UNIVERSITY OF NAIROBI

SCHOOL OF LAW

A Thesis Submitted to the School of Law in Partial Fulfillment of the Requirement for the
Master of Laws Degree

Submitted By:
Veronicah Wakarima Mbogo
G62/68610/2011

Voluntary Repatriation of Urban Somali Refugees from Kenya: A Case for Inclusion in the
Decision Making Process
DECLARATIONS

I, declare that this thesis is my original work and has not been presented before for a degree in this or any other university.

_________________________
Veronicah Wakarima

_________________________
Date

This thesis has been submitted for examination with my approval as university supervisor.

_________________________
Prof. Edwin Abuya
University of Nairobi
Faculty of law

_________________________
Date
DEDICATION

This thesis is dedicated to my nieces and nephews – Natasha, Kevin, Rose, Jamar and Ivanka.
ACKNOWLEDGEMENTS

First, I thank God for giving me grace and patience throughout this study and for enabling me to complete it. Secondly, I thank my supervisor, Professor Edwin Abuya for his thorough guidance. It’s commendable. Thirdly, I am very grateful to my family; especially my parents, Mr. & Mrs. John Mbogo for their continuous encouragement. My brothers; James and David for their dedicated support and sacrifice and my sisters; Faith and Shiku. I also wish to thank my friends and colleagues who encouraged me while I was undertaking this study. Lastly, I wish to thank my interviewees, though nameless, your input was invaluable.

Thank you all.
ABSTRACT

Voluntary repatriation is enshrined in the international human rights instruments as the right to return to one’s own country. This implies that any person – including refugees – must be able to exercise the right. Under international refugee law, voluntary repatriation is provided as protection against refoulment by the host state. My thesis argues that in order for the urban Somali refugees to make an informed choice on whether or not to repatriate they must be involved in the decision making process.

As of now, the key stakeholders in the decision making process to voluntarily repatriate Somali refugees from Kenya are the United Nations High Commissioner for Refugees (UNHCR), the Government of Kenya (GOK) and the Federal Government of Somalia (FGS). Somali refugees have been excluded in the decision making process. This therefore implies that the refugee has no choice but to repatriate.
TABLE OF CONTENTS

List of Cases...........................................................................................................................................(10)
List of abbreviation.................................................................................................................................(11)

CHAPTER 1
INTRODUCTION: GENERAL OVERVIEW AND OUTLINE

1.1 Somali Refugees in Kenya..............................................................................................................12
1.1.1 Definitions of a refugee, a returnee and repatriation..........................................................14
1.1.2 Social and economic organization of Somali Refugees.....................................................16
1.1.3 Somali refugees a security threat in Kenya............................................................................18
1.1.4 Towards Voluntary Repatriation...........................................................................................21
1.1.4.1 Tripartite agreement governing the Somali refugee returns.........................................22
1.2 Statement of the problem.............................................................................................................26
1.3 Research Objectives.......................................................................................................................27
1.4 Research Questions.........................................................................................................................27
1.5 Hypothesis......................................................................................................................................27
1.6 Theoretical Framework..................................................................................................................28
1.7 Literature Review...........................................................................................................................30
1.7.1 Voluntary repatriation and protection of refugees...............................................................31
1.7.2 Conditions conducive for voluntary repatriation...............................................................34
1.7.3 A refugee's right to participate in the decision making process........................................39
1.8 Justification...................................................................................................................................44
CHAPTER 2

VOLUNTARY REPATRIATION AND PROTECTION OF REFUGEES

2.1 Introduction..............................................................................................................55

2.2 The right to return under international law............................................................58

2.3 Voluntary repatriation refugees................................................................................61

2.4 Re-examining voluntary repatriation.......................................................................64

2.5 Conclusion................................................................................................................69

CHAPTER 3

CONDITIONS CONDUCIVE FOR VOLUNTARY REPATRIATION

3.1 Introduction..............................................................................................................71

3.2 Creating conditions conducive for return...............................................................73

3.3 Conditions when voluntary repatriation should take place.....................................76
3.3.1 Special agreements between the UNHCR and the countries involved………………77
3.3.2 Fundamental change of circumstances.........................................................79
3.3.3 Return in Safety and with dignity…………………………………………………82
3.3.3.1 Physical safety............................................................................................82
3.3.3.2 Access to legal processes..............................................................................84
3.3.3.4 Availability and access to economic and social services........................86
3.3.4 Voluntary nature of refugees’ decision to repatriate ................................88
3.3.5 Conclusion......................................................................................................90

CHAPTER 4

DECISION MAKING: A REFUGEE’S RIGHT TO PARTICIPATE IN DECISION MAKING TO REPATRIATE

4.1 Introduction........................................................................................................92
4.2 The process of decision making in voluntary repatriation..............................95
4.3 Refugees and decision making.........................................................................97
4.4 Why should the UNHCR, GOK and FGS involve Somali refugees in decision making process?.................................................................................100
4.5 Participation in decision making: Refugees' right to participate..................103
4.5.1 Access to information on conditions in the areas of return .......................104
CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS ............................................117

Bibliography......................................................................................126

Appendices
LIST OF CASES

1. Peter Bogonko v National Environmental Management Authority (NEMA) Miscellaneous Application No 1535 of 2005 eKLR.

2. Salah Sheekh v The Netherlands (Application No. 1984/04) ECtHR.

LIST OF ABBREVIATIONS

AMISOM- African Mission in Somalia

COA- Country of Asylum

COO- Country of Origin

EXCOM- Executive Committee Conclusions

ICCPR- International Covenant on Civil and Political Rights

ICESCR- International Covenant on Economic Social and Cultural Rights

IDP- Internally Displaced Persons

IOM- International Organization for Migration

FGS- Federal Government of Somalia

GOK- Government of Kenya

NGO- Non Governmental Organizations

OAU- Organization of African Unity

UDHR- Universal Declaration on Human Rights

UN CRC- UN Convention on the Rights of the Child

UNHCR- United Nations High Commissioner for Refugees
CHAPTER 1

INTRODUCTION: GENERAL OVERVIEW AND OUTLINE

How can you ask refugees who have lost their parents or those who have been born here [Kenya] or those who came when they were children to repatriate? Where do you expect them to return to? They haven’t been to Somalia nearly the whole of their lives. The voluntary repatriation is not voluntary. It has to come from me. I must want to go back but not to be forced. By the way, Kenyan authorities should not discriminate us. Somalis have businesses and we are working hard. We are contributing to the income of the country.¹

1.1 Somali Refugees in Kenya

Anab’s comment highlights the complexity of decision making by refugees in the repatriation process. The presence of Somali refugees in Kenya can be traced back to 1991 following the collapse of Siad Barre regime.² The collapse of Somalia was the consequence of a combination of internal and external factors.³ These saw the seceding of Somaliland (May 1991) from the rest of Somalia and the formation of Puntland Federal State of Somalia (August 1998). Sofia and others, claim that the causes of civil war in Africa can be linked to various issues: greed, grievances, financial and military feasibility of rebellion, low levels of trust among the population, a strong

¹Interview with Anab in Westlands, Nairobi County (29/12/2015).
³Accord 21, Endless War: A brief History of the Somali Conflict in Mark Bradbury and Sally Healy (eds), Whose peace is it anyway? Connecting Somalia and international peacemaking (Conciliation Resources 2010) 10-14 notes that, externally there was the 1977-78 Ogaden war with Ethiopia (The Ogaden War was a conventional conflict between Somalia and Ethiopia in 1977 and 1978 over the Ogaden region of Ethiopia). Fighting erupted as Somalia sought to exploit a temporary shift in the regional balance of power in their favor to occupy the Ogaden region, claimed to be part of Greater Somalia. Ethiopia had originally dominated the region. Internally there was a degree of disintegrations between the central authority and the fractious kinship system; the single rule by Siad Barre on one hand, and the various clans fighting for control of leadership and resources on the other hand. An unsuccessful attempted coup was mounted against the regime in 1978. Those who escaped arrest after coup regrouped forming a guerrilla opposition group (Somali Salvation Democratic Front) which had its operation base in Ethiopia. Also, Supra note 2 at 64-67, observes that, armed opposition to Siad spread and assumed a national character transcending the already existing clan divisions. Thus it can be said that generally no single factor can explain the causes of the conflict as the nature of the crisis keeps mutating.
The growing prevalence of refugees in Africa arise out of the many violent ethnic and civil conflicts occurring in the continent. For example, between 1960 and 2000, approximately 20 African countries experienced at least one period of civil war. Many other conflicts in Africa are an outcome of political marginalization of the minority group by the majority.

The Dadaab refugee camp was founded by the Kenyan government in 1991 in response to the influx of Somali refugees into the country. A significant number of Somali refugees have lived in Kenya for more than two decades. In 2012, Somalia held an elaborate electoral process. This saw the election of President Hassan Sheikh Mohamud and the creation of the Federal Government of Somalia (FGS). It also contributed to Somalia witnessing relative stability and security. Not surprising perhaps, Somalis from Diaspora were reported to have gone back to Somalia to develop their country.

As of April 2016, Kenya hosted 597,683 refugees and asylum seekers. Of these, an estimated 70% are registered Somali refugees. Majority of the refugees are at Dadaab refugee camp, located in

---

5 Ibid.
6 Ibid.
7 Ibid.
the North Eastern part of Kenya, close to the Kenya-Somalia border. Several others are found at Kakuma refugee camp on the Kenya-South Sudan border. Although refugees in Kenya are required to reside in camps\(^\text{11}\), approximately 10% of the refugees live in urban areas within Nairobi.\(^\text{12}\) Of these, 50%\(^\text{13}\) are registered Somali refugees. This challenges UNHCR’s assumption that ‘almost half of the world’s refugees now reside in cities and towns, compared to one third who live in camps.’\(^\text{14}\) This study will focus on urban Somali refugees in Eastleigh, Nairobi. UNHCR has allowed a minority number of refugees to live outside Kakuma and Dadaab camps. Often on the grounds of; higher education considerations, specialized medical treatment, refugees in the resettlement process or those with security concerns in the camps.\(^\text{15}\)

1.1.1 Definitions of a refugee, a returnee and repatriation

The 1951 Convention Relating to the Status of Refugees is the main legal instrument for the protection of refugees and defines a refugee as, ‘ a person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or,

\(^\text{12}\) Available at the Regional mixed migration secretariat website (RMMS) at http://www.regionalmms.org/fileadmin/content/monthly%20summaries/RMMSMonthlySummaryMarch%202016.pdf (15 March 2016) accessed on 16/04/2016.
\(^\text{14}\) UNHCR, available at http://www.unhcr.org/pages/4b0e4cba6.html accessed on 16/04/2016. The UNHCR Policy on Refugee Protection and Solutions in Urban Areas recognizes that there is a growing number and proportion of refugees found in urban areas.
\(^\text{15}\) Supra note 11 at 135.
owing to such fear, is unwilling to return to it.’\textsuperscript{16} The 1969 Organization of Africa Union Convention governing the specific aspects of refugee problems in Africa provides an additional definition of 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 or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.’\textsuperscript{17} For the purposes of this study the term ‘refugee’ is used to refer to individuals who meet the criteria set out under the 1951 Refugee Convention, its 1967 Protocol\textsuperscript{18}, the 1969 OAU Convention and the Refugees Act of Kenya 2006.\textsuperscript{19} ‘Returnee’ is used to refer to individuals who have returned to their country or origin.

There is no formal or legal definition of the term repatriation as it does not appear in any legally binding instrument. In general terms, to repatriate is to send or bring back somebody to their own country of origin.\textsuperscript{20} Within the international human rights instruments, repatriation has been described as the right to return to one’s own country.\textsuperscript{21} This is relevant as it provides a human rights basis for requiring states to re-admit and protect their citizens. ‘Repatriation’ and ‘return’ will be used interchangeably to mean the same thing in this study.

\textsuperscript{19} Article 3 of the Refugees Act 2006.
\textsuperscript{21} Article 13 (2) of the Universal Declaration of Human Rights 1948 (GA res 217A (III), 10 December 1948); Article 12(4), International Covenant on Civil and Political Rights 1966 (GA res.2200A (XXI), 16 December 1966, 999 UNTS 171; entry into force 23 March 1976 (ICCPR).
1.1.2 Social and economic organization of Somali refugees

Unlike in the refugee camps there is no formal settlement for refugees in urban centres. Majority of Somali refugees are found in Eastleigh. Refugees move to urban centres in search of better opportunities: living conditions, availability of services, economic opportunities and livelihoods.\(^22\) Other factors influencing refugees to live in urban areas include; ‘security threats in the camps, lack of education and medical services and harsh climatic conditions.’\(^23\) Refugees who choose to live in urban areas are entitled to minimal support (usually medical and psychosocial support) from UNHCR and therefore must be able to sustain themselves materially and economically.\(^24\) They also have to go back to the camp regularly for registration and population counts.\(^25\)

It is well documented that refugees contribute to the social and economic growth in the host state.\(^26\) For example, during my visit to Eastleigh I observed that most shops (clothes), open air markets and restaurants were being run by Somalis. This is also consistent with Anab’s comment at introduction. It thus follows that, when Somali refugees come to Eastleigh, they usually find employment as casual workers in hotels and shops.\(^27\) The refugees in turn provide financial support to the families back in the camps.\(^28\) Consequently, interrelations exist between refugees in the

\(^{22}\) Refugee Consortium of Kenya, Asylum Under Threat: Assessing the protection of Somali Refugees in Dadaab refugee camps and along the migration corridor (Pann Printers Limited 2012) 76-77.
\(^{24}\) Idil Lambo, In the Shelter of each other: notions of home and belonging amongst Somali refugees in Nairobi (UNHCR 2012) at 5. Also, Ibid at 13.
\(^{25}\) Ibid at 5.
\(^{27}\) Supra 22 at 21. Also, under the Refugee Act 2006, its difficult for a refugee to have a work permit which would enable him/her have meaningful employment in a formal job market. The Kenyan Labour laws do not allow refugees in the camps to earn salaries. They instead receive allowances from UN agencies and humanitarian organizations.
\(^{28}\) Supra 22 at 23.
camps and those living in Eastleigh. Furthermore, a significant number of refugees receive remittances from their relatives abroad.\(^{29}\) The remittance can be on a regular or ad hoc basis.

In Kenya as in other developing countries in Africa, refugees are seen by the nationals as ‘threatening the local economy and creating social pressures’.\(^ {30}\) Consequently, there has been very minimal effort to boost their potential and empowerment to the national economies.\(^ {31}\) In Eastleigh, Somali refugees are seen by Kenyan businessmen as competitors.\(^ {32}\) Moreover, social stability in Kenya has been undermined by the ‘rise of xenophobic attitude’\(^ {33}\) and hostility towards Somalis by Kenyans.\(^ {34}\)

In terms of social organization, Somalis living in Eastleigh have maintained their identity in terms of religion (Islam), language (Somali) and dressing among women. Their sense of identity can be attributed to the closely community network that exists among the Somalis.\(^ {35}\) These strong community networks act as safety nets particularly, when they face police harassment. For instance, ‘if a refugee and especially a woman is stopped in the street, community members passing by immediately start to collect (bribe) money in an attempt to prevent detention.’\(^ {36}\) Despite living

\(^{29}\)Supra 22 at 22.


\(^{31}\)Supra note 11 at 151. Also, supra note 23 at 23.

\(^{32}\)Supra note 23 at 27.

\(^{33}\)Supra note 21 at 327.

\(^{34}\)Supra 23 at 7.

\(^{35}\)Supra note 2 at 49 observes that, “The most pervasive organizational principle in the traditional Somali social organization is kinship, traced patrilineally in the male line…these ties continued to provide the individual’s primary identity within the Somali nation.”

\(^{36}\)Supra note 18 at page 19.
far away from home, most Somali refugees identify themselves as Somalis as opposed to being Kenyans.¹³

1.1.3 Somali refugees a security threat in Kenya

According to Lubbers, ‘since the September 11, 2001 (9/11) attack on the United States…the global attitude towards refugees and asylum seekers’ changed for the worse.³⁸ At the international level for instance, the UN Security Council Resolution 1373³⁹ requires all member states to establish effective border controls and regulate the issuance of identity papers and travel documents.⁴⁰ In addition, make sure that refugee status is not abused by those involved in terrorism.⁴¹ The anti-terrorist measures have contributed to an unwarranted link between the words ‘refugees’ and ‘terrorists’, and the advent of ‘increasingly restrictive borders control measures’ against refugees. In 2013, for example, following the Westgate mall attack by the Al Shabaab in Nairobi, Kenya⁴⁴, senior government officials spoke out strongly against allowing more refugees into the country while advocating for the return of Somali refugees back to their country.⁴⁵ As a

⁴⁰ Ibid, para. 2(g).
⁴¹ Ibid, para. 3 (g).
⁴³ Supra note 26 at 323.
consequence of the outbursts by the senior government officials, some Somali refugees ‘voluntarily returned’ home for fear of stigmatization and discrimination.46

The UN Special Rapporteur on the Human Rights of Migrants has noted that, ‘the erosion of rights sometimes caused by anti-terrorist measures affects migrants in particular.’47 According to Moekli, the portrayal of immigrants [refugees] as potential terrorists, in turn, makes restrictions of their fundamental human rights appear acceptable.48 In April 2014, for example, following a spate of grenade attacks in Kenya, security search operations were intensified in Eastleigh in an attempt to flush out Al Shabaab operatives. Many Somali refugees were arbitrary detained and harassed by police.49 It can be said that the anti-terrorist measures have created unprecedented level of suspicion and hostility against refugees.50

As noted earlier, majority of the Somali refugees in Kenya reside at the Dadaab refugee camp mainly due to its proximity to the Somalia border. Abuya notes that, host states confine refugees in camps ‘in order to protect the security of their own state.’51 Accordingly, host states regularly denounce refugee camps for being a source of insecurity and terrorism.52 In Kenya, authorities

48Supra note 42 at 470-471.
51Supra note 11 at 133.
52Robert Muggah, Once we were warriors: critical reflections on refugee and IDP militarisation and human security. in Alice Edwards and Carla Ferstman (eds), Human Security and Non-Citizens: Law, Policy and International Affairs (Cambridge University Press 2010) 173. Also, supra note 8 at 133.
have repeatedly expressed concerns to UNHCR and the international community over the Dadaab refugee camp. For example, during the London Conference on Somalia in 2012, the then Kenyan President, Mwai Kibaki, said that the overcrowded Dadaab refugee camp posed ‘growing and serious security threats to Kenya and the region.’ Critics however argue that there is ‘comparatively little evidence of the extent and pervasiveness of refugee militarization in Africa or elsewhere.’ The subject is however outside the scope of this study.

Recently, there has been significant political pressure from the Kenyan Government towards urban refugees. In 2012, for example, following the Presidential elections in Somalia, the Kenyan Government issued a directive that it had stopped registration of urban asylum seekers and refugees, and closed all registration centers. Following the announcement, UNHCR reported that Somali refugees were spontaneously returning from Dadaab camp to Somalia. In December 2012, the Department of Refugee Affairs ordered urban refugees living in Nairobi to go back to the camps on grounds of ‘unbearable and uncontrollable threat to national security.

Generally, Kenyan authorities have on several occasions accused Somali refugees of abusing their hospitality and good will. For instance, in April 2014, following a spate of grenade attacks in the country; President Uhuru Kenyatta announced that Kenya would not extend its hospitality to

---

54 Supra note 52 at 173.  
55 Department of Refugee Affairs, Press Statement, 13/12/2012, on file with the student. Around the same period, the then internal security Permanent Secretary Mutea Iringo said that the government was in talks with UNHCR to repatriate Somalis back home as “normalcy has returned in Somalia”.  
57 Supra note 50 at 2.  
58 Supra note 52 at 177.
refugees at the expense of insecurity in the country.\textsuperscript{59} He said this was because Kenyans had suffered deaths and injuries as a result of terrorist attacks.\textsuperscript{60} Furthermore, the Government of Kenya has been at the forefront urging the international community to return Somalis to their country.\textsuperscript{61}

Jeremy Bentham opines that, ‘the moral worth of actions is dependent on their effects on the interest of the community, defined as the greatest happiness of the greatest number’.\textsuperscript{62} Viewed from his perspective, the foregoing suggests that, the basis of the decision to repatriate Somali refugees by the GOK was to ensure that benefit or advantage (of security) was conferred to Kenyans at the loss or disadvantage to a select few (refugees) that were seen as posing security risk to Kenyans. Essentially, the Kenyan society had experienced mischief or pain which necessitated the repatriation of Somali refugees. It is anticipated that once Somali refugees go back to their COO, the insecurity in the country will decrease.

1.1.4 Towards voluntary repatriation of Somali refugees in Kenya

A combination of several factors contributed to the need to repatriate Somali refugees from Kenya. These include; national security concerns, donor fatigue and lack of resources to sustain the presence of Somali refugees, the formation of the Federal Government of Somalia and accessibility to new areas previously controlled by the Al Shabaab. In November 2013, UNHCR together with the governments of Kenya and Somalia signed a tripartite agreement for the repatriation of Somali

\textsuperscript{59} Supra note 45.
\textsuperscript{60} Ibid.
\textsuperscript{61} Supra note 53.
Refugees were not involved in the decision making process. UNHCR announced that the repatriation would take place from Kenya to Somalia over a period of four and half years, from July 2015 to December 2019.

1.1.4.1 Tripartite agreement governing the Somali refugee returns

The tripartite agreement will ensure that only voluntary returns of Somali refugees take place from Kenya to Somalia. With the signing of the tripartite agreement, Kenya re-confirmed its commitment to preserving the protection space of refugees. Voluntary repatriation is codified in Article 1(5) of the tripartite agreement as the ‘voluntary return of a refugee to the country of origin with the specific intention to re-avail him or herself of the national protection of the country of origin.’ The tripartite agreement sets out the fundamental human rights in the repatriation process as follows: right to nationality, life, liberty and security of the person. While acknowledging that insecurity in the Horn of Africa region as a key concern for both Kenyan and Somali governments, the tripartite agreement recognizes Kenya in shouldering the burden of Somali refugees since 1992.

Article 3 of the tripartite agreement establishes a tripartite commission composed of the UNHCR, Government of Kenya and Government of Somalia. Conspicuously missing from the commission

---

63 Tripartite Agreement between UNHCR, Government of Kenya and the Government of Somalia; governing the voluntary repatriation of Somali Refugees living in Kenya, 10 November 2013 (Tripartite agreement), (Attached as annex three).
65 Article 2 and Preamble at (j) of the tripartite agreement.
66 Article 5 of the tripartite agreement.
67 Articles 9 and 10 of the tripartite agreement and at the Preamble.
68 Ibid.
69 Article 3 of the tripartite agreement. The tripartite commission consists of representatives from host country (Kenya), country of origin (Somalia) and UNHCR.
is the refugee – who will be affected by the decision of the commission. Notwithstanding, the role of the commission is determined to advance the voluntary repatriation of Somali refugees.\textsuperscript{70} In addition, the commission is tasked with establishing modalities and providing guidance and recommendations to the UNHCR, governments of Kenya and Somalia on voluntary repatriation of Somali refugees.\textsuperscript{71} The net effect of this provision is to exclude refugees’ participation in matters affecting them, and therefore ruling out their capacity in decision making.

Part II of the tripartite agreement further reinforces the exclusion of Somali refugees from decision making process by detailing the roles and responsibilities of the UNHCR, government of Kenya and government of Somalia\textsuperscript{72} to the debar of the refugee. Nevertheless, the framing of the tripartite agreement suggests that Somali refugees have a role to play in the voluntary return by virtue of article 9 (the right of return). The preamble of tripartite agreement recognizes that the ‘attainment of this solution (voluntary repatriation) requires that refugees will voluntarily return to their country of origin’.\textsuperscript{73} In other words, refugees must consent to voluntarily return. Recourse to the attainment of return that is truly voluntary lies not only signing agreements but in recognizing refugees as an equal party – with a role to play – in the repatriation process. ‘Return that is truly voluntary is most likely to result in sustainable return in safety and dignity’\textsuperscript{74} for refugees.

Spontaneous repatriation is also the object of article 16 of the tripartite agreement. Notably, the tripartite agreement is silent on the status of refugees who decide that they do not wish to return.

\textsuperscript{70}Article 5(1) of the tripartite agreement.
\textsuperscript{71}Article 5 (2) of the tripartite agreement.
\textsuperscript{72}Articles 24-26 of the tripartite agreement.
\textsuperscript{73}Preamble at (d), tripartite agreement.
\textsuperscript{74}Supra note 26 at 324.
The implication of this is that, such refugees may be pressured to repatriate as the option to remain is not made available to them.\textsuperscript{75} Or worse, ‘risk remaining in limbo\textsuperscript{76} or ‘being denied protection under the provisions of international refugee and human rights law.’\textsuperscript{77} For instance, in 2008, the Ghanaian government asked all Liberian refugees to go back to Liberia after communicating that it intended to shut down the refugees’ settlements.\textsuperscript{78}

In addition, the tripartite agreement contains a provision explicitly targeting the needs of the ‘vulnerable groups’. Article 18 (1) provides that special measures will be adopted to guarantee the protection of vulnerable groups, children, the elderly and women.\textsuperscript{79} Nevertheless, there is no specific mention of pregnant women, disabled persons, the blind and the deaf. The tripartite is silent on what measures will be taken to ensure their protection during repatriation and how their special needs will be met.

The tripartite agreement says very little on inclusion of refugees in decision making. Article 4(5) provides that the tripartite commission “may whenever appropriate invite refugee representatives in its deliberations in an observer or advisory capacity”.\textsuperscript{80} This is not sufficient. The most direct way of ensuring that refugees are involved in decision making, would be for UNHCR, Kenya and

\textsuperscript{75}A refugee can opt to remain but must show evidence that they risk facing persecution/threats to their life if returned to their country of origin.
\textsuperscript{76}Supra note 11 at 161.
\textsuperscript{77}Ibid.
\textsuperscript{79}Article 18 of the tripartite agreement.
\textsuperscript{80}Article 4(5) of the tripartite agreement.
Somali governments to include them (refugees) as members of the tripartite commission at the planning stage.

The tripartite agreement is conspicuously silent on breach, non-performance or non-compliance by the signatories. It fails to provide for the consequences of breaching or neglecting to fulfill the provisions contained therein. Article 28 of the tripartite provides that, any disagreement originating from the application and interpretation of the agreement will be settled through consultations and negotiations among the signatories. Failure to provide for consequences of breach means that, the signatories may opt not to honor the provisions of the agreement. This suggests that the tripartite agreement lacks an enforcement mechanism.

Critics have argued that, tripartite agreements are often slow and do not reflect refugees’ criteria for deciding to go home. In response to a question whether refugees (both camp and urban) were consulted during the drafting of the tripartite agreement, John said:

> The drafting of the tripartite agreement is a states’ process and refugees were not involved. The GOK and FGS were representing the views of their citizens. UNHCR was representing the refugees. It was a political process. In international politics you deal with states not individuals.

What carried the day in the drafting and signing of the tripartite agreement was the benefit or advantage that would fetch the greatest happiness of the greatest majority of the Kenyan citizens. This was confirmed by interviews with NGO and UNHCR staffs who mentioned that the views of

---

81Article 28 of the tripartite agreement.
83Interview with John in Lavington, Nairobi County (09/09/2016).
84Supra note 62 at 39.
refugees were not well articulated in the tripartite agreement. The critical question is at what point do you involve refugees? At what stage is the voice of the refugee supposed to be heard? My thesis will seek to answer these questions.

1.2 Statement of the problem

Urban Somali refugees have been excluded in the decision making process to repatriate. Non-inclusion of urban Somali refugees contravenes their right of access to information under national\(^{85}\) and international law.\(^{86}\) The right of participation\(^{87}\) goes hand in hand with right of access to information. Thus, a mischief is occasioned by lack of access to information, which enables refugees make an informed decision. Courts in Kenya have reiterated the public interest, when dealing with non-inclusion of the public in matters affecting them.\(^{88}\) International law recognizes the participation of people (including refugees) in public affairs.

Failure to involve urban Somali refugees in the repatriation process will result to the infringement of their civil-political rights. Specifically, the right to participate and influence decisions in matters affecting them. Exclusion of urban Somali refugees is also likely to create statelessness for some refugees – those born in Kenya, as their views will not be heard.

1.3 Research objectives

\(^{85}\)Article 35 (2) and (3) of the Constitution of Kenya.

\(^{86}\)Article 9 of the African Charter on Human and Peoples Right (ACHPRs), article 19 (2) of the ICCPR and article 15 (1) of the tripartite agreement.

\(^{87}\)Article 25 of the ICCPR. Also, article 13 of the African Charter on Human and Peoples Right (ACHPRs).

\(^{88}\)See, for example, Peter Bogonko versus National Environmental Management Authority (NEMA) Miscellaneous Application No 1535 of 2005 eKLR.
i. To establish the extent to which inclusion of urban Somali refugees in the decision making process will lead to their informed choice of whether or not to repatriate.

ii. To identify ways in which urban Somali refugees can participate in the decision making process on voluntary repatriation.

1.4 Research questions

i. Will the inclusion of urban Somali refugees in the repatriation process lead to their informed decision to return?

ii. How can urban Somali refugees be involved in the decision making process to repatriate?

1.5 Hypothesis

When urban Somali refugees are involved in the repatriation process, they will make an informed decision. They will have access to information on repatriation, participate in the go and see visits to their COO and contribute their views on the repatriation process. The current decision making process is limited to UNHCR, GOK and FGS.\(^{89}\) The process sidelines refugees who are the principal actors in the repatriation exercise.

1.6 Theoretical framework

Human beings, generally move from one place to another for various reasons. Migration is one of the primary responses to conflict in the world. Unquestionably, threats to, and the search for human

---

\(^{89}\)Article 4 of the tripartite agreement.
security, inform a refugee’s decision to leave their country of origin to the asylum state.\textsuperscript{90} Needless to say, lack of human security is well recognized as a cause of migration.\textsuperscript{91} In a globalized world, migration assumes different forms; forced or voluntary, circular or seasonal, temporarily or permanently motivated.\textsuperscript{92} These differences produce different outcomes observable from a sociological perspective. Refugee migrations are as complex as the situations that create them.\textsuperscript{93} Scholars have put forward that, ‘no single theory can provide a comprehensive explanation for the migration process.’\textsuperscript{94}

My thesis will adopt the rational choice theory as propounded by George Homans. According to this theory, ‘in choosing between alternative actions, a person will choose that one for which, as perceived by him at the time, the value of the result, multiplied by the probability of getting the result, is the greater.’\textsuperscript{95} Thus, in making the decision of whether or not to repatriate, a refugee does a cost benefit analysis of whether or not to go back home. In the words of George Homans the positive factors of repatriating (for example conditions in the COO) must outweigh those of remaining in the COA. In order for Somali refugees to do the cost benefit analysis of whether to repatriate or not, they must be involved on the repatriation process. In other words, they must have

\begin{itemize}
\item \textsuperscript{90}Supra note 26 at 325.
\item \textsuperscript{91}Supra note 26 at 322.
\item \textsuperscript{92}Ibid at 318.
\item \textsuperscript{95}George Homans, Foundations of Social Theory (Cambridge University Press 1961) 27. Also, George Casper Homans and Charles P. Curtis, An Introduction to Pareto, His Sociology (New York Publishers 1974) 43.
\end{itemize}
access to accurate and reliable information about conditions in Somalia and participate in the ‘go and see’ visits to Somalia.

The rational choice theory proposes that people will perform an action depending on their perception of the probability of success.\textsuperscript{96} Thus, a person [refugee] is capable of making a ‘rational choice’ of whether or not to repatriate based on the value of the resulted expected.\textsuperscript{97} Ideally, refugees make a ‘rationally calculated’ decision after ‘due consideration of relevant information’ on the conditions in the COO.\textsuperscript{98} They compare the amount of rewards associated with each course of action and calculate the likelihood that they will receive the rewards.\textsuperscript{99} To him, people who act in accordance with the rational choice theory maximise their utilities.

This theory has four main shortcomings. First, it assumes that everyone has a choice. Not everyone who decides to repatriate, reaches that decision by themselves. For instance, it does not take into account the influence of husbands and wives in the decision making process.\textsuperscript{100} Second, it does not define ‘rational’. Third, it does not tell us what is the standard of measuring a ‘rational’ vis-à-vis an ‘irrational’ choice? Human actions involve both rational and irrational acts. What is rational to one person may not be rational to another. Fourth, what is the test used?

\begin{itemize}
\item \textsuperscript{96}Ibid
\item \textsuperscript{97}Ibid. Also, Anthony H. Richmond, ‘Sociological Theories of International Migration: The Case of Refugees’ [1988] 36 (2) Sage Publications 7.
\item \textsuperscript{98}Supra note 95. Also, Russell King, ‘Theories and typologies’ at 14.
\item \textsuperscript{99}Supra note 95
\item \textsuperscript{100}Everett S. Lee, ‘A Theory of Migration’, [1966] 3(1) Demography 51.
\end{itemize}
The rational choice theory assumes that all individuals have a choice and thus, are able to make calculated decisions. Secondly, the theory indicates an aspect of individualism. In that, the decision is made for selfish motives – convenience of the decision maker. Third, the theory assumes that any act committed has consequences: benefit or loss. Thus, in order to augment or diminish the consequences, a ‘rational’ decision must be made. In other words, a person will make a rational decision based on the profit or benefit expected from the action.

1.7 Literature review

The subject of durable solutions for refugees has received a lot of attention as evidenced by the number of scholarly writing and materials both at the international and domestic arena. However, much of the literature focuses on repatriation, resettlement and other related issues such as conditions of repatriation and involuntary returns. Very minimal literature exists on the inclusion of refugees in the decision making process to repatriate. In addition, the legal framework on participation of refugees is limited. This study will aim to fill this gap by putting forward a case for inclusion of urban Somali refugees in the decision making process to repatriate.

1.7.1 Voluntary repatriation and protection of refugees

Voluntary repatriation is one of the three main durable solutions that a refugee is entitled to. Others are local integration into the host state and resettlement to a third country. Since late 1980’s, voluntary repatriation is seen as the ‘most feasible’ of the three solutions.\(^{101}\) Resettlement places are rather limited whereas local integration is an unpopular option in developing countries where

majority of the world’s refugees are found. Voluntary repatriation brings refugees back to the protection of their state.

Commenting on the concept of repatriation, Bakewell notes that there is a stereotype by UNHCR that ‘people who are forced to leave their home very often want to go back to them’. He observes that the option to repatriate is usually presented to the refugees without examining their views: whether or not they still conceive their country of origin as ‘home’, whether the circumstances that made them flee still exist or whether they want to return. A similar point of view is shared by Harrell-Bond. She observes that, ‘it is common sense to believe that the best place for refugees is home’. The assumption being that no refugee leaves their homeland without the expectation that they will return one day. The foregoing suggests that refugees are weak and vulnerable and hence cannot be able to make decisions. According to George Homans (proponent of rational choice theory), individuals are capable of making rational decisions. Thus, refugees should be seen as strong and capable of making calculated decisions. Bakewell and Harrell-Bond suggest that the solution to this kind of assumption is to find out from the refugees’ their motivations to repatriate. In other words, refugees’ understanding of repatriation and their responses to the prospect of returning are inextricably linked with their idea of home. Bakewell’s study does not investigate the motivations of refugees who want to repatriate permanently or those who do not

102 Ibid.
103 Supra note 27 at 44.
104 Supra note 27 at 42.
105 Ibid.
107 Ibid at 43.
108 Supra note 95.
109 Supra note 106 at 48; also, supra note 27 at 10.
wish to repatriate. My study aims to fill this gap by suggesting that refugees are part and parcel of the decision making process and that they make decisions of whether or not to repatriate based on the options available.

Omata\textsuperscript{110} argues that repatriation is not always a triumphant experience for returnees. It is common place that voluntary repatriation occurs in countries struggling to emerge from lengthy wars: where peace is fragile, infrastructure weak and the future uncertain.\textsuperscript{111} Accordingly, he opines that there is a high likelihood of refugees facing significant socio-economic challenges while reintegrating in their home states.\textsuperscript{112} He also notes that ‘homecoming’ is misleading if ‘home’ is to be understood as ‘a place of refugees’ former housing before their exile.\textsuperscript{113} In his study of Liberian returnees, he explains that majority of the returnees did not have their houses at the time of the repatriation as they had been destroyed during the war.\textsuperscript{114} Although, Omata’s study identify the need to re-examine the concept of repatriation as a ‘home-coming’ it has two main shortcomings. First, it neglects to emphasis the need to involve refugees in re-examining the concept of ‘home-coming’. Second, it fails to suggest that refugees are independent decision makers. The rational choice theory pre-supposes that everyone has a choice.\textsuperscript{115} Refugees will decide whether or not to repatriate if the outcome adds to the sum total of their pleasure or benefit. This study aims to underscore that refugees are independent decision makers and should therefore be involved in the decision making process.

\textsuperscript{111} Supra note 11 at 131.
\textsuperscript{112} Supra note 110 at 265.
\textsuperscript{113} Supra note 110 at 269.
\textsuperscript{114} Ibid.
\textsuperscript{115} Supra note 95.
Chowdhory’s\textsuperscript{116} study highlights an interesting point of view that the non-inclusion of refugees as ‘citizens’ of the host state influences their motivation to repatriate. I do not concur with her because; there are empirical studies which show that the longer a refugee remains in exile the more difficult it is for them to go home.\textsuperscript{117} The contribution of Chowdhory’s work to this study is that it provides an understanding on the concept of ‘home’ – as envisioned by refugee communities living in exile. This is based on their ideas of belonging or not (within the territory they are living in). The ideal image of ‘home’ evokes a strong bond to reclaim status lost while in exile, which is further accentuated by the absence of proper status in exile.\textsuperscript{118} Chowdhory identifies two factors that influence a refugee decision to repatriate: the fact that refugee status is seen as temporary by the host state thus warranting their lesser status and secondly, refugees’ ties to ‘home’ or homeland. However, the study does not explore other options available to refugees. It emphasizes on local integration as a solution but fails to suggest other alternatives. It also fails to investigate other factors in the COA that influence refugees’ decision on whether or not to repatriate such as, insecurity, discrimination and lack of livelihoods. My study will suggest other options available to refugees other than local integration. It will also identify other social, economic and political factors that influence a refugee’s decision on whether or not to repatriate.

Bialczyk\textsuperscript{119} writes that refugees role as ‘central actors’ in the decision making process to repatriate has diminished over time. She notes that refugees have been ‘conspicuously absent’ from decision

\textsuperscript{117}Supra note 106 at 42. Also, in Dadaab camp, refugees who sought asylum in the 1990’s are less willing to voluntarily repatriate compared to those refugees who sought asylum in 2011-2012.
\textsuperscript{118}Supra note 116 at 15.
making process to repatriate.\textsuperscript{120} According to her, voluntary repatriation has been shaped by political interests rather than by refugees.\textsuperscript{121} Implied that refugees have no choice but to return.\textsuperscript{122} Thus, challenging the rational choice theory which assumes that individuals have choices. Additionally, Bialczyk argues that ‘home’ can evolve during exile. The COO can undergo significant changes while the refugees are in exile to the extent that, at the time of repatriation, refugees return to a place very different from where they had originally fled from.\textsuperscript{123} Her work fails to suggest ways in which refugees can be involved in the decision making process to repatriate and in finding other alternative solutions beyond voluntary repatriation. This study will aim to fill this gap by suggesting that an all-inclusive approach to the decision making process and alternative solutions other than voluntary repatriation.

1.7.2 Conditions in the country of origin conducive for voluntary repatriation

Research into conditions in the COO that influence refugees’ decisions to repatriate has been limited. Tripartite agreements are usually written by the UNHCR, COA and COO. More often than not, refugees are not consulted.

Abuya, in relation to repatriation of refugees, questions: ‘When can one say that it is safe for refugees to return to their pre-persecution or pre-conflict home, in other words what are the benchmarks used to determine that the conditions in the home state are deemed sufficiently stable and durable for refugees to repatriate?’\textsuperscript{124} He opines and I agree that, the impact of war and armed conflict on return possibilities is evident: destroyed infrastructure and resources in the home state

\footnotesize
\textsuperscript{120}Ibid at 16.  
\textsuperscript{121}Ibid at 25.  
\textsuperscript{122}Ibid at 26.  
\textsuperscript{123}Ibid at 12.  
\textsuperscript{124}Supra note 11 at 156-157.
discourage returns or make it unsustainable. In other words, conditions in the COO must have improved to enable a refugee decide whether to return. He highlights a gap in both the 1951 Refugee Convention and the 1969 OAU Convention, in that they fail to provide a criteria or guideline for determining when it is safe to repatriate refugees. According to him, four main pre-requisites should be considered in order to ensure sustainable returns. First, end of hostilities between warring parties. Second, signing of peace deals, third, restoration of democracy and the rule of law and lastly, reconstruction of physical infrastructure and institutions in the country of origin. He concludes that, ‘it is difficult to identify with mathematical precision whether conditions in a refugees’ state of origin have changed to promote return’. Case studies from various parts of the globe do offer guidance and this study will aim to do the same.

Bradley proposes a basic description of the conditions of fair returns. She contends that, the aim of ‘a fair return process is to restore a connection of duties and rights between the returnees and their government. Bradley argues that, “just as there are conditions such as, access to legal counsel and an impartial judiciary that must be met before a defendant can be said to enjoy her right to a fair trial, there are conditions that govern the just implementation of the refugee's right to return”. She proposes that, minimum conditions of respect for human rights, safety and prospects of economic development must be in place, in the areas of return. The main

124Ibid at 131.
126Ibid at 19.
128Ibid at 286.
129Ibid at 291.
130Ibid at 290.
contribution of Bradley to this study is that, she emphasizes the essence of upholding the choice of a refugee in repatriation – implying decision making. This is in line with the rational choice theory which assumes that individuals have choices. Individuals make choices to optimize their own interests or based on the value of the results expected. Bradley, however, focuses on refugee return from a moral perspective. This study will look at refugee repatriation from a legal aspect.

Basing his research on interviews with Liberian refugees living in Ghana, Omata notes that, ‘a simple reversal of the threats to physical safety is not sufficient reason to go back to the country of origin.’ Omata’s biggest contribution to this study is his suggestion which I concur with that, ‘if repatriation is not the most natural post-conflict outcome for forced migrants, the conditions necessary for people to decide to return voluntarily, and when and on what basis they decide to go back are crucial’. If refugees can determine when and on what basis or conditions they will return, it means that they have a choice. The rational choice theory (as propounded by George Homans) assumes that individuals have a choice and are capable of making considered decisions. Omata’s research does not explore the link between pre-conditions in the COO that influence refugees’ decision whether or not to repatriate [as identified in his research] and conditions that the UNHCR, COO and COA consider. My study will provide empirical research on pre-conditions to be considered by UNHCR, COO and COA before repatriation of urban Somali refugees. It will also propose a framework that integrates refugees’ perspective with those of the UNHCR, COA and COO.

132 Supra note 95.
133 Supra note 78 at 1282.
134 Ibid.
135 Supra note 95.
According to Hathaway, the ‘fundamental changes’ provision (in the 1951 Refugee Convention) was intended to allow host states divest themselves of the responsibility to offer protection to refugees who could seek the protection of their home state. The 1951 Refugee Convention fails to provide criteria for determining what changes amount to ‘fundamental’. Hathaway observes that, ‘governments have too often taken voluntary repatriation initiatives as a signal that they may commence their own less-than-voluntary repatriations’. This suggests that conditions in the COO do not have to have improved substantially. A view shared by Bhatia, who notes that majority of repatriation exercises are initiated by host government action or inaction. Relatedly, Sadako Ogata said that, it cannot be ignored that voluntary repatriation is more and more being compromised by the increasing numbers of forcible returns to unsafe areas. Hathaway’s study focuses on fundamental changes in the COO that justify repatriation of refugees. It however, fails to investigate other conditions conducive for refugee repatriation. This study will fill this gap.

Various scholars have identified conditions [mostly in the home state] that influenced refugees’ decisions to repatriate or consider returning. For example, Koser and Black identify availability of land as key factor that influenced the repatriation of Cambodian refugees from Thailand. They

---

note that majority of the refugees accepted to settle in any area as long as it was fertile. Moreover, they highlight the importance of social networks [with relatives or other locals] in areas of return. A view that is shared by Omata\textsuperscript{141} in his study of integration of Liberian refugees upon return from Ghana. Cohen,\textsuperscript{142} in a case study of the circumstances under which exiles from Eritrea and Ethiopia were likely to go back to their home country, observed that the most frequently cited consideration in deciding to repatriate voluntarily was ‘changes in home conditions’. Specifically, political change resulting in a new regime. Further, conditions in the COA was also an important consideration.

Tilde Nielsson\textsuperscript{143} on the unsuccessful return and reintegration of Iraqis from Denmark to Iraq identified ten socio-economic factors as highlighted by Iraqi refugees that can work against successful repatriation of returnees thus jeopardizing the sustainability of the repatriation exercise. They include; change in homeland, change by refugee during exile, a feeling of not belonging in the homeland, insufficient information about the home state, desire to leave host state as motive for repatriation, division within the household on the decision to repatriate, home state is still a post conflict society, vulnerability of the returnee, lack of economic opportunities and basic services in the country of origin. Although, the focus on my study is on conditions to consider when repatriating refugees, I agree with the finding of the study that failure to consider the highlighted issues will affect the decision of refugees in a repatriation exercise.

1.7.3 A refugee’s right to participate in decision making

The participation of refugees in decision making on whether or not to repatriate has been very minimal as evidenced by the limited literature in this area. Most recently, in 2002, UNHCR developed the Global Consultations on International Protection following discussions with refugees.\textsuperscript{144} The discussions looked at comparative analysis of the refugees’ personal experiences and their views about the practice in their countries of asylum.\textsuperscript{145} The outcome of the meeting was that refugees highlighted some of the political, social and economic challenges experienced during repatriation and came up with recommendations. Unfortunately, the recommendations did not see the light of day in any binding instrument. Nevertheless, the participation of refugees in the consultations was commendable. Broadly, my study aims at underlining the need to include refugees (camp and urban) in the decision making process. Specifically, it focuses on the exclusion of urban Somali refugees in the decision making process to repatriate.

Harrell-Bond\textsuperscript{146} observes that, in formulation of voluntary repatriation by UNHCR, COO and COA, there is ‘little evidence to suggest’\textsuperscript{147} that refugees have been consulted. A view shared by Barragaber who puts it in perspective that, ‘refugees do not have much say in the repatriation negotiations between the UNHCR, the host country and the refugee origin country’.\textsuperscript{148} This is

\textsuperscript{144} The meeting was at Institut du Developpement Social held in Rouen, France on 14-16 September 2001 and attended by approximately seventy refugees living in Europe.

\textsuperscript{145} Ibid at 2.

\textsuperscript{146} Supra note 106 at 42-45.

\textsuperscript{147} Ibidat 44.

consistent with Bentham’s theory in that, the exclusion of Somali refugees in the decision making process is at the advantage or benefit of the Kenyans, much to their loss or pain. Collins notes that, ‘once governments have decided that it is ‘safe’ for refugees to return, the agenda of the authorities over-ride those of the refugees’.149 The assumption being that, no refugee leaves their home country without the expectation that they will return one day. Harrell-Bond and Barragaber acknowledge that refugees have been sidelined in decision making process. However, their studies are theoretical and fail to suggest ways in which the UNHCR, COO and COA can involve refugees in the decision making process. My thesis argues that failure to involve refugees’ results to a myriad of problems including, infringement of their rights. This infringement can be resolved by their inclusion. This study will fill the gap by employing statistical analysis and suggesting ways in which refugees can actively participate in the decision making process.

Collins150 and Barragaber151 argue that refugees are active players who make ‘considered’ decision during their flight and exile. This view is also shared by Abuya152 who writes that ‘refugees exercise decision making during flight: to flee the situation posing danger to them’. From Homans’ perspective, individuals calculate the likely costs and benefits of any action before deciding what to do.153 The above suggests that before making the decision to repatriate, refugees weigh whether continued asylum is a better option than returning home. The contribution of Collins and Barragaber to this study is that, refugees do a cost benefit analysis of whether or not to repatriate

---

149 Supra note 93 at 21.
150 Ibid at 32-51.
152 Supra note 126 at 7.
153 Supra note 95 at 61 ‘no exchange continues unless both parties are making a profit’.
based on information available to them from the UNHCR, COO and COA. Nonetheless, both studies provide little information on how refugees can be involved in the decision making process. This study will aim to fill this gap.

Koser focuses on ‘information about conditions at home’. How refugees perceive conditions at home is crucial in their decision of whether or not to repatriate. He examines the interaction between information and repatriation. One of the ways that enable repatriation of refugees is the supply of accurate and objective information. This is consistent with the 1969 OAU Convention and the tripartite agreement standards. Karooma writes that refugees actively search for information about their home country to help them decide whether or not to return. For instance, he observes that in Uganda, Rwandan refugees spent part of each day seeking information about Rwanda through their social networks (recyclers, returnees, new asylum seekers). Afterwards, they would spread the information obtained throughout the camp to keep everyone informed. The information shared ranged from security, availability of work, land, health facilities to food and fuel supply. Koser’s and Karooma’s studies identify ways in which refugees use information obtained from their social networks to make the decision of whether or not repatriate. Nonetheless, they are silent on how refugees access information from the UNHCR, COO and COA. The rational

---

154 Supra note 93 at 32; also, supra note 151 at 604.
155 Khalid Koser, ‘Information and Repatriation: The Case of Mozambican Refugees in Malawi’ [1997] 10(1) Journal of Refugee Studies 1-2, ‘the decision of whether or not to repatriate is based on a comparison between conditions at exile with conditions at home’.
156 Ibid.
157 Ibid.
158 Article 15(1) of the tripartite agreement.
159 Ibid at 19.
160 Ibid.
161 Supra note 93 at 32.
choice theory (as propounded by George Homans) argues that individuals make decisions based on the value of the outcome expected. The theory assumes that refugees have access to information to enable them make a considered decision. Ideally, a refugee makes a ‘rationally calculated’ decision that will benefit or profit him after ‘due consideration of relevant information’ on the conditions in the COO. This study aims at filling this gap in two ways. First, by identifying ways in which refugees can access information from the UNHCR, COO and COA and second, by suggesting that refugees can be used as sources of information to complement what is being provided by UNHCR, COO and COA. This would in turn, enable refugees access credible information which would inform their decision on whether or not to return.

Stein and Cuny argue that, ‘failure to make women’s needs central to overall planning, and failure to involve women in all aspects of the planning, design, and implementation of repatriation programmes, undermine the total refugee programme and may, irresponsibly endanger most refugees’. The reason being that refugee women and those under their care, form the bulk of the returnees. Evenhuis study highlights the invisibility of refugee children in decision making process. Basing his analysis on the Australian refugee decision making framework, Evenhuis notes that it’s discriminatory towards separated children arriving in Australia as compared to adult asylum seekers. The Australian framework fails to facilitate children’s participation in decision making.

---

163 Supra note 95.
164 Supra note 95. Also, Russell King, ‘Theories and typologies’ at 14.
165 Supra note 82 at 182.
166 Ibid.
168 Ibid at 540.
169 Ibid at 536. Evenhuis identifies three major short-comings within Australia’s migration system that separated children face; first, lack of durable and efficient migration outcomes; child-inclusive law and procedure; suitable guardianship arrangements.
making. He proposes a system where children are empowered to participate in decision making process on an equal footing as the adults. Refugees’ participation in repatriation exercises play an important role in ensuring sustainable returns. Both studies underscore the need to include women and children in the decision making process. According to the rational choice theory, individuals have a choice. This theory assumes that women and children have a choice in deciding whether or not to repatriate. In reality however, the views of women and children compared to those of men are generally sidelined in decision making processes. Viewed from this perspective, failure to include women and children in the decision making process will result to a mischief or pain as they women and children have choices and are able to make considered decisions. However, both studies do not detail how women and children can participate in decision making processes and their views given equal consideration as those of men. This study will fill in the gap by identifying ways in which the views of women and children can be given equal consideration in the decision making process to repatriate.

Bakewell questions the participation of every family member in the decision making process to repatriate. He notes that at times, the decision to repatriate could be made by chiefs or elders on behalf of the community thus, eliminating the participation of individuals. Relatedly, in her research on unsuccessful returns of Iraqi refugees from Denmark, Nielsson notes that the decision to repatriate was made solely by men. She underscores that men, women and children may have different opinions concerning the repatriation process and that, not everyone within the

---

170 Ibid at 535.
171 Supra note 148 at 162.
172 Supra note 95.
174 Ibid.
175 Supra note 143 at 10-12.
household may be willing to repatriate. Bakewell’s and Nielsson’s works reveal that individuals within a household have been excluded from decision making process on whether or not to repatriate. However, they do not propose practical ways of ensuring that every member in a family unit is involved in decision making process and their voices heard. Viewed from the rational choice theory, these studies assume that every person in a household arrives at the decision to repatriate on their own. In reality, however, the decision to repatriate is usually made by others. My study will fill this gap by suggesting ways in which men, women and youth can effectively participate in decision making process and that their views are given equal weight.

1.8 Justification

In January 2014, following the signing of the tripartite agreement between UNHCR and Governments of Kenya and Somalia, the International Organization for Migration (IOM) supported by the UNHCR carried out intention surveys at the Dadaab camp to determine the number of Somali refugees willing to go back to Somalia. However, no such approach was carried out for the Somali refugees living in urban areas. Thus, the justification for this study. It’s worth mentioning that, non-inclusion in the decision making process to repatriate is a problem facing refugees across the global. Accordingly, the thesis used urban Somali refugees living in Eastleigh as a case study. In addition, the study focuses on Somali refugees as opposed to all refugees because the tripartite agreement was signed between the Governments of Kenya and Somalia and the UNHCR.

176Ibid at 11.
177Supra note 95.
While this study focuses solely on repatriation of Somalis from Kenya, it ‘acknowledges that parallel and simultaneous return’\textsuperscript{178} of Somali refugees is likely to take place within the region (from Ethiopia and Yemen) in the coming years. Therefore, the proposed framework will provide a reference point that can be used by the Governments of Yemen and Ethiopia in the repatriation of Somali refugees from their countries.

The study aims at contributing to the developing jurisprudence across the globe on inclusion of refugees in the decision making process on whether or not return. A lot of literature exists on durable solutions entitled to refugees. However, minimal scholarly work exists on inclusion of refugees in the decision making process. Hence, this study will inform academia, policy makers, humanitarian actors and governments.

1.9 Research methodology

The study was conducted through field work, use of textual analysis and case study. These methods are discussed below.

1.9.1 Field work

The field work was necessitated by gaps identified during my literature review. Limited scholarly work exists on the extent to which inclusion of refugees in the decision making process will lead to their informed decision on whether or not to repatriate. Moreover, limited statistical evidence exists to back up the minimal theoretical information.

\textsuperscript{178}Supra note 64.
Written permission to conduct the field work was obtained from the National Commission for Science, Technology and Innovation (NACOSTI) in Nairobi. The field work was collected from urban Somali refugees (I used urban Somali refugees as a case study), representatives from UNHCR Kenya (Dadaab sub-office), UNHCR Somalia, Danish Refugee Council (an international NGO working with Somali refugees), Refugee Consortium of Kenya (a local NGO working with refugees in Kenya), and officials from the Refugees Affairs Secretariat (formerly Department of Refugee Affairs) and the Directorate of immigration and registration of persons in Kenya. The rationale for this approach was to ensure that key stakeholders in the repatriation process were included from various levels. Thus, managing any biases as far as possible.

A total of 25 interviews were conducted with urban Somali refugees, representatives from UNHCR Kenya (Dadaab sub-office), UNHCR Somalia, Danish Refugee Council (an international NGO working with Somali refugees), Refugee Consortium of Kenya (a local NGO working with refugees in Kenya), and officials from the Refugees Affairs Secretariat (formerly Department of Refugee Affairs) and the Directorate of immigration and registration of persons in Kenya. Of the 25 interviewees, 13 (52%) were male and 12 (48%) were female. An age, gender and diversity approach was used in order to ensure that all views were represented in my research.

I conducted the interviews using two separate interview schedules. One, for the institutional interviews and the other one for the urban Somali refugees. The interview schedules gave the

---

179 Attached as annex five.
interviewees freedom to respond in their own words and in greater depth. The open ended questions allowed the refugees to share their feelings, thoughts, interests, hopes, motivations, decisions and what they thought was the best way for refugees to be involved in decision making process. In the following section, I will first discuss my interviews with urban Somali refugees in Eastleigh and then my institutional interviews.

I interviewed 19 urban Somali refugees of different age, gender and diversity. A colleague at work introduced me to one of the refugees. The refugee then introduced me to a group of refugees, who also introduced me to others.181 Before the actual interviews, I pre-tested the interview schedule.182 I conducted the pre-test in order to find out whether the questions were understandable, what questions could be eliminated or added. I did this with one of the refugees in her house in Eastleigh. One of the areas that the pre-testing identified was that some sentences were long and phrased poorly. Changes were effected to express more accurately. Confidentiality and anonymity of the interviewees was assured.183 For example, I informed the interviewees that pseudonyms would be used in the analysis and presentation of the research data. Thus, observing the right to privacy of all respondents. Moreover, I sought written or verbal consent from the respondents to conduct the interview and record the information they gave me. I also informed them about the purpose for which the data was going to be used.

181 Ibid at 51.
In five of the interviews, the language of the interview was done in English and Somali.\textsuperscript{184} This was made possible with the assistance of one of the refugees. She interpreted the interview schedule from English to Somali and from Somali to English. In the other interviews I interpreted the interview schedule from English to Swahili and vice versa. Interviews that I conducted together with the translator took a longer time whereas those that I did alone took a shorter period. The approximate time per interview was one hour. In addition, the use of a translator (one of the refugees) was challenging as some words would be lost in the interpretation. Nevertheless, words closest to what the refugee expressed were used.

Eighteen of the interviews with urban Somali refugees were held in Eastleigh, whereas one was held in Westlands, Nairobi County. I travelled by bus to Eastleigh and Westlands to meet up with the interviewees. The locations of the interviews had been suggested by the respondents as it was convenient for them. I met with the interviewees either in their homes or at restaurants in Eastleigh and Westlands. This is because they felt comfortable meeting at their homes or at the restaurants. In restaurants, we sat in isolated tables to maintain confidentiality. I recorded responses from the interviewees in my notebook and in the interview schedules that I had printed out.

In order to maximize on my trips to Eastleigh, I scheduled my interviews in such a way that I could interview many refugees within a day. However, this was not possible for three interviews which were conducted one per day. I rescheduled the dates as the interviewees had other commitments. Interviews with urban Somali refugees were conducted between June and December 2015.

\textsuperscript{184}Ibid at 177.
after my fieldwork; I was in touch with some of my interviewees. In December 2015, I met with one of the urban Somali refugee interviewees to see how she was doing.

I conducted six institutional interviews. I interviewed a colleague from the Danish Refugee Council who then put me in contact with representatives from UNHCR Kenya and Refugee Consortium of Kenya, and an official from the Refugees Affairs Secretariat.¹⁸⁵ The official from the Refugees Affairs Secretariat then referred me to speak with an official from the Directorate of immigration and registration of persons in Kenya. For my interview with the representative from UNHCR Somalia, a colleague at work introduced me to them. The interviews were conducted in September 2016.

Out of the six institutional interviews, one (UNHCR Kenya) was conducted through Skype as the interviewee was at Dadaab refugee camp, two interviews were held at restaurants (UNHCR Somalia and Refugee Consortium of Kenya) whereas the rest were done at the interviewees offices within Nairobi County. I travelled to meet with interviewees by bus. The location of the meeting was suggested by my interviewees as it was convenient and comfortable for them. At the restaurant, we sat at isolated tables for confidentiality purposes.

Before conducting the interviews, I pre-tested the interview schedule with a colleague at Danish Refugee Council.¹⁸⁶ The pre-test showed that some questions were repetitive. I edited the questions

---

¹⁸⁵ Supra note 180 at 51.
in light of the feedback provided. I informed the interviewees about the purpose of my interviews and obtained their informed consent before starting the interviews. Participants were informed of their right to voluntarily agree or decline to participate or withdraw participation any time. Confidentiality and anonymity of the information was assured. I informed the interviewees that pseudonym names would be used in the analysis of the information provided.

The institutional interviews were done in English. I recorded the information in English through note taking in my notebook and in the printed interview schedules. I was not able to schedule my institutional interviews as they were dependent on the availability of my interviewees. Accordingly, the interview date and time was based on the availability of each interviewee. Each of these interviews took approximately forty five minutes.

### 1.9.2 Use of textual analysis

I read statutes such as the 1951 Refugee Convention, its 1967 Protocol and the 1969 OAU Convention. I also analyzed the gaps in the tripartite agreement governing the Somali refugees’ repatriation from Kenya. Other primary sources reviewed included, case laws, the UN SC Resolutions and UNHCR EXCOM conclusions. The research was also based on existing literature on voluntary repatriation. I read and analyzed texts in books, legal journals, newspapers, websites, the internet, magazines, reports, dissertations and theses from other students. My readings and analysis was mostly done from the University of Nairobi, School of Law campus.

### 1.9.3 Case study
In order to explore ways in which refugees could be involved in the decision making process, the study used urban Somali refugees in Kenya as a case study. This thesis acknowledges that non-inclusion of refugees in the decision making process to repatriate is not a unique problem for urban Somali refugees only, but one that faces refugees across the globe.

1.10 Chapter breakdown

The study has five chapters. Each chapter discusses specific issues on the inclusion of refugees in the decision making process. Below is a breakdown of the chapters.

1. Chapter One: Introduction: General Overview and Outline

This is the introductory chapter; it contains the statement of the problem, the literature review, theoretical framework, justification of the study, the research methodology as well as the scope and the limitation of the study.

2. Chapter Two: Voluntary repatriation of refugees

Chapter two examines the concept of voluntary repatriation in a general manner. It highlights that voluntary repatriation is usually promoted by the UNHCR, COO and COA as the most feasible solution to the refugee plight without examining whether it remains relevant to the refugee crises. Refugees are not involved in deciding whether they want to repatriate or not. UNHCR, COO and COA generally depict voluntary repatriation as returning ‘home’ and assume that refugees want to go back. This view is out of touch with reality. The chapter will suggest ways in which Somali

---

187Ibid at 113.
refugees could be involved in the voluntary repatriation and in re-examining it as the most feasible solution.

3. Chapter Three: Conditions conducive for voluntary repatriation

This chapter examines the conditions conducive for the voluntary repatriation of refugees. It highlights that before UNHCR, COA and COO decide to repatriate refugee, they must ensure that conditions in the COO are conducive. One way of doing this is by conducting a thorough assessment of the conditions in the COO. I argue that refugees should be included in these assessments and their views given consideration. Under the tripartite agreement the FGS is responsible for creating conditions conducive for the voluntary return of refugees. However, it does not detail what these conditions include. Thus, this chapter argues that refugees should be involved in developing the basic minimum standards that should be in place before their repatriation. In order for refugees to make an informed decision they should have access to information on the conditions in the COO and participate in the ‘go and see’ visits. These visits will allow them to see the existing conditions in Somalia.

4. Chapter Four: A refugee’s right to participate in the decision making

In order for a refugee to exercise their right of participation, they must have access to information. The tripartite agreement provides that the UNHCR, FGS and GOK should provide accurate and objective information to the refugees to inform their decision of whether or not to repatriate. However, it is silent on modalities in which refugees can access this information. This chapter aims at identifying ways in which information sharing and dissemination among the UNHCR, COO, COA and refugees can be strengthened. The chapter also argues that the non-inclusion of
refugees in the decision making process results to a myriad of legal problems which can be resolved by including them. The chapter identifies ways in which refugees can be involved in the decision making process. Chapter four emphasizes that refugees need to be involved in all the stages of decision making to repatriate.

5. Chapter Five: Summary and Recommendations

This chapter summarizes the key findings of the research, linking them to the preceding chapters. It argues that the identified gaps can be “filled in” if the UNHCR, GOK and FGS involved urban refugees in the decision making process.

1.1 Limitations of the study

The main methodological limitation of this study was that the sample size selected in the fieldwork was small. It does not capture views from all Somali refugees in Kenya. Second, the field work focused on urban Somali refugees living in Eastleigh, Nairobi. In other words, it excluded the views of Somali refugees in the camps. This study acknowledges that, the majority of Somali refugees are found at the Dadaab camp as opposed to urban areas. However, the focus of the thesis was on urban Somali refugees living in Eastleigh. This was due to the fact that in 2014, IOM and UNHCR conducted intention surveys for the Somali refugees at the Dadaab camp but no consultations were held with urban refugees. To enrich the study, I also interviewed staffs from UNHCR Somalia and Kenya, NGOs working with Somali refugees and relevant government officials supporting the repatriation process and they provided information on both Dadaab and urban refugees. Nonetheless, the discourse of the thesis is applicable to all refugees (camp and
urban) as I used the urban Somali refugees as a case study. Third, the project was self-funded. Hence, the sample size determination was influenced largely by limited availability of funds. Fourth, the field work with urban Somali refugees used an interpreter to translate the questions from English to Somali or Swahili and vice versa. Thus, the interviews took longer than planned. Also, some of the original words used by the interviewees may have been lost in the translation. Lastly, it was difficult to schedule my institutional interviews as the time and date of the interviews was dependent on the availability of my interviewees. This was the case for two of my institutional interviews. After several calls and emails, I was able to secure the interviews.

CHAPTER 2

VOLUNTARY REPATRIATION AND PROTECTION OF REFUGEES

I was only a young boy when I arrived in Kenya. We came to Kenya because of the civil war in Somalia in 1991. Now I am 31 years. I am afraid and I do not want to
return. I do not know Somalia. How can I say Somalia is home? ...I absolutely do not want to go back to Somalia. Its better they take us somewhere else.\textsuperscript{188}

\section{2.1 Introduction}

Of the three durable solutions – voluntary repatriation, resettlement to a third country and local integration into the host state – voluntary repatriation is viewed by the UNHCR as ‘the ideal solution to refugee problems’.\textsuperscript{189} As a solution to the refugee crisis, voluntary repatriation gained preference in late 1980’s following a paradigm shift in the preferred solution: from resettlement to voluntary repatriation.\textsuperscript{190} Commentators attribute the shift to Western states reactions to ensure that ‘the growing global refugee population did not flood their borders.’\textsuperscript{191} In fact, UNHCR declared the 1990’s as the decade of voluntary repatriation.\textsuperscript{192}

Recently, voluntary repatriation has been promoted due to lack of burden sharing and donor fatigue.\textsuperscript{193} Chimni, notes that majority of refugees are located in third world countries which shoulder the burden of hosting the refugees with minimal support from donors or developed

\textsuperscript{188} Interview with Abdi in Eastleigh, Nairobi County (22/11/2015).
\textsuperscript{189} UNHCR EXCOM Conclusion No. 74 (XLV)- 1994.
\textsuperscript{190} Supra note 11 at 155. Also, supra note 167 at 2.
\textsuperscript{191} BS Chimni, 'Legal and Policy Issues relating to UNHCR’s involvement in the Protection, Facilitation or Encouragement of Voluntary Repatriation' [1993] UNHCR Round table consultations on voluntary repatriation\textsuperscript{2}. Also, supra note 106 at 52, “It was feared that the flow could not be contained and that Europe would be inundated. During the 1980s the numbers of refugees arriving by sea or by air to claim asylum in the West greatly increased.” Currently, the European Union entered into agreement with Turkey to screen all Syrian refugees before they could admit them into their countries.
\textsuperscript{192} Sadako Ogata declared that 1990’s would be “the decade if voluntary repatriation” following numerous repatriation exercises in Angola, Iraq, Somalia, Cambodia. Supra note 100, ‘more than 9 million refugees returned home between 1991and 1996’.
\textsuperscript{193} James Hathaway, 'The Right of States’ … at 175 notes that, “burdens on asylum countries can be extreme, and may only be partly offset by the arrival of international aid and protection resources”. He also notes that there is disinclination of the wealthier countries that fund UNHCR and most agencies that meet the costs of protecting refugees. Megan Bradley, \textit{Refugee Repatriation; Justice, Responsibility and Redress} (Cambridge University Press 2013) 8, says that, the current trend of conflicts being- protracted conflicts and the hospitality given by host countries towards refugees (especially in Africa) is “flagging” and unlikely to go on without “donor support and burden sharing”. Supra note 11 at 137-138, “…67 per cent of refugees in protracted situations live in the world’s poorest countries” and “…these states are themselves economically disadvantaged and, therefore, unable to meet the cost of providing effective security.” Also, supra note 11 at 154; “it is unrealistic to expect African governments to continue hosting large numbers of refugees without a solid resource foundation”. Supra note 196 at 4.
countries. Consequently, host governments are unable to cater for the needs of the refugees in addition to those of their own citizens and thus, encourage voluntary repatriation. Mary said:

Donor fatigue contributed to the signing of the tripartite agreement promoting voluntary return Somalis. The Syrian Crisis affected UNHCR Somalia donor money. There was also pressure from the GOK because of terrorism within the country (the terrorist attack Westgate Mall).

According to Tom:

There is a lot of pressure from the GOK to the UNHCR to repatriate refugees. In turn, refugees are being coerced to make the decision to return, though still maintaining that the repatriation is voluntary.

Though voluntary repatriation has been given a lot of attention by the UNHCR, it remains doubtful whether it remains relevant as the ‘most preferred solution’ to the refugee crisis. With the increasingly protracted nature of conflicts as in Afghanistan, Democratic Republic of Congo and Somalia, the number of refugees repatriated has declined. New conflicts as in the case of South Sudan, Central African Republic, Mali and Syrian Arab Republic have contributed to an increase in the number of refugees globally which is not commensurate to the existing durable solutions. To put it into perspective, in 2014, there were a total of 19.5 million refugees with nearly three million new refugees. The number of refugees repatriated in the same year was 0.65%, whereas those resettled to third countries were over 0.54%. Local integration has

194 Supra note 191 at 4.
195 As witnessed by the number of Executive Committee Conclusions on the subject matter.
196 Supra note 78 at 1294.
197 IRIN report, ‘Durable solutions for refugees prove elusive’, available at http://www.irinnews.org/report/101735/durable-solutions-for-refugee-prove-elusive#.VjE4ZRnfom8 (10 July 2015) accessed on 12/07/2015...“In 2014, just 126,000 refugees were able to go home – the lowest number of returns recorded since 1983 and a significant drop from the previous year when 415,000 went home.”
198 UNHCR, World at War; UNHCR Global Trends on Forced Displacement in 2014 (UNHCR 2015) 3.
199 Ibid.
200 Ibid.
remained elusive as it is ‘a politically sensitive and unpopular option in many host countries unwilling to accept the idea of refugees competing with locals for jobs and resources’.\textsuperscript{201} Ben shared the following sentiments:

In terms of other durable solutions, Somali refugees have no options but to return. Local integration is not viable in Kenya and resettlement is not a right, it’s a protection tool and only one percent are usually resettled.\textsuperscript{202} The figure below shows the declining trend of refugee repatriations in the world. It justifies the need to re-examine voluntary repatriation as the most feasible solution to the plight of refugees.

The foregoing suggests that other alternatives to the three durable solutions ought to be explored by States and the UNHCR in order to deal with the refugee crisis. With regards to the current study, Tom recommended:

Somalia should join the East African Community (EAC). The EAC protocol allows people within Kenya, Uganda, Tanzania, Rwanda and Burundi to move and work within the region. Since Somalis are living in Kenya, Uganda, Tanzania and Rwanda, it would be easy for refugees to get work permits to work in the region. Thus, solving the refugee problems.\textsuperscript{203}

\begin{figure}[h]
\centering
\includegraphics[width=0.8\textwidth]{refugee_returns_2001-2014.png}
\caption{Refugee returns: 2001-2014 (in millions)}
\end{figure}

\textsuperscript{201} Supra note 197.
\textsuperscript{202} Interview with Ben over skype (21/09/2016).
\textsuperscript{203} Interview with Tom at City Centre, Nairobi (09/09/2016).
As written in chapter one, urban Somali refugees in Kenya contribute to the economy of the country. Consequently, the GOK must take note of the economic benefits arising from the presence of urban Somali refugees and review their status. In order to do so, the GOK must review the Refugee Act of Kenya (2006) so that refugees conducting business in Kenya are granted permanent residency.

My interviewees suggested the following alternative options which can be explored by the GOK, FGS, UNHCR and the Somali refugees. They include; permanent residency, enhancing accessibility to business and work permits for Somali refugees, application for citizenship (mixed marriages between Somali and Kenyans) and repatriation in a phased manner. In coming up alternative options to the voluntary repatriation, refugees must be involved in the process as the decision is about their lives.

2.2 The right to return under international law

Theoretically, no refugee can be repatriated against their will. In other words, as long as an individual satisfies the definition of a refugee as outlined in the legal instruments, they cannot be forcefully returned. Nonetheless, in exceptional circumstances a refugee may be legally and forcefully returned to their country of origin. The international community has designed many legal instruments aimed at protecting refugees. These instruments fall under various categories

\[^{204}\text{Supra note 11 at 151 and supra note 23 at 23.}\]

\[^{205}\text{Article 5 (1) of the 1969 OAU Convention.}\]

\[^{206}\text{Article 33 (1) of the 1951 Refugee Convention.}\]

namely: international human rights instruments (United Nations Convention Relating to the Status of Refugees\textsuperscript{208} and its 1967 Protocol, the Universal Declaration of Human Rights\textsuperscript{209}), regional legal instruments (The Organization of Africa Union Convention governing the specific aspects of refugee problems in Africa\textsuperscript{210}, the African Charter on People and Human Rights\textsuperscript{211}) and soft law instruments (1984 Cartagena Declaration on Refugees).\textsuperscript{212}

Voluntary repatriation is implied under articles 1C (1) and (4) of the 1951 Refugee Convention. A person ceases to be a refugee once they voluntarily re-avail them self to the protection of their home state\textsuperscript{213} or if the refugee voluntarily re-establish them self in the country of origin.\textsuperscript{214} In both circumstances, the refugee would no longer be in need of international protection.

The 1969 OAU Convention provides for voluntary repatriation under article(s) five. It also mandates all member states to respect the voluntary character of repatriation in all cases and ensure that no refugee is repatriated against their will.\textsuperscript{215} The 1969 OAU Convention was passed in response to the weakness inherent in the 1951 Refugee Convention.\textsuperscript{216} It plays a key role in reflecting the African approach to refugees and has gained widespread acceptance by almost all

\textsuperscript{208}Supra note 16.
\textsuperscript{209}Supra note 21.
\textsuperscript{210}Supra note 17.
\textsuperscript{211}Article 12 (2) of the ACPHRs.
\textsuperscript{212}Cartagena Declaration on Refugees (19-22 November 1984). The Declaration of Cartagena emerged in the context of the conflicts that seriously affected Central America at the end of the 1970s and early 1980s. The civil wars in Nicaragua, El Salvador, and Guatemala resulted in the displacement of thousands of people.
\textsuperscript{213}Article 1C (1) of the 1951 Refugee Convention.
\textsuperscript{214}Article 1C (4) of the 1951 Refugee Convention.
\textsuperscript{215}Article 5(1) of the 1969 OAU Convention.
\textsuperscript{216}Article 1 A (2) of the 1951 Refugee Convention provides that, a refugee is any person affected as a result of the events which occurred before 1 January, 1951.
states, at least on paper. Additionally, it provides a model for other regions grappling with mass refugee influx, such as Central America.217

International human rights instruments recognize the right of individuals to return to their country of origin. The Universal Declaration of Human Rights218 (UDHR) provides for the right of return under Article 13 (2) as follows, ‘everyone has the right to leave any country, including his own, and to return to his country’. This implies that a country of origin has an obligation to admit a refugee when he/she decides to go back to his country and whether they choose to exercise this right or not is a matter of individual decision. A similar provision was adopted by the 1966 International Covenant on Civil and Political Rights (ICCPR) under Article 12 (4), which provides that, ‘no one shall be arbitrarily deprived of the right to enter his own country’.219 The International Convention on the Elimination of all Forms of Racial Discrimination under Article 5(d) (ii) provides for ‘the right to leave any country, including one's own, and to return to one's country’. The United Nations Convention on the Rights of the Child provides that, ‘States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country’.220

There are also soft laws that have provided for voluntary repatriation such as, the 1984 Cartagena Declaration on Refugees.221 Conclusion 12 ‘reiterates the voluntary and individual character of repatriation of refugees and the need for it to be conducted in conditions of absolute safety’. The

217 Supra note 212.
218 Article 13 (2) of the UDHR.
219 Article 12(4) of the ICCPR.
221 Supra note 212.
United Nations General Assembly (UNGA) has upheld the right to return in general terms. For example, in 1996 the UNGA reaffirmed that ‘…voluntary repatriation, when feasible, is the ideal solution to refugee problems, and calls upon countries of origin, countries of asylum, the Office of the High Commissioner and the international community as a whole to do everything possible to enable refugees to exercise their right to return home in safety and dignity.’

In sum, right to return basically means that a refugee has a right to decide how and when they should return home. This implies choice. Thus, in the words of George Homans (proponent of the rational choice theory), refugees make a calculated decision of whether or not to exercise their right of return based on the expected output in the COO. Zeinab understood this:

> The voluntary repatriation is not appropriate at this time. I would suggest to UNHCR, GOK and FGS to let refugees take their time until they [refugees] find it appropriate to go back home. There is insecurity in Somalia and the GOK and FGS have not put in place mechanisms to ensure the security of refugees while returning.

### 2.3 Voluntary repatriation of refugees

The international refugee law anticipated that the refugee status would be temporary. The design of the 1951 Refugee Convention was that, refugee status cease to exist once a refugee re-establishes themselves in the COO. Similarly, the framing of the 1969 OAU Convention was that, ‘voluntary repatriation should be the ultimate solution for African refugees’ once the
conflict ended. The assumption was that African refugees [fleeing colonial domination] would most likely want to go back to their countries following national independence.\textsuperscript{227}

Theoretically, article 33 (1) of the 1951 Refugee Convention suggests that refugees have a choice of repatriating when they decide to do so.\textsuperscript{228} This is because; the article protects refugees from being returned to areas where their life or freedom would be at risk. No reservations are permitted on the non-refoulement principle. In practice however, this is an unrealistic objective because of three reasons. First, refugees are usually not consulted by the UNHCR, COO and COA on whether or not they want to return. They are only informed that they have to return to their COO. Second, needless to say, in many countries in the world, there have been increasing incidences of forced repatriations of refugees, such as Syrian refugees from Greece and Turkey.\textsuperscript{229} In such instances, refugees are not given alternative options.

Third, host communities have become increasingly hostile towards refugees. In South Africa, for example, empirical data shows that South Africans are indeed xenophobic towards refugees.\textsuperscript{230} Abuya writes that South Africa must address ‘the growing xenophobic and anti-refugee attitudes together with outright intolerance of asylum seekers’.\textsuperscript{231} Indeed, such attitudes and intolerance undermine refugees’ choice in deciding whether or not to repatriate. The hostile environment

\begin{itemize}
\item \textsuperscript{227}Ibid.
\item \textsuperscript{228}This article provides for the right of non-refoulement. Also, supra note 93 at 21.
\item \textsuperscript{230}Supra note 126 at 18
\item \textsuperscript{231}Ibid.
\end{itemize}
eventually forced some refugees to leave South Africa. The foregoing challenges Homans’s assumptions that individual have choices.²³² Lack of options leave refugees without a choice but to go back home.

Stein and Cuny argue that, involuntary returns ‘represent a failure by the international community to provide for and protect refugees’.²³³ Implying that international laws should be interpreted in ways that serve to strengthen rather than weaken the protection of refugees against the vulnerabilities to which they are exposed.²³⁴ The best form of protecting refugees against forced returns would be to involve them in the decision making process to repatriate. The tripartite agreement provides that, UNHCR, FGS and GOK ‘shall provide Somali refugees with objective, accurate and timely information on current conditions in Somalia’ to inform their decision of whether or not to repatriate.²³⁵ The supply of accurate and objective information is one of the ways in which refugees participate decision making.²³⁶ Mohamed suggested:

The only thing that can ensure voluntary return is to consult with the refugees. I am sure there are refugees who are willing to return if they are consulted. I would recommend to the UNHCR, GOK and FGS to improve refugees’ involvement in the process of repatriation as now [in Kenya] it is not involving.²³⁷

Tom said:

For Somalis to return to their COO, they must be involved in the repatriation process. Refugees have their own community leaders. These leaders should be identified and be made part and parcel of the strategies and programs towards repatriation of Somali refugees.²³⁸

²³² Supra note 95.
²³³ Supra note 82 at 181.
²³⁴ Supra note 26 at 325.
²³⁵ Article 15 (1) of the tripartite agreement.
²³⁶ Supra note 155 at 2.
²³⁷ Interview with Mohamed in Eastleigh, Nairobi County (19/11/2015).
²³⁸ Interview with Tom in City Centre, Nairobi (09/09/2016).
The dilemma with regards to involvement of urban Somali refugees in the voluntary repatriation is; at what stage should urban Somali refugees be involved? At what point is the voice of the refugee supposed to be heard? My interviewees said that Somali refugees (urban and camp) were excluded in the drafting and signing of the tripartite agreement. After it was signed, there were some efforts at Dadaab camp to involve refugees through camp committees. However no such approach was done for the urban Somali refugees. Since the tripartite agreement is coming to an end in November 2016, I would recommend to the UNHCR, GOK and FGS to involve Somali refugees in the negotiation of an extension or in the creation of a new one. The tripartite agreement says very little about the inclusion of refugees.239 This thesis will aim to suggest more ways in which urban Somali refugees can be involved the decision making process.

2.4 Re-examining voluntary repatriation

Three fundamental dilemmas arise while describing voluntary repatriation of refugees to a country experiencing protracted conflict as in Somalia. First, there seems to be an assumption by UNHCR and states that once the cause of their flight is no longer in existence, refugees will identify with their home country and will want to return.240 Omata observes that institutions dealing with refugees depict repatriation as ‘home coming’.241 Harrell-Bond notes that ‘it is common sense to believe that the best place for refugees is home.’242 This is demonstrated by Zeinab, who said that:

---

239 Article 4(5) of the tripartite agreement.
241 Supra note 110 at 269.
242 Supra note 106 at 43.
Home is the best place to be in but the current circumstances [in Somalia] are making me stay here [Kenya].

Mohamed confessed that:

Of course Somalia is home and will forever be! Some of my family members are still living in Somalia and I have to go back one day.

The assumption is dangerous and out of touch with the reality. It does not take into consideration that some refugees may opt not to return. Some of the urban Somali refugees interviewed came to Kenya when they were children were not willing to go back to Somalia. Abdi commented:

I was only a young boy when I arrived in Kenya and I do not know Somalia. How can I say Somalia is home? ...I absolutely do not want to go back to Somalia.

Moreover, many of the returnees are going back to ‘destroyed infrastructure and resources in their home state,’ which cannot be equated to a ‘home’. As Yusuf said:

There are no schools, hospitals, no employment, no freedom of religion, no trust among people, there is revenge killing.

Black and Koser have depicted repatriation as ‘a new life cycle in a challenging environment’.

A view shared by UNHCR. Mohamed understood this too well:

Rebuilding my livelihood conditions will be very challenging...back at home I don’t have any support at all. Now, I am getting small money. I can save a little and I can send some to my family. I am hoping to get more opportunity here [in Kenya] and improve my financial capacity before I return home.

---

243 Interview with Zeinab in Eastleigh, Nairobi County (15/11/2015).
244 Interview with Mohamed in Eastleigh, Nairobi County (19/11/2015).
245 During repatriation exercises a refugee may opt not to return where the “well-founded fear of persecution” persists.
246 Interview with Abdi in Eastleigh, Nairobi County (22/11/2015).
247 Supra note 11 at 131.
248 Interview with Yusuf in Eastleigh, Nairobi County (22/11/2015).
249 Supra note 140 at 11-12.
251 Interview with Mohamed in Eastleigh, Nairobi County (19/11/2015).
The above comments suggest that, though urban Somali refugees consider Somalia to be home, they were not willing to repatriate yet. Thus, the need to re-examine the simplistic homecoming perception. The UNHCR, GOK and FGS should consult with urban Somali refugees and find out first whether or not they would like to repatriate. If they agree, then it would be important for the UNHCR, GOK and FGS to sit down and discuss the conditions that should be in place before repatriation. A comprehensive plan of the minimum basics should be agreed upon by refugees, UNHCR, COO and COA. If urban Somali refugees decide that they do not want to repatriate, then UNHCR, GOK and FGS should discuss with them about other options. As highlighted above, majority of the interviewees mentioned insecurity and lack of basic services as one of the main reasons of opting to stay. Thus, before repatriating urban Somali refugees, security and basic services must be in place.

Second, repatriation has been closely linked to the ‘myth of nostalgia for a home and memories of the past associated with return’. The assumption being that the returnees will be going back to a happy and safe home. Bakewell opines that, ‘the dreams of going home may be based on nostalgia for a past which cannot be recreated and when return is practicable, it is not necessarily desirable’ to the refugees. Bashir understood the essence of the term home:

   I believe a home to be a place where you are physically and emotionally safe, and as far as I know, I am not safe in Somalia.

Abdi M, when asked whether he would like to go back to Somalia said:

252Vincent Chetail, 'Voluntary Repatriation in Public International Law: Concepts and Contents' [2004] 23(3) Refugee Survey Quarterly 2. Also, supra note 72 at 45, the assumption that “no refugee leaves his homeland without the expectation that he will one day return.”
253Supra note 173 at 10.
254Interview with Bashir in Eastleigh, Nairobi county (28/11/2015).
Yes. I don’t want to be a refugee forever. However, the security and economic conditions in Somalia are threatening. If these conditions were promising, I would go back home.\footnote{Interview with Abdi M at Eastleigh, Nairobi County (17/11/2015).}

Needless to say, a refugee who witnessed direct violence or had traumatic experiences [in the COO] is not likely to repatriate despite their strong bond with their COO or their duration in exile. Abuya\footnote{Supra note 1 at 8.} borrowing the words of one Iraqi female refugee notes:

“Nobody wants to leave a happy safe home, we don’t come because of choice. We leave our country and our homes because we can die if we stay.”

As highlighted above, when return is proposed it may not necessarily be desirable for the refugees. Thus, even if voluntary repatriation is considered as the most feasible solution to the refugee crisis, UNHCR, COO and COA need to consult with refugees in deciding to repatriate them. The tripartite agreement provides that, ‘the decision of the refugees shall be based on their freely expressed wish and their relevant knowledge of the conditions in the COO’\footnote{Article 10 (2) of the tripartite agreement. The UNHCR, COA and COO are shall provide accurate and objective information.}. In other words, the UNHCR, FGS and GOK should not assume that Somali refugees want to go back to their COO. The views of those who do not want to repatriate should be considered and alternative options such as permanent residency be provided. In addition, continued protection and assistance must be assured by UNHCR and the GOK to those who choose to stay.\footnote{UNHCR, EXCOM Conclusion No.101 (LV) 2004.}

The third issue is that, ‘return to one’s own country’ excludes refugees who have been born in exile.\footnote{Supra note 173 at 8.} Many of the refugees living in protracted refugee situations are at risk of losing proof of
their identity with their countries after being in exile for decades. The risk of ‘statelessness’ is heightened for ‘second and third generation refugees’ who have been born in exile. This is because they are not citizens of the COA and at the same time, cannot be said to be returning to ‘their own country’. Not surprisingly, the second and third generation urban Somali refugees or those who left Somalia at a very young age do not identify with their parents’ COO. As Yusuf commented:

I do not know Somalia. I came to Kenya when I was a baby and I do not know Somalia. How can I agree to go back? ...I have never seen Somalia. So there is no way I can go back even if it’s peaceful.

The rational choice theory (as propounded by George Homans) assumes that individuals have choices. However, for many refugees who fall in this category, return to Somalia may not be their choice. In the context of international refugee protection, the fundamental question is whether repatriation implies an inherited refugee status. Neither the 1951 Refugee convention nor the 1969 OAU convention contain provisions that address refugee children born in exile. In developing alternative options for Somali refugees born in Kenya, UNHCR, GOK and the FGS must involve them. It would be important to listen to their views so that their concerns are taken into consideration when developing or reviewing policies to accommodate them.

In sum, there is a need to re-examine the simplistic home-coming perception of voluntary repatriation by the UNHCR, COO and COA. In re-examining this perception, refugees should be involved.

260 Ibid.
261 Interview with Yusuf in Eastleigh, Nairobi County (22/11/2015).
262 Supra note 95.
263 Supra note 173 at 8.
2.5 Conclusion

For many refugees repatriation is a difficult question and they do not speak longingly about going home. A considerable number of refugees are still reluctant to return.\textsuperscript{264} Advocates of voluntary repatriation have assumed that all refugees desire to go home.\textsuperscript{265} They take this as a statement of fact without interrogating what the refugees want. In reality this is not accurate. Chimni rightly observes that, an idealized image or expression of what is repatriation has ‘helped legitimize measures which compel a refugee to repatriate.’\textsuperscript{266} It is important to acknowledge that significant changes do occur in a refugee’s life during a long exile and when the question of repatriation arises it does not sit very easily with them. They are forced with a dichotomy of whether to ‘return or stay’.

There is a need to re-examine the simplistic home-coming perception of voluntary repatriation by the UNHCR, COO and COA. In re-examining this perception, refugees should be involved. Specifically, second and third refugees born Kenya who face statelessness in case they are repatriated. Also, refugees in mixed marriages and those already with established businesses in Kenya.

Figure 2: The flow chart depicting a model for the inclusion of refugees.

\textsuperscript{264} Supra note 95 at 12. Also interviews with Somali refugees in Eastleigh, Nairobi.
\textsuperscript{265} Supra note 240…BS Chimni, ‘From Resettlement to Involuntary Repatriation’ at 59.
\textsuperscript{266} Ibid at 60.
CHAPTER 3

CONDITIONS CONducive FOR VOLUNTARY REPATRIATION

In any voluntary repatriation, there must be safeguards as to the voluntary nature of the return process, safeguards as to the treatment upon return and continued asylum for those who do not repatriate or choose to remain as refugees. UNHCR and the government of Somalia should ensure we have free water, education and medical support in the areas of return.267

---

267 Interview with Bisharo in Eastleigh, Nairobi County (15/11/2015).
3.1 Introduction

Bisharo’s comment above expresses the pre-conditions put forward by the urban Somali refugees for a successful voluntary repatriation. The essence of establishing pre-conditions before repatriating refugees is to ensure that conditions in the COO are conducive to sustain the return and reintegration of returnees.\footnote{268} In other words, that refugees’ return in safety and dignity.\footnote{269}

According to my literature review, a gap exists in both the 1951 Refugee Convention and the 1969 OAU Convention, in that they fail to provide a criteria or guideline for determining when conditions are safe in the COO to repatriate refugees.\footnote{270} Similarly, the tripartite agreement is conspicuously silent on the pre-conditions to be put in place before repatriating Somali refugees. The FGS has a responsibility of creating conditions conducive to the return of Somali refugees.\footnote{271}

Conspicuously missing in the tripartite agreement is a further provision breaking down what ‘conditions conducive’ for return entail.

Chapter three aims at suggesting that, in order to fill in the gap in the international refugee laws and in the tripartite agreement, refugees must be involved in development of the minimum basics of return that should be in place in the COO before any repatriation. One way of achieving this is through the establishment of a technical committee comprising of refugees, UNHCR, NGOs, GOK and FGS representatives.\footnote{272} In this forum, refugees’ views on the basic conditions that should be in place before going back must be listened to and taken into action. For instance, in the voluntary

\footnote{268}Article 25 (iii) of the tripartite agreement.  
\footnote{269}UNHCR handbook, chapter 2.4.  
\footnote{271}Article 25 (iii) of the tripartite agreement.  
\footnote{272}Article 4(7) of the tripartite agreement.
repatriation of Mauritanian refugees from Senegal, refugees took an active role in the organization of their return. They came up with eleven conditions for their return and the full list was accepted by the UNHCR, Governments of Mauritania and Senegal. Similarly, in Guatemala, refugees were directly involved in negotiating the conditions of return with their government. When refugees participate in drawing up of the conditions for their voluntary repatriation, they will be able to make an informed decision of whether or not to repatriate.

After the development of the minimum basic conditions for return, urban Somali refugees should take part in the go and see visits in the COO to verify that the conditions are indeed conducive for repatriation. The visits to the areas of return in Somalia will enable them make an informed decision of whether or not to repatriate. The rational choice theory assumes that individuals make calculated decisions based on the expected value of the outcome. Viewed from this perspective, a refugee will make a calculated decision of whether or not to repatriate after evaluating the conditions in the COO with those in exile. He will decide to repatriate based on the one that has the highest value.

Chapter three examines conditions conducive for the voluntary repatriation of urban Somali refugees. Four pre-requisites that must be met before encouraging voluntary repatriation have been identified. These are; a tripartite agreement between UNHCR, and COO and COA.

---

274 Supra note 101 at 18 at para 101.
275 Supra note 95.
276 UNHCR, EXCOM Conclusion No. 40 (XXXIV) -1985 and UNHCR, EXCOM Conclusion No. 18 (XXXI)-1980.
277 Article 8(b) of the Statute of the Office of the United Nations High Commissioner for Refugees (GA res. 428(V), 14 December 1950), hereinafter Statute of the UNHCR.
fundamental changes in the country of origin\textsuperscript{278}, return in safety and in dignity\textsuperscript{279} and the voluntary nature of refugees’ decision.\textsuperscript{280} I argue that, in establishing conditions conducive for the voluntary repatriation, urban Somali refugees can play an active role in decision making and implementation of their return. In addition, ways in which urban Somali refugees can be involved in developing pre-conditions for their have been suggested.

### 3.2 Creating conditions conducive to return

It’s common place that, repatriation takes place in countries emerging from war and struggling to achieve basic development standards.\textsuperscript{281} Thus, the COO must ensure that certain pre-requisites are in place before the actual repatriation of refugees commences. Abdi M understood the above clearly:

UNHCR and the government of Somalia should create an enabling environment by ensuring that there is restoration of peace, and provision of financial support for my livelihoods. I strongly emphasize the safety factor.\textsuperscript{282}

If states want their people to return, they must create conditions conducive for the voluntary repatriation of refugees.\textsuperscript{283} A view also shared by the UNHCR.\textsuperscript{284} The 1969 OAU Convention obligates the COA and the COO to create conditions that will ensure the voluntary repatriation of refugees.\textsuperscript{285} Under the tripartite agreement, the FGS is responsible for creating conditions

\textsuperscript{278} Article 1(C) (5) and (6),1951 Refugee Convention.
\textsuperscript{279} UNHCR Handbook, chapter 2.4.
\textsuperscript{280}Article 5 of the 1969 OAU Convention.
\textsuperscript{281} Supra note 128 at 290.
\textsuperscript{282} Interview with Abdi M in Eastleigh, Nairobi County (17/11/2015).
\textsuperscript{283} Supra note 106 at 61.
\textsuperscript{284} UNHCR, EXCOM Conclusion Number 29 (XXXIV) – 1983. It calls upon governments to facilitate the work of UNHCR ‘in creating conditions favourable to and promoting voluntary repatriation…’
\textsuperscript{285} Article 5 (2), (3), (4) of the 1969 OAU Convention.
conducive for the voluntary repatriation of Somali refugees. In other words, the COO determines the basic or minimum conditions in which refugees will repatriate. The rational choice theory assumes that individuals have choices and thus, are able to make calculated decisions. At present, however, Somali refugees (urban and camp) do not have a choice in determining the conditions of their return. Ben said:

The responsibility of ensuring that conditions are conducive for the return of Somali refugees is on the FGS. However, the minimum basics are not on ground.

As highlighted earlier in this chapter, the 1951 Refugee Convention and the 1969 OAU Convention places no minimum standards on the quality of this ‘homecoming’. Takahashi also notes that, none of the legal instruments provide for ‘an in-depth reference’ to the pre-requisites for voluntary repatriation. Sadly and unfortunately, the tripartite agreement is also silent on what these conditions entail. The lack of clear guidelines on what should be in place prior to returning refugees poses a genuine risk to the rights of the returnees. The apprehension is real. Indeed, at the time of submitting this thesis, the Jubaland government in Somalia had detained approximately 1,200 returnees at the Dhobley transit centre on the grounds of inadequate standard of living conditions in the return areas. My interviewees said that gap can be filled in by consulting with both urban and camp refugees on the existing conditions in their return areas. This way, refugees could shed light on the minimum basics that should be in place before repatriation. For instance, Andrew said:

---

286 Article 25(iii) of the tripartite agreement.  
287 Supra note 95.  
288 Interview with Ben over skype (21/09/2016).  
289 Supra note 132 at 291.  
290 Supra note 270…Saul Takahashi, ‘The UNHCR Handbook on Voluntary Repatriation’ at 605.  
Refugees can provide insight on the conditions in the areas of return and the practical aspects that should be considered before repatriating refugees.292

Mohamed said:

The only thing that can ensure voluntary return is to consult with the refugees. I am sure there are refugees who are willing to return if they are consulted. I would recommend to the UNHCR, GOK and FGS to improve refugees’ involvement in the process of repatriation as now [in Kenya] it’s not involving.293

The UNHCR, COA and COO should consult with refugee men, women, youth and children separately to discuss the pre-conditions on repatriation and their integration upon return. The tripartite agreement provides that, ‘the decision of the refugees to repatriate shall be based on…their relevant knowledge of the conditions with the country of origin and areas of return’.294 This way, the refugee will be informed and, influence the kind of conditions the COO will put in place before they go back home. In Guatemala, refugees were involved negotiating conditions for their return.295

3.3 Conditions when voluntary repatriation should take place

According to Abuya296 the critical question in voluntary repatriation is, ‘when is it safe for refugees to return to their pre-persecution or pre-conflict home? When are conditions deemed sufficiently stable and durable for refugees to repatriate?’ Neither the 1951 Refugee Convention nor the 1969

\footnotesize

292 Interview with Andrew in Westlands, Nairobi County (01/09/2016).
293 Interview with Mohamed in Eastleigh, Nairobi County (19/11/2015).
294 Article 10 (2) of the tripartite agreement.
295 Supra note 101 at 18 at para 101
296 Supra note 11 at 156.
OAU Convention prescribe a criteria to adequately determine when voluntary repatriation should commence.\textsuperscript{297} The UNHCR Handbook provides that repatriation should only be promoted ‘when a careful assessment of the situation in the COO shows that the conditions of ‘safety and dignity’ can be met.’\textsuperscript{298} Safety and dignity entails return by refugees in and to conditions of physical, legal and material safety.\textsuperscript{299} Abuya writes that there are many difficulties associated with creating a benchmark by which one determines that it is safe and dignified to repatriate refugees.\textsuperscript{300} In recent discussions, UNHCR’s view is that, voluntary repatriation ‘can best take place after violence and intimidation are at the end, meaningful steps have been taken towards re-establishment of enforcement agencies that are compliant with human rights, as well as of an independent judiciary’.\textsuperscript{301} This is not sufficient. I argue that security, basic services and livelihoods opportunities must be in place before commencing voluntary repatriation.

### 3.3.1 Special agreements: Tripartite agreement between UNHCR and GOK and FGS

One of the pre-conditions that must be in place before undertaking voluntary repatriation of refugees is, special agreements between UNHCR and countries involved.\textsuperscript{302} In this study, a

\begin{itemize}
  \item \textsuperscript{297} Ibid.
  \item \textsuperscript{298} UNHCR Handbook at Chapter 3.1.
  \item \textsuperscript{299} UNHCR Paper on Voluntary Repatriation presented to the 4\textsuperscript{th} Meeting of the Global Consultations on International Protection, 25 April 2002 EC/GC/02/5 (Global Consultations on International Protection) at para. 15.
  \item \textsuperscript{300} Supra note 11 at 156.
  \item \textsuperscript{301} Global Consultations at paragraph 16.
  \item \textsuperscript{302} Article 8 (b) of the Statute of the UNHCR.
\end{itemize}
tripartite agreement between UNHCR and the GOK and FGS exists. One of the shortcomings of the tripartite agreement is that, Somali refugees were not involved in the drafting nor at the signing stage. In response to the question why Somali refugees were not involved in this process, Ben said:

It has never happened before. The usual procedure is that, it’s between the countries involved and the UNHCR. It’s not for refugees. This tripartite agreement is not exceptional. It’s the same as all over the world. 303

John said:
It’s a states to states process. UNHCR negotiates on behalf of refugees. The tripartite agreement is a political process. In international politics you deal with States not individuals. 304

The above comments indicate a traditional way of thinking which is out touch with the reality. The view that UNHCR represents the voices of the refugees should be revisited. My argument is that in order to guarantee full cooperation from the Somali refugees (camp and urban) in the voluntary repatriation process, UNHCR, GOK and FGS should have involved Somali refugees in the drafting and signing of the tripartite agreement. In contrast to the above comments by Ben and John, Mary said:

Refugees were absent in the drafting or signing of the tripartite agreement. The whole tripartite agreement was rushed. There should have been more consultation with the refugees (both urban and camp) before drafting the agreement. At the time of signature, it was a high level delegation composed of the UNHCR, GOK and FGS. Refugee representatives should have been present.

The tripartite agreement provides for the establishment of a tripartite commission. 305 However, the composition of commission is limited to UNHCR, GOK and FGS representatives. 306 In other words, it excludes refugees’ participation. Furthermore, whenever appropriate, refugee

301 Interview with Ben over skype (21/09/2016).
304 Interview with John in Lavington, Nairobi County (09/09/2016).
305 Article 3 of the tripartite agreement.
306 Article 4 of the tripartite agreement.
representatives may only participate in the deliberations of the commission in ‘observer or advisory capacity. This is not sufficient. Given the role of the commission\textsuperscript{307}, my argument is that since refugees are the main actors in the repatriation exercise, they should be included as members of the commission. This way, their views would be better represented in the deliberations of the commission.

In the absence of tripartite agreements, UNHCR may consider bilateral agreements or memoranda of understanding (MOU) with both the COO and the COA.\textsuperscript{308} For instance, in 2003, a MOU was concluded between UNHCR and the Angolan government.\textsuperscript{309} Increasingly peace agreements are becoming another source of legal authority for the basic repatriation framework.\textsuperscript{310} For example, in 2005 Government of South Sudan and the Sudan’s People Liberation Movement (SPLM) signed the Comprehensive Peace Agreement to cease hostilities between the warring parties with a view of attaining peace in the country. Signing of peace agreements is a crucial step towards promoting the return of refugees.\textsuperscript{311} Where MOU, bilateral or peace agreements are used, refugees should be involved in the drafting and during signature.

3.3.2 Fundamental change of circumstances in the country of origin

\textsuperscript{307} Article 5 of the tripartite agreement.
\textsuperscript{308} Marjoleine Zieck, ‘Voluntary Repatriation’ at 38.
\textsuperscript{310} Global Consultations on International Protection at para. 11.
\textsuperscript{311} Ibid.
Many refugees living in protracted situations in Africa, have fled their countries due to war or civil strife.\footnote{Supra note 4 at10.} Consequently, the second, pre-requisite that should be met before repatriation of Somali refugees (camp and urban) can take place is for the hostilities to have ended.\footnote{Supra note 11 at 156.} This is demonstrated by Mohamed:

I left Somalia because of fighting... before encouraging voluntary return, it is necessary to improve security situation in Somalia.\footnote{Interview with Mohamed in Eastleigh, Nairobi County (19/11/2015).}

Two ways exist in which state parties to the 1951 Refugee Convention may be relieved of their responsibility to protect refugees. First, when a refugee voluntarily re-avails and re-establishes themselves in the COO and second, when there are fundamental changes in the COO.\footnote{Articles 1C (1), (4), (5)-(6) of the 1951 Refugee Convention. Supra note 148 at 1.} In such circumstances, the COA may require that refugees to go back to their home state. This is because ‘refugee protection is conceived as protection for the duration of risk’.\footnote{Supra note 11 at 127. Also, James Hathaway, ‘The Rights of States’ at 177.} In this case the refugee does not have a choice as assumed by George Homans.\footnote{Supra note 95.}

The UNHCR defines ‘circumstances’ as, ‘fundamental changes in the country of origin, which can remove the basis of the fear of persecution’.\footnote{UNHCR Handbook at chapter 2.2.} Hathaway, observes that fundamental changes in the country of origin ‘must be causally connected to the risk upon which refugee status was recognized’.\footnote{James Hathaway, ‘The Rights of States’ at 186.} This means that the changes must be looked at in light of the particular cause of fear – that led to the refugee fleeing his country – in order to ensure that the situation which led to
the recognition of the refugee status has ceased to exist. Changes that qualify as ‘fundamental’
more often involve an end to hostilities and a political change resulting in a return to peace and
stability.\textsuperscript{320} While fundamental changes in a COO may at face value form a valid basis for the
repatriation of refugees, the change itself may be insufficient to validate immediate return. Put
differently, the mere cessation of hostilities is not reason enough to repatriate all refugees.\textsuperscript{321} Some
refugees may have compelling reasons of not wanting to return to their COO.\textsuperscript{322} Fatuma expressed
the following sentiments:

\begin{quote}
I am not willing to go back to Somalia because it is not safe for me to stay. I come from a
minority group and discriminated to participate in political, social and economic
activities.\textsuperscript{323}
\end{quote}

Interviews with urban Somali refugees revealed that they had reliable information on the existing
conditions in the areas of return in Somalia from their relatives and friends. Abdi M said:

\begin{quote}
The security situation in Somalia has improved but still there are some challenges like
killings and suicide bombers.\textsuperscript{324}
\end{quote}

One way of verifying whether there has been fundamental changes in conditions in the areas of
return in Somalia would be through refugee participation in information sharing. In response to a
question on how urban Somali refugees could be involved in the repatriation process, Andrew
suggested that: refugees could complement information being provided at the helpdesks as they
are better informed on the conditions back in Somalia.\textsuperscript{325} The joint information would then be
disseminated to all refugees. The involvement of urban Somali refugees’ in provision of

\textsuperscript{320} Supra note 11 at 156-157.
\textsuperscript{321} UNHCR Handbook at chapter 2.2.
\textsuperscript{322} Ibid.
\textsuperscript{323} Interview with Fatuma in Eastleigh, Nairobi County (15/11/2015).
\textsuperscript{324} Interview with Abdi M in Eastleigh, Nairobi County (17/11/2015).
\textsuperscript{325} Interview with Andrew in Westlands, Nairobi County (01/09/2016).
information, would in turn contribute to the overall quality of information being shared. This is consistent with the tripartite agreement.\textsuperscript{326}

The flipside of non-involvement of urban Somali refugees in the determining the minimum conditions of return is that, they are likely to go back in the face of continued human rights violations as conditions in Somalia are not conducive.\textsuperscript{327} In the case of \textit{Salah Sheekh v The Netherlands}\textsuperscript{328} the court examined whether an expulsion to ‘relatively safe’ areas in Somalia as deemed by the Government of Netherlands would be in violation of article 3 of the European Convention on Human Rights (ECHR) – equivalent to article 7 of the ICCPR. The court found out that the applicant’s expulsion to Somalia would be in violation of Article 3 as he was likely to be subjected to torture, degrading and inhumane treatment.\textsuperscript{329} It also noted that, the three most vulnerable groups in Somalia are said to be IDPs, minorities and returnees.

From the foregoing, at a minimum, basic safety must be guaranteed by the FGS for the urban Somali refugees to return to Somalia. In addition, urban Somali refugees can be involved in the decision making process by complementing information being provided at the help desks on conditions in Somalia. When refugees are aware of the existing conditions in their COO, they are able to make informed decisions on whether or not to repatriate.

\textsuperscript{326}Article 10(2) of the tripartite agreement, ‘the decision of the refugees to repatriate shall be based on…and their relevant knowledge of the conditions within the COO and the areas of return.’
\textsuperscript{327}Relief web, ‘PSC Interview: Conditions in Somalia are 'not conducive' to the return of refugees from Dadaab’,\texttt{http://reliefweb.int/report/kenya/psc-interview-conditions-somalia-are-not-conducive-return-refugees-dadaab} (31 August 2015) accessed on 09/01/2016.
\textsuperscript{328}\textit{Salah Sheekh v The Netherlands ECHR} (Application No. 1984/04).
\textsuperscript{329}Ibid, para 141.
3.3.3 Return in safety and with dignity

As mentioned earlier in this chapter, voluntary repatriation should only be promoted ‘when a careful assessment of the situation in the COO shows that the conditions of ‘safety and dignity’ can be met.’\textsuperscript{330} UNHCR defines, ‘safety and with dignity’ as ‘return in and to conditions of physical, legal and material safety’.\textsuperscript{331} This is the third pre-requisite that UNHCR, GOK and FGS should consider before repatriating urban Somali refugees.

3.3.3.1 Physical safety

Includes possibilities of protection from armed attacks, and mine-free routes and if not mine-free then at least demarcated settlement sites.\textsuperscript{332} According to McAdam and Saul, the right to life is directly linked and dependent on the physical environment.\textsuperscript{333} The landmark case of \textit{Sufi and Elmi v the United Kingdom}\textsuperscript{334} underlines that the COO is not only responsible for creating conditions conducive for return but must also guarantee the physical safety of returnees. In this case, the ECHR considered the principle that, ‘persons will generally not be in need of asylum or subsidiary protection if they could obtain protection by moving elsewhere in their own country’.\textsuperscript{335} The Court unanimously held that a returnee with no recent experience of living in Somalia would be at real risk of being subjected to torture or to inhuman or degrading treatment or punishment contrary to article 3 of the ECHR (equivalent to article 7 of the ICCPR). The case underlines that the physical

\textsuperscript{330} UNHCR Handbook at Chapter 3.1.
\textsuperscript{331} Global Consultations at para. 15.
\textsuperscript{332} UNHCR Handbook chapter 2.4.
\textsuperscript{334} Sufi and Elmi v the United Kingdom (2011) 1045 1 14.
\textsuperscript{335} Ibid para 35.
safety of returnees during and after repatriation is critical. Under the tripartite agreement, the FGS is responsible for ensuring ‘the safety and security of the returnees’.  

Majority of the interviewees said that they fled Somalia because of insecurity. Thus, security was an overriding priority in the decision of whether or not to return. Many of them were concerned about their physical safety in the areas of origin. Zeinab wondered:

How can the Somalia government ensure our safety if they cannot even secure the presidential palace and the prominent hotels visited by government officials?  

Fatuma expressed:

My main fear in the repatriation is that the problem that caused me to flee is still there. The government of Somalia cannot guarantee my safety.  

In order for the above concerns voiced by urban refugees to be taken into consideration by the UNHCR, GOK and FGS, urban refugees must be involved actively in the decision making process to repatriate. As suggested earlier in this chapter, refugees should be part and parcel of the tripartite commission. This way they can be able to voice the concerns of refugees at the highest level where decisions are taken. Also, urban Somali refugees should participate in the ‘go and see’ visits and ‘come and tell’ visits to their areas of return. The visits will enable them assess the security situation and lead to their informed decision of whether or not they want to return.

Linked to physical safety is the logistics of repatriating refugees. Abdi M, said:

If, we will be travelling back home by road, then children and women will have some challenges because roads are risky for children and women.  

336 Article 25 (xvii) of the tripartite agreement.  
337 Interview with Zeinab in Eastleigh, Nairobi County (15/11/2015).  
338 Interview with Fatuma in Eastleigh, Nairobi County (15/11/2015).  
339 Interview with Abdi M in Eastleigh, Nairobi County (17/11/2015).
My interviewees suggested that urban Somali refugees could be involved in decision making by providing useful information to the UNHCR, GOK and FGS on presence of landmines or explosive devices in the areas of return and the security of the roads to be used during their repatriation. This is consistent with the tripartite agreement.\(^{340}\) Furthermore, it would strengthen the information shared with Somali refugees.

### 3.3.3.2 Access to legal processes in the return areas

Before repatriating refugees, the COO with support from the UNHCR must draft legislations relating to ‘citizenship, property, documentation and return’\(^{341}\) to enable returnees exercise their civil, political and economic rights.\(^{342}\) Refugees’ should be consulted when drafting these laws and policies on repatriation and their views taken into consideration. According to Tom:

> It is important to listen to the views of refugees so that their concerns are taken into consideration when developing policies concerning them.\(^{343}\)

Housing, land and property restitution issues need to be addressed in the early stages of return. The FGS must establish fair and accessible procedures to settle any claims that a returnee may make for the successful recovery of their properties.\(^{344}\) Yusuf, commented:

> People took property belonging to refugees, so if I go and claim back the property, I will be killed because I also come from a minority clan.”\(^{345}\)

Zeinab was concerned that:

\(^{340}\) Article 18 of the tripartite agreement.

\(^{341}\) Global Consultations on International Protection at para. 19.

\(^{342}\) Kallu Kalumiya, ‘A Model Repatriation’ at 223.

\(^{343}\) Interview with Tom in City Centre, Nairobi County (09/09/2016).

\(^{344}\) Article 25 (xiii–ix) of the tripartite agreement.

\(^{345}\) Interview with Yusuf in Eastleigh, Nairobi County (22/11/2015).
Ownership of land is an issue for returnees, there might be fighting in the areas of return. Property issues will arise as there are no institutions to handle such cases.\textsuperscript{346} One way the FGS can achieve this is through the involvement of refugees in the housing, land and property discussions. UNHCR and FGS must ensure that returnees recover their homes, land and any other property that was lost while they were in exile. If not, returnees should be entitled to adequate compensation for any loss incurred.\textsuperscript{347} The right to return to one’s own country is increasingly seen as closely linked with the right to adequate housing.\textsuperscript{348}

Basic socio-economic rights\textsuperscript{349} such as right to clothing, food, housing, property, employment as well as civil and political rights\textsuperscript{350} (right to nationality, right to security of person, protection from torture) must be guaranteed to the returnees. This can rights only be exercised once the nationality of returnees is established and backed up with recognized documentation.\textsuperscript{351} Refugees who are born in exile and are not registered at birth become ‘invisible’ to the official records. This affects the ability of the unregistered refugees to access their rights (right to return) on an equal basis as others who are registered. In extreme cases, such refugees face denial of nationality. In the Angolan repatriation, for example, verification of nationality was conducted. The voluntary repatriation form (VRF) was used as a temporary identity document in order to ensure that only Angolans were repatriated.\textsuperscript{352} In the Somali repatriation, UNHCR, GOK and FGS must address the lack of basic identity documentations (birth certificates and national identification) for the Somali refugees

\textsuperscript{346} Interview with Zeinab in Eastleigh, Nairobi County (15/11/2015).
\textsuperscript{347} Article 25 (xiii) of the tripartite agreement. Also, Global Consultations on International Protection at para. 23.
\textsuperscript{348} Article 11 of the ICESCR.
\textsuperscript{349} Articles 10, 11, 12 and 13, of the ICESCR.
\textsuperscript{350} Articles 7, 9, 12, 16, 17, 19, 23 and 24 paragraph 3 of the ICCPR.
\textsuperscript{351} Global Consultations on International Protection at paragraphs 21 and 22; “in the context of return, loss of nationality, unclear nationality status (for instance as regards foreign-born children of refugees) as well as changes in personal status through marriage, including with non-nationals of the country of origin, are the most common problems faced by returnees”
\textsuperscript{352} Kallu Kalumiya, ‘A Model Repatriation’ at 218.
through issuance of practical identity documents. Findings from my interviews with urban Somali refugees born in Kenya showed that they were not willing to return. Thus, the GOK, FGS and UNHCR need to involve them in finding a solution for their plight.

Amnesty laws or public assurances of personal safety, which exempt returnees from punishment for having fled their country should be considered before commencement of voluntary repatriation. Somali refugees should be involved in the development of amnesty laws or the establishment of traditional dispute settlement mechanisms that will guarantee the safety of the returnees in the areas of origin. This is consistent with UNHCR which notes that, involving communities in this kind of mechanisms ‘may contribute to creating conditions conducive to voluntary repatriation and sustainable reintegration’. For example, in Rwanda, Gacaca traditional courts were established by the community as a means of trying those who had participated in the genocide. This court system ensured that the victims and the perpetrators continued to live together. Furthermore, it promoted communal harmony and reconciliation as the community members were involved in the process.

3.3.3.3 Availability and access to economic and social services in areas of return

In 2014, Somalia was ranked second among ‘failed states’ in the world, a position it held for six years. According to the United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA, Somalia) statistics, 731,000 persons are in humanitarian emergency and crisis, 1.1

---

353 Article 25 (ii) of the tripartite agreement. Also, Global Consultations on International Protection para. 20.
354 Global Consultations on International Protection at para.19.
355 UNHCR, EXCOM Conclusion No.101 (LV) 2004.
million are IDPs whereas people in food security stress are 2.3 million. In other words, there is a real risk that those repatriating will lack livelihoods and food and, become IDPs in Somalia. Moreover, Somalia ranks 165 out of 171 countries in Human Development Index with 75 percent of the population living below two United States Dollars (USD) a day. Therefore, prior to repatriating refugees, UNHCR and the FGS must expand the existing basic services and livelihood opportunities in the areas of return. Return to areas where there is limited basic amenities is likely to result to conflict and tensions with the ‘stayees’. Somali refugees should be involved by the UNHCR and FGS in identifying livelihood opportunities that match their skills and needs in the areas of return. In addition, refugees’ views on the basic services that should be in place before they return must be given consideration by UNHCR and the FGS. Zeinab suggested:

UNHCR and Somali government should establish schools and hospitals in the return areas and give cash to refugees so that they can sustain themselves. I do not want to go back to Somali because I am in school and there is no quality education in Somalia.

At Dadaab camp, UNHCR is providing a cash grant of USD 150, counselling, transportation, hygiene kits, tools, food and other basic needs to the returnees. The repatriation package acts as an incentive for refugees to repatriate and a form of assistance to enable individuals meet some of the initial costs of re-establishing themselves. This is consistent with the UNHCR standards.

---

360 Global Consultations on International Protection at para. 25
362 Interview with Yusuf in Eastleigh, Nairobi County (22/11/2015).
364 Supra note 126 at 16.
365 UNHCR, EXCOM Conclusion No. 18 (XXXI)-1980. Supra note 110 at 268, ‘In the Liberian repatriation from Ghana in 2009, UNHCR provided a cash grant of USD 100 to the returnees’.
However, the USD 150 cash grant being provided to the Somali returnees by UNHCR is insufficient. This is demonstrated by the words of Abdi M:

Economic and living expenses have increased. Previously, USD 100 was enough for small families now even USD 200 is not enough.\(^{366}\)

In coming up with the repatriation package, UNHCR should consult with refugees. This is because refugees are better placed to know the reality on the ground. Thus, when reviewing the current cash grant being provided, UNHCR should involve Somali (camp and urban) refugees to ensure that a reasonable amount is mutually agreed on.

It is clear from the foregoing that refugees need to be included in determining the physical, material and legal conditions conducive for their return. Certain pre-conditions must be in place before Somali refugees go back. For instance, the views of urban refugees on establishing hospitals, schools and creating livelihood opportunities in the return areas, must be taken in consideration by the UNHCR, COO and COA.

### 3.3.4 Voluntary nature of Somali refugees’ decision to return

For many refugees the immediate danger during repatriation comes from threats, pressure\(^ {367}\) and attacks by the COA and, from the inadequate international assistance.\(^ {368}\) Additionally, many host governments insist that repatriation is the only option. As stated in chapter two, voluntary repatriation can only take place when a refugee voluntarily expresses their wish to return.\(^ {369}\)

---

366 Interview with Abdi M in Eastleigh, Nairobi County (17/11/2015).
367 In both Tanzania and Ghana, the host governments and the UNHCR “encouraged” or coerced refugees to repatriate to their home states. See supra notes 78, 106 and 116.
368 Supra note 82 at 181.
369 Supra note 128 at 292, Article 5 (1) of the 1969 OAU Convention. Also, Conclusion Number 12 of the Cartagena Declaration on Refugees,
other words, the fourth pre-requisite suggests that a refugee cannot be repatriated unless they unequivocally express their wish to return.

The UNHCR defines ‘voluntariness’ as ‘implying an absence of any physical, psychological, or material pressure’. According to Bhatia, ‘voluntariness’ will be achieved through the removal of ‘push’ and ‘pull’ factors in the COA and in the COO respectively. Push and pull factors can interfere with a refugee’s objective assessment of whether or not the conditions are conducive for return. Ayan, a female Somali refugee who recently moved from Dadaab camp to Eastleigh commented:

UNHCR reduced the food rations. Previously, they used to give us food twice in a month but nowadays it’s only once a month. There is also insecurity in the camps, the Kenyan police arrest people and accuse them of being terrorists.

The above comment by Ayan shows that there was indeed, presence of physical, psychological and material pressure at the Dadaab camp from both the UNHCR and GOK. The reduction of food was likely to interfere with refugees’ decision of whether or not to repatriate. It also implies that refugees were not informed of the plan by UNHCR to reduce the food ratios. When planning to reduce the food ratios entitled to Somali refugees at Dadaab camp, UNHCR should involve them. The best way of doing this is through holding meetings with refugee and religious leaders as they have a measure of authority over the refugees. They will in turn inform the refugees who will have reliable information to inform their decision.

---

370 UNHCR Handbook at chapter 3.1.
371 Supra note 138 at 794.
372 Interview with Ayan in Eastleigh, Nairobi County (26/11/2015).
The voluntary nature of a refugees’ decision to repatriate involves a refugee making a free and an informed choice. The tripartite agreement provides that, ‘the decision of the refugees to repatriate shall be based on their freely expressed wish and their relevant knowledge...’\textsuperscript{373} This is consistent with UNHCR standards.\textsuperscript{374} Informed choice is based on availability of complete, reliable, accurate and objective information on the conditions in the COO and areas of return.\textsuperscript{375}\ The UNHCR, COO and COA are responsible for providing information on the conditions in the COO. Access to information will be discussed in the subsequent chapter.

3.5 Conclusion

It is obscure whether the UNHCR, COA and COO require all the above pre-requisites to be met in order to promote repatriation. Abuya writes that, ‘it is difficult to identify with mathematical precision whether conditions in a refugees’ state of origin have changed to promote return.’\textsuperscript{376}\ UNHCR provides that, it ‘should be convinced that the positive pull factors in the COO supersede the refugees’ decision to repatriate as opposed to the negative push factors in the COA’.\textsuperscript{377} In other words, conditions in the COO must have improved to enable a refugee decide whether to return. The foregoing, implying that refugees make calculated decisions based on a cost benefit analysis of the conditions in the COO with those in the COA. They will decide whether or not to repatriate based on the outcome with the highest value or benefit. In order to do the cost benefit analysis, Somali refugees need information about the COO (as they are already in the

\textsuperscript{373} Article 10 (2) of the tripartite agreement.
\textsuperscript{374} UNHCR, EXCOM Conclusion No. 40 (XXXVI)-1985.
\textsuperscript{375} Article 15 (1) of the tripartite agreement.
\textsuperscript{376} Supra note 126 at 19.
\textsuperscript{377} UNHCR Handbook at chapter 2.3.
The UNHCR, COO and COA must provide objective and accurate information to the Somali refugees to inform the decision of whether or not to repatriate.

Moreover, refugees can be used to complement the information being provided at the helpdesks by the UNHCR, COA and COO. Somali refugees communicate with their relatives and friends back in Somalia, who inform them about the existing conditions. Thus, strengthening information sharing between refugees, UNHCR, COA and COO. Another way in which refugees can be involved in establishing whether the conditions in Somalia are conducive is through ‘go and see’ visits. Somali refugees will be able to see for themselves which basic conditions are available on the ground and which are not and thus make an informed decision whether or not to return.

A framework that would ensure refugees are involved in the decision making process would also demand that a thorough assessment of the conditions in Somalia be conducted by the UNHCR, COO, COA and refugees. The assessment would identify the main challenges and opportunities for sustainable returns. It would also list the conditions as witnessed by the assessors without exaggerating. The assessment would highlight whether the safety and the rights of the returnees would be guaranteed if repatriated, whether education and health facilities are in place and that refugees can access basic services and livelihoods. If these pre-requisites are determined to be in place, UNHCR, COO and COA should then initiate voluntary repatriation. If not, the refugees, UNHCR, COA and COO should come up with practical steps that indicate when the conditions would be met. Only after the pre-conditions are met, should Somali refugees be repatriated.

CHAPTER 4
A REFUGEE’S RIGHT TO PARTICIPATE IN THE DECISION MAKING TO REPATRIATE

We (refugees) should be involved in the decision making process because the decision is about our lives. If there are no refugees, then there is no repatriation. We also need more information to be shared or disseminated by UNHCR and Governments of Kenya and Somalia. Currently, there are refugees who do not know about the voluntary repatriation or have accurate information to help them decide whether or not to repatriate.\(^{378}\)

4.1 Introduction

Abdi’s comment above, captures the importance of involving urban Somali refugees in the decision making process to repatriate. International law recognizes the participation of the people (including refugees) in public affairs.\(^{379}\) Similarly, courts in Kenya have upheld the right of participation in matters of public interest. In the case of Peter Bogonko versus National Environmental Management Authority (NEMA)\(^{380}\), the court held that, public interest involved far outweighed the individual rights of the applicant. In this case the public had not been accorded sufficient time to comment on the Environmental Impact Assessment report as required by section 59 (1) of the Environmental Management and Coordination Act (EMCA).

Failure to involve refugees in decision making processes is likely to result to a myriad of legal problems. First, it infringes on the refugees’ right of participation, second, non-inclusion may contribute to the statelessness of some refugees and third, it may be construed as discrimination under international law. For instance, one of the reasons why the Eritrean and Ethiopian refugees

---

\(^{378}\) Interview with Abdi M in Eastleigh, Nairobi County (17/11/2015).

\(^{379}\) Article 25 (a) of the ICCPR. Also, article 13 of the African Charter on Human and Peoples Rights (ACHPRs).

\(^{380}\) Peter Bogonko versus National Environmental Management Authority (NEMA) Miscellaneous Application No 1535 of 2005 eKLR.
in Sudan, failed ‘to cooperate with the UNHCR in its attempt to make self-sufficient schemes, was their exclusion in decision making’.\textsuperscript{381} The foregoing can be contrasted with the Guatemalan repatriation where refugees were directly involved in negotiating the conditions of return with their government.\textsuperscript{382} Similarly, Mauritanian refugees actively played a role in the organization of their return from Senegal.\textsuperscript{383} The right to participate in decisions on matters that affect their (refugees) lives is an integral part of the UNHCR mandate.\textsuperscript{384}

Chapter four looks at the extent to which inclusion of urban Somali refugees in the repatriation process will lead to their informed decision whether to return. How can urban Somali refugees be involved in the decision making process on repatriation? At what stage should they be involved? Will inclusion lead to their informed decision whether to return? This study acknowledges that, though, the majority of Somali refugees are found at the Dadaab camp, the discussions focus on urban Somali refugees. IOM and UNHCR conducted intention surveys for Somali refugees at the Dadaab camp but no consultations were held with urban refugees. According to John:

\begin{quote}
No consultations were held with urban Somali refugees. As it were, the three years (November 2013- November 2016) of voluntary return focused on Dadaab camp refugees. Our interest was in Dadaab refugee camp.\textsuperscript{385}
\end{quote}

In the wake of mass movements of refugees, an individual’s decision of whether or not to return to their COO has become less relevant.\textsuperscript{386} In most repatriations, the decision to return refugees to

\textsuperscript{381} Supra note 148 at 105 and 162.
\textsuperscript{382} Supra note 101 at para. 101.
\textsuperscript{383} Supra note 273 at 3.
\textsuperscript{384} UNHCR Handbook at para 3.1.
\textsuperscript{385} Interview with John in Lavington, Nairobi County (09/09/2016).
\textsuperscript{386} Supra note 191 at 10.
their home state is made by the COA, COO and the UNHCR to the exclusion of the refugees. Critics have argued that, ‘states concerns are given priority over those of refugees’ since UNHCR ‘relies on donations and the goodwill of states’. Nonetheless, this study underscores that the implementation of the tripartite agreement between the UNHCR, GOK and FGS depends on the willingness of the Somali refugees to return home. Thus, the need for their inclusion in the decision making process.

Chapter four underlines that central to the inclusion of urban Somali refugees in the decision making process, is the need to adopt an age, gender and diversity approach. As highlighted in the literature review, refugee women and those under their care form the bulk of the returnees, yet they are excluded in decision making. George Homans assumes that individuals have a choice and thus, are able to make calculated decisions. In reality however, women and children are excluded in the decision making process. Thus, resulting to mischief or pain. My thesis will propose an all-encompassing approach that will ensure that the views of women and children are given equal weight as those of men.

This chapter also aims at emphasizing that refugees will only participate in the decision making process to repatriate, when provided with accurate and objective information about conditions back in the COO. Arrangements that ensure refugees have access to sources of information about their

---

387 Supra note 148 at 162.
388 Supra note 119 at 8-10.
389 Supra note 333 at 386.
390 Ibid.
391 UNHCR EXCOM Conclusion 101 (LV) 2004.
392 Supra note 82 at 176.
393 Supra note 95.
394 Supra note 155 at 1.
COO that they consider credible have been unsatisfactory. The tripartite agreement is silent on the modalities of information dissemination and sensitization to the Somali refugees. This research aims to fill this gap.

4.2 The process of decision making in voluntary repatriation

Ideally, voluntary repatriation should take place at the refugees’ freely expressed wish. Practice however is that the UNHCR, COO and COA do not sit back and wait for the refugees to express a desire to return home. As soon as the conditions in the COO improve, they initiate the process of repatriating refugees. Special agreements [tripartite or bilateral] are signed by UNHCR, COA and COO. The agreements form the legal basis that govern voluntary repatriation of refugees. It thus follows that, the signatories [UNHCR, COA and COO] assume decision making in the drafting and creation of the agreements. Notably, refugees do not have much say during the negotiations or the drafting of these agreements. For instance, in the Mauritanian repatriation, the chairman of the refugee committee captured aptly their exclusion in drafting the agreement:

‘There should be four parties involved. The refugees should have some responsibilities. [Under this agreement] they are not responsible for anything…’

---

395 Supra note 78 at 1291, ‘in the absence of information on local integration, many refugees interpreted this as a means of being completely abandoned in Ghana without assistance’. Also, supra note 128.
396 Article 5 (1) of the 1969 OAU Convention. Also; Article 10 (2) of the tripartite agreement.
397 Supra note 82 at 181. Evidence of pressure is common place.
398 Article 8(b) of the Statute of the UNHCR.
399 Supra note 151 at 612.
400 Supra note 273 at 3.
It’s at drafting stage that refugees are initially excluded in matters that affect them. The signatories then sell the idea to the refugees who ‘merely confirm and approve those decisions’. They are not consulted. They are simply informed that it is safe for them to return. The foregoing is no different for the Somali refugees. According to Mary:

The whole [tripartite agreement] process was rushed. There should have been more consultation with the refugees before drafting the tripartite. At the time of signing, only UNHCR, GOK and FGS representatives were present. Refugee representatives should have been involved in the signing of the tripartite.

John said that repatriation was a states to states affair. Hence, the exclusion of refugees:

It’s a states to states process. UNHCR negotiates on behalf of refugees. The tripartite agreement is a political process. In international politics you deal with States not individuals (refugees).

As mentioned in chapter three, there is a need to revisit the view that UNHCR knows what is best for refugees and that they represent the voices of the refugees. Since the current tripartite agreement comes to an end in November 2016, I would suggest to the UNHCR, GOK and FGS to involve Somali refugees (camp and urban) in the drafting of a new agreement or in the negotiation of the extension of the current agreement. The views of the refugees should be given equal weight. This way, urban Somali refugees would have a choice in deciding whether or not they would like to repatriate.

---

401 Supra note 119 at 6. UNHCR and/or its partners carry out intention/return surveys aimed at assessing refugees’ intention and readiness to return. Also, supra note 148 at 162.
402 Supra note 128 at 293. Also supra note 106 at 56.
403 Interview with Mary at City Centre, Nairobi County (02/09/2016).
404 Interview with John in Lavington, Nairobi (09/09/2016).
405 Supra note 148 at 163.
4.3 Somali refugees and decision making

During flight, refugees react rapidly. Most do not have much control in the decision making process. In sharp contrast, when deciding to repatriate, refugees do have ‘control over the timing and context of their return’.\(^{406}\) The fact that many refugees choose to return on their own is a reflection that they are their own decision makers on whether or not to repatriate.\(^{407}\) Usually, refugees do a cost benefit analysis on whether or not to repatriate based on comparison between their situation in exile and the conditions in the COO (based on information available to them).\(^{408}\) George Homans explains that in choosing between alternative actions an individual will choose that which the expected result is greater.\(^{409}\) Viewed from this perspective, it can be argued that refugees decide to repatriate if the expected result has greater benefit or advantage than the option of remaining in the COO. The foregoing brings into question the effectiveness (or otherwise) of the current decision making process which excludes refugees.

At the community level, refugee communities have a leadership body elected by the refugees to represent their views.\(^{410}\) Sometimes refugee leaders do not represent the interests of the refugees. Thus, the need to involve other refugee members (camp or urban) in the decision making process. Generally, the leadership body acts as a bridge between the refugees and the UNHCR, and the host government respectively. The leaders have a say in the affairs of refugees.\(^{411}\) According to the

\(^{406}\) Supra 93 at 32 and supra note 148 at 162.
\(^{407}\) For example, in spontaneous return of refugees.
\(^{408}\) Supra note 82 at 174.
\(^{409}\) Supra note 95.
\(^{411}\) Ibid.
rational choice theory individuals have a choice.\textsuperscript{412} Using the case study of urban Somali refugees, I argue that, not all refugees have a choice in deciding whether or not they want to repatriate. Hawa said:

Community leaders decide whether or not we have to return. Some refugees are doing it for money, they stay for a few months and then come back.\textsuperscript{413}

Zahra commented:

Local leaders are pressuring refugees to go back. They make decisions on behalf of the community and refugees’ views are not represented.\textsuperscript{414}

In addition, the rational choice theory assume that women and children have a choice in deciding whether or not to they want to repatriate. This theory does not take into account the influence of ‘significant others’ – wives and husbands – in decision making process.\textsuperscript{415} Indeed, not all persons who decide to repatriate or stay reach that decision by themselves.\textsuperscript{416} Children are taken by parents whereas wives accompany their husbands. With regards to this study, it is well know that Somali society is patriarchal.\textsuperscript{417} Due to cultural factors, men make decisions on behalf of the family. In other words, women and children are left without a choice but to follow what the head of the family decides. According to Fatuma:

If a woman decides to stay, whereas the husband wants to go back, it may result to a family dispute, separation or even divorce. In order to safeguard her family, the woman will agree to go back to Somalia with her husband.\textsuperscript{418}

\begin{thebibliography}{9}
\bibitem{412} Supra note 95 at 61.
\bibitem{413} Interview with Hawa in Eastleigh, Nairobi County (23/11/2015).
\bibitem{414} Interview with Zahra in Eastleigh, Nairobi County (15/11/2015).
\bibitem{415} Supra note 100.
\bibitem{416} Ibid.
\bibitem{417} Michael Van Notten, \textit{The Law of the Somalis} at 27.
\bibitem{418} Interview with Fatuma in Eastleigh, Nairobi County (15/11/2015).
\end{thebibliography}
In female headed households, the woman decides on behalf of the family. This is demonstrated in the words of Zaima:

Yes, if the household head is a woman, she will make the decision of whether or not to repatriate on behalf of the family.\textsuperscript{419}

The non-inclusion of women and children at household level decisions is not unique to the Somali society only. In her study, Nielsson writes that, in the Iraqi repatriation from Denmark, the decision to repatriate was made unilaterally by men without the involvement of women and children.\textsuperscript{420}

The foregoing highlight the different levels of non-inclusion in the decision making process of urban Somali refugees: communal and household levels. International law provides for the right to participate in public life without discrimination.\textsuperscript{421} According to the tripartite agreement, Somali refugees’ representatives may participate in the deliberations of the tripartite commission in an observer or advisory capacity.\textsuperscript{422} This is not sufficient. Refugees should be part and parcel of the tripartite commission. At Dadaab camp, a technical committee comprising of refugees, UNHCR, NGOs, GOK and FGS representatives has been established.\textsuperscript{423} No similar approach has been adopted for the urban Somali refugees. In order to ensure that the views of urban Somali refugees are heard, a similar technical committee should be established.

\textsuperscript{419}Interview with Zaima in Eastleigh, Nairobi County (29/11/2015).
\textsuperscript{420} Supra note 143 at 10-12.
\textsuperscript{421} Article 25 (a) of the ICCPR.
\textsuperscript{422} Article 4(5) of the tripartite agreement.
\textsuperscript{423} Article 4(7) of the tripartite agreement.
Towards this, pragmatic steps must be taken by UNHCR, GOK and FGS to ensure that the voices of men, women\textsuperscript{424} and youth\textsuperscript{425} including children are represented in the technical committee. An age, gender and diversity approach\textsuperscript{426} should be adopted so that the views of all persons are represented. In addition, separate focused group discussions (FGDs) with urban Somali men, women, youth and children should be held. This way women, youth and children would be able to express themselves and be heard. Views from all persons must be given equal consideration.\textsuperscript{427}

Hamdi expressed:

\begin{quote}
The UNHCR, GOK and FGS should consult young people like me to get our consent. We youth should have the right to express our feelings and views because it concerns our future.\textsuperscript{428}
\end{quote}

\section*{4.4 Why should the UNHCR, GOK and FGS involve urban Somali refugees in decision making?}

In response to this question, I have highlighted three critical points that were raised by urban Somali refugees during my interviews. First, the decision to repatriate is about them—refugees. The rational choice theory assumes that refugees have a choice in deciding whether or not to repatriate.\textsuperscript{429} However, urban Somali refugees have been excluded from a [decision making] process that is largely about them. Mohamed said:

\begin{quote}
\end{quote}

\footnotesize
\begin{thebibliography}{99}
\item \textsuperscript{425} Articles 11 and 17 of the African Youth Charter, adopted 2 Jul. 2006.
\item \textsuperscript{426} UNHCR EXCOM Conclusion 101 (LV) 2004.
\item \textsuperscript{427} Supra note 11 at 164.
\item \textsuperscript{428} Interview with Hamdi in Eastleigh, Nairobi County (15/11/2015).
\item \textsuperscript{429} Supra note 95.
\end{thebibliography}
No one consulted me. UNHCR and governments of Somalia and Kenya should involve us because it’s us who are returning back home and the process is supposed to be voluntary. If we are not involved then I would say it is not voluntary repatriation.\textsuperscript{430}

Yusuf commented:

It’s me who came from Somalia. I should therefore make the decision of whether I want to go back or not.\textsuperscript{431}

As mentioned earlier in this thesis, courts in Kenya have reiterated public participation in matters that affect the public.\textsuperscript{432} Similarly, international law recognizes the participation of the people (including refugees) in public affairs.\textsuperscript{433} UNHCR on its part seeks to:

‘Consult with refugees to involve them in efforts to find a durable solution to their problems. Safeguard the refugees’ desires, enhance their decision-making process and, through concerted confidence-building measures, enlist their active participation in assessing the feasibility and desirability of their eventual return home.’\textsuperscript{434}

From the above, it’s clear that refugees (camp and urban) ought to be involved in the decision making process to repatriate. The dilemma that exists is; at what stage should refugees be involved and to what extent? Long writes that refugees are excluded in the decision making process to repatriate because of two reasons. First, the assumption that the decision making process would involve refugee populations that are reluctant to return and second, who is felt would make ‘unreasonable’ demands on the UNHCR, COA and COO.\textsuperscript{435} This assumptions are outdated and out of touch with the reality. In Guatemala, for example, refugees were directly involved in

\begin{flushleft}
\textsuperscript{430} Interview with Mohamed in Eastleigh, Nairobi County (19/11/2015).
\textsuperscript{431} Interview with Yusuf in Eastleigh, Nairobi County (22/11/2015).
\textsuperscript{432} Supra note 87.
\textsuperscript{433} Article 25 (a) of the ICCPR. Also, 13 of the African Charter on Human and Peoples Right (ACHPRs).
\textsuperscript{434} UNHCR Handbook, chapter 3.1.
\textsuperscript{435} Supra note 101 at para. 100.
\end{flushleft}
brokering the conditions of return with their government.\textsuperscript{436} It was also the same for Mauritanian refugees from Senegal.\textsuperscript{437} In my opinion, urban Somali refugees should be involved in all levels of the decision making process to repatriate (drafting, signing and the implementation stage).

Second, needless to say, urban Somali refugees are better placed to know the existing conditions back at home compared to UNHCR and the COA. Refugees are in touch with their relatives and friends back at home and are able to assess the situation in the areas of return based on the information they receive. According to the rational choice theory, individuals make rational choices after evaluating options available.\textsuperscript{438} In the words of George Homans, refugees make ‘rational’ choices on whether to return based on information received on conditions in the COO. They evaluate the information, compare it with the situation exile and then make the decision of whether to stay or go back home. Abdi M expressed:

\begin{quote}
I am in a position to know the situation in Somalia. I speak with my neighbors who tell me that there is no peace. Some refugees went back to Somalia and they came back due to conflict.\textsuperscript{439}
\end{quote}

Involvement of urban Somali refugees will positively contribute towards complementing the information provided by the UNHCR, GOK and FGS. Such complementarity will serve to reinforce the quality of information provided to the Somali refugees and thus inform their decision to repatriate.

\textsuperscript{436} Supra note 101 at para. 101.
\textsuperscript{437} Supra note 273 at 3.
\textsuperscript{438} Supra note 95.
\textsuperscript{439} Interview with Abdi in Eastleigh, Nairobi County (22/11/2015).
Third, UNHCR, GOK and FGS need to involve urban Somali refugees in decision making so that they are informed of refugees’ plans for their own return. This would help in developing an inclusive and comprehensive plan for the voluntary return of Somali refugees. Furthermore, UNHCR, GOK and FGS would gain a deeper understanding of the issues that refugees consider before deciding to repatriate. Abdi M said:

I don’t want to be a refugee forever. If the security and economic conditions in Somalia improve, I will go back.  

In summary, failure to involve urban Somali refugees in the decision making process will result to infringement of their rights. The preamble of 1969 OAU Convention underlines that human beings – including refugees – ‘shall enjoy fundamental rights and freedoms without discrimination.’ For instance, non-inclusion may be interpreted as a threat to the non-discrimination principle. In upholding this principle, a state must treat a foreigner – including refugees – no worse that it treats its own nationals. Critics may argue that UNHCR – as the mandated body to protect refugees – does indeed represent the voices of refugees in the decision making process. However, I argue that UNHCR cannot ‘necessarily be regarded as an objective actor’ in the decision making process. Often, UNHCR is under pressure from the COA or COO to fast track the repatriation of refugees sometimes to less than ideal circumstances. Interviewees from the UNHCR and GOK mentioned that there was a lot of pressure from the GOK to UNHCR to repatriate Somali refugees.

---

440 Interview with Abdi M in Eastleigh, Nairobi County (17/11/2015).
441 Preamble para.6, 1969 OAU Convention.
443 Saul Takahashi, ‘The UNHCR Handbook on Voluntary Repatriation’ at 596. Also, supra note 128 at 292.
444 Supra note 101 para 23. Also, supra note 128 at 292.
4.5 Participation in decision making

In order to solve refugee problems, states have to address the root causes of refugee flight.\textsuperscript{445} One of the ways recommended by Emmanuel is ‘participation in decision making’\textsuperscript{446} The ICCPR provides for the right to participate in public life without discrimination.\textsuperscript{447} Further support for participation in public life can be found in the Kenyan Constitution. Article 174 (c) recognizes the value of people – nationals and refugees alike – in enhancing ‘participation in the exercise of the powers of the State and in making decisions affecting them.’\textsuperscript{448} Emphasis is placed on making sure that refugees take part in decisions affecting them.\textsuperscript{449} The critical question in the decision making process to repatriate is: how can refugees be included in the process? My thesis, through a case study of urban Somali refugees, identified three ways in which refugees can participate in the decision making process. I have discussed them in the following sections.

4.5.1 Access to information on conditions in the areas of return

International law recognize the right of individuals to information. The ICCPR indicates that all persons are entitled to ‘seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.’\textsuperscript{450} The 1969 OAU Convention says surprisingly little about information. Article 5 (4) puts it this way:

\textsuperscript{445} Supra note 11 at 163.
\textsuperscript{447} Article 25 (a) of the ICCPR.
\textsuperscript{448} Article 174 (c) of the Constitution of Kenya (2010).
\textsuperscript{449} UNHCR Handbook chapter 4.1.
\textsuperscript{450} Article 19(2) of the ICCPR.
‘an appeal shall be made through national information media and through the Administrative Secretary-General of the OAU, inviting refugees to return home and giving assurance that the new circumstances prevailing in their country of origin will enable them to return without risk and to take up a normal and peaceful life without fear of being disturbed or punished, and that the text of such appeal should be given to refugees and clearly explained to them by their country of asylum.’

The UNHCR Executive Committee, in 1980, recognised ‘the importance of providing refugees with all the necessary information on the situation in their country of origin to facilitate their decision to repatriate.’ Article 35 (3) of the Constitution of Kenya obligates Kenya as the host state to ‘publish and publicise any important information affecting the nation.’

However, it is less detailed on the modalities of accessing the information. Consequently, arrangements that ensure urban Somali refugees have access to information on voluntary repatriation as well as on conditions in Somalia have been unsatisfactory.

My literature review identified that refugees actively search for information about their COO in order to repatriate. Information on conditions in the COO is majorly obtained by refugees from non-formal sources (friends, relatives, other refugees or returnees). In other words, information obtained from formal sources (UNHCR, COO and COA) is either not accessible, irrelevant or considered as unreliable. This is a gap. Zeinab said:

The Government of Somalia tells UNHCR that it’s safe in Somalia, but the reality is that there is conflict. I rely on the information received from my relatives.

---

451 Article 5(4) of the 1969 OAU Convention.
452 UNHCR, EXCOM Conclusion No.18 (XXXI)- 1980.
453 Article 35 (3) of the Constitution of Kenya.
454 Supra note 159 at 19. Also supra note 93 at 33.
455 Supra note 159 at 19, supra note 155 at 2-11 and supra note 93 at 33.
456 Interview with Zeinab in Eastleigh, Nairobi County (15/11/2015).
With regards to this study, the tripartite agreement obligates the UNHCR, GOK and FGS to provide timely, objective and accurate information on the current conditions in the COO to the refugees.\footnote{Article 15 (1) of the tripartite agreement.} Sadly and unfortunately, this has not happened for the urban Somali refugees. Abdi M commented:

> We need more information. Currently, there are a lot of refugees who do not know about voluntary return to Somalia nor do they have credible information to help them decide whether to return or not.\footnote{Interview with Abdi M in Eastleigh, Nairobi County (17/11/2015).}

In order to strengthen information provided by the formal sources, urban Somali refugees must be involved. One way of doing this is by setting up help desks in urban areas where refugees provide information to complement information obtained from formal sources. Refugees would verify information provided at help desks with that obtained from informal sources. This would in turn enhance the reliability of information provided by the UNHCR, GOK and FGS. In addition, urban Somali refugees would have access to reliable information which would enable them decide whether or not to return.

Another gap identified by my literature review was that, there was no coordinated or uniform way of channeling information [on the conditions in the COO] so that refugees could access it. Indeed, urban Somali refugees, UNHCR, GOK and FGS all have relevant information about the conditions in Somalia. However, in the absence of a well-coordinated way of collecting and sharing information, it’s difficult for urban Somali refugees to access accurate and reliable information about the conditions in the areas of return. In order to ensure that urban Somali refugees have
access to accurate and reliable information on the areas of return, information sharing between urban Somali refugees and UNHCR, GOK and FGS should be strengthened. As mentioned earlier, help desks should be set up in Nairobi to collect and provide information. They should be set up in areas which are accessible to the refugees. Refugees could also be used to disseminate the joint information. In Uganda, for instance, Rwandese refugees would spread information obtained about Rwanda throughout the camp to keep everyone informed.459

Not surprising perhaps, is that data collected from my interviewees showed that they were not aware of the planned voluntary repatriation. This is demonstrated by the words of Yusuf:

I heard a rumor in the estate. People were saying that there is a plan to return all refugees to Somalia, but I thought it was lies. I am not sure whether or not it’s true as I do not have accurate information on the voluntary repatriation.460

The information vacuum is heightened by the gaps in the tripartite agreement.461 For instance, the tripartite agreement does not specify what kind of information should be shared by each actor, how the information should be shared with the refugees, the format in which the information would be disseminated, the language to be used (English, Swahili or Somali), the frequency of information dissemination, and how and where refugees (including the vulnerable persons) would access this information.

In order to reduce the gaps and ensure that urban Somali refugees receive information on the voluntary repatriation, UNHCR, GOK and FGS must organize and carry out joint public awareness campaigns and information dissemination in all areas where refugees are living. This can achieved

459 Supra note 159 at 19.
460 Interview with Yusuf in Eastleigh, Nairobi County (17/11/2015).
461 Article 15 (1) of the tripartite agreement.
by conducting announcements via mega phones, holding public rallies and forums, holding talks
on local radio shows where urban Somali refugees can call in and where possible door to door
awareness campaigns. In order to ensure that the message is well understood, Somali language
should be used.

According to Koser, refugees evaluate information about conditions in the COO on the basis of
three characteristics: ‘reliability, accuracy and content’. As mentioned earlier, reliability of
information is dependent on the source. Information obtained through informal sources is
considered reliable compared to that from official sources. My interviewees said that they mostly
relied on information obtained from relatives and friends in the decision whether to repatriate.
Moreover, urban Somali refugees do not rely on one source of information but on several. Fatuma
said: I communicate with my family and friends who are back in Somalia. I also watch Somali
news. Koser argues that the accuracy of information about the COO depends on high frequency
of information receipt. In other words, up to date information means that the refugee keeps
abreast of the changes in the COO. Koser explains content in terms of relevance of the
information. Majority of the urban Somali refugees interviewed said that they fled Somalia
because of insecurity. Not surprising, security was an overriding priority in the decision of whether
to return. Mohamed said:

Security and political stability are the two most important factors affecting our decisions
on whether or not to go back, and for now both of them have not improved yet.

462 Supra note 155 at 9.
463 Interview with Fatuma in Eastleigh, Nairobi County (15/11/2015).
464 Supra note 155 at 10.
465 Supra note 155 at 11.
466 Interview with Mohamed in Eastleigh, Nairobi County (19/11/2015).
Prior to repatriation, refugees must be informed what to expect in their areas of return. They must be informed of what the COO, UNHCR and NGOs can and cannot provide. If this is not communicated properly, refugees will repatriate worse off than they were in the COA. This in turn will challenge the sustainability of the returns. UNHCR is obligated to provide information about the conditions of return, including the level of security, access to food, water, housing, health care, education and livelihood opportunities, choice of repatriation method, procedure for reclaiming their property and ‘information on assistance that refugees cannot expect.’\textsuperscript{467} In a research conducted on the repatriation of Iraqi refugees from Denmark in 2008, ‘insufficient information about the country of origin’ prior to repatriation contributed to refugees deciding not to repatriate.\textsuperscript{468} Specifically, Iraqi refugees pointed out that they did not receive adequate information regarding the security situation in Iraq.

The foregoing imply that, in strengthening information sharing among refugees, UNHCR, GOK and FGS, three factors are critical and should be considered: accuracy, reliability and relevance of information. This way refugees will be able to make informed decision.

\textbf{4.5.2 Go and see visits}

In 1980, the Executive Committee recognised that individual refugees should be able to visit their COO to ‘inform’ themselves of the situation in the areas of return.\textsuperscript{469} The visit is supposed to enable a refugee make a decision on whether or not to return based on what they see. Accordingly, go and

\textsuperscript{467} UNHCR Handbook, chapters 3.3 and 4.2.
\textsuperscript{468} Supra note 143 at 8.
\textsuperscript{469} UNHCR, EXCOM Conclusion No.18 (XXXI)- 1980.
see visits increase refugees’ ability to evaluate the positive and negative factors in the COA with those in the COO. According to the rational choice theory, ‘in choosing between alternative actions, a person will choose the one which the value of the output is expected to be greater.’

Thus, a refugee will decide to repatriate based on what they see. If they observe that the conditions in the areas of return will contribute to their happiness or benefit they will repatriate. However, if what they see diminishes their happiness then they will not agree to repatriate. Thus, the decision of the refugee on whether or not to go back home will be informed. The story of Noah and the flood, in the Bible, captures the importance of go and see visits:

After 40 days Noah opened a window and sent out a raven. It did not come back, but kept flying around until the water was completely gone. Meanwhile, Noah sent out a dove to see if the water had gone down, but since the water still covered all the land, the dove did not find a place to alight. It flew back to the boat, and Noah reached out and took it in. He waited another seven days and sent it out the dove again. It returned to him in the evening with a fresh olive leaf in its beak. Noah knew that the water had gone down. Then he waited for another seven days and sent out the dove once more; this time it did not come back.

The quote above demonstrates that go and see visits are organized so that refugees or IDPs can see for themselves the conditions in the areas of return. After the visit, refugees and IDPs are ‘expected to share their impressions with the other refugees or displaced people’. The information will inform their decision on whether or not to repatriate. Information shared is on general issues such as, ‘security situation, infrastructure and livelihoods opportunities’. The UNHCR has organized many go and see visits in Africa. For instance, in 2005, South Sudanese refugees from Kakuma

---

470 Supra note 100 at 54.
471 Supra note 95.
472 The Good News Bible, the book of Genesis, chapter 8 verse 6-11.
474 Ibid.
camp went to visit their areas of origin.\textsuperscript{475} In each case, refugees met with the local authorities and were given a tour of their towns. Upon return from the visit, the refugees shared with the other refugees of their findings in the areas of return. In Kenya, after the 2007 post-election violence\textsuperscript{476}, UNHCR organized a go and see visit to Nyakinyua and Timboroa in Nakuru County for 30 IDPs.\textsuperscript{477} The IDPs had fled from these areas after inter-ethnic violence broke out in 2007. International Organization for Migration financed the visit to and from the towns. During the go and see visit, the neighbors from the rival ethnic group welcomed the IDPs – some of whom had turned on them when violence erupted.\textsuperscript{478} Even so, majority of the IDPs ‘were shocked to see the devastation wreaked on their property.’\textsuperscript{479} As a consequence of the go and see visit, the IDPs were undecided on whether or not to return permanently. Ann Waithera, an IDP who after walking through the ashes of what was left of her family house and garden, expressed:

‘What are we going to do here when we come back? There is nothing left. Our land is very fertile but we are surrounded by aggressors.’\textsuperscript{480}

Although, the tripartite agreement provides that UNHCR, GOK and FGS shall facilitate ‘go and see’ visits by refugees\textsuperscript{481}, it is silent on how such information obtained from the visit will be shared with remaining refugees. For instance, Bram Jansen’s\textsuperscript{482} study on repatriation of South Sudanese refugees from Kakuma camp to South Sudan in 2011, revealed UNHCR’s control of the ‘go and

\textsuperscript{476}Supra note 11 at 164, the post-election violence created ‘some 500,000 internally displaced persons and 12,000 refugees’.
\textsuperscript{478}Ibid.
\textsuperscript{479}Ibid.
\textsuperscript{480}Ibid.
\textsuperscript{481}Article 15 (2) of the Tripartite agreement.
\textsuperscript{482}Supra note 101 para 103.
see’ visits. A local leader was ‘warned by UNHCR not to make any public comments about his trip until some days later... after the team had met and agreed upon a common statement’. In other words, the information shared by those who participated in the go and see was biased. There is a high likelihood that the common statement was partial and unreliable to enable a refugee make an informed decision. To remedy control of information by UNHCR, guidelines on information sharing and dissemination must be agreed upon by UNHCR, GOK, FGS and the refugees prior to ‘go and see’ visits. The actors must agree on what information participants can or cannot share, what UNHCR, GOK and FGS can or cannot share. Information shared should not be biased.

Generally, only leaders of the refugees participate in the ‘go and see’ visits. In order to guarantee that the visits are all inclusive, UNHCR must ensure that women, children and youth are given equal opportunity as men. In addition, refugees from minority clans should also be considered on an equal basis as those from major clans. The tripartite agreement does not provide for the selection criteria of those who take part in the go and see visits. Such a selection criteria will factor in the age, gender and diversity of those undertaking the go and see visits. The views of women and children during and after this visits must be given equal weight as those of men.

The tripartite agreement is also silent on who will finance the go and see visits. UNHCR, COO and COA must also agree on who will finance the go and see visits. I would recommend that each actor contributes financially or materially to the go and see visits.

4.6 Timing of return

483Ibid.
When making the decision of whether or not to repatriate, ‘the timing of return is an essential element’\textsuperscript{484} that refugees consider. As mentioned in chapter two, ‘home’ can evolve during exile. The COO can undergo significant changes while refugees are in exile to the extent that, at the time of repatriation, refugees return to a place very different from where they had originally fled from.\textsuperscript{485} For instance, Omata observes that after so many years in exile, ‘many Liberian refugees in Ghana were not prepared to go back to the precarious political and economic situation in Liberia’.\textsuperscript{486}

If the tripartite agreement is anything to go by, all Somali refugees in Kenya should have repatriated by November 2016. However, majority of the urban Somali refugees interviewed expressed that the timing was not conducive for any kind of returns (voluntary or spontaneous) – given the security situation in Somalia. They felt left out with regards to the decision on the timing of the return. Zeinab expressed:

\begin{quote}
The repatriation is not appropriate at this time. Refugees should be allowed to take their time until they find it appropriate to go back home.\textsuperscript{487}
\end{quote}

In addition, urban Somali refugees were worried that they would return back home in the face of continued protection risks. Abdi M said:

\begin{quote}
When refugees are not involved in deciding when they want to return, they are likely to go back to Somalia where there is greater risks for their lives or they will go to other countries in Europe.\textsuperscript{488}
\end{quote}

\begin{footnotes}
\item[484] Supra note 78 at 1292.
\item[485] Supra note 119 at 12.
\item[486] Supra note 78 at 1284.
\item[487] Interview with Zeinab in Eastleigh, Nairobi County (15/11/2015).
\item[488] Interview with Abdi M in Eastleigh, Nairobi County (17/11/2015).
\end{footnotes}
As mentioned in chapter three, the conditions in Somalia are not conducive for the voluntary repatriation of refugees. Amnesty International\textsuperscript{489} reported that the human rights situation in Somalia was precarious. Civilians were at risk of ‘grave human rights abuses’ such as, ‘indiscriminate and targeted violence, including rape and killings’ by parties to the conflict.\textsuperscript{490} This was confirmed by Mary:

There is a co-relation between increased protection risks (child recruitment and gender based violations) in Somalia and the returns of Somali refugees from Kenya. There is data that returnees are facing human rights violations once they are in Somalia.\textsuperscript{491}

The above does not mean that refugees have a right to stay in the host state indefinitely.\textsuperscript{492} ‘If return movement is a social product depending on different factors, people who are not willing to return at one point may decide to do so at another point’.\textsuperscript{493} For example, most of the Somali youths interviewed were studying\textsuperscript{494} in the Kenyan universities and colleges and felt that the timing of the voluntary repatriation would affect their studies. Despite that, most of them expressed a desire to go back home once they had completed their studies. Zeinab said:

I do not want to go back to Somalia at the moment because I am in school. After my studies, I can go back and take part in peace building efforts.\textsuperscript{495}

Mohamed commented:

\textsuperscript{489}Amnesty International, No place like home: Returns and relocations of Somalia’s Displaced, 8-9. Also, briefing of the Amnesty International, Forced returns to South Central Somalia, including Al Shabaab areas: A blatant violation of international law, (23 October 2014)AFR 52/005/2014.
\textsuperscript{490}Ibid.
\textsuperscript{491}Interview with Mary in City Centre, Nairobi County (02/09/2016).
\textsuperscript{492}Supra note 128 at 293.
\textsuperscript{493}Supra note 78 at 1292.
\textsuperscript{494}Interview with Zeinab in Eastleigh, Nairobi County (15/11/2015); Interview with Hamdi in Eastleigh, Nairobi County (15/11/2015) and interview with Halima in Eastleigh, Nairobi County (17/11/2015).
\textsuperscript{495}Interview with Zeinab in Eastleigh, Nairobi County (15/11/2015).
For now I am not willing to return but in the future I wish there will be improved security to live in safety and respect.\footnote{Interview with Mohamed in Eastleigh, Nairobi County (19/11/2015).}

From the fore going discussions, a gap exists with regards to the involvement of urban Somali refugees in the decision making process to repatriate. UNHCR, GOK and FGS should involve refugees when drafting the tripartite agreement so that they can express their views with regards to the timing of their return. Since the current tripartite agreement is coming to an end in November 2016, UNHCR, GOK and FGS must ensure that they involve refugees when drafting a new one or when reviewing the current one for extension.

At Dadaab camp, exemptions were given to children and students in colleges. I would suggest to the UNHCR and GOK to give an opportunity to urban Somali children who are doing their national exams this year, to complete. Children in other classes, should be transferred to schools in Somalia at the same school level study they were in Kenya. In addition, the GOK and UNHCR need to develop a repatriation plan together with the urban Somali youths who are in the universities or colleges to agree on the timelines for them to complete their studies. Andrew recommended:

The timing of the return is appropriate but it should be in a phased manner. First, with Somali refugees want to return and then gradually with the rest.

\section*{Conclusion}
According to Zieck, a ‘proactive approach where refugees are considered part of the solution’ should be adopted by UNHCR, COO and COA. Such an approach would ensure that urban Somali refugees have access to information that enables them participate in the decision making process. According to the urban Somali refugees interviewed, conditions in Somalia featured highly in their decision whether to return. Thus, provision of accurate, reliable and relevant information about Somalia would lead to their informed decision to return. Other than access to information, urban Somali refugees can take part in the go and see visits in areas or return. This would inform their decision of whether or not to repatriate based on what they see. Urban Somali refugees or their leaders should also take part in the drafting of strategic documents affecting them.

Ways in which urban Somali refugees can access information which be strengthened. For instance, house to house visit by UNHCR staff, targeting particularly, the blind, deaf, disabled, and sickly as well as other vulnerable persons should be conducted. UNHCR should not wait for the vulnerable people to come to their offices to access the information. Radio talk shows where urban Somali refugees can call in. Visual and oral methods of information dissemination should be given preference over written forms due to the Somali culture of being an ‘oral’ society. Local language (Somali) should be used in sharing and disseminating information. Help centres should also be set up in various places where refugees can access easily for information.

---

497 Marjoleine Zieck, ‘Voluntary Repatriation’ at 37.
In order to ensure an age, gender diversity approach, women, men, youth and children should be included or their views represented in the ‘go and see’ visits and repatriation decision making process respectively. All views must be given equal weight.\textsuperscript{498}

**CHAPTER 5**

**CONCLUSIONS AND RECOMMENDATIONS**

5.0 **Introduction**

This research set out to answer two questions: whether the inclusion of urban Somali refugees in the decision making process to repatriate would lead to their informed decision of whether or not to return and secondly, to identify ways in which urban Somali refugees could be involved in the decision making process to return. The decision of whether or not to repatriate is a complex one and though, only refugees’ can exercise the right to return, they have been excluded from the decision making process.

5.1 **Conclusions**

In answering the first question, the researcher through interviewing urban Somali refugees, UNHCR, NGO and GOK officials found out that indeed, the inclusion of urban Somali refugees in the decision making process to repatriate would contribute to their informed choice of whether or not to return. This is in line with the rational choice theory which assumes that individuals make rational decisions.\textsuperscript{499} View from this perspective, urban Somali refugees were likely to make informed decisions on whether or not to return once they were involved in the repatriation process.

\textsuperscript{498}Supra note 11 at 164.
\textsuperscript{499}Supra note 95 at 54-61.
The current decision making process composed of UNHCR, COO and COA sidelines Somali refugees. Further, women and children have been sidelined in the decision making process as the decision is unilaterally made by men. Somali society is well known to a patriarchal. Others who have been excluded in the decision making process include, refugees born in Kenya, those in schools and colleges, those who do not wish to repatriate. Inclusion of women and children, second or third generation refugees, the deaf and the blind, the elderly and those who do not wish to repatriate in the decision making process, will lead to their informed decision.

International law is predisposed towards the inclusion of refugees in decision making process. The ICCPR and the ACPHRs provide for the right to access information. The courts in Kenya have also reiterated right to information and participation in matters of public interest. Urban Somali refugees will be able to participate in decision making if they have access to information on voluntary repatriation.

To adequately address the exclusion of urban Somali refugees in the decision making process, attention must be given to how refugees access information on voluntary repatriation. Although, the tripartite agreement provides that the UNHCR, GOK and FGS shall provide information to refugees (on the conditions in Somalia) to inform their decision to return, modalities of how the information will be shared and disseminated to the refugees is wanting. In addition, before undertaking any voluntary repatriation of refugees, UNHCR, GOK and FGS must ensure that the
conditions in Somalia are conducive for the return of voluntary. A joint assessment by UNHCR, GOK, FGS and refugees must be undertaken prior to promotion of voluntary repatriation. Minimum basic standards of what should be in place before repatriation should be developed and agreed upon by the refugees, UNHCR and COO. According to my interviewees, the basic conditions include, availability of livelihoods, health services, schools, access to land, security and respect for human rights.

In answering the second question, the researcher identified several ways through which urban Somali refugees could be involved in the decision making process. The current decision making process is composed of the UNHCR, GOK and FGS. Bradley writes that, ‘the fact that the refugees are the ones repatriating and have not be involved on the decision of whether or not to repatriate calls for their inclusion’. Refugees are the main decision makers during flight and should therefore be seen as decision makers in the decision making process to repatriate. This is in line with the rational choice theory which assume individuals have choices and are able to make considered decisions. In making an informed decision of whether or not to repatriate, refugees require information on the existing conditions in the COO.

The UNHCR, GOK and FGS are obligated to provide accurate and objective information to the Somali refugees on the existing conditions in Somalia. Thus, one of the ways in which urban Somali refugees can be involved in the decision making process is through access to information

---

500 Article 5 of the OAU Convention.
501 Article 4 of the tripartite agreement.
502 Supra note 128 at 290.
503 Article 15 (1) of the tripartite agreement.
on the conditions in Somalia. Through the establishment of helpdesks by GOK and UNHCR in Nairobi, urban Somali refugees can access information about Somalia. Refugees can also provide and receive information about Somalia at these helpdesks. In addition, they can verify the information being provided at the helpdesks. UNHCR and GOK can provide information to the urban Somali refugees through local radio shows, where refugees can call in, hold public meetings where refugees can participate, conducting focus group discussions with women, children, youth and men separately and through translated leaflets and brochures.

Other ways in which urban Somali refugees can be involved in the decision making process include; participating in the drafting and signing of the tripartite agreements, taking part in assessments in the COO, negotiating for basic conditions to be in place in the COO before repatriation, membership to the tripartite commission and technical committee on voluntary repatriation. The UNHCR, GOK and FGS must also organize ‘go and see’ visits to Somalia for the urban refugees to enable them travel to the areas of return. This way they will be able to see the conditions in Somalia and make the decision of whether or not to repatriate based on what they see. The visits are provided for in the tripartite agreement.\(^{504}\) Urban Somali refugees should also be involved by the UNHCR, FGS and GOK when developing repatriation package entitled to refugees. This way, a reasonable amount that can sustain refugees for the first three months can be agreed upon. In all these activities, an age, gender and diversity approach must be used and the views of women and children given equal weight as those of men.

\(^{504}\) Article 15 (2) of the tripartite agreement.
5.2 Recommendations

5.2.1 Strengthen the information sharing among urban Somali refugees, UNHCR, GOK and FGS

Information is power. In order to make a free, voluntary and well informed decision with regards to their return process, urban Somali refugees must have access to accurate, reliable, timely and objective information about the conditions in their COO. From my interviews, more than 90% interviewees (23 out of 25) suggested that urban Somali refugees should be educated or informed about the repatriation process. Specifically, urban Somali refugees require information about the existing conditions in the areas of return. Under the tripartite agreement, the UNHCR, GOK and FGS are expected to make information on repatriation available to refugees. Consequently, information flow (gathering, dissemination, access and reception) among the UNHCR, refugees, GOK and FGS ought to be strengthened. Interviewees from the UNHCR, NGOs and GOK said that return helpdesks were being set up in Nairobi to serve as sources of information for urban Somali refugees. I would recommend to the UNHCR and GOK to involve urban Somali refugees in setting up the helpdesks. Refugees would complement and verify the information being provided at the helpdesks since they also receive information on conditions back in Somalia through other channels (relatives and friends).

5.2.2 Inclusion of urban Somali refugees in the design and planning of repatriation processes

---

505 Article 15 of the tripartite agreement.
All my interviewees said that urban Somali refugees had a role to play in the repatriation process. As highlighted in chapter four, one of my findings was that, challenges emanating from non-inclusion could be mitigated by the inclusion of urban Somali refugees in the decision making process.\textsuperscript{506} According to Andrew:

\begin{quote}
Stronger involvement of urban Somali refugees would lead to better appreciation of the repatriation process. The implementation of the tripartite agreement would be more workable if they were involved in decision making.\textsuperscript{507}
\end{quote}

During the drafting of the tripartite agreement, Somali refugees (urban and camp) should have been consulted and their views incorporated in the agreement. Their role in the repatriation process should have been outlined. As the tripartite agreement will be coming to an end in November 2016, my recommendation to the UNHCR, GOK and FGS is that Somali refugees should be included in the drafting of the new agreement or in the negotiations for the extension of the current agreement. One of my recommendations would be to include Somali refugees in the tripartite commission. This way the views of Somali refugees would be heard. In addition, Somali refugees should be part and parcel of the discussions on developing strategies, modalities and programmes on repatriation. Urban Somali refugees should also be included at the implementation stage of the repatriation process. For instance, their views on logistical arrangements during repatriation should be considered. Women, children and men should be included in the decision making processes. The views of all should be given equal weight.

\textsuperscript{506}Daily Nation Newspaper (02/09/2016). The Jubaland government had detained Somali returnees from Kenya at Dhobley on the grounds of inadequate living conditions in Somalia. If refugees had been consulted, the detention would not have occurred.

\textsuperscript{507}Interview with Andrew in Westlands, Nairobi County (01/09/2016).
5.2.3 A joint comprehensive plan should be developed by the UNHCR, GOK and FGS and Somali refugees.

One of the recommendations made was that refugees should take a key role in the implementation of the repatriation process. A number of conditions and processes need to be in place before repatriation of Somali refugees (urban and camp). First, a thorough assessment by the UNHCR, GOK, FGS and Somali refugees must be conducted before development of the joint plan. Once the assessment determines that the conditions in Somalia are conducive for the voluntary return of refugees, then the comprehensive plan should be developed. This plan would detail the minimum or basic conditions that must be in place before repatriation of Somali refugees. These would include education and health facilities, livelihoods opportunities, security and respect for human rights. The detailed plan should also indicate a time frame of when these basic conditions would be in place.

Out of my interviewees, there were ‘second and third generation’ refugees (born in Kenya), refugees married to Kenyans and economic refugees. My finding was that refugees born in Kenya did not want to repatriate as they didn’t know Somalia. Similarly, according to my interviews with UNHCR and GOK, some Somali refugees do not want to go back to Somali because of economic benefits. Whereas others (mostly students) did not to repatriate as the timing was off. Thus, the need for the UNHCR, GOK, FGS and Somali refugees to develop a comprehensive plan for the repatriation process.

---
508 Interview with Abdi in Eastleigh, Nairobi County (22/11/2015).
In addition, my interviewees said that the repatriation package being provided was insufficient. There is a need to review it upwardly. Somali refugees should be involved when reviewing the return package to ensure that a reasonable amount is agreed upon UNHCR, GOK, FGS and the refugees.

5.2.4 Exploring other alternative options

Although voluntary repatriation has been identified as the ‘permanent solution’ to the refugee crisis, there is a need to explore whether it remains the ideal solution in the current global refugee plight. Other options beyond voluntary repatriation, local integration and resettlement need to be explored. From my literature review and interviews with UNHCR staff, local integration in Kenya was not viable whereas, resettlement to a third country was least favored (it is slow and only one percentage of refugees are considered).

It is obvious that urban Somali refugees in Kenya contribute to the economy of the country. Consequently, the GOK must take note of the economic benefits arising from the presence of urban Somali refugees and explore their status in Kenya. My recommendation is that the GOK should review the Refugee Act of Kenya (2006) so that urban Somali refugees are granted permanent residency. The UNHCR, GOK and FGS must work on the caseload of those belonging to the ‘second and third generation refugees’ or refugees who came to Kenya as children. From my

509 Supra note 11 at 151, supra note 23 at 23 and interview with Anab in Westlands, Nairobi (29/12/2015).
interviews, this group of refugees did not associate Somalia as home since they had never been there. Thus, an alternative option for this group is critical.

My interviewees suggested the following options which can be explored by the GOK, FGS, UNHCR and the Somali refugees. They include; permanent residency, enhancing accessibility to business and work permits for Somali refugees, application for citizenship (mixed marriages between Somali and Kenyans). An alternative option suggested by Andrew was repatriation in a phased manner. Such that refugees who want to return should be given first priority whereas those who are not ready because of schooling or medical issues should be given a bit of time. Some of my interviewees were in universities and colleges in Kenya and wanted to complete their studies first before repatriating to Somalia. Another option suggested by Tom was that, land bordering Kenya and Somalia could be identified and Somali refugees could then be re-settled therein.

The time spent in exile by Somali refugees should also be taken in consideration while coming up with durable solutions or other options for refugees. Somali refugees `who have spent more than ten years in exile'\textsuperscript{510} are less likely to go back home compared to those who had spent less than three years in exile.

\textsuperscript{510}Supra note 141.
BIBLIOGRAPHY

A. BOOKS

1 Accord 21, Endless War: A brief History of the Somali Conflict in Mark Bradbury and Sally Healy (eds), Whose peace is it anyway? Connecting Somalia and international peacemaking (Conciliation Resources 2010).


6 Craig Forcese, A distinction with a legal difference: the consequences of non-citizenship in the ‘war on terror’ in Alice Edwards and Carla Ferstman (eds), Human Security and Non-Citizens (Cambridge University Press 2010).


14 Idil Lambo, *In the Shelter of each other: notions of home and belonging amongst Somali refugees in Nairobi* (UNHCR 2012).


18 Katy Long, Back to where you once belonged: A historical review of UNHCR policy and practice on refugee repatriation (UNHCR 2013).


21 M.D.A Freeman, Llyod’s Introduction to Jurisprudence 8th ed. (Sweet and Maxwell 2008).


25 Refugee Consortium of Kenya, Asylum Under Threat: Assessing the protection of Somali Refugees in Dadaab refugee camps and along the migration corridor (Pann Printers Limited 2012).

26 Robert Muggah, Once we were warriors: critical reflections on refugee and IDP militarisation and human security. in Alice Edwards and Carla Ferstman (eds), Human


B. JOURNAL ARTICLES


C. ELECTRONIC SOURCES


d_has_invited_somali_refugees_back_home.aspx (08 January 2013) accessed on 03/02/2016.


D. NEWSPAPERS

E. REPORTS

1 Briefing of the Amnesty International, Forced returns to South Central Somalia, including Al Shabaab areas: A blatant violation of international law, (23 October 2014) AFR 52/005/2014.

2 Economic and Social Council report of the Office of Internal Oversight Services on evaluation of the office of the UNHCR 18 March 2015.


5 UNHCR, World at War; UNHCR Global Trends on Forced Displacement in 2014 (UNHCR 2015).

F. MEDIA SOURCES

1 KTN news; ‘Somali refugees to return home’, available at https://www.youtube.com/watch?v=S6-obplAf-E accessed on 03/02/2016.

2 K24, ‘All PEV victims have been resettled’, available at www.youtube.com/watch?v=Rd55F9Lvy9Y (29 August 2015), accessed on 12/04/2016.

G. OTHER SOURCES (ON FILE WITH THE AUTHOR)


4 Department of Refugee Affairs, Press Statement, 13/12/2012.


7 UNHCR Paper on Voluntary Repatriation presented to the 4th Meeting of the Global Consultations on International Protection, 25 April 2002 EC/GC/02/5 (Global Consultations on International Protection).


H. THESIS

1 John S. Collins, ‘An Analysis of the Voluntariness of Refugee Repatriation in Africa’ [1996], research thesis at page 32-51; available at
I. STATUTES


J. LIST OF CITED INTERNATIONAL LEGAL INSTRUMENTS


**K. SOFT LAWS**

1 Cartagena Declaration on Refugees (19-22 November 1984).

2 UNHCREXCOM Conclusion No. 29 (XXXIV)-1983.

3 UNHCR EXCOM Conclusion No.58 (XL)-1989.

4 UNHCR EXCOM Conclusion No. 79 (XLVII)-1996.

5 UNHCR EXCOM Conclusion No.40 (XXXIV)-1985.

6 UNHCR EXCOM Conclusion No.101 (LV)-2004.


APPENDIX ONE

Interview schedule with urban Somali refugees

Study Title: Voluntary repatriation of urban Somali refugees: a case of inclusion in decision making process

Researcher: Veronicah Wakarima, LL.M Candidate, University of Nairobi

Supervisor: Professor Edwin Abuya

Introduction

Good day Sir/Madam,

Thank you for accepting to participate in this interview. I am currently pursuing my Masters Degree in Law at the University of Nairobi. As part of the course complement, I am required to write and present a Project Paper in an area of interest. As indicated above, my topic of study is “Involvement of Somali urban refugees in the decision making process to repatriate from Kenya to Somalia.” This interview schedule is administered as part of a study on the voluntary repatriation of Somali refugees in Kenya. On 10th November 2013 the Governments of Kenya and Somalia together with UNHCR signed a tripartite agreement that guarantees voluntary repatriation of Somali refugees in Kenya. Voluntary repatriation ensures that return takes place in the free-will of a refugee. The study intends to assess the factors affecting the decision making process of urban Somali Refugees to repatriate to Somalia as well as their level of involvement the decision making process to repatriate.
As a participant in this interview, please note the following:

- Your participation is entirely voluntary. You may withdraw at any time from the interview;
- The interview is intended to take approximately 1 hour;
- In the event that any question administered during the interview is not clear, feel free to ask for clarification;
- Your responses will be recorded on the interview schedule or note book; and
- Your identity as a participant in this interview will be protected by an identifying code number known only to the researcher. You will not be named in any study reports, presentations or publications.

- Do you agree to participate in this study?

Yes: _______
No: _______

Please sign below confirming your decision:

Signature: ________________
(Accept/Decline)

Please complete the following background information:

1. Name [optional]:............................................................................................................

2. Refugee/asylum seeker:...................................................................................................................

3. Age (tick): □15-17 □18-25 □26-35 □36-50 □above 50

4. Gender (tick) □Female □Male

5. How long have you lived in Kenya (tick)?
   □0-3 years □5-10 years □Over 10 years
6. Date of the interview…………………………

7. Time of the interview: Start…………………….End……………………

8. Language of the interview, if not English…………………………

**General questions**

**Topic 1: Introduction**

1. When did you leave Somalia?

2. What caused you to leave Somalia?

3. Are you aware of the proposed voluntary repatriation process (tick)? : ☐Yes ☐No

4. How would you describe the planned voluntary repatriation?

5. What are your fears in the repatriation exercise or what challenges do you think you will face?

**Topic 2: A refugee’s right to participate in decision making**

1. Did someone speak to you on whether or not you want to go back to Somalia? Yes/No. If yes, who spoke to you?

2. Who do you think should make the decision of whether or not a refugee should go back to their country?

3. Why do you think it’s important for UNHCR or the Government of Somalia or the Government of Kenya to speak to you before they decide to take refugees back to their country?

4. Are there any social factors that influence the decision of refugees to go back to Somalia? (Security, age, gender, health, schools, hospitals, sanitation). Please explain

5. Are there any economic factors that influence the decision of refugees to go back to Somalia? Please explain.
6. Are there any political factors in Kenya or Somalia that influence the decision of refugees to repatriate? Please explain.

**Topic 3: Conditions conducive for voluntary repatriation**

1. Are you aware of the existing situation in Somalia? (Yes/No) Please explain.
2. Does the situation in Somalia make you decide that you want or you do not want to go back to Somalia?
3. What do you think UNHCR or the government of Kenya or the government of Somalia can do or put in place before asking refugees to go back to Somalia?
4. What would you like to see in Somalia so that you can go back?

**Topic 4: Voluntary Repatriation of Refugees**

1. Are you willing to go back to Somali, if yes or no, give reasons for your choice?
2. What are the social factors in Kenya or Somalia that will influence your decision to go home?
3. What are the economic factors in Kenya or Somalia that will influence your decision to go home?
4. Are there any political factors in Kenya or Somalia that will influence your decision to go home?

Please provide any other comments or suggestions that you may have-----------------------------

-----------------------------------------------------------------------

142 | P a g e
APPENDIX TWO

Interview schedule for institutional interviews (UNHCR, NGOs and GOK)

**Study Title:** Voluntary repatriation of urban Somali refugees: a case for inclusion in the decision making process

**Researcher:** Veronicah Wakarima, LL.M Candidate, University of Nairobi

**Supervisor:** Professor Edwin Abuya

**Introduction**

Good day Sir/Madam,

Thank you for accepting to participate in this interview. I am currently pursuing my Masters Degree in Law at the University of Nairobi. As part of the course complement, I am required to write and present a Project Paper in an area of interest. As indicated above, my topic of study is on “Voluntary repatriation of urban Somali refugees: a case for inclusion in the decision making process.” This interview schedule is administered as part of a study on the voluntary repatriation of Somali refugees in Kenya. On 10th November 2013 the Governments of Kenya and Somalia together with UNHCR signed a tripartite agreement that guarantees voluntary repatriation of Somali refugees in Kenya. Voluntary repatriation ensures that return takes place in the free-will of a refugee. The study intends to assess the factors affecting the decision making process of urban Somali Refugees to repatriate to Somalia as well as their level of involvement the decision making process to repatriate.

As a participant in this interview, please note the following:
• Your participation is entirely voluntary. You may withdraw at any time from the interview;
• The interview is intended to take approximately 1 hour;
• In the event that any question administered during the interview is not clear, feel free to ask for clarification;
• Your responses will be recorded on the questionnaire; and
• Your identity as a participant in this interview will be protected by an identifying code number known only to the researcher. You will not be named in any study reports, presentations or publications.

• Do you agree to participate in this study?
Yes: ______
No: ______

Please sign below confirming your decision:
Signature:_______________
(Accept/Decline)

Please complete the following background information:

9. Name [optional]:........................................................................................................

10. Institution:................................................................................................................

11. Gender (tick) □Female □Male

12. Date of the interview………………

13. Time of the interview: Start………………..End……………………

14. Language of the interview, if not English…………………………

General questions
Topic 1: Introduction

1. What’s your opinion of the voluntary repatriation of Somali refugees from Kenya?

2. Were refugees consulted or involved in any stage of the decision making process to repatriate? (Yes or No) explain?

Topic 2: Voluntary Repatriation of Refugees

1. Would you call/consider the current voluntary repatriation of Somali refugees as voluntary? (Yes/No) Please explain.

2. What alternatives options are available for refugees other than voluntary repatriation and are they feasible?

Topic 3: Conditions conducive for voluntary repatriation

1. Do you think conditions in Somalia are conducive for the voluntary return of Somali refugees? (Yes/No) Please explain.

2. In your opinion what the basic minimum conditions that should be in place before repatriating refugees to Somalia?

Topic 4: A refugee’s right to participate in decision making

1. Do you think refugees have a role to play in the decision making process? (Yes or No). Please explain.

2. At what stage do you think refugees should be involved in the decision making process?

3. In what ways can refugees be involved in the decision making to repatriate?
Please provide any other comments or suggestions that you may have---------------------------------

-----------------------------------------------------------------------------------------------

APPENDIX THREE

List of respondents (urban Somali refugees, UNHCR, NGO and GOK staff in Nairobi)

<table>
<thead>
<tr>
<th>S/No.</th>
<th>Pseudo name</th>
<th>Gender</th>
<th>Location</th>
<th>Date</th>
<th>Occupation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Fatuma</td>
<td>F</td>
<td>Eastleigh</td>
<td>15 Nov 2015</td>
<td>Refugee/businesswoman</td>
</tr>
<tr>
<td>2</td>
<td>Bisharo</td>
<td>F</td>
<td>Eastleigh</td>
<td>15 Nov 2015</td>
<td>Refugee/student</td>
</tr>
<tr>
<td>3</td>
<td>Hawa</td>
<td>F</td>
<td>Eastleigh</td>
<td>15 Nov 2015</td>
<td>Refugee/student</td>
</tr>
<tr>
<td>4</td>
<td>Zeinab</td>
<td>F</td>
<td>Eastleigh</td>
<td>15 Nov 2015</td>
<td>Refugee/student</td>
</tr>
<tr>
<td>5</td>
<td>Hamdi</td>
<td>F</td>
<td>Eastleigh</td>
<td>15 Nov 2015</td>
<td>Refugee/Businesswoman</td>
</tr>
<tr>
<td>6</td>
<td>Halima</td>
<td>F</td>
<td>Eastleigh</td>
<td>17 Nov 2015</td>
<td>Refugee/student</td>
</tr>
<tr>
<td>7</td>
<td>Abdi M</td>
<td>M</td>
<td>Eastleigh</td>
<td>17 Nov 2015</td>
<td>Refugee/Peasant</td>
</tr>
<tr>
<td>8</td>
<td>Mohamed</td>
<td>M</td>
<td>Eastleigh</td>
<td>19 Nov 2015</td>
<td>Refugee/Peasant</td>
</tr>
<tr>
<td>9</td>
<td>Abdi</td>
<td>M</td>
<td>Eastleigh</td>
<td>22 Nov 2015</td>
<td>Refugee/Taxi driver</td>
</tr>
<tr>
<td>10</td>
<td>Yusuf</td>
<td>M</td>
<td>Eastleigh</td>
<td>22 Nov 2015</td>
<td>Refugee/Peasant</td>
</tr>
<tr>
<td>11</td>
<td>Zahra</td>
<td>F</td>
<td>Eastleigh</td>
<td>23 Nov 2015</td>
<td>Refugee/businesswoman</td>
</tr>
<tr>
<td>12</td>
<td>Ayan</td>
<td>F</td>
<td>Eastleigh</td>
<td>26 Nov 2015</td>
<td>Refugee/student</td>
</tr>
<tr>
<td>13</td>
<td>Abdiqani</td>
<td>M</td>
<td>Eastleigh</td>
<td>26 Nov 2015</td>
<td>Refugee/employed</td>
</tr>
<tr>
<td>14</td>
<td>Ayub</td>
<td>M</td>
<td>Eastleigh</td>
<td>26 Nov 2015</td>
<td>Refugee/employed</td>
</tr>
<tr>
<td>15</td>
<td>Omar</td>
<td>M</td>
<td>Eastleigh</td>
<td>26 Nov 2015</td>
<td>Refugee/employed</td>
</tr>
<tr>
<td>16</td>
<td>Bashir</td>
<td>M</td>
<td>Eastleigh</td>
<td>28 Nov 2015</td>
<td>Refugee/self employed</td>
</tr>
<tr>
<td>17</td>
<td>Kaltun</td>
<td>F</td>
<td>Eastleigh</td>
<td>29 Nov 2015</td>
<td>Refugee/student</td>
</tr>
<tr>
<td></td>
<td>Name</td>
<td>Gender</td>
<td>Location</td>
<td>Date</td>
<td>Organization</td>
</tr>
<tr>
<td>---</td>
<td>--------</td>
<td>--------</td>
<td>--------------</td>
<td>------------</td>
<td>-----------------------------------------------</td>
</tr>
<tr>
<td>18</td>
<td>Zaima</td>
<td>F</td>
<td>Eastleigh</td>
<td>29 Nov 2015</td>
<td>Refugee/businesswoman</td>
</tr>
<tr>
<td>19</td>
<td>Anab</td>
<td>F</td>
<td>Westlands</td>
<td>29 Dec 2015</td>
<td>Refugee/ employed</td>
</tr>
<tr>
<td>20</td>
<td>Andrew</td>
<td>M</td>
<td>Westlands</td>
<td>01/09/2016</td>
<td>Danish Refugee Council</td>
</tr>
<tr>
<td>21</td>
<td>Mary</td>
<td>F</td>
<td>City Centre</td>
<td>02/09/2016</td>
<td>UNHCR Somalia</td>
</tr>
<tr>
<td>22</td>
<td>John</td>
<td>M</td>
<td>Lavington</td>
<td>09/09/2016</td>
<td>Refugees Affairs Secretariat</td>
</tr>
<tr>
<td>23</td>
<td>Tom</td>
<td>M</td>
<td>Nairobi</td>
<td>09/09/2016</td>
<td>Directorate of immigration and registration of persons</td>
</tr>
<tr>
<td>24</td>
<td>Sam</td>
<td>M</td>
<td>Westlands</td>
<td>20/09/2016</td>
<td>Refugee Consortium of Kenya</td>
</tr>
<tr>
<td>25</td>
<td>Ben</td>
<td>M</td>
<td>Skype</td>
<td>21/09/2016</td>
<td>UNHCR Kenya (Dadaab)</td>
</tr>
</tbody>
</table>