Group (2010)<sup>47</sup> a non-governmental organization registered in Kenya, gives refugee accounts of persecution, abuse, abduction, illegal detention, human rights abuses, torture and inhuman degrading treatment in the hands of the current administration in Ethiopia. They blamed the Ethiopian government for continued persecution of Oromos in Ethiopia and in Kenya. Majority of the respondents interviewed who were Oromo women settled in Easleigh and Kayole, gave chilling accounts of rape, abduction of their husbands, detention incommunicado in police stations, maiming and even killings. Other documented works by Oromo organized groups and organizations content the same way. This has led to many Oromo refugees fleeing Kakuma camp into hiding in Nairobi and other urban centers.

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<sup>47</sup> Oromo Support Group Press release No. 46 December 2010 (part ii); [http://www.oromo.org/osg/pr46\\_2.html](http://www.oromo.org/osg/pr46_2.html)

The need to address the looming numbers of vulnerable refugees who have had their status revoked cannot be gainsaid. Research studies need to be done to determine whose responsibility it is to ensure that rejected asylum seekers do not become Stateless and that States make plans and programmes to provide for them is done otherwise States risk have soaring numbers of illegal immigrants who pose a security threat to its nationals.

The research revealed the reasons why States abdicate responsibilities to this vulnerable groups and new ways of handling with this special category of refugee. The United Nations, its agencies and the African Union can play a big role in assisting States address long outstanding issues that cause refugee like situations as well as alleviating the burden that comes with hosting refugees.

## **2.6 Conclusion**

From the foregoing, Kenya's refugee burden remains complex today. Clear and transparent refugee determination process and procedures need to be reviewed to ensure that only genuine refugees are accorded protection. The worrying State fatigue, unresponsiveness by States and the UNHCR to sustainable ways of handling the rising numbers of refugees and rejected asylum seekers, unclear and unenforceable tripartite agreements that are not clearly implementable and the rising number of a special category of rejected asylum seekers continues to pose challenges for Kenya in the management of refugees and asylum seekers.

## **CHAPTER THREE: RETHINKING OBLIGATIONS: A CRITICAL ANALYSIS OF REFUGEE CESSATION BASED ON ‘CHANGED CIRCUMSTANCES’ IN KENYA**

### **3.1 Introduction**

From the earlier Chapters, Kenya is evidently bearing a huge burden of refugees from neighboring countries. These systemic challenges exist from reception until at the point of exit. Unclear and prolonged reception procedures, increased number of unregistered asylum seekers, preference to stay in urban centers all poses challenges to Kenya’s internal security and public order. From the struggles in the heavy refugee burden provides huge lessons on refugee management and the call to rethink new approaches in State obligations are inevitable.

This Chapter will critically look at State practices in the understanding of refugee Conventions’, their practices and appreciation of the refugee definitions and debates. A look at the Kenya’s experiences in the revocation of the cessation of refugee status through ‘*changed circumstances*’ will highlight Kenya’s experiences and dilemma paving way for the lessons and perspectives from other countries. The choice of European Union that is lauded as the pace setter in rethinking refugee obligations and Southern African Development Community provide good comparative approaches and best practices that can be used for learning and replication. At the tail end of the Chapter, States are encouraged to review their obligations not with desperation and call to renounce their obligations under the refugee Conventions but rather to be innovative in devising new and modern approaches to curbing the refugee burden.

### **3.2 Definitions and Debates**

The evolution of the ‘refugee’ dates back to the European inter-war periods of the World War 1, the Balkans War of 1912-1913, the Caucasus Wars of 1918-1921, the Greco-Turkish wars of 1919-1922 and the Russian Revolution and civil war. At the time, the

resulting conflicts were responsible for massive movements and displacement of people from their abode across borders. The aftermaths of the wars raised new ways of social organization resulting into State consciousness in controlling people through immigration laws that distinguished between citizens and non citizens.

As a result, there arose a need to regulate refugees under an international legal framework since their recognition was purely based on the prerogative of States to grant protection. In this sense, States understood asylum as the protection of refugees and an agreement not to return them back to their States of Origin. In summing up these ideas, Simpson concluded that a refugee was not a condition inherent in the individual.<sup>48</sup> This therefore brings out that States respect for 'non refoulement' and the 'refugee' title as temporary and not a permanent in nature.

In the 1920's with the rising of the displaced numbers of Russia and Armenians refugees, States and international humanitarian organizations began conversations about defining the refugee problem as a crisis in need of international protection. Two (2) years later, States came up with a common agreement that the refugees needed a form of recognition by way of the Certificate of Identity. In the same years, the League of Nations established the 1<sup>st</sup> position of the High Commissioner for Refugees Dr. Fridtjof Nansen who was tasked with coming up with a legal definition of a 'refugee'.

On 12<sup>th</sup> May 1926, Dr. Nansen refugee definition was accepted and adopted by the League of Nations. It defined a refugee as:

*'Any person of Russian/Armenian origin who does not enjoy the protection of the Government of the Union of Soviet Socialists Republic/Turkish Republic'*.

From the reading of this definition, the definition is limited to a person who is outside his country of nationality, has not acquired another nationality and most critically has no

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<sup>48</sup> Royal International Affairs , 'The refugee problem': Report of a Survey, J. Simpson, London: Oxford University Press, pp. 529

protection of the Country of asylum in this case USSR and Turkey. The first part of the definition goes against the major principles of refugee international law and human rights law. In that the refugee enjoyed no rights whatsoever in the State of asylum. In addition, the definition was limited in scope and therefore only subscribed to a few States.

With the worrying trend in the increase in the number of refugees, another Inter-governmental conference was held which resulted in the Inter-Governmental Agreement of 30<sup>th</sup> June 1928. The Agreement extended its definition of refugees to other groups of displaced persons/refugees and widened the mandate of the UNHCR Commissioner to that of focusing on personal status matters. This Arrangement will however be most remembered for setting pace for the 1st time, the standardization of refugee rights in addition to the rights existing under the 1926 Arrangements, to include Civil rights of the right to work, access to courts, enjoyment to security, protection against expulsion and the right to identity.

In the above attempts to define and standardize refugee protection, one thing was conspicuously missing namely that of State responsibility beyond recognition of a refugee and the ensuing civil rights. The Arrangements were not legally binding, had no enforcement and therefore it became increasingly difficult to pin States responsibility to refugees. The identification documents were also expensive and therefore not affordable to all refugees. This led to the 1<sup>st</sup> International Convention the '*Convention of 28<sup>th</sup> October 1933 relating to the International Status of Refugees*'.<sup>49</sup>

The 1933 Convention was significant in the following number of ways namely;

It retained Nansen's definition while granting Contracting States the leeway to vary it suit their circumstances. It affirmed refugee civil rights and economic social rights such as education, labour, right to recognition through the Certificate of Identification for a maximum period of 11/2 years, it protected against 'non-refoulement' for incoming and

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<sup>49</sup> League of Nations Treaty series Vol. CLIX No. 3663

also for expelled refugees unless there were valid reasons of National Security and public order, guaranteed refugees personal status, provided the right to legal assistance, granted limited labour rights only to refugees who had stayed 3 years and above, intermarried with a national, had a child/children possessing the nationality of the country of residence. Also granted were welfare rights to social security and for monitoring and enforcement purposes, the setting up of special Committees in each State.

Today, the 1951 Convention is the most popularly accessed to Convention by States in refugee protection. The Convention is termed as the most comprehensive and progressive that takes into account current issues responsible for refugee flight. This Convention defined a refugee as;

*‘A person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particularly 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’.*<sup>50</sup>

Notable is that the Statute of the Office of the UNHCR, also takes in this definition to define refugees albeit with a few differences. The Statute definition reads that a refugee is; *‘Any person who, as a result of events occurring before 1<sup>st</sup> January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his*

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<sup>50</sup> OAU Refugee Convention Governing Specific Aspects of Refugee problems in Africa; Article 1 (1) & (2).

*former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it’.*

The first difference noted in the two (2) definitions is that the UNHCR Statute definition confined itself to refugees affected by events happening before 1<sup>st</sup> January 1951 while the 1951 Convention did away with the timeline. Another major difference is that the UNHCR Statute definition does not take into account persecution based on ‘*membership of a social group*’ at the time of accepting the refugee definition during the plenum of the 5<sup>th</sup> United Nations General Assembly.<sup>51</sup> At the time of enacting the 1951 Refugee Convention, States did not consider ‘membership of a social group’ as a stand-alone ground enough to warrant refugee protection.

In the views of most States, ‘membership of a social group’ overlapped with the other grounds of race, religion and nationality. States conceded that persecution must stem from the State as persecutor or as condoning it from 3<sup>rd</sup> parties.<sup>52</sup> This definition was however later included in the 1951 Convention as a result of internal consultations with member states. Sweden will be the most remembered as championing the inclusion of ‘membership of a social opinion’ in the 1951 Convention based on its national practice.<sup>53</sup> Having included it in the definition, debates on the definition of ‘membership of a social group’ were dominant among the United Nations quarters and in States interpretation.

The dominant views in the definition of this ground was popular in the context of women specific persecution, on grounds of gender, homosexuality and in the context of Africa genital mutilation. Based on existing literature, the definitions of Reinhard Marx, UNHCR and the Immigration and Refugee Board of Canada give a guiding framework. Reinhard Marx defined this ground to mean ‘persons connected to each other by a consciousness of

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<sup>51</sup> United Nations Resolution A/RES 429 (v)

<sup>52</sup> P. Tiedemann, ‘Protection against persecution because of membership of a social’ in German law, 2000

<sup>53</sup> Swedish Aliens Act, Chapter 3, Article 3 Paragraph 3

common identity and a common practice. He focused his definition from a women perspective persecution by citing the example of sexual violence as a weapon of war mounted on women due to political conviction of their sons and men.<sup>54</sup>

This definition is common amongst many cases of refugee women and particularly in Africa where refugee women are subjected to sexual violence of rape as a result of the political stand of their husbands and sons. Reinhard's example however narrowly did not take cognizance of the fact that many women are also subjected to sexual violence even without any connection with the other refugee grounds. While confirming the earlier concerns of States that protection under the 'membership of social group cannot be a stand-alone and need be connected to the other grounds, the argument above and based on practice can make women face persecution even without any connection to the other grounds.

On the other hand, the UNHCR expounded on Reinhard's definition on the ground of membership of a social group to mean 'persons with similar backgrounds, habit and social position'.<sup>55</sup> Summing up these views, was the Immigration and Refugee Board of Canada who defined membership in a particular social group as definition through kinship ties, colour, gender, clan, or caste, past economic, social or professional status, membership in associations such as labour unions, political organizations, certain clubs or societies.<sup>56</sup>

These definitions though insightful provide a guiding framework to States based on prevailing circumstances. From the forgoing, the guiding definitions above connote a

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<sup>54</sup> M. Reinhard, 'Non-Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims', *International Law Journal*. pp. 383, 1995.

<sup>55</sup> UNHCR Handbook Paragraph 77

<sup>56</sup> Immigration and Refugee Board of Canada, *Membership in a Particular Social Group as a Basis for a Well-Founded Fear of Persecution - Framework of Analysis*, December 1991, available at: <http://www.refworld.org/docid/3ae6b32510.html> [accessed 3 September 2013]



group connection thereby implying that the application should not narrowly be applied to an individual perspective rather it should be applied broadly only that the group membership should similarly be subjected to the same forms of persecution by the fact that they belong to that specific social group. This position clarifies Reinhard's definition that looking at the definition from a women persecution perspective though broad cannot guarantee protection merely because they are a women rather, the female asylum seeker needs to prove the special circumstances that warrant special treatment of the group membership as a whole and targeted persecution.

Thirdly, another difference in the earlier (1926, 1928 and 1933) Conventions was the additional use of the term '*personal convenience*' which is present in the UNHCR Statute. The term was used for the very first time under the Germany Convention of 10<sup>th</sup> February 1938 which unlike its predecessor Conventions, expanded the exclusion clause of a refugee to '*persons who left Germany for reasons of purely personal convenience*'. As Jose Fischel de Andrade put it, by including this newly worded exclusion clause, its drafters singled out for the first time the '*forced migration*' character of refugee protection. In concurring with Jose's view, Hartling argued that for the first time, this definition brought out though very timidly, the insinuation of 'persecution'.

A review of the various definitions of '*persecution*' such as in the Thesaurus English (United States) dictionary, defines 'persecution' as harassment, maltreatment, discrimination, singling out, hounding, bullying and harrying etc. what is particularly evident in these definitions is that there is an element of bad *cruelty, persistent disturbance, threat, injustice* and even *torture* inflicted by a person or in the case of institutions, legal persons. With the rise numbers of people freely moving across borders, the displeasure of States was evident. The need to push for a strict definition of a refugee from an individual rather than a group perspective was mooted.

The opportunity came with the establishment of the 1<sup>st</sup> United Nations agency on refugee affairs the United Nations Relief and Rehabilitation Administration (UNRRA) in 1943. Through UNRRA, a strict interpretation of a refugee was designed. The definition focused on an individual rather than group recognition, requiring proof in the form of evidence of personalized persecution i.e the fact of being ‘singled-out’ or ‘more at risk’ than others and as Robinson candidly explains, well founded was meant to signify that a person has either been a victim of persecution or can show good reason why he fears.<sup>57</sup>

In 1950, the United Nations Officer of High Commissioner for Refugees was established and coined the refugee definition as known today under its Statute.

The 1969 OAU Convention Governing Specific aspects of Refugee problems in Africa is an extended definition of the 1951 Convention and in addition defines a refugee as; *‘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 is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality’*.

In the two (2) Conventions, the terms *‘well founded fear of persecution’* and *‘events seriously disturbing public order’* are the main crux of these definitions. The Statute of the International Criminal Court defines *‘persecution’* as the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity on political, racial, national, ethnic, cultural, religion, gender or other grounds that are universally recognized as impermissible under international law.<sup>58</sup>

Renowned scholar James Hathaway extended the definition of persecution as the *‘sustained or systemic violation of human rights demonstrative of a failure of State*

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<sup>57</sup> Robinson N. Convention Relating to the Status of Refugees – its history, content and interpretation ; New York, Institute of International Affairs, 1953 pg 48

<sup>58</sup> Article 7(2)(g) the *‘Statute of the International Criminal Court’* adopted in Rome 17<sup>th</sup> July 1998

protection'.<sup>59</sup> While assessing refugee determination status, refugees receive individual protection while others in the case of Africa receive refugee protection on a group basis especially where there is mass influx of refugees. In addition to the refugee Conventions, some States also commit to 'comprehensive action plans' to address looming challenges of the refugee burden.

This definition took into account the Africa situation at the time which was marred by liberation struggles resulting into many conflicts. This definition unlike the 1951 Convention definition was not very specific to individualized fear and sought to protect massive movements of people fleeing warlike situations. Under its definition, States were at liberty to accord protection on group basis to people displaced from their countries of origin.

### **3.3 Refugee Cessation based on 'Changed Circumstances' the Kenyan experience**

As the largest refugee hosting State in Africa, Kenya's experiences provide a good case study on the implications of the cessation clauses under guiding legal framework. The refugee title is not permanent and all the Refugee Conventions make similar provisions on cessation. Out of the cessation clauses provided, that of cessation based on '*changed circumstances*' has been rarely yet unlike the others clauses, it allows State refusal for continued refugee protection unless compelling reasons prevail. The cessation clause provides that;

*'a person cannot, because of circumstances in connection with which he had been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality'*.

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<sup>59</sup> Hathaway James; '*The Law of refugee status*' Toronto ButterWorths1991 pg 104-105

A critical read of this provision, suggests refugee responsibility to re-avail and re-establish themselves back to their countries of origin as a show of solidarity to the States that accorded them recognition in the first place. By providing for this provision, States appear to have anticipated situations where refugees refuse to go back home. Based on practical realities, today, this is the most difficult clause that has over century's be-deviled voluntary repatriation.

Kenya is signatory of both the 1951 and 1969 refugee Conventions. In addition, under it has gone further under its Constitutional provisions of 2010, Kenya became a dualistic State and reaffirms its commitment to respect international law. Under the Refugee Act 2006, the definition of a refugee borrows word to word the definitions of both 1951 and 1969 Conventions. It expands the definition of the 1951 Convention by including the 'sex' a ground for persecution. This was largely informed by wide spread experiences of sexual violence meted against women, girls and boys.

Kenya in anticipation of the challenges of implementing the Refugee Act, went further to categorize refugees into two (2) categories i.e. statutory refugees befitting the 1951 Convention and 'prima facie' refugee befitting the 1969 Convention. Interestingly, the Refugee Act is quick to provide a proviso on its refugee protection by preserving the right to declare persons as 'prima facie' refugees, amend or revoke refugee protection. On the face of it, this proviso provides for a cessation of refugee status based solely on the volition of the Minister responsible for refugee affairs.<sup>60</sup> This proviso introduces a 'revocation clause' which is not provided for in the entire Refugee Act. A question that arises from this is novel yet cautionary way of ending refugee protection is whether by so doing, Kenya would be usurping the powers of UNHCR whose mandate is solely responsible for the smooth repatriation and reintegration of refugees. What are the guiding

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<sup>60</sup> Refugee Act 2006 Kenya, Article 3(3)(2)

principles in the application of this proviso? and can the UNHCR guidelines apply in cases where the revocation of refugee status has been initiated by the State?

In my submission, and given the challenges of refugee hosting, States have a responsibility to protect and manage refugees as part of their immigration laws. This is a show of their Sovereignty and right to provide for who does and who doesn't stay within their territorial jurisdiction. In the fulfillment of this duty, the State should however work hand in hand with the UNHCR due to its dual role in refugee protection and State support. This will essentially alleviate State fatigue in finding lasting solutions to the rising problem of refugee displacements.

Given the past record of Kenya's re-foulement practice, a caution approach is needed to avoid rendering refugees more vulnerable in the interpretation and application of the ambiguous proviso of revocation of refugee status. For a long time, the practice in Kenya has been that in cases of mass influx of refugees, they have been accorded '*prima facie*' protection as opposed to the statutory refugee protection. Refugees considered under this definition include Somali, Sudan, Rwanda and Ethiopian refugees. In addition, a keen preview of letters of refugee recognition 'popularly known as mandate letters' provided by the UNHCR during refugee status determination, reveals the preference to the '*prima facie*' recognition as compared to the statutory recognition. Further, the recognition is granted based on the national laws, the 1951 and 1969 Conventions.

It then suffices to summarize that Kenya's refugee protection model seeks to exonerate against the huge presence of refugees. Even with these provisions, the management of refugees remains a challenge in Kenya. The presence of many revoked refugees turned asylum seekers and stateless persons soars by the day. In the urban centers particularly, refugees with no recognition are in the increase mainly eking a living through small collar jobs, income generating activities and through support from friends and well-wishers in Kenya and internationally.

Though Kenya is not very clear on its encampment policy, in agreement with the UNHCR, they have developed incentives that ensure those refugees are confined to the designated refugee camps of Kakuma and Dadaab the largest hosting camp of Somali refugees. These incentives include food rations, free medical treatment, free schooling, etc. however, the up hauling conditions in the camps have resulted in congestion, insecurity, denial of basic necessities like a good education, medical assistance, free movement. Another challenge has been in double registration of refugees at the urban refugee centers and at the camps making it difficult to determine accurate numbers of refugee population.

Kenya's experience in repatriation of refugees has not been an easy one. An example is the 1993-94 Somali repatriation of refugees from Kenya which was rated poor due to underlying social context issues. For a long time, Kenya's relationship and that of Somalia has been complex between the two (2) governments and ethnic Kenyan Somalis. Cases of attacks by shift bandits including the Kenyan security forces attacking to Somalis have been reported widely. The question of who is a Kenyan Somali or a Somali from Somalia has again been poorly addressed due to unclear records. Kenya has been accused of mistreating and ignoring the ethnic Somalis by not heading their calls for protection, denying issuance of national identity cards, just to mention a few. Although the Somali refugees repatriated as planned many believe it was forced through the mistreatment by Kenya. They received limited assistance in country and out of country during repatriation, harassment and violence. John Collins, summarily classifies it as repatriation by expulsion.<sup>61</sup>

In addressing the social context of refugee problems, a broad based approach is needed. In the case of Sudan enumerated under Chapter 2, Kenya could borrow a leaf from the

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<sup>61</sup> John Collins, 'An analysis of voluntariness of refugee repatriation in Africa', Master of Arts thesis, Department of Geography: University of Manitoba, 1996  
Assessed at [http://www.umanitoba.ca/institutes/disaster\\_research/refugee\\_thesis/index.html](http://www.umanitoba.ca/institutes/disaster_research/refugee_thesis/index.html)

experience in its pro-active and re-active approach to the refugee problem. A joint inter-agency partnership with the UNHCR, civil society and other stakeholders, focusing on reconstruction and development in the country of origin is a best case scenario in tackling causes of refugee flight. This guarantees quick fundamental and durable changes that alleviate the many years of refugee flight. It also encourages quick cessation of the refugee title before a refugee fully re-established her/himself in the host country. This is what Kenya struggles with at the moment. With the increased number of refugees, lack of naturalization and few resettlements to 3<sup>rd</sup> countries, refugees become accustomed to the life in Kenya making it difficult to encourage repatriation. Increased learning and sharing with other countries with similar approaches can go a great deal in devising innovative ways of tackling the refugee puzzle. The commitment by the east African Community to develop common themes of tackling refugee experience is lauded as a great step in acknowledging the desire of States to act in solidarity for the good of its citizenry.

### **3.4 Lessons and Perspectives from other countries**

Europe continues to set the pace in international refugee protection albeit under different circumstances. As the forerunners in the development of international refugee law, Africa can learn a great deal from Europe and similarly, Africa offers a comparative experience in refugee management and particularly in the 1969 Convention. Another growing area that continues to shape refugee law is in precedent setting by the judiciary. With the increase in democracy, this budding area of law provides great insights in refugee law.

Discussions into the amendments of cessation clauses particularly Article 1 C (5) and (6) based on ‘changed circumstances’ are not new. In the early 2000’s States conversations intensified around the need to revolutionize the refugee regime to overcome difficulties and challenges associated with State security. Talks around burden shifting as opposed to burden sharing featured in the conversations of States. Desirous of finding modern ways

of dealing with the complex problem of refugees, the temptations to amend the 1951 Convention were neigh.

### **3.4.1 Lessons from the European Union:**

The impetus of European States to push for a common asylum procedure presents a renewed approach to the tradition management practices of States in refugee protection. European States concerns on the evolution the refugee and asylum management, was generally based on their experiences in managing refugees, the increased number of illegal immigrants and the ‘permanent character’ of the refugee title. Consequently, the European Union set out an ambitious goal of establishing a Common European Asylum System by the year 2012.

The Special meeting in Tampere, Finland on 15<sup>th</sup> and 16<sup>th</sup> October 1999, will be historically remembered for setting pace toward the vision of a united and standardized European Union Asylum procedure. In the meeting, member States agreed to work towards establishing a common European asylum system in which member States dealt with applications for asylum, to remove the incentive of asylum seekers to shop around and to ensure that asylum seekers are dealt with in the first European Union member State they enter.<sup>62</sup>

Following the Tampere resolution, the European countries developed the ‘*Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*’ a conglomeration of amendments and minimum standards to guide the European Union on asylum procedures.<sup>63</sup> The lengthy yet informative European Council Directive, comprising of 46 Articles identified an number of key issues for discussion that were heavily condemned by UNHCR and civil society groups as defeating

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<sup>62</sup> Hansard 19<sup>th</sup> October 1999; Special European Union council meeting Tampere

<sup>63</sup> Council Directive 2005/85/EC of 1 December 2005, On minimum standards on procedures in member States for granting and withdrawing refugee status; Official Journal of the European Union



the provisions of international refugee law. From the Directive, three (3) key things come out that are interesting in this study. These are the directive relating to; terminating the refugee status, inclusion of two (2) additional grounds for exclusion and the setting of minimum/common standards of practice.

On the first ground on terminating the refugee status, States raised concerns that though Article 1 C (5) and (6) of the 1951 Convention provides for cessation based on changed circumstances, very few States actually applied it and in the sense refugees stayed long and re-established themselves making it difficult and unfair to return back to their countries of origin. The European States therefore recommended the application of the cessation clauses to all new refugee applications and the constant review of refugee title to revoke it as soon as circumstances changed. This is despite the refugees continued personalized fear or persecution.

On the second ground, in addition to the exclusion clauses, the States proposed the addition of '*persons who have committed cruel crimes with an allegedly political objective*' and to '*persons who instigate or otherwise participate in a broad liberation or opposition against an oppressive government*'. The States also took note of the fact that the Geneva Conventions did not provide for 'revocation clauses'. This was proposed for inclusion to allow refugee status to be revoked where the refugee became a security danger to the host country and or was convicted of a serious crime.

The third proposal was on setting minimum and/or common set of standards for European States in asylum and immigration legislation. This was intended to harmonize State practices for more control and order since in the view of the European Commission some States appeared to be more generous to the reception of refugees than others which was an imbalance. A few of the minimum standards set that States could negotiate on included; definition of grounds for persecution, the revocation clauses and exceptions to non refoulement. The common set of standards was viewed as those clauses that States could

not be very generous on. This included grant of refugee status, cessation clauses, exclusion clauses and the clause on granting of refugee status.

In response to the Directive and proposals, the European Council on Refugees and Exiles (a consortium of 76 Non-governmental organizations working in 30 countries) humanitarian agencies and wider civil society, put a spirited fight calling for the withdrawal of the asylum directives. In a letter dated 22<sup>nd</sup> March 2004 addressed to Mr. Antonio Vitorino, member of the European Council, the group made serious reservations on the proposed directive which in their view intended to deny asylum seekers access to asylum procedures and to facilitate their transfer to 3<sup>rd</sup> countries outside the European Union. Further, the plea to withdraw the Directive was pegged on the implications on European States abdication of States international law obligations on refugee protection and a tainting of European Union's reputation in international law as a whole.

The letter highlighted three (3) contentions issues namely; on provisions on 'safe countries of origin', 'safe 3<sup>rd</sup> countries' and the 'appeal system'. Regarding the 'safe countries of origin' concept and considering the idea to designate various countries as 'safe', the challenge to the asylum seeker in rebutting the views of the State was raised on the basis of discrimination. In reality this would be almost impossible for States to consider refugee claims to fear of persecution.

The 'safe 3<sup>rd</sup> countries' concept amounted to refolement and shift of refugee burden to 3<sup>rd</sup> countries despite the fact that the 3<sup>rd</sup> country and refugees had no meaningful links. In my submission, the prerogative power of the European States in the presumption of safety of a 3<sup>rd</sup> country is mischievous, one-sided and open to manipulation.<sup>64</sup> The provision departs from State's responsibility to cooperate in the spirit of solidarity in that a transfer of asylum seekers without consent to the receiving State would on the face of it be an

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<sup>64</sup> Article 17, Council Directive 2005/85/EC of 1 December 2005, On minimum standards on procedures in member States for granting and withdrawing refugee status; Official Journal of the European Union

infringement of States sovereignty. In addition, the absence of the place of the individual in making the choice to voluntarily avail themselves the protection of the country of origin amounts to forcible repatriation. In summary, this proposal by the European Union can rightly be termed as amounting to burden shifting.

That said, I concur with the idea mooted under Article 18 of the Council Directive that of developing a common criteria for designated 3<sup>rd</sup> countries as safe countries of origin. In my view, these criteria would develop minimum guidelines to gauge a countries 'change in circumstances' which would go a long way in assisting to demystifying the current illusion of 'change circumstances' however, I would recommend while designating a country of origin as 'safe', in addition to the focus on civil, legal and political circumstances, that economic and social reasons be considered too as a major contributory factor in displacement.<sup>65</sup>

On the appeal process and while linking it to the safe 3<sup>rd</sup> country concept and the infringement on non-refoulement, the fear of complete disregard to asylum seekers right to seek protection through the refugee status determination exercise was expressed and therefore would place the asylum seeker at a disadvantage.

Further, as the European's Council Directive, it's introduction was received with a fair share of reservations amongst European Union members which was largely attributed to the haste and therefore failure in stakeholder consultations and especially amongst the European Council, European Parliament and European Commission.

These responses and experiences to the Council Directive 2005 /85/EC of 1 December 2005 have been used to improve the latest version of the Directive 2013/32/EU of the European Parliament and the Council of 26<sup>th</sup> June 2013. The Directive expected to be operational from 21<sup>st</sup> July 2015, is more improved and takes into account many of the

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<sup>65</sup> Article 21, Council Directive 2005/85/EC of 1 December 2005, On minimum standards on procedures in member States for granting and withdrawing refugee status; Official Journal of the European Union

concerns raised by stakeholders. One such example is the adoption of critical proposals made by the European Council on Refugees and Exiles (ECRE). A key proposal made was on financing of asylum processes which continue to place huge financial burden on host countries.<sup>66</sup>

A keen read of the European Union Directive, brings forth the keenness of the drafters in justifying and weaving in accountability provisions that seek to justify the well intentions of the European States. The provisions such as reporting on the experiences and evaluation of the Directives while proposing recommendations every two (2) years and that the of decisions made are subject to judicial scrutiny appeal for the confidence and support of stakeholders in this novel process.

### **3.4.2 Lessons from Southern Africa**

The Southern Africa region has for a long time struggled with the challenges in refugee management. Fragile States, cross border conflicts, displacements of people, uncontrolled movement across countries, etc are common problems faced by the region and similarly prevalent in Eastern Africa. These problems when left unguarded have amplified beyond State borders and threatened regional stability, cooperation and intergration. In addition, irregular apportionment of refugees in the region has unfairly left a heavy burden in Tanzania, Botswana, Angola and South Africa all of which border refugee conflict producing countries.

Keen to ensure that concerted efforts address the refugee problem, the Southern Africa States through the Southern African Development Community (SADC), are exploring ways to harmonize admission procedures and inter-regional burden sharing. Irregular movement of refugees continues to be the leading abuse of refugee management efforts by

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<sup>66</sup> European Council on Refugees and Exiles; Comments from the European Council on Refugees and Exiles on the Amended Commission proposal to recast the Asylum Procedure Directive (COM(2011) 319 final) , September 2011

refugees. Tanzania and South Africa lead in efforts to curb irregular movements through the adoption of the concept of ‘3<sup>rd</sup> safety countries’.<sup>67</sup> The ‘3<sup>rd</sup> safety country’ concept provides for the rejection of asylum seekers who have transited through relatively stable countries.

Based on Tanzania and South Africa experiences, the lessons learnt in the implementation of the 3<sup>rd</sup> safety country present a good starting point for advancing the harmonization of admission procedures agenda. This way, they will not contravene the provisions of ‘refoulement’ and in the case of countries that encourage refugee movement due to denial of refugee status, burden shifting. Another best practice from Southern Africa is the commitment to address refugee problems through specific inter-governmental arrangements. One such arrangement was through the SADC and UNHCR memorandum of understanding of 1<sup>st</sup> July 1996 that provided amongst other provisions;

*‘to address the social, economic and political issues in the region particularly those which have a bearing on the root causes of forced population displacement, refugee protection, provision of humanitarian assistance and the search for durable solutions’.*

Through this arrangement, UNHCR has supported the SADC region in not only man-made disaster management but also in emergency preparedness in face of natural calamities that likely would produce peoples’ displacements. For instance in the year 2000, UNHCR provided non-food items worth US\$ 100,000 to Mozambique.<sup>68</sup>

From the foregoing and based on the lessons learnt and perspectives projected, great practices can be replicated by the UNHCR and Kenya in the management of refugees during reception, refugee status determination and in general refugee management. The above is a step forward in actualizing the debate of States in rethinking their refugee protection obligations.

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<sup>67</sup> Tanzania Refugee Act 1998; Section 4(4)(e)

<sup>68</sup> United Nations General Assembly: ‘Cooperation between the United Nations and the Southern African Development Community’ report of the Secretary General; A/56/134/Add.1

### **3.5 Rethinking Obligations**

The call for improved democracies, stronger economies, trade and development has placed States under immense pressure to remain afloat in the dynamic yet shrinking space of globalization. States re-organization is eminent through the cementing of regional blocks bound by the common ties of identities, culture and a sense of belonging. In Africa, the East Africa Community is forging great strides towards sustainable and strong economies, common identity, a common market, common trade, trade and non-tariff barriers and the popularized campaigns for the free movement of people.

In spite of the above, the protracted situations of refugees in East Africa remain a constant thorn in the flesh that won't just fade away. The idea to disassociate and break the refugee international Conventions manifests itself in the behavior of States towards refugees and asylum seekers that of refoulement, indifference to rejected asylum seekers, strict encampment policies, harassment, ill-treatment, detention, etc.

Refugees practices have also contributed to the abuse of asylum procedures necessitating pressure by States to tighten their policies on refugee control. Illegal movements from one country to another is one such abuse to refugee protection. According to UNHCR, such movements have a destabilizing effect on the structured international efforts to provide appropriate solutions to refugees.<sup>69</sup>

States obligations under international law mandate them to respect, promote and uphold international principles of cooperation. As such, and with respect to refugees and while recalling the binding principles of State solidarity in addressing the refugee problem, States must continue to desire to develop efficient measures to solving the problem of

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<sup>69</sup> UNHCR Executive Committee, Conclusion No. 58(XL) On the Problem of Refugees and Asylum Seekers who move in an Irregular manner from a country in which they had Already found Protection, Paragraph a.

refugees in Africa through close and continuous collaboration amongst themselves in partnership with the UNHCR and stakeholders.

The innuendos on States' abdication of its obligations under international refugee law and ensuing debates, States understanding about re-thinking their obligations, should be looked at as a call not to denounce its obligations under the international law but rather, to strategically analyze new and novel approaches of defeating with the refugee menace. The problem has been the stagnant nature of the refugee legal framework. However, not all is lost and as guiding frameworks, these Conventions are still relevant today. It is up to the States to devise innovation in minimizing conflicts, pull together as regional blocks, develop strong movements that take into account common approaches in forced migration that are adaptive to the modern times.

Using resources that are locally available, researches on the changing face of forced migration and particularly in Africa provides a rich resource from an informed perspective. Others include upholding strong democracies, developing progressive legal frameworks and Constitutions, promoting inclusive development of minority groups, promoting cohesion and reconciliation programs, planning for self sufficient economies and societies, respect for social diversity and the protection of civil and political rights are a sum of just but a few of the issues that States need to constantly remember in their development agendas.

### **3.6 Conclusion**

The fruitful implementations of the regional arrangements above remain to be tested and tried in the quest for renewed State international cooperation. Similarly, East Africa Community (EAC) can borrow a leaf from SADC in the management of forced migration.

A beginning point is the East Africa Treaty that calls on member States to device common ways of dealing with refugees. The membership of Tanzania and its experiences would be a good discussion point since the refugee problems are very similar within the region. In addition, practicing burden sharing through Comprehensive Agreements in support of reconstruction of fragile States is a durable and sustainable approach that acts as an incentive to promote the spirit of nationhood and nation building for refugees to go back and participate in their countries development.



## **CHAPTER FOUR: REFUGEE CESSATION BASED ON ‘CHANGED CIRCUMSTANCES: A CRITICAL ANALYSIS**

### **4.1 Introduction**

The preceding Chapter lays a good foundation for discussion in this Chapter. From the foregoing, the challenges in the implementation of Cessation clauses based on ‘*changed circumstances*’ is a catalyst in State conversations especially today in light of increased call for repatriation of refugees. It is therefore inevitable for States to rethink new and novel approaches in exercising Cessation of refugee status based on ‘*changed circumstances*’ as the best durable solution.

This Chapter will look at three (3) key emerging issues that have come up in the course of the study namely; a) explaining the concept of ‘*changed circumstances*’ as an issue; b) Conflict of laws ; and c) Tripartite Agreements and the absence of an enforcement regime.

### **4.2 Emerging Issues**

#### **4.2.1 Explaining the concept of ‘*Changed Circumstances*’ as an issue**

From the preceding Chapters, it has emerged that the concept of ‘*changed circumstances*’ as provided for under Article 1 (5) and (6) of the 1951 Convention, Article 1 (4) (e) of the OAU Convention and paragraph 6 (A) (e) of the Statute of the Office of UNHCR all providing for cessation of refugee status is rather problematic in its application. Revisiting the wording of the Cessation clause, it stipulates that a person ceases to be a refugee; ‘*if he can no longer, because of the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality*’.

The underlying factor in the definition is the ‘*change in circumstances*’ at the country of origin that caused a refugee to flee in the first place. The definition therefore presupposes two (2) key responsibilities i.e. State responsibility in ensuring that change in

circumstances that led to the flight of refugees are fundamental removing the basis of fear and on the other hand, refugees have a duty to voluntarily avail themselves for repatriation back to their country of origin. In practice however, the numbers of refugees voluntarily repatriating have been low necessitating the Cessation of refugee status through tripartite agreements between UNHCR and respective States.

UNHCR admits that the application of ‘*changed circumstances*’ is not easy and should be approached with due care. States are urged to understand key refugee terms during refugee status determination. Going by UNCHR guidelines, it has emerged that refugee status is temporary and comes to an end when international protection is no longer necessary. In arriving at this position, UNHCR urges States to consider the difference in the use of terms during the determination of refugee status. These terms i.e. ‘Cessation’, ‘Revocation’ and ‘Cancellation’ though very distinct have been used interchangeably by States and authorities mandated to review refugee applications thereby undermining the refugee process.

*‘Cessation of refugee status’, is the ending of refugee status pursuant to Article 1 C of the 1951 Convention, Article 1 (4) (e) of the OAU Convention and paragraph 6 (A) (e) of the Statute of the Office of UNHCR, for the reason that international protection is not necessary’.*

*‘Revocation of refugee status’ refers to the withdrawal of refugee status in situations where a person who had been determined a refugee engages in conduct subsequent to recognition which goes under the scope of Article 1 F (a) or (c) of the 1951 Convention and Article 5 (a) (c) or (d) of the 1969 Convention’.*

*‘Cancellation of refugee status’ means a decision to invalidate an earlier recognition of refugee status where it is subsequently established that the individual should never have been recognized, including where he or she should have been excluded from international refugee protection in the initial status determination procedure’.*

Going by the above definitions, then it is correct to say that refugee status comes to an end where because of '*changed circumstances*' in the country of origin, international protection is no longer necessary. This therefore means that where refugee cessation is invoked, provisions requiring refugees to show cause why they need continued protection are erroneously misleading and unless only in exceptional circumstances should such claims be tolerated.

A confusion in the use of these terms is manifested under Kenya's Refugee Act Section 3(3)(2) which states '*the Minister .... May at anytime amend or revoke 'prima facie'* recognition. This can be construed to mean that 'revocation of '*prima facie*' refugee status' is an additional ground for disqualification from grant of refugee status as provided in Section 4 of Kenya's Refugee Act.

The heavy burden of proof shifts to the individual to prove well-founded fear of persecution under the 1951 Convention or continued fear under the 1969 Convention. This is one reason why many former refugees remain rejected in host countries unable to prove continued refugee protection.

It is common practice that where States or the UNHCR declare the application of Cessation of refugee status, the same has been met with negative public outcry by the public and refugees depicting negatively the State and UNHCR. However a look at the above definitions and refugee law practice reveals that actually, unlike the circumstances following the revocation and cancellation clauses, under international refugee law, the application of the Cessation clauses is a friendly act calling on both State and citizens towards nationhood and nation building. Using the defined procedures of repatriation, States and UNHCR make commitments to ensure continued protection, resettlement of refugees and commitments to improve in-country situations.

Continued protection manifests itself in various ways. For individuals, safe return in dignity while for the country of origin, development assistance and re-construction. The

breaching therefore of this implied contract only worsens the situation leading to innuendos on suspicion, mistrust and misperceptions between the two (2) parties i.e. (State and its citizens). It is no wonder that where refugees who have lost their refugee status continue to refuse to avail themselves for repatriation, they have been suspected and labeled as perpetrators hiding from justice.

This scenario presents a question on whether '*changed circumstances*' can remove personalized fear. Rwanda has been in the limelight in persuading its citizens including issuing statements to countries hosting Rwandese refugees to cease refugee protection and promote repatriation. In retaliation, Rwandese refugees have raised cried foul citing the move as amounting to forceful repatriation.

The issues of ambiguity in the definition of refugee terms also emerged in the course of the study. The 1969 Convention provides for refugee recognition based on forced migration as a result of '*events seriously disturbing public order*'. The arbitrariness in the definition of what constitutes '*events seriously disturbing public order*' has been as earlier provided in the preceding Chapters a subject of scholarly debates. This has inevitable led to abuse in the application through the adhoc recognition and clustering of persons who fail to meet the other definition provisions under this provision. In the process of group recognition, States have failed to distinguish between genuine and non genuine refugees thereby raising concerns of authenticity in the process and state exposure to insecurity.

Viewed another way, the general recognition under the 1969 Convention unlike the 1951 Convention is not individualized and the mere fact that there is fear perpetuated by the State of origin through external parties is good ground for recognition. The lack of clarity in this definition has led host countries to apply 'blanket' recognition of refugee title on a group basis – usually '*prima facie*' recognition. In the same way, when the cessation clauses are applied, States have used 'blanket' cessation of refugee status for particular groups of refugees. This has again been met with heavy criticism by civil society

organizations, humanitarian organizations and the UNHCR. The determining factor in such situations would be to consider the period and nature of protection accorded to the refugees before crying foul. The case of the Rwandese cessation continues to dominate the headlines in Africa today.

International refugee law defines '*changed circumstances*' as changes of a fundamental, effective and durable character. Fundamental changes have been construed refer to developments in the country of origin that have led to a complete transformation of the political and social structure as well as in its human rights situation. The change of government is one of the most driving factors that have been presumed fundamental in nature. UNHCR prescribes the waiting period of 12-18 months or more to determine the character of fundamental changes. In the study, however, it has emerged that in some occasions, UNHCR has had to re-consider repatriation of refugees due to continued political instability, inhabitable environment in some cases a detection of land mines etc.

Another interesting emerging issue is that the Cessation of refugee status does contribute to forced migration in continued flight of asylum seekers across borders and therefore encourages a state of dependency and longevity of the refugee title. If this assumption is anything to go by, then the '3<sup>rd</sup> safety country' concept which is mooted as a condition to deny refugee status recognition, by the fact that a refugee has transited other safe countries, encourages refoulement and further deepens the vulnerability of refugees/asylum seekers.

State fragility in Africa, has also been regarded as one of the most contributing factors to refugee flight as well as refugee repatriation. It has therefore emerged that for '*changed circumstances*' to be fundamentally durable and attractive to refugees, a simultaneous process of State re-construction should go in tandem with the preparation to declare refugee cessation.

Addressing economic and social related factors that have largely contributed to forced migration in the country of origin, is crucial. This is because it presents a delicate balance of improbability for refugees who have re-established themselves and have considerable income, to freely voluntarily repatriate starting all over again. A good emerging practice is for countries of origin to make appropriate plans including securing land and property rights for returning refugees.

Lack of access to information has also emerged as an issue needing to be considered. Continuous monitoring and unhindered access to information regarding situations in the States of origin, the procedures of asylum processing, repatriation preparations and temporary returns through go-see visits, including information on the intentions/reasons of declaring Cessation of refugee status are all factors impacting on '*changed circumstances*'.

Usually States and UNHCR make lengthy Tripartite agreements promising to conduct intense awareness about repatriation. Even with such information, many refugees refuse to repatriate. Conducting baselines on reasons for decline can enable States and UNHCR address prohibitory factors.

Kenya's refugee Act provides that for those protected under Article 3(3) provides that 'prima facie' recognition can be revoked or amended at any time. This then places a responsibility on the State to continuously provide information to refugees about the situation of their countries of origin. The same duty of the State is also provided for under the European Parliament and Council Directive 2013/32/EU which urges European Union members to promote awareness raising to States and refugees on the asylum procedures. The Directive introduced two (2) key responsibilities in ensuring better access to asylum procedures namely; the determination of refugee processing within a reasonable time; and mandatory sequencing of examination to determine refugee risks.

#### **4.2.2 Conflict of Laws**

The evolution of refugee laws in Africa, is best explained using Dr. Rutinwa's summary viewed from three generations. The first generation was during the colonial era and was characterized by the absence of refugee specific laws. In this era, refugee matters were dealt with under the general immigration laws. Here the main focus was mainly on entry and residence of refugees. Refugees were treated and clustered together as aliens and immigrants. Challenges experienced at the time included the lack of a precise definition of a refugee, whether they were protected from non-refoulement, what actions to be taken to address reasons for flight, challenges in managing mass influx of refugees was also experienced etc.

The second generation i.e. during the 1970's and 1980's, introduced refugee specific laws albeit with one main goal, that of controlling rather than protecting refugees. Here, refugees were subjected to both immigration and refugees policies to meet any gaps. Tanzania for example, developed the Refugee Control Act of 1966. The Act did not reflect the refugee ideology and in many cases provided repressive provisions such as refoulement by expulsion of refugees back to their countries of origin, restrictions in movements etc. Despite all these, refugees were fairly treated. They could work, own property, co-mingle with citizens and even marry. They were generously treated and enjoyed equal rights akin to those of citizens. In this period, the 1969 African refugee Convention was enacted.

In the third generation period, post 1980's there increase interest by States to develop refugee and asylum related policies that were geared towards protection of refugees and asylum seekers as required under international laws. The definition of a refugee became apparent the rights to refugee status determination and non refoulment began to be

appreciated. This is also the period where forced migrations due to internal and external conflicts were experienced by many States.<sup>70</sup>

Today, majority of States have ratified the international refugee Conventions and gone forward to domesticate them in national legislation. Kenya's Refugee Act of 2006 has borrowed many provisions as provided under the 1951 and 1969 Refugee Conventions albeit with a few differences. The definition of a refugee, is categorized into two (2) i.e. 'statutory refugees' as refugees protected under the 1951 Convention definition and '*prima facie*' refugees as refugees protected under the 1969 Convention definition and by extension the 1951 refugee Convention.

The '*prima facie*' recognition which is granted in cases of mass influx is based on the concept of group identification for purposes of admission to safety, protection from refoulement and basic provision of humanitarian assistance. At the time of recognition the presumption of refugee is made subject to subsequent refugee status determination exercise that is done to cancel or invalidate the '*prima facie*' recognition. Under the Kenya's Refugee Act, the Minister responsible for refugee Affairs is granted this authority under Section 3(3).

Based on the above, it then can justified that the best solution for '*prima facie*' recognition is repatriation on both voluntary basis and under Cessation of refugee status based on '*changed circumstances*'. Globally this remains a challenging issue not only to refugees themselves but also States and refugee advocates. The drafters of the Kenyan refugee Act anticipated this challenge under Section 4.

Under its provision in Section 3(3) requiring the Minister to revoke '*prima facie*' recognition, an exclusion clause provided in Section 3(4)(2) where former '*prima facie*'

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<sup>70</sup> B. Rutinwa, '*Asylum and Refugee policies in Southern Africa: A historical perspective*', ed. Lambert H., United Kingdom: Ashgate publishers, 2010 pp. 12-14



refugees whose status is lifted can apply to undergo the full refugee status determination process. The process of seeking re-evaluation is however not clarified.

Another misconception identified in study is that, '*prima facie*' refugees are not conclusively refugees entitled to full refugee rights. States continue to struggle with '*prima facie*' protection for three (3) reasons. Firstly, the fact that these refugees do not undergo the full refugee status determination process, as provided under their national laws; secondly, there are no well laid procedures under the international refugee Conventions for group refugee status determination; and thirdly, it is extremely difficult in massive movements to determine genuine from un-genuine refugees.

In attempting to answer the questions posed above, in the first instance, scholarly debates have conceded to the fact the mere existence of intention to provide protection as '*prima facie*' under the refugee Conventions is enough reason to accord full refugee entitlements.

In the second instance, in view of the lacuna, it remains in the interest of States to ensure that in the long-run, plans are made for '*prima facie*' refugees to undergo individualized refugee status determination. And finally in the third instance, States should during the individualized refugee determination process and in addition to considering any new evidence presented, refugee applications should be tested against the Cessation, Revocation and Cancellation criteria's to warrant renewed/continued refugee status.

The responsibility of the State in granting the right to asylum continues to be a challenge to many States. Globally, there is a lack of clarity on who exactly is responsible for rejected asylum seekers and refugees and especially for asylum seekers rejected for other reasons other than those of expulsion on grounds of national security or public order. The assumption made in the Kenya's Refugee Act is that once rejected, asylum seekers are expected to transit to other countries to seek refuge. This has produced a group of illegal immigrants who are neither provided recognition under refugee law nor immigration and

alien Acts. This presumption is a burden shifting gimmick and indirectly, a diplomatic way of practising non-refoulement.

Alte Grahl Madsen highlights this in an interesting way and contends that the right of non-refoulement is related to the right of asylum. He gives the example of where a State rejects the right to asylum, it indirectly practices non-refoulement in the sense of non-extradition and therefore the close relationship between two.<sup>71</sup> Consequently, States have left it entirely upon the refugees to determine their next cause of action and thereby raising huge burdens of unknown illegal immigrants.

The view above is also closely related to the concept of '3<sup>rd</sup> safety countries' which deny protection to refugees who move across borders shopping for protection. On both occasions, it places a dilemma on the refugee while compromising his/her protection.

#### **4.2.3 Tripartite Agreements and the absence of an enforcement regime**

The protective function of UNHCR's under Chapter 11 Section 8 of the UNHCR Statute mandates UNHCR to provide refugee '*protection through special arrangements with Governments the execution of any measures to improve the situation of refugees and to reduce the numbers requiring protection*'. This mandate is best demonstrated through Tripartite agreements with governments. UNHCR enters into Tripartite agreements with countries of asylum and countries of origin during the promotion of voluntary repatriation or assimilation within new communities. Just like any other binding agreements, parties thereto affirm their commitment to facilitating the repatriation of refugees in safety and dignity.

In cases where refugee repatriation occurs as a result of Cessation of refugee status based on '*changed circumstances*' these negotiations happen in advance to prepare refugees exit

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<sup>71</sup> Raul Wallenburg Institute, '*The Land Beyond*', A collection of essays on Refugee Law and Policy; A. Madsen, Netherlands : library of congress

and resettling communities for their reception. From the late 1990's dubbed the year of repatriation, UNHCR has signed many Tripartite agreements with States. The emerging concern is whether these agreements are measurable and effective to determine change in attaining their objectives.

The legality of enforcement of Tripartite agreements is an emerging issue. From the literature analysis, the difficulty of measuring success is based on the fact that these Tripartite agreements are largely political documents based on the political will the States. This is closely linked to UNHCR inability to condemn States as was the case in Kenya during the closure of the Liboi border. Involvement of other Stakeholders in as parties to the agreements will assist in defining clear roles that provide a watchdog role in monitoring State commitment to Tripartite agreements.

Introducing sanctions on State failure through diminished finance assistance is an option that can be taken.

The question whether tripartite agreements address the root causes that cause forced migration is often a difficult balancing act and especially where internal conflicts have endured for a long period of time thereby producing different eras of refugees. The debates surrounding the blanket call for repatriation by Rwanda has raised many questions regarding the intentions of the Rwanda government due to its continued insistence that all countries hosting Rwandese refugees should support its efforts to cease refugee status citing that considerable changes in development have been done and therefore no threats exists. Many scholars have read mischief in this call for repatriation terming it akin to forced repatriation, intimidation, threat and fear which essentially amount to continued fear of persecution.

The threat to State sovereignty is one of the most detested by States worldwide. The increase in the numbers of asylum seekers within territories and the corresponding low numbers of repatriations cripples State assertiveness to manage who gets in and who goes

out of its territories. The States retaliate by way of developing strict policies that undermine any threat to their existence.

The issue of the infusion of refugee interests vis a vis those of governments have rendered Tripartite agreements to viewed as one-sided usually containing political needs of States. On this issue however, no consensus has been reached as diverse views from scholars appear to support either side. My submission is informed by scholarly articles in the area that indicate though well intended, few numbers of refugees than expected do actually repatriate. Perhaps a re-thinking to incorporate a middle ground that essential captures the interests of refugees will propel them to appreciate, own and essentially support governments in the process of reintegration.

A cross-check of samples of Tripartite agreements has also revealed some gaps that States and the UNHCR can work on. The place and role of third parties is not well defined therefore limiting their participation in the process of repatriation as well as questions addressing measures to minimize negative impact by receiving communities.

A concern with respect to the timing, motivation and preparedness by the Countries of origin emerges. Proper internal legislative frameworks that acknowledge State commitment in safeguarding smooth resettlement procedures for returnees and displaced persons must be in place. State for instance must have corresponding legal frameworks with well defined roles on resettlement of displaced persons and relief procedures in cases where State fails to meet its obligations. Angola presents a good case study because of its efforts to plan for returnees in the enactment of the Council of Minister's Decrees on resettlement of displaced persons.<sup>72</sup> Other practices by countries include provision of access to land and property rights, job creation etc.

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<sup>72</sup> European Union, European Parliament, 'Council of Ministers' Decree Number 1/01; *'The Norms on the Resettlement of Displaced populations'* and 'Council of Ministers Decree Number 19/02: *'The Standard Operating procedures for the Enforcement of the Norms on the Resettlement of Displaced Persons'*.

Inadequate funding to support repatriation exercises emerged as an area needing donor support to governments, UNHCR and implementing partners. Innovations in resource mobilization can be done through comprehensive government work plans and budgets providing for re-construction targeted at repatriation of refugees and sensitization of communities.

The challenge of measuring durable and fundamental changes is tied to the issue of State fragility as a major contributor to forced migrations. Internal and external influences in political, social and economic fronts have been responsible for State wars that have crippled the mere existence of States. International mechanisms for State support to fragile States will reduce the numbers of refugee outflows. Regional arrangements, Comprehensive Working Agreements and Tripartite Agreements with States and UNHCR can work best in addressing such issues.

### **4.3 Conclusion**

The implementation of refugee cessation based on '*changed circumstances*' is a huge burden on States in this era of repatriation. Its lack of manageability threatens States sovereignty in the management and control of refugees and asylum seekers. More so because it actualizes voluntary repatriation, which is mooted as the most preferred durable solution in international refugee law. As the most critical yet difficult provision for States today, tackling the crippling underlying issues that affect the implementation of cessation based on '*changed circumstances*' is that of clarity in the concept of '*changed circumstances*', conflict of laws and effectiveness of Tripartite agreements.

Clarifying the gaps highlighted above and any other emerging issues will address the underlying issues of State fragility and breakdown of political, economic and social safety nets which form more than 95% of the reasons that cause refugee flight. The presumptuous nature of this clause on mutual cooperation of stakeholders, comprehensive

planning, financing, monitoring and evaluation, collection of reliable up to date information and the participation of communities are timely and provide great insights today as States re-think their obligations in the implementation of Cessation of refugee status based on '*changed circumstances*'.

## CHAPTER FIVE: CONCLUSION

### 5.1 Summary

The face of international law is taking a new shape. Today, States are re-thinking their obligations in tackling the refugee problem that has bedeviled them for many years. Increasingly, there is consensus in promoting 'repatriation' as the best durable solution by way of addressing the underlying causes of refugee migrations. In Africa, after many years of internal and external conflicts, there is evidential commitment by States to support reconstruction and peace initiatives as modes of controlling unnecessary forced migration.

Players in refugee migration studies i.e. States, UNHCR, implementing partners and Scholars agree that though refugee principles in international protection are relevant, the application of the refugee Conventions as conceived are problematic and irrelevant today. They are unrealistic in addressing the changing face of forced migration, constituting a threat to State sovereignty and therefore responsible for creating resistance by States.

Also, the problems of ambiguity in the universal character of defining refugees and cessation of status based on '*changed circumstances*' as a determinant in repatriation, challenges of complementarities of international refugee Conventions with national refugee laws, lack of clarity in the complementarities role of stakeholders and many others have emerged in the study as reasons that warrant States to re-evaluation of their obligations under international refugee law.

Desirous of overcoming the above challenges, States are making concerted efforts to pro-actively deal with forced migration with the goal of precipitating repatriation aimed at improving the situation of refugees and controlling numbers requiring protection. States have therefore adopted new approaches of tackling forced migration from a social perspective.

These approaches include regional cooperation through pro-active and re-active approaches where, like in the case of Kenya, where it plays the dual roles of pro-active

prevention through peace-keeping and peacemaking missions and re-active prevention through hosting and providing refugee protection. Regional groupings like the shared perspectives from the European Union and Southern Africa are becoming popular in adapting workable 'common asylum procedures' for purposes of uniformity in refugee burden sharing.

Other approaches include, balancing States legitimate interests to control and the legitimate interests of refugees to be protected, addressing structural violence that contributes to social exclusion of groups to address perceived injustices and loss of confidence of refugees, are mooted as some of the best approaches existing today.

The question of State international obligation to international law has been subject to interrogation by Scholars in refugee studies. As demonstrated in earlier Chapters, the question of whether international law is binding on States has been interrogated for many years. One common finding is that State interactions are firmly grounded on vested interests. State sovereignty is at the bedrock of social interaction with other institutions.

When States sovereignty is under threat, they have retaliated by breaking international norms that bind them. For instance, the movements of refugees across borders have troubled States for many years. This is because of the principles of non-refoulment and right to grant asylum to refugees that bind. As such this is a direct threat on their sovereignty to be in-charge of who comes in and leaves their territorial jurisdiction.

In the context of refugees, forced migrations is a characteristic of States failure in meeting their obligations. These failures include provision for citizens civil, political, economic and social rights, control of internal and external conflicts among others. These failures have regrettably led to high production of refugee displacements across borders. This in essence has led to disproportional burdens among States bearing heavy presence of asylum seekers. This pressure has also led to sour relations among States and hence a challenge to principle of burden sharing.



The advent of binding partnerships such as through Comprehensive Plans of Action, Peace Agreements has in addition to tripartite agreements been popularized across the world. The European Union has committed to binding Directives on common asylum procedures with member States that standardize the reception, management and exit on immigrants. Africa has taken the same que through regional re-organizing and common approaches on the '3<sup>rd</sup> safe country' safety models to management movement across borders.

## **5.2 Key Findings**

*Changed Circumstances*' in the country of origin are the best determinants of promoting repatriation as the best durable solution for refugees. The traditional understanding of Cessation based on '*changed circumstances*' has moved from a developmental perspective to that of a social perspective in addressing social imbalances that are responsible for forced migration.

The removal of personalized fear of persecution based on '*changed circumstances*' cannot be measured. It is however depended the individual's perceptions on the circumstances surrounding their flight. A wholesome approach to addressing underlying issues through political, civil, economic and social means builds more confidence in the refugee and has high chances of sustainable repatriation.

The evolving area in refugee status determination through the concept of 'Common Asylum Procedures' is presumably both a good and bad concept. Good in the sense that it has the commitment of its member States and bad in the sense that it is heavily politically driven in which case it may overshadow refugee rights.

## **5.3 Recommendations**

With the passage of time, prolonged displacements have transformed the refugee title from its original temporary nature to a perpetual title. This has precipitated the popularization of

repatriation through the support of proactive and reactive measures based on States comparative advantages in State reconstruction. On the other hand, preference for repatriation has gained ground over resettlement and naturalization of refugees. Consequently, cessation of refugee status based on '*changed circumstances*' is now popularized by States.

In the course of this study, two (2) areas in need of further research have emerged;

First, there is need for further scholarly research on the concept of 'Common Asylum Procedures' and its contribution to the doctrine of Refugee burden sharing. Comparative studies and experiences from other continents would greatly enrich this budding area in forced migration; and

Secondly, there is need for deeper scholarly research work on the right to asylum in the context of rejected refugees and asylum seekers which remains a grey area even today. More in-depth research is needed to determine three (3) things; a) State responsibility after rejection; b) whether this denial of the right to asylum amounts to refoulement; and thereafter c) the linkage between denial of asylum to refugee burden sharing.

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