

Voluntary Repatriation in the African and International Refugee Protection Systems: A Critical Reassessment

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ABSTRACT

This doctoral dissertation critically examines the principle of voluntary repatriation as a durable solution to refugee displacement in both the African and international protection contexts and addresses the complexities surrounding the ‘voluntariness’ of repatriation decisions, especially in the face of push factors influencing refugees’ choices and discussions surrounding the evolving concept of ‘home’.

It traces the evolution of voluntary repatriation in the African system of refugee protection, arguing that it was introduced primarily to serve the security concerns of newly independent African states. Similarly, its evolution and crystallization under international refugee law as preeminent solution to refugee-related issues is questionable. By juxtaposing voluntary repatriation with co-constitutive principles of modern international society like asylum and *non-refoulement*, coupled with a critique of its socio-political origins and practice, the very necessity of voluntary repatriation as a solution is questioned.

Adopting an interdisciplinary approach which combines the social process and legalization theories, fragmentation applied as an analytical framework, and the concept of primary institutions of international society from international law, and threat framing from international relations, is utilized to critique voluntary repatriation as a ‘durable solution’ to refugee displacement. The findings have important implications for refugees, policymakers and practitioners working in the field of refugee protection and resettlement.

Keywords: voluntary repatriation, international refugee law, asylum, non-refoulement.

ÖZ

Bu doktora tezi, Afrika ve uluslararası koruma kontekstlerinde mültecilerin yerinden edilmesine uzun süreli bir çözüm olarak gönüllü geri dönüş ilkesine eleştirel bir bakış sunmakta ve mültecilerin kararlarını etkileyen itici faktörler karşısında ülkesine geri dönüş kararlarının ‘gönüllülüğü’ etrafındaki karmaşıklıklara değinmekte; özellikle ‘ev’ kavramının değişimi etrafındaki tartışmaları ele almaktadır.

Afrika mülteci koruma sisteminde gönüllü geri dönüşün evrimini izleyerek, bunun başlangıçta yeni bağımsız Afrika devletlerinin güvenlik kaygılarına hizmet etmek için öncelikle ortaya atıldığını tartışmaktadır. Benzer şekilde, uluslararası mülteci hukuku altında gönüllü geri dönüşün mülteciler ile ilgili sorunların üstesinden gelinmesi için öncelikli çözüm olarak görülmesinin evrimi ve zaman içinde billurlaşması sorgulanmaktadır. Gönüllü geri dönüşü modern uluslararası toplumun diğer oluşturucu prensipleri olan sığınma ve non-refoulement (geri göndermeme) ilkeleriyle yan yana getirerek, sosyo-politik kökenleri ve uygulamaları eleştirilirken, gönüllü geri dönüşün bir çözüm olarak gerekliliği sorgulanmaktadır.

Sosyal süreç ve yasallaştırma kuramlarını birleştiren, analitik bir çerçeve olarak parçalanma kuramını ve uluslararası toplumun temel kurumları kavramını uluslararası hukuktan, uluslararası ilişkilerden tehdit çerçevesini birleştiren disiplinlerarası bir yaklaşım kullanılarak, gönüllü geri dönüşün mülteci yerinden edilmesine karşı bir ‘kalıcı çözüm’ olarak eleştirilmesi değerlendirilmiştir. Bulgular, mülteciler, politika yapıcılar ve mülteci koruma ve yerleştirme alanında çalışan uygulayıcılar için önemli sonuçlar doğurmaktadır.

Anahtar Kelimeler: gönüllü geri dönüş, uluslararası mülteci hukuku, sığınma, non-refoulement (geri göndermeme).

DEDICATION

This thesis is dedicated to Barrister Akwen Achu. You remain in our hearts forever.

This thesis is also all dedicated to all persons on the move.

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Chapter 1

INTRODUCTION

1.1 Introduction

The issue of refugee displacement has been a major concern for the international community for several decades. Globally, about 108 million persons are displaced in 2023; amongst which 35 million are refugees, 5.4 million are asylum seekers, and 5.2 million, other people in need of international protection.¹ According to the United Nations High Commissioner for Refugees (UNHCR), 1.9 million children between 2018 and 2022 were born as refugees, and 52% of all refugees under its mandate originate from just three countries; Syria (6.8 million), Ukraine (5.7 million), and Afghanistan (5.7 million).² Türkiye (3.6 million), Iran (3.4 million), Colombia (2.5 million), Germany (2.1 million), and Pakistan (1.9 million) host 38% of the world's refugees.³ In Africa, Uganda (1.5 million), Sudan (1.1 million), Ethiopia (800,000), Chad (550,000), Kenya (480,000) and Cameroon (450,000) host the largest number of refugees in the region.⁴ The proliferation of armed conflicts to places like Ukraine, the resurgence of oppressive regimes in Afghanistan and Sudan, and the continuation of

¹ UNHCR, "Refugee Statistics," 2023.

² Ibid.

³ Ibid.

⁴ Statista. "African Countries Hosting the Most Refugees in 2021."

old conflicts in Syria and the Sahel region in Africa, is continuing to lead to massive displacements globally. There seems to be no end in sight to these global turbulences.

By the end of 2022, one in seventy-four persons globally, most of them in low-and-middle-income countries had been internally displaced by conflict, violence, persecution or human rights violations.⁵ As the world faces a global climate emergency, individuals and communities at risk are frequently subjected to involuntary displacement. In vulnerable regions like the Sahel in Africa where armed groups have led to the displacement of about three million people, changes in the climate is leading to secondary displacements exposing already vulnerable persons to violent armed groups.⁶ The situation is so dire, the UNHCR has begun suggesting the recognition of the concept of climate refugees, albeit with resistance from some states.⁷

Amidst, growing humanitarian concerns as the number of displaced persons continue to rise globally and state inaction becomes ever more visible, the UNHCR has been quick to reiterate that the refugee problem given its complexity is not the sole problem of the refugees, but that of the international community as a whole.⁸ Referring to the 1951 Convention Relating to the Status of Refugees⁹ and its 1967 Protocol,¹⁰ the UN Refugee Agency has been quick to remind states of their international responsibility

⁵ UNHCR, "Global Trends Report 2022: Forced Displacement in 2022,"

⁶ UNHCR, "Climate Change and Disaster Displacement," 2023.

⁷ Ibid.

⁸ UNHCR, "UNHCR's Mandate for Refugees, Stateless Persons, and IDPs," 2023.

⁹ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189.

¹⁰ UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606.

to seek comprehensive responses to forced displacement, one based on international refugee law principles. The intention of this response is not for individuals to remain refugees forever, but, to find lasting solutions.

Yet, the massive displacement of people remains one of the biggest human rights issues today. Indeed, the UNHCR states that there are more refugees today than at any other moment since the end of World War Two.¹¹ The response by the international system is prone to failure. While some states have sought to welcome refugees, the emphasis for some, is to move away from responsibility sharing and solidarity toward refugees, to border control and the prevention of access to their territories. Generally, hostility toward refugees is on the rise worldwide.¹² Although, the majority of displaced persons eventually settle within their territorial boundaries, a significant number also seek for protection outside of their home countries. This increase in the number of asylum seekers and refugees over the last decade has been referred to as a 'refugee crisis',¹³ and has spurred many a response from state and non-state actors alike. Debates on the relevance of the 1951 Convention is also on the rise.¹⁴

Perhaps to reflect this urgency, in December 2018, the United Nations General Assembly affirmed the Global Compact on refugees after consultations led by the

¹¹ Frances Nicholson and Judith Kumin, "A Guide to International Refugee Protection and Building State Asylum Systems" (Inter-Parliamentary Union: Geneva, Switzerland, 2017), 10.

¹² Maykel Verkuyten, "Public Attitudes towards Migrants: Understanding Cross-National and Individual Differences," *World Psychiatry* 20, no. 1 (2021): 132.

¹³ Myria Georgiou and Rafal Zaborowski, *Media Coverage of the "Refugee Crisis": A Cross-European Perspective* (Council of Europe, 2017).

¹⁴ Chatham House, "The Refugees Convention: Why Not Scrap It," *Independent Thinking on International Affairs* (2010).

UNHCR.¹⁵ The Global Compact although not binding on states, represents an important development in international refugee law as it is a representation of the political will and the ambition of the global international community. This Compact presents an exceptional chance to revolutionize the global response to refugee situations, benefitting refugees and their hosting communities. It offers a framework for governments, international organizations, and other involved parties to guarantee sufficient support for host communities and enable refugees to lead constructive lives. Its four main stated objectives include; easing pressure on host countries, enhancing refugee self-reliance, expanding access to third country solutions, and supporting conditions in countries of origin for return in safety and dignity.¹⁶

The Comprehensive Refugee Response Framework outlined in Annex I of the New York Declaration for Refugees and Migrants, adopted by the General Assembly on September 19, 2016 (A/RES/71/1) and designed to improve the international community's approach to addressing significant flows of refugees and migrants, called on the High Commissioner to propose a global compact on refugees to address large movements of refugees. Importantly, this Global Compact recognized the need for 'durable solutions' to refugee-related situations. The position of voluntary repatriation as one of the durable solutions together with local solutions, resettlement, and complementary pathways is reiterated in paras 10 – 12.¹⁷ The text of the Global Compact also reaffirms voluntary repatriation as the preferred durable solution for

¹⁵ UN High Commissioner for Refugees (UNHCR), Global Compact on Refugees, 2018.

¹⁶ Ibid.

¹⁷ UN General Assembly, New York Declaration for Refugees and Migrants: resolution / adopted by the General Assembly, 3 October 2016, A/RES/71/1: paras 10 – 12.

refugees, stating that “voluntary repatriation is not necessarily conditioned on the accomplishment of political solutions in the country-of-origin states.”¹⁸

What is interesting for this study, is that despite no mention of voluntary repatriation in the 1951 Convention, it has evolved today to dominate the discourse on ‘durable solutions’, often referred to as the preeminent solution for refugee-related situations. Indeed, the only legally binding instrument that explicitly addresses voluntary repatriation is the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.¹⁹

This study therefore critically examines the historical trajectory of voluntary repatriation, tracing its origins and evolution to its current prominent status in the Global Compact for Refugees and international refugee law in general. It begs the question; how a norm barely referenced seven decades ago in the 1951 Convention, is today claimed to be the best solution for refugee-related situations. By analyzing the motivations behind the codification of voluntary repatriation as a principle under African refugee law, and its introduction as a norm in international refugee law, this research aims to shed light on the intricate interplay between state interests and humanitarian concerns.

¹⁸ Ibid., para 87.

¹⁹ Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"), 10 September 1969, 1001 U.N.T.S. 45.

This study is inspired by the works of Katy Long on the ‘The Point of No Return’,²⁰ and Natasha Saunders’ ‘International Political Theory and the Refugee Problem’.²¹ Long contends that the history of refugee repatriation is one that has often centered on the meaning and contestation of the term ‘voluntariness’. In her view, voluntariness is central to the ethics of refugee repatriation and its importance should lie in the confirmation of the refugee autonomy. Too often, states and at times the UNHCR have used the language of voluntary repatriation as a shield against charges of forcible return, raising concerns around the notions of ‘coercion’ and ‘voluntariness’. She questions the claim that repatriation is a ‘natural’ best solution for refugees, arguing that this in fact is a reflection of the interests of those who want to maintain the international political status quo. Accordingly, the existing international framework addressing refugees is inadequate and needs reform as the current system based on the idea of the nation-state, prioritizes the interests of states over the rights and wellbeing of refugees. For Long, repatriation is a political process which is possible without physical return. Central to Long is the autonomy of the refugee in decision making process involving repatriation and the idea of the development of a more flexible relationship between citizenship, nationality, and residency.

Saunders problematizes the use of the term ‘the refugee problem’ contending that how we conceive of solving a problem cannot be separated from what we understand that problem to be. Highlighting that there may in fact be more than one understanding of the problem, she asserts that not all of the actors involved with the regime of refugee

²⁰ Katy Long, *The Point of No Return: Refugees, Rights, and Repatriation*, Oxford, 2013, online edition, Oxford Academic, September 26, 2013.

²¹ Saunders, Natasha. *International Political Theory and the Refugee Problem*. Routledge, 2017

protection understand their work as ‘solving’ the same ‘problem’. As it stands, the international refugee protection system is not designed to solve the problems refugees face, but rather to solve refugees as the problem. To redress this, she suggests reframing the ‘refugee problem’ from the viewpoint of refugees and not states, and exploring how this reconfiguration can open up space for reimagining the traditional solutions to the ‘refugee problem’.

Similarly, to Long, this study scrutinizes the principle and practice of voluntary repatriation, the meaning of ‘voluntariness’, and the interests of states in maintaining the international political status quo. Where Long proposes ethical refugee repatriation and attempts to reconcile repatriation with liberal principles such as citizenship, nationality and residency, this work chooses to rather question in the first place the compatibility of voluntary repatriation as a concept with international refugee law. While Long focuses on reconciling practices of voluntary repatriation with liberal international principles, this study questions the very necessity of this concept and practice under international refugee law. In the same way Saunders concludes that the international refugee protection system is designed not to solve the problems refugees face but the problems refugees pose to states, this author problematizes voluntary repatriation as a solution benefiting states and not the refugees. This author similar to Long and Saunders, calls for the recentering of refugees as key decision makers in the assessment of the threshold of ‘voluntariness’, placing refugees at the center and as key decision makers in refugee-related issues. In the case of voluntary repatriation, this study pushes for quadripartite agreements involving refugees and refugee leaders instead of the current tripartite agreements. Additionally, this study highlights the necessity to clarify in legal instruments such as the United Nations General Assembly resolutions and UNHCR Executive Committee decisions for the right to seek and enjoy

asylum to be internationally recognized as a human right which is legally binding on all states and for which there can be no derogation. These may seem idealistic, but as Long quoting Joseph Corens put it, “before you worry about what is possible, you must first decide what is right”.²²

More precisely, this work questions the principle of voluntary repatriation as a durable solution to refugee displacement in both the African and international contexts, and addresses the complexities surrounding the ‘voluntariness’ of repatriation decisions, especially in the face of push factors influencing refugees’ choices and discussions surrounding the evolving concept of ‘home’. However, it does not only end there, as it delves deeper by raising questions about the role of voluntary repatriation in the framework of international refugee protection law. This involves juxtaposing it with co-constitutive principles of modern international society such as asylum, alongside the principle of non-refoulement, which holds a ‘*jus cogens*’ status in international refugee law. Essentially, this undertaking not only assesses the norm and practice of voluntary repatriation but also takes a step further by questioning the very necessity of such a norm’s existence.

Historical scholarship in the field of forced migration is not as encouraged compared to the fields of anthropology, law, sociology and policy. Rather, the concern has often been on producing scholarship that can be of use to policy makers. However, for policy to be relevant and meaningful, we must be able to situate historically and contextually such refugee policy and be able to evaluate its relevance for today. It in this spirit that this work adopts a historical approach to refugee policy. However, unlike many

²² Long, *The Point of No Return*, 2.

researchers who have mostly focused on the evolution of voluntary repatriation in Africa or globally as separate phenomena, this work investigates both historical processes to demonstrate how intrinsically linked they are. It demonstrates how as unique developments within Africa led to the introduction and codification of voluntary repatriation, at almost the same time, phenomena specific to the Western world was evolving the practice of refugee protection more and more toward voluntary repatriation. As these specific events unique to both parts of the world occurred simultaneously, other events happening at the global level was also contributing to the evolution of the norm of voluntary repatriation.

In Africa, the historical context of independence struggles and the demarcation and construction of national borders contributed to the introduction of voluntary repatriation as a concept. In Europe meanwhile, discussions surrounding the development of voluntary repatriation were being influenced by a number of factors: changes in the types of refugees (non-European refugees) going to Europe, developments during the Cold War and great power rivalry between the East and the West, and the demand for less labor in Europe compared to the post World War Two era of reconstruction. In Asia and Latin America, struggling economies and the decline of solidarity (refugee compassion fatigue) were the leading factors. These factors combined caused refugees to be increasingly seen as either security threats, economic burdens, flaws in the global international order, and as such, temporary visitors who needed to leave at some point. This study sheds light on how these unique phenomena in different parts of the world coalesced contributing to the development of a norm of voluntary repatriation designed to solve what was perceived as a 'refugee problem'.

As the world faces numerous massive displacements, and the continued discourse surrounding voluntary repatriation as the preferred solution for refugee-related issues remains dominant, it is necessary to ask the question; ‘voluntary repatriation as the preferred solution for who and by who?’.

Ethnographic studies continue to question the practice of voluntary repatriation by interviewing refugees on their perceptions of the process and practice of repatriation. Legal scholars focus on the legal character of voluntary repatriation as a norm under international law, and international relations theorists are concerned with questions surrounding state practice, norm convergence and adherence to international refugee law principles. Not many have attempted to address these different issues, that is, the legal character of voluntary repatriation, its contentious practice, and the position of voluntary repatriation as a norm under international law in the same research study. Additionally, there has been limited theoretical exploration on whether voluntary repatriation, positioned as a durable solution, goes against the primary objective of international refugee law, which is to provide protection for refugees. This is an inquiry worth undertaking, and this study attempts exactly this.

The researcher drawing from his experience as a displaced person and his work with refugees as an advocate for the rights of persons on the move, is interested not just in questions surrounding ‘voluntariness’ in repatriations or the legality of voluntary repatriation, but seeks to examine the very foundations of the modern international refugee protection regime, in particular, voluntary repatriation being the preeminent solution proposed by actors as solution for the ‘refugee problem’. To put it simply, where did this norm come from, why are actors referring to it as the preeminent

solution for refugees, and why are we not questioning the very necessity of this norm's existence?

The underlying reality of the voluntary repatriation regime can be asserted as follows: host countries are eager for refugees to leave, relieving them of their burdens; countries of origin anticipate the return of refugees as a signal to the world that the conflicts forcing them to flee have ended, showcasing stability and openness for business; simultaneously, donor states are keen to conclude long-standing refugee assistance programs they financially support. Voluntary return therefore serves the interest of different state actors. In these intricate dynamics, the United Nations High Commissioner for Refugees (UNHCR) navigates a complex role within negotiations; aiming to uphold globally recognized legal and ethical principles for which it is the custodian while addressing the concerns of various state stakeholders. Regrettably, in the most challenging instances, the United Nations' refugee agency has yielded to pressures, actively involving itself in repatriation endeavors that significantly deviate from being secure or voluntary.²³ The UNHCR has itself recognized that repatriations are possible in less than optimal circumstances.²⁴

When one considers that the majority of refugee producing countries like Syria (6.8 million), Afghanistan (2.8 million), South Sudan (2.3 million), Myanmar (1.2 million), DRC Congo (900,000), Sudan (800,000), Somalia (790,000), and the Central African Republic (730,000) are not only affected by security issues but are often low

²³ Jeff Crisp and Katy Long, "Safe and Voluntary Refugee Repatriation: From Principle to Practice," *Journal on Migration and Human Security* 4, no. 3 (2016): 142.

²⁴ Dennis McNamara, UNHCR Director for International Protection. Speech in Washington cited in Bupinder S. Chimni, "From resettlement to involuntary repatriation: towards a critical history of durable solutions to refugee problems." *Refugee Survey Quarterly* 23, no. 3 (2004): 63-64.

income countries,²⁵ the expectancy that these countries are able to effectively resettle returnees is not based in objective reality, rather it is a callous aspiration by states and the UNHCR, one which often has fatal impacts on the lives of refugees. It is therefore important to critic and to empirically understand how voluntary repatriation is being used as a pretext to reduce the protection offered to refugees.

As previously stated, this is not the first study to question the concept of voluntary repatriation or to critique the international refugee protection system, but this work goes a step further to argue that the very existence of voluntary repatriation contravenes the fundamental principles of international refugee law; the right to seek asylum and the principle of *non-refoulement*. Asylum is not only an important principle under international law, it is a foundational principle of modern international society that enables persons fleeing persecution and war to be able to receive sanctuary in other states. The principle of *non-refoulement* on its part is a '*jus cogens*' in international law and expressly forbids the return of persons to places where their life or liberty may be jeopardized. How then, is it possible for the principle of voluntary repatriation to coexist with the fundamental principles of asylum and *non-refoulement* especially given as this text will show, its problematic practice and questionable historical origins? What this study does, in contrast to most other studies that have attempted to examine the principle of voluntary repatriation, is to prove that this norm is not compatible with the purpose of the regime of international refugee protection.

By adopting an interdisciplinary approach to the study of international refugee law and combining international law and international relations frameworks, this study

²⁵ "Refugees by Source Country - Statistics & Facts," *Statista*, 2023.

continues a rich tradition of interdisciplinary scholarship in the social sciences. By utilizing the *theories of legalization*²⁶ and *social process*,²⁷ this work positions voluntary repatriation as a norm under international refugee law through the use of the robust *Obligation-Precision-Delegation* (OPD) methodology developed by Abbott et al.,²⁸ while at the same time question its historical context as well as whether it is adequate as a solution to refugee-related situations. Further, by incorporating the English School's theory on *institutions of global international society*,²⁹ and the conceptual approach of *fragmentation of law*³⁰ applied as a theory, this study weighs different principles of international refugee law and attempts to objectively theorize and make suppositions as to which should take precedence in the hierarchy of norms under international refugee law.

The choice of *threat framing*³¹ as an additional analytical framework allows for important questions to be asked about the characteristics of the 'refugee problem' as a frame and an object of securitization. Combining these different analytical frameworks

²⁶ Kenneth W. Abbott et al., "The Concept of Legalization," *International Organization* 54, no. 03 (2000): 401-419.

²⁷ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1995).

²⁸ Abbott et al., The Concept of Legalization, 405-406

²⁹ Robert Falkner and Barry Buzan, "The Emergence of Environmental Stewardship as a Primary Institution of Global International Society," *European Journal of International Relations* 25, no. 1 (2019): 131-155.

³⁰ Martti Koskenniemi and Päivi Leino, "Fragmentation of International Law? Postmodern Anxieties," *Leiden Journal of International Law* 15, no. 03 (2002): 553-579. United Nations International Law Commission Study Group and Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (2006)..

³¹ Jörg Matthes and S. Allan, "Frames in Political Communication: Towards Clarification of a Research Program" (2011). Scott D. Watson, "'Framing' the Copenhagen School: Integrating the Literature on Threat Construction," *Millennium* 40, no. 2 (2012): 279-301. Dagmar Rychnovská, "Securitization and the Power of Threat Framing," *Perspectives: Review of International Affairs* 2 (2014): 9-32. William A. Gamson, David Croteau, William Hoynes, and Theodore Sasson, "Media Images and the Social Construction of Reality," *Annual Review of Sociology* 18, no. 1 (1992): 373-393.

in this study enriches the methodological enquiry, leads to robust findings, and provides a roadmap for similar inquiries in the future.

In addition to adopting an interdisciplinary framework approach, this study employs a mixed-methods approach, drawing from international law methods supplemented by general methods of qualitative inquiry commonly used in the social sciences.³² This provides the researcher with a number of different tools with which to be able to go about identifying and assessing what the current law of voluntary repatriation is and what the regime of refugee protection ought to be (a *policy-oriented jurisprudence method*), investigate into the historical development of voluntary repatriation (a *historical analysis method*), and engage in a discursive analysis of the elements of the evolution of the norm and practice of voluntary repatriation both within the African and global contexts (a *qualitative document analysis method*). By combining these different methods in the same inquiry, the findings of this study are not only meant to be robust but also provides nuanced insights that can inform the practices and policies of those engaged in the field of refugee protection.

Usually, the exploration of international refugee law or refugees is often undertaken by legal experts and theorists, viewing it as a phenomenon that requires clarification of its legal standing in relation to other global legal frameworks. This tends to result in overly legalistic viewpoints that may not accurately capture the complexities of reality. Similarly, for international relations theorists, the focus has primarily been on

³² Mixed-methods approach understood here as an intra-paradigm research where two or more qualitative methods are used in a single research, and not as the more commonly understood inter-paradigm approach which combines qualitative and quantitative methods. See for example, Michelle O'Reilly, Nikki Kiyimba, and Alison Drewett, "Mixing Qualitative Methods versus Methodologies: A Critical Reflection on Communication and Power in Inpatient Care," *Counselling and Psychotherapy Research* 21, no. 1 (2021): 66-76.

examining the evolution, convergence, and collision of norms. However, employing these approaches independently is limiting, neglecting the inherently multidisciplinary aspects of refugee issues, involving sociology, anthropology, and law.

In this study, a multifaceted approach is adopted by the researcher, combining theoretical frameworks and methodologies from international law and IR theory to investigate international refugee protection, with a specific emphasis of dissecting the principle of voluntary repatriation. While international law methods and frameworks form the primary mode of inquiry, international relations theories are also used as a supplementary means to discern the nature of voluntary repatriation. Even though this study is not the first to adopt such an approach to the study of international refugee law, this study is pioneer in its approach of scrutinizing the principle of voluntary repatriation through arguments from both international law and IR theory and illustrating its incompatibility with the contemporary refugee protection regime.

Where others have attempted to trace the evolution of voluntary repatriation, this study goes beyond mere historical tracing. The researcher qualitatively examines *travaux préparatoires* of major refugee conventions, including, but not limited to, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, the Constitution of the International Refugee Organization of 1946, and the 1951 Convention Relating to the Status of Refugees. Additionally, the study scrutinizes other historical and contemporary documents, such as UNHCR EXCOM decisions between 1975 and 2017 and UNGA resolutions, and relevant materials that illustrate the origins and practice of voluntary repatriation within a securitized political

landscape.³³ This examination is conducted both in Africa, where it is codified today, and within the global regime of refugee protection, where it has become a norm. The researcher also documents how different but interrelated sets of circumstances occurring in Africa, Europe, and other parts of the world contribute to the development of voluntary repatriation as a norm under international law. What makes this inquiry unique is its demonstration of the distinctive circumstances that intensify the securitization of refugees, leading to the incorporation of voluntary repatriation as a principle in the African refugee protection model. It also illustrates how different circumstances occurring globally contribute to the establishment of a norm of voluntary repatriation. The researcher contends that these developments, influenced by various factors, converge in two important ways: the establishment of voluntary repatriation as a ‘durable solution’ to refugee-related issues; and the fact that this establishment of voluntary repatriation is underpinned by state interest, not necessarily the protection of refugees.

Because the conclusions drawn from this study are robust, they are relevant for legal scholars, international relations theorists, policy makers, advocates and refugees themselves.

1.2 Research Questions

In the context of contemporary refugee protection, the practice and norm of voluntary repatriation holds a significant position, referred to as the preeminent solution to refugee-related situations. This study embarks on an exploration of this norm and practice, critically examining their nature and implications within the broader

³³ Documents examined are listed in table 2.

international refugee protection framework. In so doing, it seeks to answer the following overarching questions: First, what is the conceptual framework of voluntary repatriation within the context of the international refugee law protection regime, and what makes it unique, as a solution for refugee-related situations, taking into account its historical evolution and contemporary utilization?

Second, within the African context of refugee protection, what is the precise legal position and significance accorded to voluntary repatriation, and what are the distinctive features that set it apart or establish common ground with the overarching framework of international refugee protection? How have specific developments within Africa shaped the legal status and implications of voluntary repatriation, both explicitly through formal provisions and implicitly through underlying principles? Moreover, can this regional perspective be effectively juxtaposed with those of international refugee law to shed light on areas of harmonization and discord, facilitating a holistic evaluation of voluntary repatriation's legal positioning within both the African and international refugee protection systems?

Additionally, to what extent, if any, does the norm and practice of voluntary repatriation conflict with established principles of international refugee law, such as the principle of *non-refoulement* and asylum?

Further, what are the conclusions that can be drawn from the analysis of these research questions to our understanding of voluntary repatriation within the African and international refugee protection regime, and what are the implications for policy, practice, and further scholarship in the field of refugee protection?

Lastly, in light of the Global Compact for Refugees, the UNHCR, and various states advocating for voluntary repatriation as the primary solution for refugees despite its contested practice and questionable origins, this study adopts the hypothesis that voluntary repatriation is incompatible with general international refugee law.

These are important questions that need to be asked, and answers provided for. This is particularly relevant given the preeminent position of voluntary repatriation in international refugee law today. One should question how this came to be so, but not by simply making presuppositions, rather, the approach must be empirical if the findings are meant to be relevant for policy makers and for refugees, who are the subjects of international refugee law.

1.3 Understanding the Key Concepts

1.3.1 Who is a Refugee?

The starting point for the definition of a refugee is nowhere else than article 1(a)(2) of the 1951 Convention, in addition to the definition provided for in the 1967 Protocol which does away with the geographic and time limitations of the 1951 Convention.³⁴ Because the text of the 1951 Convention is analyzed in depth elsewhere in this study including its how it defines a refugee, here, the purpose is to simply highlight how refugees are understood in literature by different authors.

A good starting point would be Guy and McAdam who point out that the main purpose of trying to define or describe refugees should be to “facilitate, and to justify, aid and protection”, stating that this should also be understood within the framework of the

³⁴ The 1951 Convention and the UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267

prevailing debates of a particular era relating to the concerns, interests and identities of nation-states.³⁵ Haddad on her part contends that refugees must be understood first as a category – one which distinguishes one group from another.³⁶ In the same vein, describing the evolving definition of the term ‘refugee’, Worster asserts that it is at the same time a descriptive and normative endeavor, as one attempts to describe who a refugee is and who a refugee ought to be.³⁷ Take for instance this example; ‘rainbow’ is a refugee because ‘rainbow’ has a genuine fear of persecution, as a result, for ‘clouds’ to be a refugee, ‘clouds’ needs to also meet the criterion of having a genuine fear of persecution to be considered a refugee. But for Goldenziel, understanding who qualifies as a refugee is constantly evolving and arguably being narrowed against the intention of the Refugee Convention due to state practice which is reflective of what their interests are at any given moment in history.³⁸ Zetter, going a step further contends that the term refugee is not just reflective of state interests, but is as a result of the formation and reformation of bureaucratic political discourses “as part of a social compact” between citizens and their states all the while keeping refugees “dispossessed” and “at a distance”.³⁹ Accordingly, today it is harder to conceptualize the meaning of refugeehood because of complex political and social transformations which have led to convoluted meanings of exile and forms of persecution, thereby

³⁵ Goodwin-Gill, Guy S., and Jane McAdam. "The Refugee in International Law." Oxford University Press, 2007, 2.

³⁶ Emma Haddad, *The Refugee in International Society: Between Sovereigns*, Cambridge Studies in International Relations (Cambridge: Cambridge University Press, 2008), 11.

³⁷ William Thomas, Worster. "The Evolving Definition of the Refugee in Contemporary International Law." *Berkeley Journal of International Law* 30 (2012): 160.

³⁸ Jill I. Goldenziel. "The Curse of the Nation-State: Refugees, Migration, and Security in International Law." *Arizona State Law Journal* 48 (2016): 590.

³⁹ Roger Zetter. "More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization." *Journal of Refugee Studies* 20, no. 2 (2007): 188-190.

making the claim of the label of a refugee more of an expensive commodity and prize than a right.⁴⁰

Because refugees flee their homes for varying reasons, Haddad posits that it is impossible to find one all-encompassing definition which is simply not an instrument for academic enquiry. Instead, she suggests that definitions should serve the practical needs of refugees, specifically enabling them to access international protection.⁴¹ This is the challenge confronting legal scholars and political scientists. In reality, there exists a multitude of definitions and perspectives on who qualifies or should be considered a refugee, and who does not.

For instance, Shacknove argues that the all too popular criteria of ‘persecution’ often used to determine refugee status fails to take into consideration that there are several other ways through which a person’s bond with their state can be cut off, and as such, defining who should be protected under international refugee law must take these different circumstances into consideration and not just the element of persecution.⁴² Consequently, a more apt definition for a refugee would be a person who has no recourse other than to seek for protection because their basic needs have not been protected in their country of origin, and is in such a position that there is a need for international assistance.⁴³ Recognizing as well that the reasons for which people flee are complex and varying, Zolberg postulates that refugees are persons who have “a strong claim to a very special form of assistance, including temporary or permanent

⁴⁰ Ibid, 188.

⁴¹ Haddad, ‘Who is (not) a Refugee?’, 2.

⁴² Andrew E. Shacknove. "Who Is a Refugee?" *Ethics* 95, no. 2 (1985): 276.

⁴³ Shacknove, ‘Who is a Refugee?’, 277.

asylum” in the country where they are not members.⁴⁴ Therefore, as Miller puts it, recipient states have a duty to assist refugees and those in dire need of assistance as a result of not being able to meet their basic needs in their home countries.⁴⁵ However, defining refugees based on this criterion raises the challenge of determining who has the authority to decide what qualifies as basic needs. This terminology of ‘basic needs’ is convoluted and not the most objective measurement of assessment.

Haddad considers this criterion of having crossed an international border as a condition for being a refugee irrelevant because many are those who suffer the same fate that those who have crossed international borders suffer, but are unable to cross borders and therefore denied vital international protection.⁴⁶ To her, refugees are a creation of the modern territorial state, and the ideas of political borders, and of the notions of ‘inside’ and ‘outside’ that make our understanding of the existence of refugees intelligible.⁴⁷ As a matter of fact, refugees are not the consequence of but an inevitable and unanticipated part of international society because the existence of borders means that refugees will continue to exist.⁴⁸ A position also buttressed by Nantermoz who has contended that the modern society of states relies on the presence of refugees to consolidate its statist representation of the world.⁴⁹

⁴⁴ Aristide R. Zolberg, Astri Suhrke, and Sergio Aguayo. *Escape from Violence: Conflict and the Refugee Crisis in the Developing World*. Oxford University Press, USA, 1989, 33.

⁴⁵David, Miller. "Immigration: The Case for Limits." 2005, 202.

⁴⁶ Haddad, ‘Who is (not) a Refugee?’, 2-3.

⁴⁷ Haddad, ‘Who is (not) a Refugee?’, 23.

⁴⁸ Ibid, 24.

⁴⁹ Nantermoz, ‘International refugee protection and the primary institutions of international society’, 42.

Soguk adopting a more critical stance, questions definitions that portray refugees as victims and helpless individuals who are in need of assistance and have no agency, thereby, preventing refugees from being able to partake in the process of their own definition.⁵⁰ This view is also shared by other critical writers like Lammers and Harrell-Bond, who affirm as well that refugees are too often seen simply as persons eligible for UNHCR aid and not as actors with agency.⁵¹

Writers such as Wettergren and Wikström critically assert that the definitions of who qualifies as a refugee primarily stem from Western perspectives on the concept of political persecution. This approach assumes that persecution is targeted exclusively at individuals, thereby excluding groups or actions not deemed appropriately political.⁵² As a matter of fact, the term refugee comes from the French word '*réfugié*' referring to the Huguenots who fled France to England following the revocation of the Edict of Nantes in 1685.⁵³ Influenced by this perspective, the understanding of a refugee which has evolved out of the practice of powerful European states reflects the

⁵⁰ Nevzat Soguk, "States and Strangers: Refugees and Displacements of Statecraft," vol. 11 (University of Minnesota Press, 1999), 242.

⁵¹ Ellen Lammers, "Refugees, Gender and Human Security: A Theoretical Introduction and Annotated Bibliography" (International Books, 1999), 29-30. Barbara Harrell-Bond, Eftihia Voutira, and Mark Leopold, "Counting the Refugees: Gifts, Givers, Patrons and Clients," *Journal of Refugee Studies* 5, no. 3-4 (1992): 209.

⁵² Åsa Wettergren and Hanna Wikström, "Who is a Refugee? Political Subjectivity and the Categorisation of Somali Asylum Seekers in Sweden," *Journal of Ethnic and Migration Studies* 40, no. 4 (2014): 567.

⁵³ The Origin of 'Refugee', Merriam-Webster, 2021.

political aspect more, even though increasingly, the practice of African and Latin American states may be leading to a more globalized understanding.⁵⁴

If the quest is for a simple yet meaningful definition, then that offered by Gibney who asserts that a refugee is someone who needs a new place to stay because of the brutality of his home country, and as a result, based on humanitarian grounds is owed this assistance is apt.⁵⁵ However, if the task is not simplicity but accuracy – a central aim of this study, then one would be better served adopting the definition suggested by Worster describing a refugee as a person;⁵⁶

“who, owing to a well-founded fear of being subjected to a situation of
(1) persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion;
(2) torture, inhuman or degrading treatment and/or punishment; and/or
(3) a threat to life, security or liberty due to events seriously disturbing public order; that
(a) is so widespread that it exists in all parts of the state of origin where the person could flee and also exists in every state the person reached upon leaving his state of origin; and
(b) is unable to be cured by credible, reliable and genuine assurances offered by the state of origin, and any other state that the individual previously reached, of the situation not occurring to that individual; and
II. Such person is outside the country of his or her nationality of former habitual residence and is unable or, owing to such fear, unwilling to avail himself of the protection of that country or return to it.”

To complement this definition by Worster, this study borrows from parts of the definition provided in the 1969 OAU Convention and the 1994 Arab Convention on Regulating the Status of Refugees in the Arab Countries which assert that a refugee is;

⁵⁴ Wettergren and Wikström, ‘Who is a refugee?’, 567.

⁵⁵ Gibney, Matthew J. "Liberal Democratic States and Responsibilities to Refugees." *American Political Science Review* (1999): 170-171.

⁵⁶ Worster, ‘The evolving definition of the refugee in contemporary international law’, 160.

“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.”⁵⁷

and is compelled to leave their habitual residence “because of the occurrence of natural disasters or grave events resulting in major disruption of public order in the whole country or any part thereof.”⁵⁸

In reality, the world of refugeehood is complex. Expecting a simple definition or a single definition, while convenient, does not necessarily reflect the complexity involved. Defining a refugee has to be an ongoing task, and should be based on the specific individual characteristics of the case at hand. For the purposes of this study, the combination of Worster and the OAU 1969 convention as written above is the working definition.

1.3.2 Explaining Asylum

The practice of granting asylum can be traced back 3500 years to the traditions of hospitality in the ancient world and in most of the major religions in the world.⁵⁹ Elsewhere in this study, an exhaustive examination of the historical underpinnings of the refugee protection regime has been undertaken, encompassing the genesis of sanctuary and to a significant degree the origins of the concept of asylum.

⁵⁷ ‘Convention Governing the Specific Aspects of Refugee Problems in Africa’, art 1(2).

⁵⁸ League of Arab States, *Arab Convention on Regulating the Status of Refugees in the Arab Countries*, 1994, article 1 para 2.

⁵⁹ Michael A. Peters and Tina Besley, "The Refugee Crisis and the Right to Political Asylum," *Educational Philosophy and Theory* 47, no. 13-14 (2015): 1367-1374.

Consequently, this section will abstain from redundancies and instead offer a succinct inquiry into the contemporary essence of asylum within the framework of modern international law.

Nonetheless, it is important to first state that throughout history asylum has persisted as the paramount political norm linked with the state of exile. In fact, Grotius one of the fathers of international law claimed that “a fixed abode ought not to be refused to strangers, who being expelled their own country, seek a retreat elsewhere”.⁶⁰ The significance of asylum was further underscored in 1921 by the Polish representative at the League of Nations, who highlighted that “political refugees have always enjoyed in all civilized countries... the right of asylum and the full protection of the country within which they have settled.”⁶¹

In modern international law, asylum is recognized as “the right to seek and to enjoy in other countries asylum from persecution” in article 14(1) of the Universal Declaration of Human Rights⁶² where from the 1951 Convention and the 1967 Protocol make reference to. While not legally binding, this Declaration was adopted by consensus at the UNGA, an indication of the international community’s strong commitment to its execution. The provisions of article 14(1) are so widely accepted that they are regarded today as part of customary international law and thus generally understood to be legally binding. While states try to frustrate or avoid their responsibility to provide

⁶⁰ Grotius, ‘De jure belli ac pacis libri tres’, 156.

⁶¹ League of Nations, Russian Refugees: Information provided by Members of the Conference of Enquiry held at Geneva from 22–24 August 1921, September 1921, C.323/M.233/1921: 18. Cited in Long, ‘The point of no return’, 55.

⁶² UN General Assembly, "Universal Declaration of Human Rights," 10 December 1948, 217 A (III), accessed 19 August 2023

asylum, they do not question its primacy, indicating that they recognize the right to seek asylum as a foundational principle of international law and society.

Although, the 1951 Convention does not make reference to a right to asylum in its articles, its preamble recognizes that “the grant of asylum may place unduly heavy burdens on certain countries”, as such international cooperation is encouraged in the dispensation of asylum claims.⁶³ By introducing in the Convention the principle of *non-refoulement* prohibiting states from returning refugees back to places where their lives will be in danger, reinforces the unquestionable character of asylum. However, it remains somewhat unclear whether the intent of the 1951 Convention was not to impose obligations on states to offer asylum but rather to establish provisions for the treatment that refugees should receive once asylum is granted.

The right to asylum is also safeguarded in regional instruments such as; article 12 (3) of the African Charter on Human and Peoples’ Rights which states that “every individual shall have the right, when persecuted, to seek and obtain asylum in other countries...”.⁶⁴ In article XXVII of the American Declaration on the Rights and Duties of Man, asylum is described “as the right, when pursued to seek and receive asylum in foreign territory”.⁶⁵ According to the American Convention on Human Rights article 22 (7), if persecuted for political offenses or “related common crimes”, then one has

⁶³ ‘1951 Convention Relating to the Status of Refugees’, para 4.

⁶⁴ Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁶⁵ Inter-American Commission on Human Rights (IACHR). "American Declaration of the Rights and Duties of Man." May 2, 1948.

the right to not only seek but to also be granted asylum in a foreign country.⁶⁶ More purposefully, article 18 of the Charter of Fundamental Rights of the European Union states that this right to asylum is to be guaranteed in line with the 1951 Refugee Convention and its 1967 Protocol.⁶⁷ All of these key regional instruments are binding on their member states and therefore it should be understood that such a right to seek asylum exists under international law.

The EXCOM of the UNHCR has also held that the right to seek and enjoy asylum “is among the most basic mechanisms for the protection of human rights”.⁶⁸ The 2017 UNHCR guide for parliamentarians explains the meaning of asylum under international law, stating that although the word ‘asylum’ is not defined under international law, it has over the years become an umbrella term referring to the protection countries provide to refugees.⁶⁹ In line with this, Nicholson and Kumin contend that asylum should be understood as a process that includes; the admission of refugees and asylum seekers to a state’s territory, the access to an effective and fair process to determine their status, access to the UNHCR, fair treatment in accordance with refugee and human rights law, the responsibility of host countries to safeguard and respect the humanitarian nature of asylum, and the asylum seekers duty to abide

⁶⁶ Organization of American States (OAS). "American Convention on Human Rights, 'Pact of San Jose', Costa Rica." November 22, 1969.

⁶⁷ European Union. "Charter of Fundamental Rights of the European Union." October 26, 2012. 2012/C 326/02.

⁶⁸ Executive Committee of the High Commissioner’s Programme. "Conclusion on International Protection No. 85 (XLIX) - 1998." October 9, 1998. No. 85 (XLIX), F.

⁶⁹ UN High Commissioner for Refugees (UNHCR), *A guide to international refugee protection and building state asylum systems*, 2017, Handbook for Parliamentarians N° 27.

by and respect the laws of host states.⁷⁰ Yet, an important distinction exists between asylum and refugee status. That is, while refugee status refers to someone who benefits from protection, asylum is the institution of protection.⁷¹

Submitting an advisory opinion to the Inter-American Court of Human Rights in 2017, Gil-Bazo argued that asylum is a sovereign right of states which is recognized under human rights law as a human right, consequently, states are under the obligation to grant asylum under international law. This obligation to grant asylum also arises from the principle of non-refoulement [defined in the next section]. However, the power rests with states to assess asylum claims.⁷²

However, states have been known to undermine the effectiveness of asylum. Unlike non-refoulement, which is not exclusively within the jurisdiction of states, asylum still remains within their competence. As a matter of fact, Medard argues that states historically have developed various strategies to hinder asylum seekers and undermine the effectiveness of asylum procedures posing a serious predicament for refugees as the suspension of asylum can lead to substantial challenges leaving their refugee status uncertain or unresolved during this period.⁷³ It is possible that it is in response to this that UNHCR EXCOM decisions since the 1980s have emphasized that the primary

⁷⁰ Frances Nicholson and Judith Kumin, "A Guide to International Refugee Protection and Building State Asylum Systems" (Inter-Parliamentary Union: Geneva, Switzerland, 2017), 28.

⁷¹ Gil-Bazo, 'Asylum as a general principle of international law', 4.

⁷² Gil-Bazo, María-Teresa. "Inter-American Court Of Human Rights - Request For An Advisory Opinion OC-25 Public Hearing." San José (Costa Rica). Submissions by Dr María-Teresa Gil-Bazo, Convenor of the Research Group on International Studies in Forced Migration. Newcastle University, 2017, 9.

⁷³ Rwelamira, Medard RK. "Some reflections on the OAU Convention on Refugees: some pending issues." *Comparative and International Law Journal of Southern Africa* 16, no. 2 (1983): 155-178.

responsibility for safeguarding refugees' rights rests with states, emphasizing the respect of the right to asylum.⁷⁴

Perhaps this also explains why in efforts to codify asylum, at its 662nd meeting in 1960, the UN Human Rights Commission adopted a draft declaration on the right of asylum which was submitted to the UN Economic and Social Council and Member States for adoption. This declaration, based upon the principles outlined in Article 14 of the UDHR concerning the right to asylum and Article 13(2) of the UDHR regarding the right to return, delineates asylum as a privilege conferred by states within the scope of their sovereignty to eligible individuals (Article 1). It also underscores the international community's responsibility for the welfare of these individuals without encroaching upon sovereignty (Article 2), asserting that no individual, save for compelling national security reasons, should undergo denial at the border, expulsion resulting in return, or compelled residency in regions where their life or personal freedom is imperiled (Article 3).⁷⁵

Reaffirming in 2002 that refugee camps and settlements must possess an entirely humanitarian and non-military nature, emphasizing that the act of granting asylum is a peaceful and benevolent gesture which should not be construed as hostile by other states, echoing the principles outlined in the 1969 OAU and conclusions from its Executive Committee, and recognizing that all stakeholders including the refugees themselves bear the responsibility to collaborate in upholding the peaceful and

⁷⁴ UNHCR, 'Note on Voluntary Repatriation', A/RES/72/150. Para 9.

⁷⁵ UN. Commission on Human Rights (16th sess. : 1960 : Geneva). "Commission on Human Rights: Report of the 16th Session, 29 February-18 March 1960." Geneva: UN, 1960. Pages 8-17.

humanitarian essence of refugee camps and settlements, the UNHCR EXCOM reiterated asylum as a general principle of international law.⁷⁶

The reality is that however one conceives of asylum, it is a political term. For Gil-Bazo, whose publications have been cited by the UNHCR in proceedings before the European Court of Justice, asylum is the protection that states can offer on their territory or some other place it has control over to persons who are persecuted.⁷⁷ Writers like Matthew Price who have traced the politicized nature and history of asylum, also claim that the ‘persecutory’ element required in claims of asylum today is a “product of recent Western history”, one that was designed to cast a spotlight on and wielded against the Soviet Union, thereby distorting it at the expense of addressing the needs of refugees.⁷⁸

While what exactly constitutes the right to asylum may be debatable, it is hard to argue against a norm of asylum under international law, one that is foundational to the international refugee protection regime along with the principle of non-refoulement. It should be understood as such that the principle of non-refoulement plays a key role in understanding the meaning of the right to asylum as more than just the prevention of forced return, but a process which commences when a person is protected by a host country and only ends when said person receives citizenship or a protected status in

⁷⁶ Conclusion No. 94 (LIII) – 2002

⁷⁷ Gil-Bazo, María-Teresa. "Asylum as a General Principle of International Law." *International Journal of Refugee Law* 27, no. 1 (2015): 28.

⁷⁸ Price, Matthew E. "Recovering Asylum's Political Roots." In *Rethinking Asylum: History, Purpose, and Limits*. Cambridge: Cambridge University Press, 2009, 24-68.

that host country, or is able to gain admission into a third country, or willingly returns to their country of origin when the situation changes.

The crux of the matter lies not in debating whether asylum constitutes a fundamental principle of international society or not, but rather in the absence of an obligation imposed on states to provide the “hospitality which it is stated (that the asylum seeker) has a right to seek.”⁷⁹ This much is true as claimed by Gil-Bazo who asserts strongly that asylum is a general principle of international law.⁸⁰ Even so, states continue to frustrate the enjoyment of the right to asylum. As analysis in this work will show, the norm of voluntary repatriation is another one such method states have developed and continue to reconfigure in attempts to avoid providing protection to persons in need.

1.3.3 The Principle of Non-Refoulement

Simply put, *non-refoulement* is a refugee’s right not to be forced to return to a place where his life is threatened. The principle of *non-refoulement* is the cornerstone of the regime of international refugee protection, and is a ‘*jus cogens*’.⁸¹

The principle of *non-refoulement* has a long history of customary practice among states and as such is legally binding on all states, even those states who are not parties to the 1951 Convention or its Protocol.⁸² Goodwin-Gill and McAdam argue that while the practice of *non-refoulement* can be considered a principle of international law, the

⁷⁹ Green, L. C. "The Right of Asylum in International Law." U. Malaya L. Rev. 3 (1961): 239.

⁸⁰ Gil-Bazo, Asylum as a General Principle of International Law, 28.

⁸¹ Allain, Jean. "The Jus Cogens Nature of Non-Refoulement." International Journal of Refugee Law 13, no. 4 (2001): 533.

⁸² Ibid, 539.

claim that it represents a '*jus cogens*' is far less certain.⁸³ However, as some critiques have argued, a good measure of determining the collective acknowledgement by the international community of the principle of *non-refoulement* as a peremptory norm are the decisions by the UNHCR EXCOM which reflect consensus among states.⁸⁴ Indeed, in 1982 the UNHCR EXCOM declared that the principle of *non-refoulement* "was progressively acquiring the character of a peremptory rule of international law",⁸⁵ and in 1996, it reaffirmed that *non-refoulement* had become a norm for which there could be no derogation from.⁸⁶

Under treaty law, the principle of *non-refoulement* is enshrined as a peremptory norm in article 33(1) of the 1951 Convention on Refugees as follows;

"no Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."⁸⁷

Nicholson and Kumin argue that the words 'in any manner whatsoever' should be understood as applying to any and all actions taken whether directly or indirectly by a state that would put the refugee at the risk of being returned to their country of origin or habitual residence where the refugee may be persecuted, including removal from

⁸³ Goodwin-Gill and McAdam, 'The Refugee in International Law', 234

⁸⁴ Jean, 'The *jus cogens* Nature of non-refoulement', 539.

⁸⁵ Executive Committee of the High Commissioner's Programme. "General Conclusion on International Protection No. 25 (XXXIII) – 1982"

⁸⁶ Executive Committee of the High Commissioner's Programme. "General Conclusion on International Protection No. 79 (XLVII) - 1996."

⁸⁷ 1951 Convention, art. 33(1)

the territory or refusal of entry at the border.⁸⁸ In fact, this principle they assert applies wherever a state exercises political authority.⁸⁹ As they put it, “all refugees are entitled to protection from *refoulement*”, and this includes those asylum seekers whose status as refugees have not yet been concluded.⁹⁰

As far as exceptions to this principle goes, Article 33(2) of the 1951 Convention allows for two; in the event where the individual is a security danger, and when said individual has committed a serious crime and is considered a threat to the community.⁹¹ However, the principle of *non-refoulement* under article 2(3) of the 1969 OAU Convention, unlike the 1951 Convention, views *non-refoulement* in absolute terms and offers no exception to this principle.⁹² This is further buttressed in article 3(5) of the Cartagena Declaration which also offers no exception to the principle of *non-refoulement*.⁹³ Indeed, the absoluteness of the prohibition on *non-refoulement* is further highlighted in article 16(2) of the Convention Against Torture,⁹⁴ which according to the general comment of the UN Committee Against Torture should be read as meaning that the expulsion or extradition of a person even if a criminal or underserving is prohibited if

⁸⁸ Nicholson and Kumin, ‘A guide to international refugee protection and building state asylum systems,’ 20.

⁸⁹ Ibid

⁹⁰ Ibid

⁹¹ The 1951 Convention on Refugees, art 33(2).

⁹² ‘Convention Governing the Specific Aspects of Refugees in Africa’, art. 2(3)

⁹³ ‘The Cartagena Declaration’, art. 3(5)

⁹⁴ ‘Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’, art. 16(2)

there is substantial grounds to believe that this person is in danger of facing cruel or inhumane treatment in the country where they are to be expelled or extradited to.⁹⁵

The International Red Cross also advocates for *non-refoulement* as a peremptory norm under international humanitarian law.⁹⁶ A position which aligns with UNHCR EXCOM decisions. For instance, in 1982, the UNHCR EXCOM expressed that the principle of *non-refoulement* was progressively acquiring “the character of a peremptory rule of international law”,⁹⁷ and in 1996, affirmed that this principle was not subject to derogation.⁹⁸

Today, it is generally understood that this principle is one which there can be no derogation from making it a *jus cogens* as evidenced by the practice many states, especially Latin American states.⁹⁹ This principle it can be understood ensures that no individual should be sent back to a country where they could be subjected to torture, cruel, inhuman, or degrading treatment or punishment, as well as other irreversible harm. It is a principle that is applicable to all refugees and asylum seekers regardless of their status. Notwithstanding, as Molnar puts it, state practice has been decidedly

⁹⁵ UN Committee Against Torture (CAT), "General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, para. 26..

⁹⁶ International Committee of the Red Cross (ICRC), "Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)," 12 August 1949, 75 UNTS 31, para 709.

⁹⁷ Executive Committee of the High Commissioner's Programme. "General Conclusion on International Protection No. 25 (XXXIII) - 1982." 20 October 1982. No. 25 (XXXIII).

⁹⁸ Executive Committee of the High Commissioner's Programme. "General Conclusion on International Protection No. 79 (XLVII) - 1996." 11 October 1996. No. 79 (XLVII). Accessed 31 August 2023. URL: <https://www.refworld.org/docid/3ae68c430.html>.

⁹⁹ Allain, Jean. "The *jus cogens* Nature of non-refoulement." *International Journal of Refugee Law* 13, no. 4 (2001): 539-540.

inconsistent,¹⁰⁰ and unfortunately, for many refugees and asylum seekers, the adherence or non-adherence to this principle of *non-refoulement* is often a case of ‘life and death’.¹⁰¹

1.4 The Structure of this Study

This study is organized into several chapters. Chapter one explains the relevance of the subject under investigation and the justification of this study, enunciates the research questions, and defines some of the major concepts including the meaning of the terms refugee, asylum, and *non-refoulement*. The researcher intentionally avoids defining the term ‘voluntary repatriation’ in this introductory chapter, as the entirety of Chapter five is dedicated to this endeavor.

Chapter two focuses on interdisciplinary theoretical frameworks that draw from the fields of international law (*legalization theory, social process theory, fragmentation applied as a theory, and the English School’s institutions of global international society*), and supplemented by the international relations theoretical approach of threat framing to provide a comprehensive understanding and critique of the norm of voluntary repatriation.

Chapter three is an overview of the methodology employed in this work, a mixed methods approach which is a combination of qualitative research methods in

¹⁰⁰ Tamás Molnár, "The Principle of Non-Refoulement under International Law: Its Inception and Evolution in a Nutshell," *Corvinus Journal of International Affairs (COJOURN)* Vol. 1 (2016): 60.

¹⁰¹ Jari Pirjola, "Shadows in Paradise – Exploring Non-Refoulement as an Open Concept," *International Journal of Refugee Law* 19, no. 4 (2007): 656.

international relations (*qualitative document* and *historical* analyses) and international law (*legal positivism* and *policy-oriented jurisprudence*).

Chapter four provides an overview of the international refugee protection regime, by tracing its historical origins, investigating the institutions that make up this regime, and comparing and contrasting the international refugee protection system with regional protection systems, in particular the African system.

Chapter five and six provide an analysis of the discursive nature of the evolution of voluntary repatriation as a norm under the African and international protection regimes, examines the legal character of this norm using the legalization and social process theories, evaluates the historical and contemporary practice of voluntary repatriation globally, and juxtaposes this norm against the primary institutions of asylum and *non-refoulement*.

Chapter seven provides conclusions, explains the major contribution of this study to the literature and the debate on the position of voluntary repatriation in international law, as well as quizzes the international refugee protection regime in general. This chapter concludes with possible recommendations for policy makers.

Chapter 2

ADOPTING A MULTIDISCIPLINARY THEORETICAL FRAMEWORK

2.1 Introduction

Adamson and Sriram have posited that for many students of international relations, international law is often invisible.¹⁰² They argue that international relations theory if not explicitly, implicitly engages with international law by using different approaches, languages, and terminology, and most often, international relations theory approaches the study of international law through the language of institutions, regimes, and norms. Usually, the study of international law adds to our understanding of international relations.¹⁰³

A group of scholars including Slaughter, have engaged in the project on interdisciplinary scholarship.¹⁰⁴ They premise that although canonical narratives of how both disciplines evolved is valuable in providing intellectual history as well as

¹⁰² Fiona Adamson and Chandra Sriram, "Perspectives on International Law in International Relations," (2010): 26-27.

¹⁰³ Ibid.

¹⁰⁴ Anne-Marie Slaughter, Andrew S. Tulumello, and Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship," *American Journal of International Law* 92, no. 3 (1998): 367-397.

providing the contexts of debates, it was time to move beyond this dichotomy.¹⁰⁵ The indivisibility of politics and law they claim, was one reason why there was a need for an integrated international relations/international law scholarship.¹⁰⁶ In this same vein and in efforts to explain why self-interested states cooperate, institutionalists have paid attention to law and formal organizations. The rise of constructivism as a prominent discipline and its postulation of identity creation formed through interactions based on shared norms such as sovereignty and international law has been a welcome addition, reinforcing the need for more interdisciplinary scholarship.¹⁰⁷ The preference for interdisciplinary scholarship today reflects the changes in world politics and diverse intradisciplinary dynamics, sharpening and deepening our understandings of the political world.¹⁰⁸

This position is additionally reinforced by Shaffer and Ginsbury who introduce conditional international law theory (conditional IL theory) which aims to avoid the reductionism often associated with normative analysis, recognizing that such analysis may overlook the intricate contexts in which complex international phenomena transpire.¹⁰⁹ They assert that without paying attention to context, theorizing is not helpful.¹¹⁰ Consequently, they propose that international lawyers need to avoid prescriptions solely based on theoretical positions that are not grounded in empiricism.

¹⁰⁵ Ibid, 368.

¹⁰⁶ Ibid, 372-373.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid, 374.

¹⁰⁹ Gregory Shaffer and Tom Ginsburg, "The Empirical Turn in International Legal Scholarship," *American Journal of International Law* 106, no. 1 (2012): 10

¹¹⁰ Ibid, 43.

Shaffer and Ginsbury contend that because conditional IL theory is “theory regarding the mechanisms and conditions through and under which international law works,¹¹¹ it provides researchers with the tools to develop theories about the social conditions that contribute to the formation of international law and the conditions under which it exerts influence in various contexts.¹¹²

This work follows the recommendations by Shaffer and Ginsbury by subjecting the legal principle of voluntary repatriation to an empirical analysis in efforts to understand the social conditions that have contributed to the formation and development of this principle. To understand the norm and the practice of voluntary repatriation, and to be able to enquire as to the principles surrounding this norm and its contested nature, one must on the one hand, understand what this norm is, and this requires a legal investigation. On the other hand, one must also probe not only into the practice of it, but as well into why and how this norm has emerged, and investigate into its crystallization and/or non-crystallization as a principle under international refugee law. This second part requires an international law approach supplemented by an international relations (IR) approach. What Shaffer and Ginsburg describe as conditional IL theory.¹¹³ Therefore, the researcher for the purposes of this work adopts analytical frameworks from both disciplines as a matter of expediency and to add to the richness and contribution this work brings to the literature on international refugee law.

¹¹¹ Ibid, 44

¹¹² Ibid, 2

¹¹³ Ibid, 1

For this purpose, and given the complex nature of this research, the legal analytical frameworks used are: the '*process theory*' propagated by the New Haven School with a particular focus on Rosalyn Higgins¹¹⁴; the '*theory of legalization*' expounded by Abbot & Snidal;¹¹⁵ '*fragmentation*' as explained by Jenks¹¹⁶ and Koskenniemi;¹¹⁷ and the English School's '*primary institutions of international society*' as explained by Buzan and Falker,¹¹⁸ and Nantermoz.¹¹⁹

It is worthy of noting beforehand that the theory of international law as a '*process*' proposed by Higgins is intrinsically interwoven with the '*theory of legalization*' advanced by Abbot¹²⁰ and further developed by Goldstein.¹²¹ Higgins views international law as a '*continuing process of authoritative decisions*'¹²². Legalization is characterized as a '*particular form of institutionalization*' which involves obligation, precision and delegation,¹²³ what, Goldstein puts as '*move to law*'.¹²⁴ Both theories acknowledge the intimate relationship between power, politics and law. Higgins

¹¹⁴ Higgins, 'Problems and Process', 2.

¹¹⁵ Abbott, et al., 'The Concept of Legalization', 401-419.

¹¹⁶ C. Wilfred Jenks, "The Conflict of Law-Making Treaties," *British Yearbook of International Law* 30 (1953): 403.

¹¹⁷ Koskenniemi and Leino, 'Fragmentation of International Law?', 553-579. 'Fragmentation of International Law', 2014.

¹¹⁸ Falkner and Buzan, 'The emergence of environmental stewardship as a primary institution of global international society', 131-155.

¹¹⁹ Nantermoz, Olivia. "International refugee protection and the primary institutions of international society: 256-277.

¹²⁰ Abbott, et al., 'The Concept of Legalization,' 401-419.

¹²¹ Judith Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter, "Introduction: Legalization and World Politics," *International Organization* 54, no. 3 (2000): 385-399.

¹²² Higgins, 'Problems and Process', 2.

¹²³ Abbott, et al., 'The Concept of Legalization', 401.

¹²⁴ Goldstein et al., 'Introduction: Legalization and World Politics', 388.

contends that law does not exist in a vacuum, but rather converges with power, while Goldstein views the relationship between politics and law as reciprocal. The first section of this chapter is dedicated to reviewing Higgins' law as a process theory, and Abbot's concept of legalization, and how these theories provide a blueprint for the probe into the norm of voluntary repatriation under international law.

This is significant because in efforts to understand the position of voluntary repatriation under international refugee law, it is equally important to figure out whether it is 'soft law' or 'hard law'. Because preliminary investigation shows that voluntary repatriation is explicitly mentioned in the 1969 OAU Convention, one can understand that within this context it is hard law. However, we must be able to also investigate as to the nature of this norm under international law.

The English School's theory on primary institutions also adds novelty to this analytical framework as it introduces the concept of primary and secondary institutions of global international society. The claim is that the refugee protection is a primary institution of international society. The enquiry here is whether voluntary repatriation has developed to be a secondary institution. If this is the case, does it serve to reinforce refugee protection as a primary institution or does the existence of this concept weaken the regime of refugee protection?

While the purpose of the use of international law analytical frameworks is meant to identify the position of voluntary repatriation under international refugee law, 'threat framing' as an international relations analytical framework is useful in exploring the interplay and intersection between the theories of securitization and framing. In this work, it is used to investigate how refugees are framed, and how by framing refugees

as a ‘problem’ and as ‘threats’, they have been securitized by states and non-state actors in both the passive and active sense, and how this serves to justify the solutions proposed for refugee-related situations.

2.2 Exploring International Law Frameworks

2.2.1 Rosalyn Higgins and the Process Theory

Higgins a student of the New Haven School of thought in her book titled: “*Problems and Processes*” denies the view of international law as a set of rules often ignored because of a lack of a central authority. Rather, she views “law as a process”. A social process which involves rules, but not only rules, “international law is a continuing process of authoritative decisions”.¹²⁵ Higgins contends that law is not only concerned with authority, but also with harmonization of power, control and authority. In fact, international law according to Higgins exists within a social environment and must be applied within this social context, arguing that one cannot disregard the moral, social and the humanitarian aims of the law.¹²⁶ Notwithstanding, in order for law to remain legal, we need to make sure that decisions are taken by designated and authorized persons with reference to guidelines embodied in past decisions while also taking into consideration the needs of the present community.¹²⁷ Law as a process stimulates choices and interpretations which are more consistent with our values and needs. If law is a process, then there would be no need for the false dichotomy between *lex lata* and *lex feranda*. She asserts that because international law is not just rules, but a continuous process of decision making, if the present norms no longer serve the

¹²⁵ Higgins, ‘Problems and Process’, 2.

¹²⁶ W. Michael Reisman, "Criteria for the Lawful Use of Force in International Law." *Yale J. Int'l L.* 10 (1984): 283. Cited in Higgins, *Problems and Process*, 252.

¹²⁷ *Ibid.*, 9.

interests and needs of the community, then they should be subjected to processes of adjustment. Higgins is not alone in this line of thinking, it has been noted by other writers that laws and norms are devised for human beings for specific purposes and social circumstances. Therefore, the purpose for the law is of utmost importance, and the law should always pay attention to context.¹²⁸ This dynamism is also at the center of the process theory.

The process theory should be understood as positioned between naturalism and positivism. As explained by Basak, the emphasis should be placed not only on the expression of the will of states but also on other principles that are independent of states' will.¹²⁹ In this sense, international law is not simply a "platform where everything goes".¹³⁰ Consequently, students of politics prefer to understand international law as a process because it cuts across not only the divide between jargons of international relations and international law, but also provides room for law in politics,¹³¹ which if one is being objective, makes better sense of the world around us.

2.2.2 Applying the Legalization Framework as a Theory

Goldstein¹³² and Abbot¹³³ argue in their articles that legalization is a '*move to law*', a specific mode of institutionalization which involves three principal variables;

¹²⁸ Reisman, Criteria for the Lawful Use of Force in International Law, 283.

¹²⁹ Cali, Basak, ed. International Law for International Relations. Oxford University Press, USA, 2010, 79.

¹³⁰ Ibid.

¹³¹ Ibid, 80.

¹³² Goldstein et al., 'Introduction: Legalization and World Politics', 387.

¹³³ Abbott, et al., 'The Concept of Legalization', 401.

obligation, precision and delegation. Obligation means that states are bound through law; precision, that the rules are specific and unambiguous and delegation that the authority to settle disputes, to interpret, to implement and if necessary to make rules is delegated to a neutral entity. These three are the definitive characteristics which institutions may or may not enjoy. This legalization does not only entail a *move to law*, but it is a *move to law* which takes into consideration the realities of power politics (interest and power as opposed to legalism which ignores the realities of power and interests).¹³⁴ Goldstein agrees with Higgins that law and politics are deeply embedded. The relationship between politics and law is a *reciprocal* one, thus, one cannot be understood in isolation from the other.¹³⁵

Abbot notes that legalization ranges from the ideal type in which the properties of obligation, precision and delegation are maximized, to hard legalization wherein, at least the criteria of delegation and obligation are high and to several forms of soft or limited legalization involving one or more attributes, to another ideal type which is a complete lack of legalization. In other words, it is a “multidimensional continuum”.¹³⁶ Note should be taken of the fact that each of these properties is an issue of gradation and degree. All the same, this move to law is not entirely uniform or coherent.¹³⁷ It is also important to note that states will either oppose or favor legalization based on whether this legalization is in their best interests.¹³⁸

¹³⁴ Goldstein et al., ‘Introduction: Legalization and World Politics’, 392.

¹³⁵ Higgins, ‘Problems and Process’, 252.

¹³⁶ Abbott, et al., The Concept of Legalization, 401-402.

¹³⁷ Goldstein et al., Introduction: Legalization and World Politics, 386.

¹³⁸ Ibid., 397.

Legalization varies in terms of degree. Obligation varies from an express non legal norm to '*jus cogens*', precision varies from a principle which is vague to a highly precise and elaborate rule, while delegation varies from simple diplomacy to institutionalization in domestic and international courts. Abbot provides a *figure* to illustrate this.

Typology		
Obligation (Non-Legal Norm)	————→	<i>Jus Cogens</i> (Peremptory Norm)
Precision (Vague)	————→	Highly Precise
Delegation (Diplomacy) Courts	————→	Institutionalization In International And Domestic

Figure 1: Typology of Legalization

One of the purposes of this thesis is to determine whether and if yes, to what extent the principle of voluntary repatriation is legalized under African law in particular, and international law in general. In order to make this determination, one needs a formula which can possibly test this degree of legalization. Abbot's evaluation mechanism which explains the eight possible *mélanges* of obligation, precision and delegation is a perfect example of such a tool. Each property is termed high, moderate or low, depending on its degree of legalization.

Charlotte and Francis, as well as Abbott and Snidal, perceive international law as an ongoing process, often described as “a continuum”¹³⁹ or a “series of tradeoffs.”¹⁴⁰ Parallely, Ratner and Wippman argue that international law is a dynamic process where actors continually shape and reshape policies and interests to maximize gains and advance a desired “world order.” They characterize it as a “constitutive process of authoritative decision-making.”¹⁴¹ Indeed as Dupuy puts it, ‘*repetition*’ is of utmost importance in the process of law formulation.¹⁴²

Legal positivists, contrary to Higgins focus on law as ‘*rules*’ and ‘*commands*’. They, for instance, reject the social process theory of law, arguing that it takes the lawyer into the social, economic and political domain which blurs legal arguments. More so, by attaching political processes to law-making, international law develops an ‘*apologist*’ character and this makes international law whatever powerful states determine it to be.¹⁴³ Kleimann for instance, opines that the moral justification of decisions having political natures is a question of philosophy rather than legal interpretation, because moral standards can never be truly objective.¹⁴⁴ This position is reinforced in the South West Africa Cases, where the judges argued that social and

¹³⁹ Ku, Charlotte, and Paul Francis Diehl, eds. *International Law: Classic and Contemporary Readings*. Boulder, CO: Lynne Rienner, 2003: 7.

¹⁴⁰ Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," *International Organization* 54, no. 3 (2000): 455.

¹⁴¹ Steven R. Ratner and David Wippman, *International Law: Norms, Actors, Process: A Problem-Oriented Approach* (Aspen Pub, 2010): 22.

¹⁴² Pierre-Marie Dupuy, "Soft Law and the International Law of the Environment," *Michigan Journal of International Law* 12 (1990): 424-425.

¹⁴³ Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2006). 227.

¹⁴⁴ David Kleimann, "Positivism, the New Haven School, and the use of force in international law," *BSIS Journal of International Studies* 3 (2006): 39.

humanitarian factors when taking decisions are meant for the political arena, not the legal.¹⁴⁵ In fact, the ICJ's position on this is clear;

law exists...to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.¹⁴⁶

2.2.3 Understanding Primary Institutions of International Society

In their work on “the emergence of environmental stewardship”, Falkner and Buzan drawing inspirations from Bull¹⁴⁷ and Keohane¹⁴⁸ define primary institutions as “deep and relatively durable social practices in the sense of being evolved more than designed.”¹⁴⁹ These practices extend beyond mere design, embodying a sense of historical development. However, their significance is not confined to mere existence, rather, they are of paramount importance in being shared among the members of international society. That is, “they are constitutive of both states and international society” and define “the basic character of states...their patterns of legitimate behaviour in relation to each other,” and membership criteria for belonging to international society.¹⁵⁰ These practices must be perceived as not only shared but also as sanctioned by legitimacy. In essence, the concept of primary institutions revolves around fostering a collective identity among international society's members. These institutions serve as the underpinning fabric of both states and the broader international

¹⁴⁵ *South West Africa Cases*, ICJ Reports (1962) 466 (Joint Dissenting Opinion of Judges Fitzmaurice and Spender).

¹⁴⁶ *South West Africa Cases*, ICJ Reports (1966) 6 at para 49.

¹⁴⁷ Hedley Bull, *The Anarchical Society* (1977). Robert Falkner and Barry Buzan, eds., *Great Powers, Climate Change, and Global Environmental Responsibilities* (Oxford University Press, 2022): 53-57

¹⁴⁸ Robert Keohane, "International Institutions: Two Approaches (1988)," in *International Theory: Critical Investigations*, 279-307 (London: Palgrave Macmillan UK, 1988): 285.

¹⁴⁹ Falkner and Buzan, ‘The emergence of environmental stewardship as a primary institution of global international society’, 134

¹⁵⁰ *Ibid.*

society. They not only define the fundamental nature of states but also outline the contours of legitimate conduct in their interactions and lay down the criteria for membership within this global community.

Primary institutions usually emerge from the “complex processes of human societies”, which continuously exhibit ingenuity in producing various social forms and structures.¹⁵¹ While the nature of primary institutions is sometimes the subject of debate, explicit criteria are offered by Holsti who contends that: first, institutions provide the framework for international political activities, encapsulating standard actions, interactions, norms, rules, principles, and prevalent ideas of a specific period; second, they encompass pivotal regulations governing state and societal coexistence, and offer an enabling environment for diverse social exchanges.¹⁵² Order in international society is maintained by primary institutions.¹⁵³ Balance of power, war, diplomacy, and international law are some examples of primary institutions of international society.¹⁵⁴

Falkner and Buzan contend that environmental stewardship has emerged as a primary institution of modern society in response to the “destructive potential of the modern industrial system.”¹⁵⁵ They offer two main criteria; a clearly defined value applicable

¹⁵¹ Falkner and Buzan, ‘The emergence of environmental stewardship as a primary institution of global international society’, 135.

¹⁵² Kalevi Jaakko Holsti, *Taming the Sovereigns: Institutional Change in International Politics*, No. 94 (Cambridge University Press, 2004): 18.

¹⁵³ Charlotta Friedner Parrat, "On the Evolution of Primary Institutions of International Society," *International Studies Quarterly* 61, no. 3 (2017): 623.

¹⁵⁴ Hedley, ‘The Anarchical Society’, 624.

¹⁵⁵ Falkner and Buzan, ‘The emergence of environmental stewardship as a primary institution of global international society’, 135

across international society, and a substantial level of societal integration of environmentalism as a norm of global international society.¹⁵⁶

Secondary institutions, on their part, act as expressions of the strength and scope of the underlying primary institution.¹⁵⁷ In essence, they are formalized versions of primary institutions.¹⁵⁸ They do not only represent norms and establish frameworks for regulations and practices, but also serve as arenas where the primary institution is “reproduced, developed and contested”.¹⁵⁹ Secondary institutions are “deliberately created institutions” or regimes, which are meant to regulate the behaviours of states and non-state actors in a specific issue area.¹⁶⁰ They are sites of political contestation for actors and serve to socialize them. They can also play a key role in the decay of primary institutions.¹⁶¹ While secondary institutions are easy to identify, it has always been much harder to set a criterion for regimes to be classified as primary institutions of global international society.¹⁶² Examples of secondary institutions may include specific rules which states must adhere to, international organizations, and regimes.¹⁶³

¹⁵⁶ Ibid, 136.

¹⁵⁷ Ibid, 132.

¹⁵⁸ Parrat, On the evolution of primary institutions of international society, 629.

¹⁵⁹ Ibid, 133.

¹⁶⁰ Ibid, 134.

¹⁶¹ Cornelia Navari, "Primary and Secondary Institutions: Quo Vadit," *Cooperation and Conflict* 51, no. 1 (2016): 121-127.

¹⁶² Buzan, 'From international to world society?', 161 – 204.

¹⁶³ Parrat, 'On the evolution of primary institutions of international society', 629.

Refugee protection, it is argued, is a primary institution of modern international society.¹⁶⁴ Nantermoz's work "International Refugee Protection and the Primary Institutions of International Society" constructs a model to assess if refugee protection qualifies as a primary institution. This model encompasses three interconnected tests: firstly, identifying the foundational principle of the primary institution that defines its normative essence. Secondly, examining the supplementary regulations (norms and practices) stemming from this foundational principle, termed by Buzan as the process of 'social consolidation'.¹⁶⁵ Lastly, it examines how the institution interacts with the identity of states and international society. The argument presented is that the principle of asylum, obligating states to safeguard refugees, serves as the constitutive aspect of the international refugee protection regime. The presence of consistent state practice, ongoing development of comprehensive rules at various levels, and the establishment of international and regional organizations underscore refugee protection as a primary institution within international society. While acknowledging potential practice variations, in line with Buzan's 'changeability within a constant,' the enduring core principle of refugee protection sustains the primary institution, even as rules and norms evolve.¹⁶⁶

2.2.4 Fragmentation of International Law Applied as a Theory

As the process of globalization is taking place, so too is international law expanding to new areas. Cultural, national and regional developments are being integrated into international law on the one hand, and on the other, these new developments also

¹⁶⁴ Nantermoz, 'International refugee protection and the primary institutions of international society', 262.

¹⁶⁵ Falkner and Buzan, 'The emergence of environmental stewardship as a primary institution of global international society', 136.

¹⁶⁶ Buzan, 'from international to world society?', 2004.

challenge the body of existing international law. Koskenniemi notes that increased globalization and uniformization of the world have paradoxically led to increased fragmentation of international law. Fragmentation takes place when international law is broadening. He goes further to explain that fragmentation has seen the emergence of autonomous rules and/or legal institutions in different regions of the world. What formerly used to be under the jurisdiction of general public international law is now being governed by specialist systems such as ‘human rights law’, ‘refugee law’, ‘African law’ or ‘the law of the sea’, etc. with each of them possessing their separate principles and legal institutions.¹⁶⁷ For instance, the introduction of the principle of voluntary repatriation in the 1969 OAU Convention indicates a unique African perspective to the protection of refugees in Africa or can it be understood otherwise? The concept of fragmentation was initially introduced in 1953 by Jenks, who proposed that “law-making treaties are tending to develop in a number of...regional groups which are separate from each other...”¹⁶⁸

The increase in conflicts and interpretations of public international law, has led to the fragmentation of law to regional specialist institutions such as the African Union and the European Union. Yet, international law through the doctrines of ‘*lex specialis derogat legi generali*’ and the principles of hierarchy of norms provides appropriate means of resolving the complexities and conflicts in international law. These principles are applicable in various contexts, including within a single treaty, between provisions

¹⁶⁷ United Nations. International Law Commission. Study Group, and Martti Koskenniemi. *Fragmentation of International Law: difficulties arising from the diversification and expansion of international law*. Erik Castrén Institute of International Law and Human Rights, 2006, 30-34.

¹⁶⁸ Jenks, ‘Conflict of Law-Making Treaties’, 403.

in multiple treaties, between a treaty and a non-treaty standard, and even between two non-treaty standards.

The doctrine of '*lex specialis*' provides that in cases of conflict between a general law and a specific rule, the specific rule takes precedence over the general rule.¹⁶⁹ That is, where there is a conflict between two legal understandings of a law which both sides claim are applicable, but provide incongruous guidance on how to proceed with the application of the law, the doctrine of '*lex specialis*' provides that the rule which is specific (exception) should be applied.¹⁷⁰ This idea of the 'specific' taking precedence over the 'general' has been a long standing one in international law and was also espoused by Grotius.¹⁷¹ However, this maxim is not as straightforward as it may seem. It is often very difficult to distinguish the difference between what is general law and what is a particular law. Also, in some cases '*lex specialis*' may be forbidden from overriding the general law. One such instance is in the case where the general rule is a *jus cogens*.¹⁷² The other exception concerns human rights norms. In this case, the law that is "more favorable to the protected interest is usually held to be overriding".¹⁷³

When two or more laws are in conflict, the doctrine of the hierarchy of norms is also used to resolve this conflict. The interpretation is that some norms are of a higher legal

¹⁶⁹ 'Fragmentation of International Law', 19-30.

¹⁷⁰ Jenks, 'Conflict of Law-Making Treaties', 403.

¹⁷¹ Hugo Grotius, *De Jure Belli ac Pacis. Libri Tres*, Edited by James Brown Scott, *The Classics of International Law* (Oxford: Clarendon Press, 1925) Book II, Chap. XVI, Sect. XXIX, : 428.

¹⁷² 'Fragmentation of International Law', 28.

¹⁷³ *Ibid.*

rank than others.¹⁷⁴ In particular, *jus cogens* are so fundamental that there can be no derogation from them. This is also echoed by Vattel who has contended that some norms exist above the will of states and as such are timeless.¹⁷⁵ The uncontested position of *jus cogens* is further emphasized in articles 53 and 64 of the 1969 Vienna Convention.¹⁷⁶ Art. 53 explains that treaties are void if they conflict with a peremptory norm of general international law.¹⁷⁷ It states further that only a peremptory norm can replace another peremptory norm. Further, “if a new peremptory norm emerges, any existing treaty which is in conflict with that norm becomes void and terminates”.¹⁷⁸ It is important to note that art.53 is not meant to be understood as simply giving priority or precedence of the *jus cogens* over the treaty law or norm, rather it means where there is a conflict, the norm that contests the *jus cogens* becomes non-applicable and void.¹⁷⁹

When two or more principles are both valid and applicable in respect to a given situation, the International Law Commission, , considered that it could either be a relationship of interpretation where one norm assists in clarifying, modifying, updating or the application of the other norm, or a case of relationship of conflict when both norms are valid and applicable but point to incompatible decisions.¹⁸⁰ To resolve these,

¹⁷⁴ Ibid., 74

¹⁷⁵ Emer de Vattel. *Le droit des gens, ou, Principes de la loi naturelle: appliqués à la conduite & aux affaires des nations & des souverains*. Vol. 1. chez E. van Harreveld, 1775, 4.

¹⁷⁶ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, art 53 and 64.

¹⁷⁷ ‘Vienna Convention on the Law of Treaties’, art. 53.

¹⁷⁸ Ibid., 64.

¹⁷⁹ ‘Fragmentation of International Law’, 75.

¹⁸⁰ ‘Fragmentation of International Law’, 7-8.

the Commission made reference to articles 31-33 of the Vienna Convention on the Law of Treaties,¹⁸¹ which calls for the interpretation of treaties in good faith, in the light of its purpose, as well as other supplementary methods of interpretation including the '*travaux préparatoires*'. Additionally, fragmentation refers to the time factor and the rule that new norms replace old ones '*lex posterior derogat legi priori*', as well as, to the norms of hierarchy under international law.¹⁸²

With the broadening of public international law, conflicts have arisen on the interpretations and application of law. In order, to serve their particular needs and interests, regional organizations have increasingly developed laws on specific issues to govern state practice within their given regions. The principle of voluntary repatriation within African law is a case in point. Using fragmentation as a theory, this work attempts to explain the uniqueness of the African system, as well as questions as to what this means for public international law.

2.3 Threat Framing as an International Relations Theoretical Analytical Tool

Researchers employing securitization and framing theory often prefer to categorize themselves as belonging to separate schools of thought ignoring one another, each preferring to retain the purity of their analytical frameworks. This is the case, despite their mutual interests in the fields of threat construction.¹⁸³ In reality, securitization and framing are innately intertwined. They are not only compatible, but securitization,

¹⁸¹ 'Vienna Convention on the Law of Treaties', art. 31 – 33.

¹⁸² Koskenniemi, 'Fragmentation of International Law', 36.

¹⁸³ There is an increasing number of researchers employing threat framing and calling for a closer integration between the theories of framing and securitization. Some of the leading authors include; Johan Eriksson, Scott Watson and Dagmar Rychnovská.

it is argued “is a distinct master frame” and a subfield of framing.¹⁸⁴ Threat framing research spreads across security studies, framing theory and crisis studies. This interdisciplinary characteristic makes threat framing the ideal analytical tool for a researcher adopting an eclectic theoretical framework in an attempt to examine a concept as complex as that of voluntary repatriation. However, before delving into what threat framing offers as an analytical tool, first, the theories of securitization and framing should be analyzed distinctly.

2.3.1 What is the Securitization Theory?

The point of securitization studies is to understand: who is securitizing, what the threat (referent object) is, what the issues are, why there is need to securitize, what the results are, and what explains when this process of securitization has been successful?¹⁸⁵ What this framework offers research, is the ability to evaluate whether a security issue is good or bad. It provides the opportunity to pose pertinent questions, thereby elevating the significance of the securitized subject to a topic of public discussion. The emphasis in this section is on the Copenhagen (Buzan, Wæver, and Wilde) and Paris (Balzacq) schools of securitization. The main focus is not on the differences between the schools, but more importantly on how an analysis which borrows from both provides insight into a better understanding of securitization as a framework of analysis.

Buzan, Wæver and Wilde explaining the theory of securitization contend that the “special nature of security threats justifies the use of extraordinary measures to handle

¹⁸⁴ Scott D. Watson, “‘Framing’ the Copenhagen School: Integrating the literature on threat construction,” *Millennium* 40, no. 2 (2012): 280.

¹⁸⁵ Barry Buzan, Ole Wæver, and Jaap De Wilde, *Security: A New Framework for Analysis* (Lynne Rienner Publishers, 1998): 21.

them”.¹⁸⁶ They argue that when states use the term ‘security’ what they are doing is declaring an emergency situation that then justifies extraordinary measures to stop this threat.¹⁸⁷ As a matter of fact, existential threats can only be understood when viewed vis-à-vis the specific character of the referent object.¹⁸⁸ In the case of the regime of international refugee protection, refugees put into question the constitution of the modern regime of organization, as such pose a threat to the system. This is in line with their assertion that international regimes can face an “existential threat” when a situation arises that challenges the validity of their norms, rules, and institutions.¹⁸⁹ Security, they assert “is the move that takes politics beyond the established rules of the game and frames the issue either as a special kind of politics or as above politics”.¹⁹⁰ Therefore, “securitization can thus be seen as a more extreme version of politicization”.¹⁹¹ Due to this process of securitization, the reactions by a society to rival identities depends on how close-minded or open-minded they are.¹⁹² If a society is close-minded, this rival group may be securitized as a threat. To securitize implies presenting a particular issue as an existential threat, thus requiring “emergency measures” that rationalize actions typically considered “beyond the usual bounds of political procedure.”¹⁹³ Nonetheless, because placing issues on the security spectrum is open, depending on the circumstances, an issue may range from “non-politicized”

¹⁸⁶ Buzan, ‘Security: A new framework for analysis’, 32.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid., 22.

¹⁹⁰ Ibid., 23.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Ibid, 23-24.

which means the state does not deal with it, to “politicized” meaning it is a part of the state’s public policy and as such requires resource allocation or government decision.¹⁹⁴

The authors claim that if an issue is considered an international security issue, it therefore means that absolute priority is to be given to this issue.¹⁹⁵ This is especially relevant in refugee discourse given that some political actors continuously refer to refugees as ‘illegal migrants’ or as ‘problems’ in efforts to securitize them as persons posing a threat to their states and communities. By securitizing an issue, the securitizing actor claims a right to use a special measure to handle it, as such “security” is “a self-inferential practice.”¹⁹⁶ This is so because it is in the practice of securitizing an issue that it becomes a security issue, not because a real threat which is existential exists, but, because the issue is being presented as a security threat.¹⁹⁷ In fact, “it is by labelling something a security issue that it becomes one”¹⁹⁸ and “about survival in the face of an existential threat”¹⁹⁹ not necessarily because something bad will happen. Securitization is the establishment of a socially constructed intersubjective process that is sufficiently salient that it develops political effects which are equally salient.²⁰⁰

¹⁹⁴ Ibid, 23.

¹⁹⁵ Ibid., 24.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Ole Wæver, "Aberystwyth, Paris, Copenhagen: New ‘schools’ in security theory and their origins between core and periphery," paper presented at the annual meeting of the International Studies Association, Montreal, 2004, 13.

¹⁹⁹ Buzan, ‘Security: A new framework for analysis’, 27.

²⁰⁰ Ibid., 25.

Indeed, it is “a political fact that has consequences” that will compel the actor to function in a way different from their usual course of action.²⁰¹

For conceptual clarification, it is important to understand that the discourse of securitizing a referent object does not necessarily create securitization, rather, it is when the audience accepts this referent object as a security threat that it can be said that securitization has occurred.²⁰² It is the audience that decides that the “speech act” (the utterances by the securitizing actor) of the securitizer is indeed a security threat.²⁰³ The center of analysis is the practice of securitization.²⁰⁴ The Copenhagen School contends that for securitization to be successful, three conditions have to be met: a securitizing actor must assert the necessity of extraordinary measures by declaring that the survival of a referent object is in jeopardy, thus rationalizing the requirement for unconventional actions to safeguard the referent object's existence; the actor must successfully convince the audience of the existence of this threat and mobilize support to justify actions needed to be taken; and this threat (issue) must be moved out of the realm of “normal politics” to “emergency politics”.²⁰⁵ The difficulty of defining what constitutes ‘normal politics’ is highlighted by critics of the Copenhagen School

²⁰¹ Ibid., 30-31.

²⁰² Ibid., 25.

²⁰³ Ibid., 31.

²⁰⁴ Ibid., 32.

²⁰⁵ Ibid., 6.

because the understanding of what constitutes ‘normal politics’ varies from state to state and from institution to institution.²⁰⁶

Consequently, an object is said to have been securitized if it has the following components; “it is considered an existential threat, requires emergency action, and affects inter-unit relations by breaking free of rules.”²⁰⁷ It must have a specific rhetorical structure (could be survival of the group or its identities or jobs, etc.) which is the distinguishing feature of securitization.²⁰⁸ In security discourse, the issue is presented as one of supreme importance due to the dramatization of a ‘speech act’, the utterance of which is the act.²⁰⁹

Buzan, Waever and Wilde shed light on the meaning of security in the framework of analysis, arguing that “security is a generic term” but with different variations, which boils down to survival in the face of threats that are existential.²¹⁰ However, what these existential threats are differs depending on the field.²¹¹ The conceptualization and political practice of securitization vary across different places and times.²¹² The important thing to note is that for securitization to be possible or to be successful, the securitizing actor needs to define a referent object as a security threat (the speech act),

²⁰⁶ Nicole J. Jackson, "International organizations, security dichotomies and the trafficking of persons and narcotics in post-Soviet Central Asia: A critique of the securitization framework," *Security Dialogue* 37, no. 3 (2006): 311-312.

²⁰⁷ Buzan, ‘Security: A new framework for analysis’, 26.

²⁰⁸ Ibid.

²⁰⁹ Ibid

²¹⁰ Buzan, ‘Security: A new framework for analysis’, 27.

²¹¹ Ibid.

²¹² Nils Bubandt, "Vernacular Security: The Politics of Feeling Safe in Global, National, and Local Worlds," *Security Dialogue* 36, no. 3 (2005): 291.

and the audience has to accept this definition of the object as a security threat which would otherwise not be possible without this ‘speech act’. However, the Copenhagen school’s criteria for successful securitization remains vague particularly on the role of the audience. For instance, what defines a successful securitization? When the audience accepts the object as securitized or when policies are put in place following this securitization or both? According to Balzacq an act of securitization can only be considered successful when it is accepted by the audience.²¹³ He agrees with many of the assertions raised by the Copenhagen School, but argues that “security as a speech act is highly problematic” because it ignores the external context.²¹⁴ Jackson agrees that studying securitization through the “speech-act” prism is too narrow and does not take into consideration why securitization occurs in the first place, as well as, the wider context. He goes a step further to contend that securitization is only successful when the issues advanced have been accepted by the audience and have an impact on policy output.²¹⁵ The Copenhagen Framework is also criticized for being too state-centric because it asserts that states are the only ones who can securitize issues.²¹⁶

Balzacq proposes an approach to securitization which is pragmatic – “as a strategic practice”, – a social construction perspective of securitization.²¹⁷ Basically, the construction of a certain reality in terms of a threat/security concern is essential to

²¹³ Thierry Balzacq, "The Three Faces of Securitization: Political Agency, Audience, and Context," *European Journal of International Relations* 11, no. 2 (2005): 173.

²¹⁴ Balzacq, ‘The three faces of securitization’, 174.

²¹⁵ Nicole J. Jackson, "International organizations, security dichotomies and the trafficking of persons and narcotics in post-Soviet Central Asia: A critique of the securitization framework," *Security Dialogue* 37, no. 3 (2006): 313.

²¹⁶ Bill McSweeney, *Security, Identity, and Interests: A Sociology of International Relations* (Cambridge University Press, 1999): 71.

²¹⁷ Balzacq, ‘The three faces of securitization’, 174.

securitization as an inter-subjective process. Thus, focusing on the ‘audience’ rather than a ‘speech-act’ given at a specific point in time can be the key to understanding institutionalized securitization processes.²¹⁸ What is more, if one views securitization just as an illocutionary ‘speech act’, then there is no room for social interaction or authorization because then language is imbued the power to create social reality, but if understood as an inter-subjective process, then language by itself does not produce security, but is just one part of the inter-subjective construction of reality.²¹⁹ In fact, the audience often challenges the securitizing actor’s presentation forcing them to either abandon or modify their narrative.²²⁰ Securitization “encompasses not only the particular piece(s) of persuasion that we are interested in but also all other successful and abortive attempts at modification that are relevant to experiencing that rhetoric”.²²¹ Balzacq concludes that securitization is not a “self-contained process” and to be successful, three conditions are necessary; the audience, context, and securitizing actor.²²²

This theory is relevant to the study of international refugee law because as will be discussed much later in this study, refugees have been, and are continuously being securitized by state and non-state actors. In fact, the international regime of refugee

²¹⁸ İlke Dağlı, "Identities in Limbo: Securitisation of Identities in Conflict Environments and Its Implications on Ontological Security: Prospects of Desecuritisation for Reconciliation in Cyprus" (PhD diss., University of Warwick, 2016): 39-40.

²¹⁹ Adam Côté, "Agents without Agency: Assessing the Role of the Audience in Securitization Theory," *Security Dialogue* 47, no. 6 (2016): 542; Matt McDonald, "Securitization and the Construction of Security," *European Journal of International Relations* 14, no. 4 (2008).

²²⁰ Côté, ‘Agents without agency: Assessing the role of the audience in securitization theory’, 546.

²²¹ Eugene Edmond White, *The Context of Human Discourse: A Configurational Criticism of Rhetoric* (University of South Carolina Press, 1992): 13.

²²² Balzacq, ‘The three faces of securitization: Political agency, audience and context’, 192-193.

protection and refugees this author contends, has been securitized in such a way as to frame refugees as threats to the stability of the international global order.

2.3.2 Exploring the Theory of Framing

The theory of framing is used more commonly in the field of communication studies rather than international politics. Goffman who is credited with conceiving the term ‘frame analysis’ describes frames as those culturally determined definitions of reality that allows us make sense of events and objects. This “schemata of interpretation” (frames), “allows its users to locate, perceive, identify and label” issues, events and phenomena within a comprehensible framework, shaping the way individuals understand and make sense of the world around them.²²³ Framing is sometimes a difficult term to understand because although it is possible to intuitively grasp its meaning, “it can mean anything and everything”.²²⁴

To some, frames are central organizing ideas used to make sense of events suggesting what is at issue,²²⁵ and to others, “to frame is to select some aspects of a perceived reality and make them more salient in a communicating context, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation for the item described”.²²⁶ Van Dijk argues that frames are “conceptual structures or sets of beliefs that organize political thoughts, policies and

²²³ Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience* (Harvard University Press, 1974): 21.

²²⁴ Matthes, Jörg. (2011). Frames in Political Communication: Towards Clarification of a Research Program; 124.

²²⁵ Gamson and Modigliani, ‘Media discourse and public opinion on nuclear power’, 3.

²²⁶ Robert M. Entman, "Framing: Toward Clarification of a Fractured Paradigm," *Journal of Communication* 43, no. 4 (1993): 52.

discourse”²²⁷ Benford and Snow claim that framing is also “an active, processual phenomenon that implies agency and contention at the level of reality construction”.²²⁸ Simply put, frame analysis is a method used to study how the various alternatives to ordinary activities are developed, and situations defined. It offers the researcher the ability to evaluate and describe “the power of communication to direct individual cognitions towards a prescribed interpretation of a situation or object”.²²⁹ It should be noted that ‘strategic actors’ and ‘audiences’ do not simply transport or reflect social and political realities, rather, events, issues and politics are subject to different interpretations and patterns of selections. Consequently, according to some authors, frames construct reality in a particular way which leads to different evaluations and recommendations. Framing is an active “process of creating, selecting and shaping”.²³⁰

Entman postulates that framing takes place in the culture, the minds of professional communicators and elites, communication texts, and the individual minds of citizens.²³¹ It is a diachronic process and repeatedly invokes the same objects and traits, using identical or synonymous words and symbols in a series of similar communications that are concentrated in time. These frames function to promote an interpretation of a problematic situation or actor (implicit or explicit) and support for a desirable response, often along with a moral judgement that provides an emotional

²²⁷ Teun A. Van Dijk, "Critical Discourse Analysis," in *The Handbook of Discourse Analysis*, ed. Deborah Schiffrin, Deborah Tannen, and Heidi E. Hamilton (Malden, MA: Blackwell Publishers Ltd, 2001): 360.

²²⁸ Robert D. Benford and David A. Snow, "Framing Processes and Social Movements: An Overview and Assessment," *Annual Review of Sociology* 26, no. 1 (2000): 614.

²²⁹ Amy E. Jasperson, Dhavan V. Shah, Mark Watts, Ronald J. Faber, and David P. Fan, "Framing and the Public Agenda: Media Effects on the Importance of the Federal Budget Deficit," *Political Communication* 15, no. 2 (1998): 206.

²³⁰ Ibid.

²³¹ Entman, et al., ‘Nature, sources, and effects of news framing’, 176.

charge.²³² Jörg and Allan analyzing several works contend that the framing process involves four guiding principles: first, there are always competing frames; second, actors do not necessarily adopt the frames of others because during the framing process some frames are selected over others; third, framing is a diachronic process which evolves with time; and fourth, frames through repetition exert their power by giving the audience the possibility of noticing, understanding and storing mental association. Hence, they are not just singular persuasive assertions.²³³ Because the analytical tools of framing can capture the dynamics of audience acceptance, it can therefore be merged with securitization theory in the analysis of context specific discursive practices. What in literature is referred to as threat framing.

2.3.3 Applying Threat Framing as a Theoretical Framework of Analysis

Framing and securitization in many respects are similar research programs in which the construction of meanings is defined by the “audience, communicator and culture”.²³⁴ By combining both frameworks, one is able to understand how “frames are generated, developed and deployed” during the process of securitizing refugees using the categorization of “frames technique”.²³⁵ Questions on how collective meanings are affected by shared assumptions and created through discursive interactions is the focus of the theory of framing.²³⁶ Securitization analysis therefore, stands to benefit from a

²³² Entman, et al., ‘Nature, sources, and effects of news framing’, 177.

²³³ Jörg and Allan, ‘Frames in Political Communication: Towards Clarification of a Research Program’, 125.

²³⁴ Watson, ‘‘Framing’ the Copenhagen School’, 284.

²³⁵ Rychnovská, ‘Securitization and the power of threat framing’, 15.

²³⁶ Gamson, et al., ‘Media images and the social construction of reality’, 15.

cooperation with the theory of framing, particularly when the focus is on the study of the practices of securitization in “discursive-oriented settings” and “social context”.²³⁷

Actually, framing analysis provides the tools with which to breakdown the securitization process through a number of frames; i) a diagnostic frame (explaining and defining a given situation and ascribing responsibility); ii) prognostic frame (providing solutions to problems that have been diagnosed); iii) motivational frame (call for action to change); and iv) frame resonance (to be effective, the content of the frame must be appealing to the beliefs and values of the audience targeted).²³⁸ By re-conceptualizing securitization as a process of threat framing, one is able to look at the discursive context to examine: what constitutes the threat, who is responsible for that, what needs to be done, the urgency of the threat, the framing processes within which these discursive contexts are embedded, and the power relations playing out in the negotiation and re-negotiations of the meanings of these frames?²³⁹

Both the securitization and framing theories agree on the importance of linguistic-grammatical composition in understanding political outcomes. That is to say, actors construct threats/problems through discursive practices. Both frameworks also value the importance of the audience in threat construction processes, as well as, that, the processes of securitization and framing are embedded in power relations and the external context plays an instrumental role in the successful construction of

²³⁷ Rychnovská, ‘Securitization and the power of threat framing’: 15

²³⁸ David A. Snow and Robert D. Benford, "Ideology, Frame Resonance, and Participant Mobilization," *International Social Movement Research* 1, no. 1 (1988): 197-217: 199-202.

²³⁹ Rychnovská, ‘Securitization and the power of threat framing’, 16.

meaning.²⁴⁰ Despite the compatibility and similarities, securitization and framing analysis are not one and the same. For instance, while securitization as a framework is relatively well defined, structured, and limits itself solely to the field of security studies, the same cannot be said of framing analysis which is a large field of study applicable to sociology, media studies, political studies, psychology and anthropology. It is also not theoretically precise.²⁴¹ Furthermore, the logic of exceptionalism in securitization studies whereby threats are constructed in order to move them from the realm of 'normal politics' to the realm of exception is not necessarily true for framing studies. Here, even after the construction of threats occurs, it is still possible for it to remain within the realm of "normal politics."²⁴² Yet, securitization could be understood as a type of framing, albeit, the most important.²⁴³

Threat framing is a political process. A process which explains how power symbols and metaphors such as threat, risk and security, are established and maintained.²⁴⁴ Threat framing is the process whereby experts opt for the use of certain stories and phrases to "add urgency to their case".²⁴⁵ This language is used with the specific intention to dramatize the issue, and because ordinarily this is not considered a threat, "constant persuasion" and use of this specific language is needed in order to amplify

²⁴⁰ Watson, 'Framing' the Copenhagen School', 283-287.

²⁴¹ Ibid., 282.

²⁴² Ibid., 289 -290.

²⁴³ Johan Eriksson, "Cyberplagues, IT, and Security: Threat Politics in the Information Age," *Journal of Contingencies and Crisis Management* 9, no. 4 (2001): 212.

²⁴⁴ Paul Anthony Chilton, "Security Metaphors: Cold War Discourse from Containment to Common House" (1996) cited in Ibid.

²⁴⁵ Myriam Dunn Cavelty, "Cyber-terror—looming threat or phantom menace? The framing of the US cyber-threat debate," *Journal of Information Technology & Politics* 4, no. 1 (2008): 23.

the sense of danger.²⁴⁶ To put it simply, threat framing relates to how an issue is “perceived, labeled and communicated as a threat” to someone or something.²⁴⁷ The choice of threat framing is one which offers the researcher the best of both analytical frameworks.

As it regards to refugees and the securitization of refugees as a problem, threat framing analysis enables us ask the following questions; which framing agents are responsible for this development? What are the characteristics of the ‘refugee problem’ as an object of securitization? What events, hostile agents or structural conditions led to the securitization of refugees? What are the patterns of continuity and change discernible vis-à-vis the securitization of refugees? Is the emergence of voluntary repatriation as a norm within the African and international refugee protection systems a result of the framing of refugees as security threats or the desire to proffer a durable solution to the refugee problem? And if so, can one also postulate that the preference for voluntary repatriation as the ‘preferred option’ for refugees as claimed by states and international actors is the consequence of securitizing refugees? By labelling refugees as a ‘problem’ which needs an urgent solution, have actors dramatized the issue thereby pushing it from the realm of normal politics to emergency politics justifying the use of actions which under normal circumstances would not be possible? These are some of the questions which the utilization of threat framing as an analytical toolkit provides answers to.

²⁴⁶ Ibid

²⁴⁷ Eriksson, ‘Threat framing’, 1.

Chapter 3

AN ECLECTIC METHODOLOGICAL APPROACH

3.1 Introduction

This study adopts an eclectic approach to the study of refugees due to the complexity of the nature of the phenomenon under inquiry. This methodological approach borrows from the international law method, as well as, the general methods of qualitative inquiry used in the social sciences. By using an eclectic methodological approach, the researcher is able to analytically pry into and dissect the norm of voluntary repatriation. By combining the legal and IR theory methods the researcher probes into the historical development of voluntary repatriation in particular, and the international regime of refugee protection, and analyzes the discursive elements which have contributed to the evolution of this norm.

The researcher's primary focus is not necessarily how voluntary repatriation has been established under international law [although this analysis is also conducted in this text], but more precisely to be able to understand the social context, processes and forces which have influenced its development in order to be able to critique it. In essence, to be able to say that this norm does not serve the interest of refugee but that of states, it was first important to understand what the norm is, the conditions under which it was introduced and the socio-political processes which have influenced its evolution into what is considered today an important norm under international refugee law.

During the initial readings in preparation for this study, the researcher selected a number of codes/themes to use as part of the analysis of major historical treaties and documents in international refugee law. These codes which can be described as words, phrases, ‘speech acts’, and frames often used by actors and policy makers when referring to refugees, were not just randomly selected. At the start of the study, the researcher engaged in a review of literature, scanning the publications of the leading writers and publicists in international refugee law. These included but is not limited to; Alice Edwards, Bhupinder Chimni, Barbara Harrell-Bond, David James Cantor, Erika Feller, George Okoth-Obbo, Guy S. Goodwin-Gill, James C. Hathaway, Jane McAdam, Karen Musalo, Katy Long, Matthew J. Gibney, Natasha Saunders, and Vincent Chetail. Some of their works are cited in this study where relevant.

These codes were imputed into the qualitative analytical tool Atlas.Ti [explained below] which the researcher used in the analysis. These codes allow for discourse, including meaning, themes and words surrounding voluntary repatriation to be traced and analyzed across time. In particular, the researcher was able to assess how and why they are used within specific contexts to mean specific things, generate particular responses, and lead to specific policies. The codes used are listed in the table below;

Table 1: List of codes

refugee problem	terrorism	traitors
refugee crisis	subversive agents and activities'	war criminals'
economic burden	peace and security	illegal migrants
security threats	stability of the global international order	safe return
border control	cultural differences	voluntary repatriation
territorial integrity and sovereignty	imperialism/imperialist agents	smugglers and traffickers
economic migrants	illegal aliens	undocumented immigrants

By employing these codes, the researcher is able to track the shifting discourse, meanings, frames, and terminologies associated with refugee protection offering a better understanding of the development of the regime. This method allows for the development of a narrative explaining how and why certain phrases and concepts have been strategically employed across specific socio-political contexts to legitimize different methods of managing refugee-related issues and displacement in general. These codes are essentially the linguistic tools that policy makers and various actors utilize to shape perceptions, policies, and justify their decisions. They provide a structured framework through which the intricate narrative surrounding voluntary repatriation can be meticulously dissected, revealing the broader socio-political, cultural, and ideological factors that have shaped its trajectory.

In terms of this research, qualitative document analysis was used to analyze the content of documents in efforts to understand the socio-political and historical processes that have influenced the development of voluntary repatriation as a norm under the African and international refugee law. These were mainly *travaux préparatoires* of the major international Conventions as well as subsequent interpretations of these Conventions by agencies such as the UNHCR, the UNGA, amongst others. A list of some of the major documents consulted and their relevance is provided in the table below. This should not be considered an exhaustive list of major resources consulted, but rather as a guideline for other researchers undertaking a similar venture.

Table 2: List of major sources

Title	Relevance
Resolutions Adopted by the Assembly of Heads of State and Government (OAU), 22-25 May 1963	The establishment of the OAU was relevant as it set the stage for the prioritization of solidarity among African states in the face of what was seen at the time as the external threat of former colonial powers.
Resolutions of the OAU Council of Ministers, Second Ordinary Session. African Union (AU). 24-29 February 1964	OAU Council of Ministers adopts a resolution setting up a commission of ten states to examine the problem of massive displacements in Africa
Resolutions of the OAU Council of Ministers Third Ordinary Session." African Union (AU). 13-17 July 1964	Following this recommendation, the Council of Ministers was asked to draft a refugee Convention for Africa
Resolutions of OAU Council of Ministers Fourth Ordinary Session. African Union (AU). 26 February - 9 March 1965	Committee provided comments on draft African refugee convention

Assembly of Heads of State and Government Second Ordinary Session October 26, 1965	Assembly recognizes the gravity of the refugee situation in Africa and its complexity.
OAU Resolution Council of Ministers Seventh Ordinary Session, Addis Ababa, 31 October to 4 November 1966	Resolution adopting a draft Convention on the Status of Refugees in Africa.
OAU Resolution Council of Ministers Ninth Ordinary Session. 4-10 September 1967	Council of Ministers recommends to the OAU Commission, the adoption of the African Convention.
Report of the Administrative Secretary General for the Meeting of the OAU Commission on Refugees held in Addis Ababa from 17th To 23rd June 1968.	Committee of Legal Experts to study the draft Convention is appointed.
The 1969 OAU Convention on African Refugees	Adopted by OAU member states as a supplementary to the UN 1951 refugee Convention
Resolutions adopted by the Thirteenth Ordinary Session of the Council of Ministers held in Addis Ababa, Ethiopia from 27 August to 6 September 1969	Resolution on the activities of the bureau of placement and education of refugees in Africa
Recommendations of the Commission of Ten on Refugees Problem. Twentieth Ordinary Session, 1973	Reiteration by the Commission of voluntary repatriation as the ideal solution.
Resolutions on the Twenty Second Ordinary Session of the Council of Ministers, 1975	Voluntary repatriation is chosen as theme of refugee day celebration and the Committee of Ten is asked to consider repatriations

African Charter on Human and Peoples' Rights 1981	Highlights the right to return to one's country, which is a central argument by proponents of voluntary repatriation.
Constitution of the International Refugee Organization, December 15, 1946	First International Organization created to deal with massive displacement. It's constitution also references return and resettlement as solutions for massive displacement.
The 1948 Universal Declaration of Human Rights	References the right to seek asylum as well as the right to return to one's country
American Declaration of the Rights and Duties of Man, 1948	Restates the importance of asylum as a principle of law
The Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950	Called on states to assist the High Commissioner to promote the voluntary repatriation of refugees
The 1951 Refugee Convention	First legally binding global refugee Convention
Commission on Human Rights: Report of the 16th Session, 29 February-18 March 1960	Attempted to codify the right to seek and enjoy asylum
Protocol Relating to the Status of Refugees, 1967	Expanded geographical and time limitations in the 1951 Convention
American Convention on Human Rights, 1969	An important human rights treaty which once more restates the right to seek asylum
UNHCR Handbook for Emergencies. 7th edition. A Thematic Compilation of Executive Committee Conclusions.	A compilation consists of selected paragraphs of the Conclusions of

Conclusions Specific to Voluntary Repatriation from 1975 – 2004	UNHCR's Executive Committee grouped by subject.
Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 – 2017	A compilation consists of selected paragraphs of the Conclusions of UNHCR's Executive Committee grouped by subject.
The Cartagena Convention, 1983	Expands the refugee definition and reiterates the peaceful nature of asylum
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984	Article 3 references the non-derogable nature of <i>non-refoulement</i> as a principle of international law.
UNHCR, Discussion Note: Protection Aspects of Voluntary Repatriation, 1992	Declared that voluntary repatriation required as much attention in international law as the right to seek asylum
The 1994 Arab Convention on Regulating the Status of Refugees	Expands the refugee definition to recognize environmental causes
Handbook - Voluntary Repatriation: International Protection, January 1996	Guideline to understanding voluntary repatriation produced by the UNHCR
Charter of Fundamental Rights of the European Union, 2000	Codified the right to asylum and the principle of <i>non-refoulement</i> under European law
The European Charter of Fundamental Human Rights, 2007	Provides for the right of asylum, protection from expulsion, removal or extradition and freedom from torture and other degrading treatment
A Historical Review of UNHCR Policy and Practice on Refugee Repatriation, 2013	A systematic examination and assessment of UNHCR policies, programmes, projects and practices.
The New York Declaration for Refugees and Migrants, 2016	Offers a blueprint for states, international organizations and other relevant stakeholders to deal with refugee-related

	situations, referring to voluntary repatriation as the preeminent solution.
The Global Compact on Refugees, 2018	Reaffirms the support of the global international community for people who are forced to flee their homes
Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, 2019	Sets out the criteria for determining refugee status under the Refugee Convention as well as the complimentary position of regional frameworks.

Even though qualitative document analysis can be used as a stand-alone method, it is often used to complement other research methods. As such, for this study, historical analysis is also employed with the goal of providing an additional methodological analysis. This approach involved analyzing historical documents and the interpretations of historians writing at the time of the introduction of voluntary repatriation as a norm under the African and the development of global refugee regime, as well as the readings of contemporary writers. The writings and evaluations of the leading authors are referenced in the section where the evolution of voluntary repatriation is discussed. Historical analysis is distinct in that its purpose is to establish facts and draw conclusions on the past. In this study, this involved ascertaining what happened, why it happened and its implications on the development of the norm of voluntary repatriation.

The researcher also utilized the international law method proposed by the policy-oriented school of legal interpretation to dissect the evolution and nature of the norm of voluntary repatriation. Similarly, to historical analysis, this method adds an extra

element of rigor and robustness to the findings in this study. The primary objective was to initially ascertain the nature of voluntary repatriation within the framework of international and African refugee law. Thereafter, the investigation delved into the conception of what international refugee law should look like ideally. While the identification of existing legal principles is a crucial aspect, this study also places emphasis on the normative and prescriptive aspects of legal doctrines.

The policy-oriented jurisprudential approach facilitates a profound critique of voluntary repatriation as a legal institution and the socio-political dynamics influencing the broader development of refugee law. Employing qualitative document and historical analyses, this study dissects the evolution and positioning of voluntary repatriation within the contemporary global refugee protection regime by examining the *travaux préparatoires* of major international refugee law readings.

3.2 The Policy-Oriented Approach to Legal Interpretation

The Policy-Oriented Jurisprudence of law as a method was introduced by McDougal and Lasswell.²⁴⁸ The ‘*process theory*’ framework discussed earlier in this work is a brainchild of the method of interpreting and understanding legal norms from a policy-oriented perspective. Used as a method, it insists on reading legal documents from a normative and prescriptive viewpoint. This normative interpretation of law, focuses on what the *law is* as well as what the *law ought to be*. This approach to law views law as ‘a process through which members of a community seek to clarify and secure their common interests.’²⁴⁹ That is to say, law is simply not a set of rules, rather it is a set

²⁴⁸ Myres McDougal and Harold Lasswell, "Jurisprudence in Policy-Oriented Perspective" (1967): 486.

²⁴⁹ Siegfried Wiessner and Andrew R. Willard, "Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity," *American Journal of International Law* 93, no. 2 (1999): 322.

of authoritative decisions and can be changed by the decisions and actions of the relevant political actors.²⁵⁰ Unlike legal positivism²⁵¹ which insists only on ‘existing’ rules, proponents of this school contend that by failing to take into consideration the context within which laws are made, such as the personalities, cultural backgrounds, gender and political inclinations of the decision makers, and the ‘mood of the times’, the search for certainty in law is ultimately futile, and predictions also bound to most likely be inaccurate.²⁵²

Reisman argues that the policy-oriented normative method is both analytical and prescriptive and enables scholars understand and shape law.²⁵³ This normative method “offers a comprehensive, contextual, problem and policy-oriented analysis of social problems and the legal responses designed to address them” in comparison to the positivist method which is rigid.²⁵⁴ By applying a normative reading to the international and African refugee regimes of refugee protection, and in particular to the norm of voluntary repatriation, the researcher is able to investigate the socio-political processes and context which have influenced the formulation of laws as well as the factors that influence how and why voluntary repatriation has evolved today to

²⁵⁰ Ibid

²⁵¹ Legal positivists argue that what counts as law is a matter of convention and there is not necessarily a connection between morality and law. In fact, law is the emanation of the will of states. See L. Coleman and Brian Leiter, "Legal Positivism," in *A Companion to Philosophy of Law and Legal Theory* (2010), 228; and John Austin, *Austin: The Province of Jurisprudence Determined* (Cambridge University Press, 1995): 157.

²⁵² Wiessner and Willard, ‘Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict’, 323-324.

²⁵³ W. Michael Reisman and Aaron M. Schreiber, *Jurisprudence: Understanding and Shaping Law* (New Haven, CT: New Haven Press, 1987).

²⁵⁴ Siegfried Wiessner and Andrew R. Willard, "Policy-oriented Jurisprudence," *German Yearbook of International Law* 44 (2001): 97.

be the preeminent solution proposed by international actors for refugee-related situations. An application of positivist methodology on its own does not explain how voluntary repatriation has emerged to be the preferred durable solution. It certainly does not explain the changes that have occurred within the regime of international refugee law or what one is to expect in the future.

3.3 Employing Methodological Approaches in International Relations

3.3.1 The Analysis of Documents as a Qualitative Method of Inquiry

“Document analysis is a systematic procedure for reviewing or evaluating documents”, which “requires data to be analyzed and interpreted in order to gain new meaning, understanding and knowledge”.²⁵⁵ It is “a research tool for collecting, reviewing, interrogating and analyzing various forms of written ‘texts’ as a primary source of research data”.²⁵⁶ Document analysis involves skimming (superficial examination) and reading (thorough examination and interpretation). This process borrows elements from content analysis requiring the researcher to be able to identify and separate pertinent information from that which is not pertinent. Moreover, thematic analysis involving the identification of patterns that result in emerging themes, subsequently forming analytical categories that necessitate a meticulous examination of the data, constitute an integral aspect of documentary analysis.²⁵⁷ During this process and in efforts to uncover those themes essential to understanding the phenomenon, the researcher has to carefully review the pertinent information selected during the

²⁵⁵ Glenn A. Bowen, "Document Analysis as a Qualitative Research Method," *Qualitative Research Journal* 9, no. 2 (2009): 27.

²⁵⁶ Zina O'Leary, *The Essential Guide to Doing Your Research Project* (2017): 496.

²⁵⁷ Jennifer Fereday and Eimear Muir-Cochrane, "Demonstrating Rigor Using Thematic Analysis: A Hybrid Approach of Inductive and Deductive Coding and Theme Development," *International Journal of Qualitative Methods* 5, no. 1 (2006): 80-92.

analysis and perform coding and categorization.²⁵⁸ In particular, research wherein the primary source of evidence are documents and a need for a meta-analysis of the available literature on a subject matter, require some form of document analysis. Notwithstanding, document analysis should not be confused with a literature review. The latter being an “overview of research studies” and the former a “form of indirect data analysis.”²⁵⁹

Document analysis is not simply a process of lining up excerpts from documents, but rather a process through which documents are evaluated such that understanding is developed and empirical knowledge produced. These documents may include journals, books, minutes or meetings, manuals, maps, newspapers, summaries, press releases, and so on and so forth.²⁶⁰ This analysis often provides the researcher with a more accurate understanding of the socio-cultural, political and economic context within which ideas are conceived and enables us understand how power shapes social life.²⁶¹ It also helps refine ideas and identify conceptual boundaries. However, it is important that during the analysis of documents, the researcher is critical. Documents are not necessarily always accurate or precise. As Cox has stated; “theory is always for someone and for some purpose”.²⁶² Moreover, one must interrogate if the content of the document being analyzed is fit for the purpose of the study, as well as, its relevance

²⁵⁸ Ibid

²⁵⁹ O’Leary, ‘The Essential Guide To Doing Your Research Project’, 251.

²⁶⁰ Bowen, ‘Document analysis as a qualitative research method’, 27 -28.

²⁶¹ David Altheide, Michael Coyle, Katie DeVriese, and Christopher Schneider, "Emergent Qualitative Document Analysis," in *Handbook of Emergent Methods* (2008):132-133.

²⁶² Robert W. Cox, "Social Forces, States and World Orders: Beyond International Relations Theory," *Millennium* 10, no. 2 (1981): 128.

to the research problem and question.²⁶³ This investigative process entails that the researcher understands the social context within which the document was created. That is to say, the rationale for writing, the target audience, the author, and whether it is a primary or secondary source, and importantly, it should be evaluated in conjunction with other sources of information.²⁶⁴

The benefits of employing document analysis encompass: its unaltered nature since documents remain unaffected by the research process; the readily accessible nature of documents, particularly in the digital era; its efficiency in terms of time and cost; and its precision due to the comprehensive details and coverage of phenomena. Nonetheless, because documents are often produced for other purposes and not necessarily for research, they may not provide sufficient details on the subject of interrogation. Furthermore, biased selectivity may influence what documents are stored over time and/or are easily available to the general public.²⁶⁵ It is important to pay attention to the credibility of texts to be analyzed, as well as, one's own biases. Documentary analysis is an ongoing and iterative process which requires constant review, reassessment and improvement of the data under scrutiny.²⁶⁶ En bref, the researcher engaging in document analysis must be objective and sensitive when selecting documents to analyze.

²⁶³ Bowen, 'Document analysis as a qualitative research method', 33.

²⁶⁴ Bowen, 'Document analysis as a qualitative research method', 33.

²⁶⁵ O'Leary, 'The Essential Guide To Doing Your Research Project', 282 -284. Bowen, 'Document analysis as a qualitative research method', 31 – 32.

²⁶⁶ O'Leary, 'The Essential Guide To Doing Your Research Project', 496.

Document analysis can either be: positivistic, in efforts to confirm, support or reject a hypothesis; phenomenological, in a bid to interpret the meaning of a document and draw inferences from it; or of a critical social research approach to locate the document socially, politically, and historically in efforts to understand how the document relates to and informs social processes. This research employs a critical social research approach in an endeavor to locate the development of voluntary repatriation socially, politically and historically. To be able to do this, qualitative document analysis is employed.

Qualitative document analysis (QDA) is a research method which allows for systematic and rigorous analysis of the contents of documents.²⁶⁷ QDA describes, tracks discourse, including meanings, themes and words over time. It is “a technique for the location, identification, retrieval and analysis of meaning, significance and relevance of documents”,²⁶⁸ one which is highly reflexive and recursive involving the development of concept, sampling, collection of data, coding data, analyzing data and interpretation with the aim of being analytical and systematic while avoiding rigidity.²⁶⁹ To be successful, QDA requires the researcher to be flexible and to immerse themselves in the subject matter, as well as, to have conceptually informed conversations with a variety of documents, and to be able to continuously compare documents, styles, meanings and scenarios using systematic theoretical sampling.²⁷⁰ The emphasis of QDA is on discovery, description and the search for underlying

²⁶⁷ Elise Wach and Richard Ward, "Learning About Qualitative Document Analysis" (2013): 1.

²⁶⁸ David L. Altheide, *Qualitative Media Analysis* (Newbury Park, CA: Sage, 1996): 16. Cited in David Altheide, Michael Coyle, Katie DeVriese, and Christopher Schneider, "Emergent Qualitative Document Analysis," in *Handbook of Emergent Methods 2008* (2008): 128.

²⁶⁹ Ibid.

²⁷⁰ Altheide, et al., 'Emergent qualitative document analysis', 127.

meanings, processes, patterns and contexts rather than on mere numerical relationships between variables, as is the case with content analysis. That is to say, with the emphasis on communication discourse and patterns than just frequencies.²⁷¹ The key is for research to help engage and provoke the researcher into investigating relevant documents, with flexibility built into the methodology to accommodate for changes in cultural context and social circumstances. The aim being to observe how “events are placed into context” and the presentation of frames, discourses and themes and their evolution overtime and across different media sources.²⁷² Contextual understanding is important in QDA. In other words, asking questions about the production, organization, as well as how they are reflective of a format of communication.²⁷³

Even though document analysis can be used as a ‘stand-alone method’, it is often used to complement other research methods. As such, historical analysis is also employed with the goal of providing an additional methodological analysis.

3.3.2 Ensuring Robustness Through the Use of Historical Analysis

Although, there are similarities between document and historical analysis, the latter is distinct in that its purpose is to establish facts and draw conclusions on the past.²⁷⁴ This involves ascertaining what happened, why it happened and its implications. Historical analysis is a methodological approach that uses primarily historical documents or the

²⁷¹ Altheide, ‘Tracking discourse and qualitative document analysis’, 290.

²⁷² Altheide, et al., ‘Emergent qualitative document analysis’, 130.

²⁷³ Ibid., 133

²⁷⁴ O’Leary, ‘The Essential Guide To Doing Your Research Project’, 501.

interpretations of historians to develop and test theory.²⁷⁵ As a matter of fact, scholars of international relations often turn to history for ‘facts’ in their explanations. Notwithstanding, one has to bear in mind that these ‘facts’ are never objectively obvious and do not speak for themselves.²⁷⁶ Still, the purpose of historical analysis is to seek for basic information (statements relatively free of interpretation) and limited to (well-known events).²⁷⁷

In the conduct of historical analysis, it is important to take cognizance of the difference between ‘*manifest events*’, that is events which contemporaries were conscious of as they happened, and ‘*latent events*’ that contemporaries were not conscious of as they happened and only became aware in retrospect. In as much as the researcher may be tempted to focus only on ‘*manifest events*’, it is more likely when doing research that one would have to rely on both ‘*manifest*’ and ‘*latent*’ events.²⁷⁸ One of the problems associated with historical analysis is that the facts; the researcher seeks are often the interpretation and judgements made of historical events (both *manifest* and *latent events*) by historians. Therefore, the selection process for historical material has to be carefully done in order to mitigate for unwarranted investigator selectivity and bias. The aim is to always justify one’s selection of studies, as well as, a conscious effort to minimize selection bias. Irrespective of our attempts to mitigate bias and selectivity in our historical analysis, the reality remains that research in the social sciences are

²⁷⁵ Cameron G. Thies, "A Pragmatic Guide to Qualitative Historical Analysis in the Study of International Relations," *International Studies Perspectives* 3, no. 4 (2002): 352.

²⁷⁶ Thies, ‘A pragmatic guide to qualitative historical analysis in the study of international relations’, 353.

²⁷⁷ Ibid.

²⁷⁸ Bernard Bailyn, "The Challenge of Modern Historiography," *The American Historical Review* 87, no. 1 (1982): 9 – 10.

reflective of personal agendas and reflect political and institutional realities.²⁷⁹ Consciousness of this bias explains why this study has adopted an eclectic methodological approach to ensure for robustness and limit subjectivity.

In the conduct of historical analysis, it is always key to differentiate between primary and secondary sources of information. Primary sources include all contemporary evidence to an event, that is, original sources of information and material, while secondary sources is everything written about that event subsequent to that time.²⁸⁰ In practice the distinction is not always clear-cut.

One of the objectives this research set out to achieve is to expand body of literature on the benefits of interdisciplinary research involving international law methods and international relations theory. By embracing and implementing methodologies from both disciplines, the researcher continues this rich tradition, promoting the adoption of eclectic methodological approaches in the examination of complex phenomena and in this case, in international refugee studies.

²⁷⁹ Richard Ned Lebow, "Social Science and History: Ranchers Versus Farmers?" in *Bridges and Boundaries: Historians, Political Scientists, and the Study of International Relations* (2001): 116.

²⁸⁰ Thies, 'A pragmatic guide to qualitative historical analysis in the study of international relations', 356.

Chapter 4

A COMPARATIVE ANALYSIS OF GLOBAL REFUGEE PROTECTION REGIMES: A CRITICAL EXAMINATION.

4.1 Introduction

This study sets out to investigate the norm of voluntary repatriation under international refugee law, and the influence the African system of refugee protection has had on the latter, with a particular focus on the origins and evolution of this norm. To do so, it is imperative that an overview of the global refugee protection system is first presented. This is necessary because in order to ascertain the contribution of the African system of refugee protection and by extension the norm of voluntary repatriation, it is crucial to situate it within the larger discourse on refugee protection.

As such, it is important to understand the foundations of the system for refugee protection by tracing its historical origins, investigating the institutions that make up this system, comparing and contrasting the international refugee protection system and the regional protection systems, in particular the African refugee system, and importantly, attempt to define the meanings of terms like refugee, *non-refoulement*, asylum and voluntary repatriation.

4.2 Tracing the Historical Roots of Refugee Protection

The problem of displacement and refugees is not new. In fact, the practice of granting asylum is one of the hallmarks of early civilization dating as far back as 3500 years ago during the period of the Babylonian, Hittite, Assyrian and ancient Egyptian empires.²⁸¹ For instance, the Assyrians provided shelter to Babylonians fleeing wars during the 2000 – 1500 B.C.²⁸² During the fall of the late Bronze Age civilizations around 1200 B.C, wars led to massive displacements of people and they sought refuge in more peaceful settlements.²⁸³ Israelite and Canaanite refugees have also been referenced in some texts.²⁸⁴ Moreover, during the Peloponnesian wars, Spartans and Athenians granted asylum to those fleeing persecution.²⁸⁵ This practice of granting refuge to persons fleeing war and persecution is also visible in the early Christian days with the Church providing sanctuary to people fleeing religious and other forms of persecution. By 399 AD, the Code of Theodosius had recognized the right to sanctuary, and subsequently, the Justinian Code, followed by a Papal Sanction in 441 by Pope Leo I recognized sanctuary as a Church tradition.²⁸⁶ Sanctuary is also seen as a practice in England as early as 600 AD in King Aethelbert of Kent's Code of Laws.²⁸⁷ While

²⁸¹ Michael A. Peters and Tina Besley, "The Refugee Crisis and the Right to Political Asylum," *Educational Philosophy and Theory* 47, no. 13-14 (2015): 1367-1374.

²⁸² Eugene Fair, "An Introduction to the Study of the Babylonians and Assyrians" (Kirkville, Mo.: Journal Printing, 1907)..

²⁸³ Richard Bulliet, Pamela Crossley, Daniel Headrick, Steven Hirsch, and Lyman Johnson, *The Earth and Its Peoples: A Global History* (Cengage Learning, 2014), 52.

²⁸⁴ Ibid

²⁸⁵ Thucydides, *History of the Peloponnesian War*, ed. M. Finley, trans. Rex Warner (Penguin Books, 1954), 176-77.

²⁸⁶ George Cyprian Alston, "Sanctuary," in *The Catholic Encyclopedia*, Vol. 13, ed. Robert Appleton Company (New York: Robert Appleton Company, 1912).

²⁸⁷ Michael A. Peters and Tina Besley, "The Refugee Crisis and the Right to Political Asylum," *Educational Philosophy and Theory* 47, no. 13-14 (2015): 1368.

the right to sanctuary was initially confined to the Church's premises, it was later expanded to encompass an area extending up to a mile from the Church. However, the Church of England's authority to provide sanctuary ceased during the reformation, though this should not be mistaken for the termination of the practice of sanctuary in England.²⁸⁸ The practice itself was brought to an end in England in the late 17th century through parliamentary abolition, and in the broader European context, it dwindled by the 18th century.²⁸⁹ But the practice of offering sanctuary was not online confided to the Church, in fact, the practice of protecting persons fleeing from persecution is rooted in all of the world's major religious legal traditions.²⁹⁰

The concept of refugees and refuge as we understand it today, dates back to before the modern nation-state system. References are made at different points in history were persecuted persons sought refuge in neighbouring countries and empires. For instance, when the Jews were expelled from Spain following the Alhambra Decree in 1492, Ottoman Emperor, Sultan Bayezid II welcomed them as refugees into his territories.²⁹¹ The idea of asylum was also supported by the father of international law, Hugo Grotius, who argued that a permanent residence should not be refused to foreigners seeking refuge who have been driven from their own counties.²⁹² A position buttressed

²⁸⁸ There were two forms of sanctuary; one provided by the Church by prescription, and the other provided by the King of England. See , "Sanctuary," in *The Catholic Encyclopedia*, Vol. 13

²⁸⁹ Ibid

²⁹⁰ Ahmed Abou-El-Wafa, "The Right to Asylum between Islamic Shari'ah and International Refugee Law" (2009), 27-35. Matthew E. Price, "Rethinking Asylum: History, Purpose, and Limits" (Cambridge: Cambridge University Press, 2009), 26.

²⁹¹ Ben-Naeh, Yaron. "Research on Ottoman Jewish History and Culture: The State of the Art." *Revue Européenne Des Études Hébraïques*, no. 18 (2016), p.55.

²⁹² Hugo Grotius, *De jure belli ac pacis libri tres*, Book 1, Chapter 2, No. XVI, Section 20, 84.

in 1758 by Vattel who argued that “no nation may, without good reason, refuse even a perpetual residence to a man who has been driven from his country”.²⁹³

Despite the non-existence of bilateral and multilateral treaties governing the protection of refugees in early modern Europe, states did accept refugees even though this was done on an ad-hoc basis with little to no restriction upon entry partly because travelling was costly, and as such, those refugees who did travel were often wealthy and would be of benefit to the economies of receiving states.²⁹⁴ As a matter of fact, there was no distinction between refugees and migrants who were treated as the same group.²⁹⁵ It was only in 1905 following the Alien Act in Britain that a distinction was made between immigrants and refugees.²⁹⁶ This distinction foreshadowed the modern refugee system in place today where refugees have to prove on an individual basis that they are persecuted.

The Huguenots of France can be considered as the first documentation of modern refugee movement.²⁹⁷ When King Louis XIV of France in 1685, revoked the Edict of Nantes which had previously protected Protestants from persecution,²⁹⁸ about 200,000 Protestants (known as the Huguenots) fled France and were mostly welcomed in

²⁹³ Emer de Vattel, *The Law of Nations* [1758], Book I, Chapter 21, Paragraph 231, Carnegie Institute, 1916.

²⁹⁴ Laura Barnett, "Global Governance and the Evolution of the International Refugee Regime," *International Journal of Refugee Law* 14, no. 2 and 3 (2002): 240.

²⁹⁵ Ibid

²⁹⁶ Emma Haddad, *The Refugee in International Society: Between Sovereigns*, Cambridge Studies in International Relations (Cambridge: Cambridge University Press, 2008), 51-55.

²⁹⁷ Aristide R. Zolberg, "The Roots of American Refugee Policy," *Social Research* (1988): 651.

²⁹⁸ The Edict of Nantes had been signed in 1598 by King Henry IV during the Inquisition to protect protestants. By doing away with the Edict of Nantes, King Louis XIV exposed French protestants to persecution. See Ibid.

Prussia.²⁹⁹ By the 18th and 19th centuries, European states were using the mass displacements of populations as tools for creating state and national identities leading to an increase in the number of flows and rising security concerns.³⁰⁰ The French revolution and the chaos that ensued also led to the flight of many persons into England, Russia, Prussia and Austria.³⁰¹ Despite a lot of these refugees being welcomed, by the 1848 revolutions, entry restrictions developed as European states increasingly feared giving entry to dissidents.³⁰²

As the years progressed, and the number of refugees increased in Europe and worldwide, it became more evident that there was a need for a set of laws to regulate the protection of refugees. While this did not exist yet in 19th century Europe, ground works for such a field were laid following the development of bodies of legal protection for aliens, which can be argued is the ‘precursor to modern refugee law’.³⁰³ The French constitution of 1793 for example, provided a constitutional right of asylum following the French revolution.³⁰⁴

Even though, refugees have been around as long as recorded human history, a collective awareness of the responsibility of the international community to protect

²⁹⁹ Jill I. Goldenziel, "The Curse of the Nation-State: Refugees, Migration, and Security in International Law," *Ariz. St. LJ* 48 (2016): 593.

³⁰⁰ *Ibid.*

³⁰¹ Barnett, ‘Global governance and the evolution of the international refugee regime’, 240-241.

³⁰² *Ibid*

³⁰³ Goldenziel, ‘The curse of the nation-state’, 595.

³⁰⁴ See Franck Moderne, “Les aspects constitutionnels du droit d’asile” (The constitutional aspects of the right of asylum) in the minutes of the symposium held on 11th 13th June 1992, *Les réfugiés en France et en Europe, quarante ans d’application de la Convention de Genève 1952-1992* (Refugees in France and Europe, forty years of the application of the 1952-1992 Geneva Convention)

and provide for refugees as a subject of international law in its own right, only dates from the inter-war period.³⁰⁵ The first acts of solidarity toward refugees emerged at the end of the First World War to deal with two sets of refugees; refugees from the Russian revolution and the refugees from the collapsed Ottoman Empire.³⁰⁶

Following the end of WW1, in 1921, the League of Nations elected Dr. Fridtjof Nansen as High Commissioner for refugees fleeing Russia.³⁰⁷ His task was to define their legal status, organize either their allocation to possible host countries or repatriation back to Russia, and undertake relief work. His mandate was later extended to include Armenian refugees in 1924 and in 1928 to Assyrians, Assyro-Chaldean and Turkish refugees and by 1931 following Dr. Fridtjof's death, the Nansen Office for Refugees was created and given a mandate to deal with humanitarian work.³⁰⁸ In 1933, following Hitler's rise to power, a High Commissioner for German refugees was appointed.³⁰⁹ In 1938, the Nansen office and the High Commissioner for German Refugees were dissolved and substituted by a League of Nations-appointed High Commissioner for Refugees, based in London. By the same year, a resolution was made to expand the scope of the Intergovernmental Committee on Refugees, initially established in 1938 to address 'involuntary emigration from Germany and Austria', to encompass all refugee groups during World War Two, as decided during the Bermuda conference.³¹⁰

³⁰⁵ Michael Robert Marrus, *The Unwanted: European Refugees in the Twentieth Century* (New York: Oxford University Press, 1985). Erika Feller, "The Evolution of the International Refugee Protection Regime," *Wash. UJL & Pol'y* 5 (2001): 129.

³⁰⁶ Marrus, 'The Unwanted: European Refugees in the Twentieth Century', 1985.

³⁰⁷ Feller, 'The Evolution of the International Refugee Protection Regime', 130.

³⁰⁸ Ibid.

³⁰⁹ UN High Commissioner for Refugees (UNHCR), *RLD1 - An Introduction to The International Protection of Refugees* RLD1,2, 3.

³¹⁰ Feller, 'The Evolution of the International Refugee Protection Regime', 130 – 132.

This is the committee that was replaced in 1947 by the International Refugee Organization, the precursor of the United Nations High Commissioner for Refugees (UNHCR). Earlier in 1943, the Allied forces had created the United Nations Relief and Rehabilitation Administration to organize the return of hundreds of thousands of refugees back to their countries of origin.³¹¹ However, some of these refugees refused to return back to countries where new political ideologies governed.³¹²

At the end of World War Two, there were millions of refugees scattered the world over and a real need for this ‘problem’ to be addressed. As a consequence, in 1946, during the first ever United Nations General Assembly, it was recognized that: the ‘refugee problem’ was of an international nature; the future of refugees should be the concern of an international body which was to be established; these displaced persons should not be forced to return back to their countries of origin; and the main task of the international community was to assist and encourage in any way possible the early return of these refugees to their countries of origin.³¹³ It was within this same line of thought that in 1947, the first international agency to deal with the problem of refugees, the International Refugee Organization (IRO), was established.³¹⁴ The IRO handled all aspects of refugee problems from registration to the determination of the status of refugees, repatriation, resettlement, and legal and political protection. The IRO

³¹¹ UNHCR, ‘An Introduction to The International Protection of Refugees’, 3-5.

³¹² The refusal of many refugees to return back to their countries of origin, led to the first discussions surrounding the principle of non-refoulement and voluntary repatriation in its current nature. The question as to whether persons fleeing persecution could be forced to go back to places where such fear of persecution still persisted, became an important one in the field of refugee protection. See Katy Long, *The Point of No Return: Refugees, Rights, and Repatriation* (OUP Oxford, 2013), 51-53.

³¹³ UNHCR, ‘An Introduction to The International Protection of Refugees’, 3.

³¹⁴ United Nations, Constitution of the International Refugee Organization, 15 December 1946, United Nations, Treaty Series, vol. 18.

continued to operate till 1951 when the UNHCR took over. However, the discussions leading to the establishment of the 1951 Convention were held during the lifetime of the IRO.³¹⁵

By 1949, a debate had ensued between those states that saw the role of the IRO as overbearing and preferred not to have the United Nations (UN) involved in the question of refugees and those who supported UN involvement, especially given the context of the Cold War era. A balance was finally struck and the UNHCR was created for an initial period of 3 years starting from 1951. The new organization was going to have a ‘broad protection mandate’ but ‘limited mandate in the field of assistance’.³¹⁶ In December 1950, *Resolution 428 (V)* of the United Nations General Assembly (UNGA) adopted the Statute of the Office of the United Nations High Commissioner for Refugees.³¹⁷ This new organization was to become a subsidiary organ of the UNGA under Article 22 of the UN Charter.³¹⁸ In the same year and building on Article 14 of 1948 Universal Declaration of Human Rights, the Convention Relating to the Status of Refugees also known as the 1951 Convention was approved at a special United Nations conference.³¹⁹ This Convention which was the first comprehensive attempt to

³¹⁵ UNHCR, ‘An Introduction to The International Protection of Refugees’, 3-5.

³¹⁶ Ibid.

³¹⁷ UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V).

³¹⁸ UN High Commissioner for Refugees (UNHCR), "The Scope and Content of the Principle of Non-Refoulement (Opinion) [Global Consultations on International Protection/Second Track]," 20 June 2001.

³¹⁹ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189.

define refugees has since remained fundamental to the international refugee protection regime.

Today, there is a plethora of international and regional legal instruments designed to protect refugees and other persons of concern. All of these, have emerged out of the 1951 Convention albeit, with regional characteristics and constitute the core of the refugee protection regime today.

4.3 Examining the Foundations: An In-Depth Exploration of the International Framework for Refugee Protection

4.3.1 Introduction

States have been granting refuge to individuals and groups fleeing war and persecution for millennia; however, the modern refugee system is largely a product of the second half of the interwar years and the aftermath of the Second World War which preceded it. As has been highlighted in the section above, the 1930s and 1940s were an important period for the development of the regime of refugee protection which culminated in the establishment of the United Nations High Commissioner for Refugees and the 1951 Convention. As a branch of international law, refugee law has developed and come to embrace today, a vast set of international and regional legal instruments protecting refugees and forcibly displaced persons. This section provides an overview of the international refugee protection regime, and where necessary compares and contrasts the different legal instruments which have since developed to protect refugees. Some of these legal instruments include, but are not limited to; the 1951 Convention, the 1967 Protocol, the 1966 Bangkok Principles, the 1969 OAU Convention, the 1984 Cartagena Declaration, the 2004 European Council's Directive, the 2016 New York Declaration, and the 2018 Global Compact on Refugees. Notwithstanding,

international refugee law does not operate on its own, but in conjunction and collaboration with international humanitarian law and international human rights law. As such, where necessary relevant international humanitarian and human rights law instruments will be read in conjunction with international refugee law for a more complete understanding of the regime of international refugee protection.

The regime of international protection afforded to refugees is firmly rooted in the customary practices of states, as well as, in internationally and regionally agreed upon treaties and conventions. Added to this, some of the origins of this protection regime can be traced back to other general principles of human rights and humanitarian law. Below is an attempt to explain and evaluate the international legal instruments for refugee protection, as well as, regional instruments, and other international legal instruments that relate to refugee protection.

4.3.2 The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol Relating to the Status of Refugees

The 1951 Convention relating to the Status of Refugees is the first and till today, remains the only international instrument of protection which is binding at a global level. In terms of refugee law, the Convention and its 1967 Protocol relating to the Status of Refugees are the controlling and foundational international framework for refugee protection.³²⁰ By providing a definition for who is to be considered a refugee, setting out the responsibilities of states towards refugees, outlining the rights of refugees, and the establishment of the peremptory norm of '*non-refoulement*', the

³²⁰ Convention Relating to the Status of Refugees 1951. UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606.

Convention lays the basis for any and all discussions relating to the international protection of refugees.

The importance of the 1951 Convention is threefold: it symbolizes the unique declaration by the majority of states in the international community of their commitment to protect and uphold the rights of refugees (ethical importance); it is politically significant because of its universal framework for cooperation, and burden and responsibility sharing by states on the subject of refugee protection; and it provides a legal and basic standard on which actions to protect refugees can be based on.³²¹ The importance of the 1951 Convention cannot be overemphasized.

Along with its 1967 Protocol, the 1951 Convention covers three key issues;

1. The definition of a refugee and the procedures for cessation and exclusion,
2. The rights and the duties refugees enjoy in a country of asylum, and,
3. The obligation that states have to work and coordinate their activities with the UNHCR while exercising their functions as stipulated in the Convention.

4.3.2.1 Who is a Refugee under the 1951 Convention?

The 1951 Convention defines a refugee in Article 1(a) as someone who;³²²

(1) “has been considered a refugee under the arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;”

³²¹ Erika Feller, "International Refugee Protection 50 Years On: The Protection Challenges of the Past, Present and Future," *International Review of the Red Cross* 83, no. 843 (2001): 582.

³²² Convention Relating to the Status of Refugees, Art. 1(a).

(2) “As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

Upon first glance, one notes that the Convention’s definition highlights a couple of very important factors: a refugee being a person who has a ‘well-founded fear’ of persecution because of their race, religion, nationality, or membership to a particular social group or political opinion; this person needs to be currently outside of their habitual residence or country of origin; and is unable to or not willing to avail themselves to the protection of that country or able to return because of a continuous fear of persecution. These key tenets of the refugee definition provided by the 1951 Convention is examined here. But before doing so, because the Convention is often read along with its 1967 Protocol, it is important to highlight why this Protocol is important, and what it contributes to the Convention.

The 1967 Protocol is intrinsically related to the Convention. To understand this, it is important to recognize the social context within which the 1951 Convention was drafted and adopted. This was at the end of the Second World War, and as such, it solely focused on the problems of displacement at that time, especially in Europe. Accordingly, the protection for refugees under the Convention was only for those persons who had become refugees due to events which had taken place prior to 1951.³²³ Moreover, states were required to declare whether such protection was meant

³²³ Nicholson and Kumin, ‘A guide to international refugee protection and building state asylum systems, 2017’, 16.

only for those affected by events solely in Europe, or whether, it included other parts of the world.³²⁴ However, by the 1960s particularly with the massive displacements caused by the decolonization process, it became evident that the refugee problem was worldwide. Consequently, it was important to have a definition for refugees which was not constraint by time or geography. The 1967 Protocol did just that, and by so doing, guaranteed protection for persons in need of such protection irrespective of place or time. While most states are party to both the Convention and its 1967 Protocol, not all states are.³²⁵ However, because the 1967 Protocol in Article 1 states that all states that ratify the Protocol by so doing, agree to also abide by the 1951 Convention, countries that are party to the Protocol but not the Convention, are also bound by the Convention. Together, the Convention and the Protocol do not only reaffirm, but also embody the protection regime for refugees worldwide. This was reaffirmed by the UNGA in 2016 with the New York Declaration for Refugees and Migrants, stating that; “we reaffirm the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto as the foundation of the international refugee protection regime”.³²⁶

To fully understand the purpose and significance of the 1951 Convention and its 1967 Protocol, specific attention must be paid to a number of key aspects. The first of which is that the Convention makes no attempt to distinguish between refugees fleeing persecution during wartime or peacetime. The emphasis is laid on there being a well-founded fear of said person being persecuted for one or any of the other grounds stated

³²⁴ Ibid.

³²⁵ UNHCR Archives, "About the 1951 Refugee Convention".

³²⁶ UN General Assembly, "New York Declaration for Refugees and Migrants: Resolution / Adopted by the General Assembly," 3 October 2016, A/RES/71/1.

in the Convention.³²⁷ What is to be understood as persecution depends on the circumstances of each case, as well as, gender, age, health, political opinions, psychological make-up, and feelings of the individual concerned.³²⁸ As such, events which could include threats to freedom or life, as well as, serious violations of human rights, violations of international humanitarian law or even lesser forms of harm can constitute persecution under the Convention.³²⁹ However, it should be noted that international humanitarian law is not meant to be determinative, but rather informative. That is to say, reliance on international criminal law or humanitarian law in determining the status of a refugee could negatively undermine the protection intention of the 1951 Convention due to the requirement in the former of “the requirements of discriminatory intent and that the crime be part of a widespread or systematic attack against a civilian population”.³³⁰ Generally, as soon as it is determined that a person’s continued stay in their home country is or would become intolerable, then the fear of persecution is well-founded.³³¹ In some cases, the reasons for fear of persecution may overlap or there could be more than one reason.³³² This is not seen as a problem when interpreting the Convention. What is important here is that the grounds stipulated

³²⁷ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions*, 2 December 2016, HCR/GIP/16/12, para 10.

³²⁸ UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, paras 52 and 53.

³²⁹ Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, para 51. UN High Commissioner for Refugees (UNHCR), *Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law: Summary Conclusions*, July 2011, paras 13-21.

³³⁰ Ibid, para 15.

³³¹ Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees 2011, para 42.

³³² Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees 2011, para 67.

under the Convention for a person to be considered a refugee may not necessarily be the dominant or sole reason, but only a contributing factor.³³³

In terms of the reasons provided under the Convention as grounds for international protection, what is taken into account is whether the reasons for the individual's predicament within the context of their country is related to one or more of the Convention's grounds.³³⁴ As it happens, unless it can be determined with certainty that the violence and conflict and the impact thereof is limited to a particular geography or part of the country, it will not be reasonable or even relevant for the application of the internal flight or relocation alternative because a lot of the time, even though a conflict may be geographically limited, the consequences of this violence may affect other societal and state structures which significantly has an impact on the life and safety of the refugee.³³⁵

Furthermore, the foundational principle upon which the refugee protection regime is built on is the prohibition to return (*refouler*) refugees back to places where their lives may be in danger (article 33).³³⁶ This principle of '*non-refoulement*' has become a '*jus cogens*' under international law, – a peremptory norm for which there can be no derogation.³³⁷ This much was made evident in the recent ruling by the Supreme Court

³³³ UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions, 2 December 2016, HCR/GIP/16/12, para 34..

³³⁴ Refugee Status Appeals Authority, *Refugee Appeal No. 72635/01*, 72635/01 (New Zealand: Refugee Status Appeals Authority, 6 September 2002), 376-379.

³³⁵ UNHCR, 'Guidelines on International Protection No. 12', paras 40 and 41.

³³⁶ Convention Relating to the Status of Refugees, Art. 1(33).

³³⁷ UN High Commissioner for Refugees (UNHCR), *The Principle of Non-Refoulement as a Norm of Customary International Law: Response to the Questions Posed to UNHCR by the Federal*

of the United Kingdom where the Court ruled that the UK government's decision to deport asylum seekers to a third country, Rwanda, was unlawful as Rwanda was not a safe third country.³³⁸

Additionally, the Convention and its Protocol establishes: that protection must extend to all refugees irrespective of place and time; that the problem of refugees is of a humanitarian and social nature, as such, it cannot be a cause for tension between states; reinforce the notion that burden and responsibility sharing is essential to tackle the refugee problem; that because regular means of leaving their countries in times of persecution may not be possible, refugees cannot be penalized for using irregular means of entering the host country or for living there illegally; giving that expulsion poses a serious threat to the lives of refugees, the reasons for expulsion may only be in cases where national order is disturbed or in cases of national security concerns; and not least, lays the foundation of state cooperation with the UNHCR.³³⁹

Although, generally accepted as the universal standard for refugee protection worldwide, the Convention has not been short of criticism. Early on in the 1960s, the Convention was criticized for its focus on an individualized and persecution-based approach and the difficulties of applying this within the African context where civil wars caused by the decolonization process were causing massive refugee flows.³⁴⁰ It is also contended that the Convention is too rigid and not as relevant in the

Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, 31 January 1994, paras 1 and 2.

³³⁸ Associated Press. "UK top court says a plan to send migrants to Rwanda is illegal. The government still wants to do it," 2023.

³³⁹ Feller, 'The evolution of the international refugee protection regime', 132.

³⁴⁰ Ibid

contemporary world given the nature of the challenges faced today.³⁴¹ Some have argued that it fails to take into consideration the financial, social and political impact of large numbers of refugees on receiving countries, contending that the asylum seeking system provided by the Convention is not applicable in a post-Cold War setting where mass displacements is putting enormous pressure on the asylum systems of states, unwittingly creating an avenue for people smuggling, and states spending more money on processing asylum applications than on contributions to the UNHCR.³⁴² As such, there is either a need for a more flexible reading and application of the Convention or the need for a new Convention and/or refugee definition which recognizes today's challenges, including those posed by environmental changes.³⁴³

Globally, states are closing their borders and accepting fewer numbers of asylum seekers irrespective of whether these persons are deserving of protection or not.³⁴⁴ The development of regional regimes which are more specific, also threaten to render redundant the 1951 Convention, or at the very least bring into question the universality of its application.³⁴⁵ Others have postulated that, not only is more radical thinking needed, but a need to strengthen the Convention by "embedding it in a more rigorous

³⁴¹ Luara Ferracioli, "The Appeal and Danger of a New Refugee Convention," *Social Theory and Practice* (2014): 123.

³⁴² Adrienne Millbank, "Australia and the 1951 Refugee Convention [Revised version of The Problem with the 1951 Refugee Convention; a Research Paper (no. 5, 2000-2001) published by the Dept of the Parliamentary Library]," *People and Place* 9, no. 2 (2001): 1-2.

³⁴³ Lewis W. Marshall, "Toward a New Definition of 'Refugee': Is the 1951 Convention Out of Date?," *European Journal of Trauma and Emergency Surgery* 37 (2011): 61.

³⁴⁴ Nanjala Nyabola, "The End Of Asylum: A Pillar Of The Liberal Order Is Collapsing—But Does Anyone Care?," *Foreign Affairs*, 2019.

³⁴⁵ Feller, 'International refugee protection 50 years on', 591.

system of global” responsibility and burden sharing if it is to discourage the practices of states that undermine international refugee law.³⁴⁶

Despite these criticisms, there is a general consensus that opening up the Convention for review will lead to more restrictions rather than the expansion of rights for refugees.³⁴⁷ Moreover, rather than broadening the refugee definition, what may be needed is a wider interpretation of the Convention within the context of today’s world in conjunction with guidelines periodically provided by UN agencies.³⁴⁸ Whether one views the Convention as restrictive or outdated, the reality is that the protection regime for refugees will lose its main regulatory component without the 1951 Convention.³⁴⁹ While this does not mean that there can be no improvements, it certainly reinforces the importance of the Convention, albeit, the need for more flexibility to address contemporary challenges.

4.3.3 Unpacking the African System of Refugee Protection: Insights and Analysis

In terms of refugee protection in Africa, the main instrument is the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (hereinafter referred to as the OAU Convention or the African Convention or 1969 Convention).³⁵⁰ This Convention is a combination of classical refugee thinking along

³⁴⁶ Seyla Benhabib, "The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights," *Jus Cogens* 2, no. 1 (2020): 96.

³⁴⁷ Millbank, 'Australia and the 1951 Refugee Convention', 1 and 2.

³⁴⁸ UNHCR, "Q&A: The 1951 Refugee Convention 'Is As Relevant Today As It Was At The Time'," 2016.

³⁴⁹ Jane McAdam, "The Enduring Relevance of the 1951 Refugee Convention" (2017), 1.

³⁵⁰ Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, 10 September 1969, 1001 U.N.T.S. 45.

with the priorities of state security and the ‘politics’ of international relations.³⁵¹ When the 1969 Convention entered into force, it was hailed by commentators as monumental in the evolution of the protection of refugees both regionally and internationally.³⁵² Not only does the African Convention reaffirm faith in the 1951 Convention on refugees, but it also makes three distinct contributions to the global regime of refugee protection: by expanding the definition of a refugee, adopting a wider interpretation; reinforced the absolutism of the principle of *non-refoulement*; and by introducing the principle of voluntary repatriation.

Within the African context, the 1969 Convention regulates the protection of refugees in conjunction with the 1951 Convention and its 1967 Protocol, the 1994 Addis Ababa Document on Refugees and Forced Population Displacements in Africa,³⁵³ and other principles of international human rights and humanitarian law. This sub-section, examines the contribution of the 1969 OAU Convention and the Addis Ababa Document to international refugee law.

4.3.3.1 The 1969 OAU Convention Governing the Specific Aspects of Refugees in Africa

The decolonization processes within Africa during the late 1950s and 1960s, led to many conflicts and civil wars which resulted in the massive displacements of peoples. However, the application of a time and geographic restriction by the 1951 Convention definition meant that a lot of these new refugees were not protected under this regime.

³⁵¹ George Okoth-Obbo, "Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa," *Refugee Survey Quarterly* 20, no. 1 (2001): 88.

³⁵² Medard R. Rwelamira, "Two Decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa," *International Journal of Refugee Law* 1 (1989): 558

³⁵³ Organization of African Unity (OAU), *Addis Ababa Document on Refugees and Forced Population Displacements in Africa*, 10 September 1994

Also, the specificity of the concerns of African refugees had not been reflected in the 1951 Convention, partly because it never set out to address this in the first place. As such, by 1964, in efforts to address the problem of African refugees, the OAU Council of Ministers established a Commission to research into this problem and proffer possible solutions.³⁵⁴ In 1969, the African Convention was adopted upon signature by OAU Heads of States and Government in Addis Ababa³⁵⁵, all the while recognizing that despite the shortcomings of the 1951 Convention and its 1967 Protocol in relation to the specific needs of African refugees, its transcendent role as the quintessential instrument for the protection of refugees had to be reaffirmed.³⁵⁶ In its preamble, the African Convention also places emphasis on a humanitarian approach to solving the problem of refugees in such a way as to eliminate the friction massive displacements were causing between African states.³⁵⁷

The African Convention is binding within the continent, and was aimed at solving the specific problem of refugee ‘crises’ within Africa in the spirit of African solidarity. Its importance lies in its ‘Africanization’ of the definition of a refugee; the absoluteness of the principle of *non-refoulement*; the strengthening of the asylum regime and the principle of non-discrimination; the reinforcement of regional and international

³⁵⁴ OUA (Organization of African Unity), Council of Ministers, "Problem of Refugees in Africa, Resolution No. CM/Res. 19 (II)," 24-29 February 1964. "(The Council of Ministers) resolves that a commission consisting of Rwanda, Burundi, Congo (Leopoldville), Uganda, Tanganyika, Sudan, Senegal, Nigeria, Ghana and Cameroon be appointed to examine: a) the refugee problem in Africa and made recommendations to the Council of Ministers on how it can be solved; b) ways and means of maintaining refugees in their country of asylum.

³⁵⁵ 'Convention Governing the Specific Problems of Refugees in Africa'.

³⁵⁶ Ibid., preambular 9.

³⁵⁷ Ibid., preambular 2 and 3.

cooperation and burden-sharing; and the codification of voluntary repatriation as a law within the African system of refugee protection.

4.3.3.1.1 Who is a Refugee under the 1969 Convention?

Article 1(1) of the 1969 Convention reaffirms the primacy of the definition of the 1951 Convention as modified in its 1967 protocol, thereby, eliminating any and all doubts as to whether the African Convention's definition is meant to replace that of the 1951 Convention. In Article 1(2) the Convention definition adds the following as a criteria for determining who constitutes a refugee;³⁵⁸

The term "refugee" shall also apply to 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.

While, the OAU definition complements the 1951 definition albeit, with some African characteristics, there are still some important differences between the two definitions and as such should not be interpreted as the same.³⁵⁹ First, it is worth highlighting that the OAU Convention distinguishes between peaceful and subversive refugees, reflecting the concerns of both origin and host countries at the time.³⁶⁰ Subversion was regarded as one of the most serious problems associated with the 'refugee problem' in Sub-Saharan Africa and was one of the preeminent consequences for hosting refugees and as such, legal provisions were put in place to address this.

³⁵⁸ Ibid., art. 1(2).

³⁵⁹ Alice Edwards, "Refugee Status Determination in Africa," *African Journal of International and Comparative Law* 14, no. 2 (2006): 211-216.

³⁶⁰ 'Convention Governing the Specific Aspects of Refugee Problems', art. 3.

Further, the OAU definition rather than a focus on ‘persecution’ as the standard for the determination of refugee status, places its emphasis on ‘objective’ and ‘identifiable’ circumstances such as; internal or external aggression which are occasioned by: wars, foreign armed groups, or state or non-state actors; foreign domination; occupation; and/or events which seriously disturb public order in such a way as to endanger the freedom, life and security of the person(s) as the standard for assessing refugee status.³⁶¹ It emphasizes on the situations which have caused persons to flee in search of sanctuary.³⁶² The basis of ‘events’ which seriously disturb public order is to be interpreted as people fleeing from situations of conflict which can be internal, international, between non-state and state actors and governments, as well as, other conditions of generalized violence which endanger civilian freedoms.³⁶³ The view that the OAU Convention moves away from the ‘persecutionary’ position of the 1951 Convention is supported in the literature.³⁶⁴

By including the language of ‘compulsion’ in its definition rather than the language of ‘fear’ used in the 1951 definition, the African Convention lays emphasis on the seriousness of the situation under which the refugee finds himself/herself, thereby, rendering the 1969 Convention a more objective assessment that focuses on the observable conditions which have compelled the refugee to flee rather than the

³⁶¹ Ibid., art. 1(2).

³⁶² UNHCR, ‘Guidelines on International Protection No. 12’, 10-11.

³⁶³ UNHCR. "The 1969 OAU Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status Determination." January 2013, 17.

³⁶⁴ Rwelamira, ‘Two Decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa’, 559. oe Oloka-Onyango, "Human Rights, the OAU Convention and the Refugee Crisis in Africa: Forty Years After Geneva," *International Journal of Refugee Law* 3 (1991): 455.

subjective criteria of discerning whether the refugee has a genuine fear of persecution or not. Consequently, the objectiveness of the African definition lies in replacing the subject criteria of fear, and focuses on “a series of objective events in an asylum-seeker’s country of origin”.³⁶⁵ However, it can also be said that the word ‘compelled’ is ambiguous because it could be interpreted objectively or subjectively to mean different things. As such, there is a need for an assessment to observe the link between the refugee and the particular event which compelled them to seek protection.³⁶⁶ Equally significant in the comprehension of the language of ‘compulsion’ is the 1969 Convention’s reference to ‘habitual place of residence’, which when read together with ‘compulsion’ gives one a clearer understanding. That is to say, if the condition is serious enough to necessitate that the refugee has a fairly reasonable reason to flee his habitual place of residence, then, they are in need of protection.³⁶⁷

Another important difference is the interpretation of ‘habitual residence’ as understood under the 1951 Convention (meant as a reference point for stateless refugees),³⁶⁸ and its interpretation within the African Convention. In the latter, it is not meant to denote whether the individual has been forced to leave his country of origin, but rather from his habitual place of residence.³⁶⁹ To determine his habitual residence, all that is required is to show a link between the individual and the place in terms of length of

³⁶⁵ UN High Commissioner for Refugees (UNHCR), "Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On," April 2005, ISSN 1020-7473, 5.

³⁶⁶ Ibid, 6.

³⁶⁷ *Radjabu v. The Chairperson of the Standing Committee for Refugee Affairs*, 8830/2010, South Africa: High Court, 4 September 2014, para 6.

³⁶⁸ UN High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, 102, HCR/1P/4/ENG/REV. 4.

³⁶⁹ UNHCR, ‘Extending the limits or narrowing the scope?’, 23.

stay or affinity.³⁷⁰ This view that the definition provided in the 1969 Convention is more of an ‘objective’ one is contested by those who argue that the African definition is both ‘subjective’ and ‘objective’ and should be applied with this in mind, in order to eliminate the possibility of ‘fraudulent applicants’, while at the same time guaranteeing that there is no prejudice against claimants of the refugee status.³⁷¹

The definition provided by the OAU Convention was also meant to include freedom fighters involved in the fight against colonial and racial domination in Africa. During the Conference on the Legal, Economic, and Social Aspects of the African Refugee Problem convened in Addis Ababa in 1967, it was widely agreed that while the issue of freedom fighters was closely associated with the concept of subversion, there existed a crucial need, in the spirit of African solidarity, to extend assistance to these freedom fighters engaged in combat against colonial and racial oppression, as their struggle was deemed legitimate.³⁷²

Contrary to the 1951 Convention which only provides for individualized assessment for refugee status determination, the African Convention allows for group assessments.³⁷³ This *prima facie* mechanism in the 1969 Convention, a novelty to international refugee protection, means that unless proven otherwise, a person or a group is considered to be a refugee under the 1969 Convention where the reason for

³⁷⁰ Ibid., 23-24.

³⁷¹ Edwards, ‘Refugee status determination in Africa’, 228-230.

³⁷² Rwelamira, ‘Some reflections on the OAU Convention on Refugee’, 155-178.

³⁷³ UNHCR, ‘Guidelines on International Protection No. 12’, 11.

flight is reasonable.³⁷⁴ However, some questions need to be considered. For example, what specific procedures should be employed to establish this determination, and what are the objective circumstances that have caused this massive displacement in the first instance?³⁷⁵ Some have disputed that the intention of the OAU Convention may not have been to provide for group *prima facie* determination, even though it is recognized that the African Convention was worded in such a way as to make such group determinations possible in the event of massive population displacements.³⁷⁶ The origins of the group *prima facie* approach is contested, and it is argued that this is wrongly assumed to have originated from the 1969 Convention.³⁷⁷ Nevertheless, the practice of *prima facie* group determination can be seen in Africa as early as the 1960s when Tanzania utilized *prima facie* refugee status determination for Rwandese and Burundian refugees who crossed into Tanzanian territory.³⁷⁸ Since that time, the UNHCR within the African context has also implemented the *prima facie* mechanism, which emphasizes objective factors rather than the subjective criterion of 'well-founded fear of persecution' found in the 1951 Convention. By so doing, the UNHCR has adopted the expanded version of the refugee definition when dealing with refugee situations in Africa.³⁷⁹

³⁷⁴ Bonaventure Rutinwa, *Prima Facie Status and Refugee Protection*, UNHCR, New Issues in Refugee Research, No. 69, Working Paper, 2002, 2.

³⁷⁵ Rutinwa, 'Prima Facie Status and Refugee Protection,' 1.

³⁷⁶ Okoth-Obbo, 'Thirty years on,' 120.

³⁷⁷ Edwards, 'Refugee status determination in Africa,' 228-229.

³⁷⁸ National Legislative Bodies / National Authorities (Author), published by UNHCR – UN High Commissioner for Refugees, *Refugees (Control) Act*, 7 January 1966, accessed on September 19, 2023.

³⁷⁹ Emmanuel Opoku Awuku, "Refugee Movements in Africa and the OAU Convention on Refugees," *Journal of African Law* 39, no. 1 (1995): 81.

The African Convention also addresses the concept of the ‘internal flight alternative,’ which considers whether individuals who are compelled to depart from their usual place of residence are relocating internally within their own country or externally to another country, as it encompasses both scenarios. The understanding is that unless it can be proven with certainty that the state is able to guarantee the safety and security of the persons fleeing to other parts of its territory, then it does not matter whether the conditions for flight have affected only a ‘part’ or the ‘whole’ of the territory.³⁸⁰ Further, recognizing that many refugees are running away from conflicts which are still on-going, the Convention prohibits placing refugees at borders in order not to expose them to unforgiving regimes from their home countries.³⁸¹

In terms of state cooperation, both the 1951 Convention and the 1969 OAU Convention place obligations on states to cooperate with each other and with international organizations. However, the OAU Convention places greater emphasis on regional cooperation in article 2(4) by introducing the key concept of ‘African solidarity and international cooperation’, in efforts to lessen the burden on states granting asylum, and in article 8(1) calling on African states to cooperate with the UNHCR in exercising their protection duties towards refugees.³⁸²

It is important to reiterate that the common understanding is that, while the 1969 OAU Convention expands upon the definition of a refugee as outlined in the 1951

³⁸⁰ UNHCR, ‘Guidelines on International Protection No. 12’, 12. See also, UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, para 5.

³⁸¹ Rutinwa, ‘Prima facie status and refugee protection,’ 7.

³⁸² ‘Convention Governing the Specific Aspects of Refugee Problems’, art. 2(4) and 8(1).

Convention, this expansion is intended to be complementary, and the primary authority of the latter should not be contested. Therefore, the initial step is to apply the 1951 Convention definition to ascertain refugee status. Only if it is established that the applicant does not meet the criteria outlined in the 1951 Convention should an evaluation be conducted using the regional definitions. This sequential strategy highlights the supremacy of the 1951 Convention, the universality of its definition in Article 1(a)(2), and the clearly complimentary nature of the regional definitions including the 1969 Convention. In the event where a person does not meet the criteria for refugee determination under the 1951 Convention, but does so under the 1969 Convention, it is understood that this regional definition expands the range of individuals who are eligible for protection.³⁸³ However, in terms of group assessments, it makes more sense applying the 1969 Convention because it provides for such group assessments unlike the 1951 Convention.³⁸⁴ Generally speaking, the 1969 Convention as well as other regional Conventions are intended to be applied in ways that strengthen and compliment the 1951 Convention and not as a replacement. Although, the general principle of international law of *lex specialis derogate legi generali* proscribes for *lex specialis* to be applied before *lex generalis* as one of the recommended techniques for the interpretation and the resolution of conflicts in international law, meaning, that in this case the more specific rule of African refugee law should be applied before the more general rule in the 1951 Convention, the UNHCR EXCOM on the contrary has affirmed that “measures to provide complementary protection should be implemented in a manner that strengthen, rather than undermine, the 1951 Convention and its 1967

³⁸³ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status*, 24 June 2015, HCR/GIP/15/11, paras 2 and 5, accessed August 19, 2023, URL: <https://www.refworld.org/docid/555c335a4.html>.

³⁸⁴ Ibid.

Protocol.³⁸⁵ Moreover, the 1969 Convention in its preamble and in Article 8(2) reaffirms the position of the 1951 Convention as the basic and universal instrument for refugee protection, with the 1969 Convention as the regional complement.³⁸⁶ Further the *travaux préparatoires* of the OAU Convention suggests the intention of recognizing the superior position of the 1951 Convention, exemplified in 1965 by the African Assembly of Heads of States and Government recognizing the primacy of the 1951 Convention in its resolution.³⁸⁷ Therefore, the intention of the 1969 Convention was not to challenge the supremacy but to complement the 1951 Convention, as such, where there is conflicting interpretation between the 1969 OAU Convention and the 1951 Convention, the latter takes precedence.

Almost all African states with the notable exception of Eritrea, Libya and Mauritius are party to the 1951 Convention.³⁸⁸ Although, it is worth noting that Eritrea has also not ratified the 1969 Convention. The reading of the 1969 Convention and its affirmation of the important position of the 1951 Convention and its 1967 Protocol leads to believe that signatories of the 1969 Convention but not the 1951 Convention are still bound by the latter.³⁸⁹

³⁸⁵ Executive Committee of the High Commissioner's Programme, *Conclusion on International Protection No. 89 (LI) - 2000*, 13 October 2000, No. 89 (LI), accessed August 19, 2023, URL: <https://www.refworld.org/docid/3ae68c7e0.html>. Executive Committee of the High Commissioner's Programme, *Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection No. 103 (LVI) - 2005*, K, 7 October 2005, No. 103 (LVI), accessed August 19, 2023, URL: <https://www.refworld.org/docid/43576e292.html>.

³⁸⁶ 'Convention Governing the Specific Problem of Refugees in Africa', art. 8(2).

³⁸⁷ The decision by the Assembly of Heads of States and Government is discussed in section 5.2.1 of this study titled: "Understanding the Historical Roots of Voluntary Repatriation in Africa."

³⁸⁸ UNHCR. "States Parties to the 1951 Convention and its 1967 Protocol."

³⁸⁹ 'Convention Governing the Specific Problem of Refugees in Africa', preamble and art. 8(2).

4.3.3.1.2 Introducing the Concept of Voluntary Repatriation

Given the context of the frictions caused by massive displacements in Africa which existed during the drafting of the African Convention, the point was made in article 2(2) that the act of granting asylum must be understood as a “humanitarian and friendly act”.³⁹⁰ This was particularly important as members of the OAU were concerned of subversive activities directed against their Member States by foreign powers including the apartheid regime in South Africa which was accused of attempts at destabilizing neighboring countries, causing massive population displacements.³⁹¹

In article 2(3), similar to the 1951 Convention, the 1969 Convention highlights the importance of the principle of *non-refoulement* as a peremptory norm of international refugee law.³⁹² However, the principle of *non-refoulement* under the African definition extends further than that of the 1951 Convention. With the latter, national security and the disturbance of public order are exceptional cases under which the principle may not be applicable, but with the former, the prohibition on *refoulement* is absolute and cannot be waved under any circumstance.³⁹³ As a matter of fact, this prohibition extends also to rejections at borders, as well as is applicable to persons who are still in the places where they face persecution.³⁹⁴

³⁹⁰ ‘Convention Governing the Specific Aspects of Refugee Problems’, art. 2(2).

³⁹¹ Ibid.

³⁹² Ibid, 2(3).

³⁹³ Okoth-Obbo, ‘Thirty years on’, 88-89.

³⁹⁴ Rutinwa, ‘Prima facie status and refugee protection,’ 5-6.

Arguably, the most important contribution of the African Convention to international refugee law is its introduction of the principle of voluntary repatriation. As this norm is the subject of focus in Chapter 5, it is only superficially covered here – for the purpose of highlighting another important contribution of the African Convention to international refugee law.

As highlighted earlier, during the years leading up to the African Convention, OAU Member States were particularly concerned about the security implications of massive flows of refugees. Specifically, they were concerned about the complex problems refugees caused for both host and origin countries, especially the initiation of potential subversive activities from within host countries in other African countries. The recognition of the security implications of refugee flows played a significant role in the deliberations leading up to the OAU Convention on Refugees as it introduced voluntary repatriation as a durable solution to what was perceived as a potential problem.³⁹⁵ Article 5 of the OAU convention by mentioning and elaborating on the specific modalities for voluntary repatriation makes the 1969 OAU Convention the only legally binding document which explicitly mentions and defines this principle.³⁹⁶

4.3.3.1.3 The OAU Convention and its Critics

The 1969 Convention is not without its critiques. Indeed, the claim that the African Convention's refugee definition was expanded in response to civil wars and other armed conflicts is not necessarily supported by historical record. Instead, it is argued that it is very likely that the definition was expanded in efforts to deal with those

³⁹⁵ Feller, 'The evolution of the international refugee protection regime,' 133.

³⁹⁶ UNHCR, 'The 1969 OAU Refugee Convention and the Protection of People fleeing Armed Conflict', 109-110.

refugee situations in territories that were still colonized or under minority racist rule.³⁹⁷ Similarly to the 1951 Convention, the 1969 Convention's definition of a refugee has been accused of being redundant and outdated and not necessarily reflective of the new realities within the African continent.³⁹⁸ Unlike the 1951 Convention which has the UNHCR to supervise its implementation, the OAU Convention does not have such an independent organ, rather it encourages its members to work in close collaboration with the UNHCR.³⁹⁹ Although, one could argue that this choice was influenced by the need to foster international cooperation rather than regional approaches to refugee protection. Perhaps, the most significant criticism of the African Convention is that contrary to the 1951 regime which by means of the Executive Committee of the UNHCR is continuously in the process of developing 'soft law' mechanisms which improve its understanding and the application of its regime, the OAU Convention has no such mechanism.⁴⁰⁰ An issue which sometimes is attributed to the excessive romanticization of the OAU Convention by critics and supporters alike, thereby, hindering its development.⁴⁰¹

Despite these criticisms, the contribution of the 1969 OAU Convention to the African and the international regime of refugee protection cannot be overstated. By providing an expanded refugee definition, reinforcing the absoluteness of the principle of *non-*

³⁹⁷ Okoth-Obbo, 'Thirty years on', 112.

³⁹⁸ Okello, J. Moses, "The 1969 OAU Convention and the Continuing Challenge for the African Union," *Forced Migration Review* 48 (2014), 73.

³⁹⁹ Cristiano D'Orsi, *Specific Characteristics and Challenges of Refugee and Asylum-Seeker Protection in Sub-Saharan Africa: Lessons Learnt in Search of a Better Future* (Genève: Institut Universitaire de Hautes Études Internationales, 2013), 62.

⁴⁰⁰ Okoth-Obbo, 'Thirty years on', 105.

⁴⁰¹ Isabelle R. Gunning, "Expanding the International Definition of Refugee: A Multicultural View," *Fordham International Law Journal* 13 (1989): 37.

refoulement, introducing *prima facie* group determination, emphasizing burden sharing and international cooperation, and its introduction of the principle of voluntary repatriation, the 1969 Convention makes important contributions to international refugee law.

4.3.3.2 Supplementary African Regional Instruments of Refugee Protection

One of the regional instruments of refugee protection in Africa is the 1994 Addis Ababa Document on Refugees and Forced Population Displacements in Africa.⁴⁰² This document makes thirty-four recommendations across ten topics and calls on states to ratify, uphold and implement the 1969 OAU Convention.⁴⁰³ Largely considered to be a failure in its efforts to advance progressive thinking on key issues, but succeeded in reiterating the urgent need to address root causes of forced migration and refugee displacement in Africa. However, it fails to clearly spell out policy, legal or operational mechanisms to tackle the refugee problem.⁴⁰⁴ The 2004 Cotonou Declaration and Programme of Action is another important instrument in terms of refugee protection in Africa.⁴⁰⁵ The Cotonou Declaration contains a Declaration and a Programme of Action which has eleven broad objectives.⁴⁰⁶ The Declaration reaffirmed the continuous relevance of the 1951 Convention and the 1969 OAU Convention. Some of its key contributions include: a pledge by the Inter-Parliamentary Union to observe humanitarian principles while affirming that parties to conflicts will honor obligations

⁴⁰² OAU, 'Addis Ababa Document on Refugees and Forced Population Displacements in Africa, 10 September 1994'.

⁴⁰³ Marina Sharpe, *Engaging with Refugee Protection?: The Organization of African Unity and African Union Since 1963* (UNHCR, Policy Development and Evaluation Service, 2011): 24.

⁴⁰⁴ George Okoth-Obbo, "The OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa: A Review Article," *International Journal of Refugee Law* 7 (1995): 281.

⁴⁰⁵ "African Parliamentary Conference. 2004. 'Refugees In Africa: The Challenges of Protection and Solutions'." Geneva: Inter-Parliamentary Union.

⁴⁰⁶ UN High Commissioner for Refugees (UNHCR), *Refugees in Africa: The Challenges of Protection and Solutions*, December 2004.

under international refugee law, human rights law and humanitarian law (art 1); promote the self-reliance of refugees (art 2); promote the three durable solutions: voluntary repatriation, local integration and resettlement in a third country in the spirit of international cooperation and burden-sharing (art 3); a call to the UNHCR as well as other partners to double their efforts in providing support for asylum countries (art 4); to protect refugees especially women and children from exploitation, violence and abuse (art 5); reiterated the humanitarian character of asylum (art 6), and encouragement of national parliaments to adopt the 1969 Convention and other international refugee law and human rights instruments (art 7); amongst others.

In addition to these regional refugee instruments and given the specific cultural, national, and political situations in the different African regions, often sub-regional frameworks have emerged which are complimentary to the 1951 and 1969 Conventions in these local contexts; Southern African region,⁴⁰⁷ West African,⁴⁰⁸ East African,⁴⁰⁹ and North African regions.⁴¹⁰ Other regional and international human rights instruments applied include; the 1981 African Charter on Human and Peoples’

⁴⁰⁷ Bonaventure Rutinwa, "Asylum and Refugee Policies in Southern Africa: A Historical Perspective," *Legal Resources Foundation, A Reference Guide to Refugee Law and Issues in Southern Africa* (2002): 1-10.

⁴⁰⁸ Aderanti Adepoju, Alistair Boulton, and Mariah Levin, "Promoting Integration through Mobility: Free Movement under ECOWAS," *Refugee Survey Quarterly* 29, no. 3 (2010): 120-144.

⁴⁰⁹ UN High Commissioner for Refugees (UNHCR), *Regional Conferences on Refugee Protection and International Migration in Central America, Western Africa, Eastern Africa and Asia - Selected Conference Materials*, June 2011.

⁴¹⁰ Euro-Mediterranean Human Rights Network (EMHRN), *Study on Migration and Asylum in Maghreb Countries: Inadequate Legal and Administrative Frameworks Cannot Guarantee the Protection of Migrants, Refugees and Asylum Seekers*, July 2010, ISBN: 87-91224-53-5. Nizar Messari and Johannes van der Klaauw, "Counter-Terrorism Measures and Refugee Protection in North Africa," *Refugee Survey Quarterly* 29, no. 4 (2010): 83-103.

Rights (Banjul Charter),⁴¹¹ the 1990 African Charter on the Rights and Welfare of the Child,⁴¹² the 2003 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa,⁴¹³ and the 2006 Great Lakes Protocol on Property Rights of Returning Persons.⁴¹⁴

Worth noting as well is the important jurisprudential contribution of African courts to the evolution of regional and international refugee law. Some examples include the ruling by a South African court overturning the decision by the Home Office to close the Cape Town refugee centre. In another case, another South African court ruled that an applicant met the requirements to be a refugee thereby overturning the decision of the Refugee Appeal Board.⁴¹⁵ A Kenyan court has also invalidated a directive by the Kenyan government to move refugees from Urban areas to designated areas due to security concerns, asserting that this directive threatened the freedom of movement of refugees and their right to dignity,⁴¹⁶ and in another instance, a Kenyan high court issued a stay preventing the closure of the Dadaab and Kakuma camps citing violation of the Kenyan constitution and the principle of *non-refoulement*.⁴¹⁷ While the African

⁴¹¹ Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁴¹² Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

⁴¹³ African Union. *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*. 2003.

⁴¹⁴ International Conference on the Great Lakes Region, *Protocol on the Property Rights of Returning Persons*, 30 November 2006.

⁴¹⁵ *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* (1107/2016) [2017] ZASCA 126; [2017] 4 All SA 686 (SCA); 2018 (4) SA 125 (SCA) (29 September 2017). and *Ibrahim Ali Abubaker Tantoush v. Refugee Appeal Board and Others*, 13182/06, South Africa: High Court, 14 August 2007

⁴¹⁶ *Kituo Cha Sheria and others v. The Attorney General*, Kenya: High Court, 26 July 2013.

⁴¹⁷ *Kenya National Commission on Human Rights & another v Attorney General & 3 others*. [2017] eKLR

Court on Human and People's Rights has the capacity to listen to refugee-related cases, because individuals and NGOs who are more likely to bring these cases to the African Court do not have automatic standing before the Court, so far, engagement by the Court is non-existent.⁴¹⁸ Notwithstanding, the African Commission in collaboration with the UNHCR and has begun engaging with issues relating to refugees.⁴¹⁹

4.3.4 Exploring Other Regional Frameworks of Refugee Protection

While the focus of this dissertation is mainly on the African and international regional framework of protection, in particular, the principle of voluntary repatriation, it is still important to take a brief look at how other regional systems offer protection to refugees.

Inspired by the 1969 OAU Convention, highly qualified jurists and representatives from several states in Latin America, convened in Cartagena, Colombia in 1984 and following discussions adopted the 1984 Cartagena Declaration on Refugees.⁴²⁰

The Cartagena Declaration makes a number of important contributions to the regime of refugee protection in Latin America, especially in article 3(1) and (2) reaffirming faith in the 1951 Convention and its 1967 Protocol and encouraging Latin American states to accede to this Convention.⁴²¹ In article 3, the Cartagena Declaration following

⁴¹⁸ Marina, Sharpe. "Engaging with Refugee Protection: The Organization of African Unity and African Union since 1963, UNHCR, 2011, 33-34.

⁴¹⁹ Ibid

⁴²⁰ Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, *Cartagena Declaration on Refugees*, 22 November 1984.

⁴²¹ 'The 1984 Cartagena Declaration on Refugees', art 3(1-2).

the precedence set by the OAU Convention⁴²², acknowledges the primacy of the refugee definition outlined in the 1951 Convention, while expanding it to also include:

refugees are persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.⁴²³

The Cartagena Declaration reaffirms the peaceful character of asylum in article 3(4), recognizes the *non-refoulement* principle as articulated in the OAU Convention, referring to it as a ‘peremptory norm’ of international law in article 3(5). It also underscores the significance of international cooperation in article 3(15) and, in article 3(12), emphasizes that repatriation must be voluntary and individual, in order to guarantee absolute safety.⁴²⁴

It has been argued that the Cartagena Declaration was intended as ‘soft law’, but has over the years as a result of state practice developed a ‘de facto’ binding character.⁴²⁵ In fact, sixteen states in Central and South America have ratified this Convention and included it in their national legislations.⁴²⁶ It has also been endorsed by the United Nations General Assembly, the Organization of American States (OAS) and the Executive Committee of the UNHCR, and Costa Rican and Ecuadorian courts have made the case for this regional definition to be included in their national legal

⁴²² Okoth-Obbo, ‘Thirty years on’, 114.

⁴²³ ‘The 1984 Cartagena Declaration on Refugees’, art. 3(3).

⁴²⁴ ‘The 1984 Cartagena Declaration on Refugees,’ art. 3(4) (5) (15) and (12).

⁴²⁵ Olivia Nantermoz, "International Refugee Protection and the Primary Institutions of International Society," *Review of International Studies* 46, no. 2 (2020): 32.

⁴²⁶ Liliana L. Jubilut, Marcia V. Espinoza, and Gabriela Mezzanotti, "The Cartagena Declaration at 35 and Refugee Protection in Latin America," *E-International Relations* (2019): 3.

frameworks.⁴²⁷ The Latin American Convention is described by some as the ‘most comprehensive regional framework’,⁴²⁸ and its ten year review mechanism is hailed as revolutionary.⁴²⁹

In the Middle East and Asia, there are no binding regional instruments protecting refugees which is an issue because almost half of the total numbers of refugees worldwide and a significant portion of the budget of the UNHCR (23%) is directed towards refugees in the Middle East and North Africa.⁴³⁰ For instance, attempts at passing regulation to protect refugees at the regional level in the Middle East have not yet been successful, such as the failure of the 1994 Arab Convention on Regulating the Status of Refugees.⁴³¹ This is disappointing because the definition provided by this Convention in article 1 paragraph 2 is one of the few declarations which recognizes an environmental factor (natural disasters), as a valid reason for the recognition of refugee status.⁴³² There are however, some soft law instruments and the practice of states protecting people who have been forcibly displaced. Still, some progress has been made in recent years, and in 2017 the UNHCR and the League of Arab States signed

⁴²⁷ Nicholson and Kumi, ‘A guide to international refugee protection and building state asylum systems’, 21.

⁴²⁸ Flávia Piovesan and Liliana Lyra Jubilut, "Regional Developments: Americas (2011)," in *Refugee Protection in Brazil and Latin America D Selected Essays* (2018), 224.

⁴²⁹ Jubilut et al., ‘The Cartagena Declaration at 35 and Refugee Protection in Latin America’, 3.

⁴³⁰ UNHCR, "Global Focus: UNHCR Operations Worldwide. Budget and Expenditure 2023".

⁴³¹ League of Arab States, *Arab Convention on Regulating the Status of Refugees in the Arab Countries*, 1994.

⁴³² ‘Arab Convention on Regulating the Status of Refugees in the Arab Countries’, art. 1.

a Memorandum of Understanding (MoU) aimed at establishing a regional framework for effective refugee relief response.⁴³³

In Asia, similar attempts at codification have not been successful. Nonetheless, the Bangkok principles of 1966⁴³⁴ was revised in 2001 and adopted by African and Asian countries.⁴³⁵ Despite these shortcomings, the repeated attempts at codifying refugee protection within the Middle East and Asia even though unsuccessful, is evidence that there at the very least exists a recognition and commitment to refugee protection amongst states. Indeed, the Ashgabat Declaration in 2012 by members of the Organization of Islamic Cooperation reaffirmed the importance of the 1951 Convention and its 1967 Protocol, while also asserting that the Islamic religion lays down a basis for granting refuge.⁴³⁶

4.3.4.1 The European Regional Framework for Refugee Protection

Europe has one of the most comprehensive and developed regional frameworks for the protection of refugees.⁴³⁷ The specific regime of protection for refugees in Europe began in the 1980s as a series of intergovernmental cooperations and has since been harmonized in 1999 to form the Common European Asylum System (CEAS) based on

⁴³³ UNHCR, "UNHCR and League of Arab States Sign Agreement to Address Refugee Challenges in the Arab Region," 2017.

⁴³⁴ Asian-African Legal Consultative Organization (AALCO), "Bangkok Principles on the Status and Treatment of Refugees ("Bangkok Principles").

⁴³⁵ Nicholson and Kumin, 'A guide to international refugee protection and building state asylum systems', 21

⁴³⁶ Organization of Islamic Cooperation, "Ashgabat Declaration of the International Ministerial Conference of the Organization of Islamic Cooperation on Refugees in The Muslim World," 12 May 2012.

⁴³⁷ Nantermoz, 'International refugee protection and the primary institutions of international society', 31.

the 1951 Geneva Convention.⁴³⁸ CEAS welcomes the fundamental right of asylum and a European shared responsibility to welcome and offer protection for refugees. Based on the three overarching pillars of solidarity and fair share of responsibility, efficient asylum and return procedures, and strengthened partnerships with third countries, the European Commission in 2020 reformed the Common Asylum system in favor of adopting a comprehensive approach towards solving the problem of refugees. This system is regulated by a single agency; the European Asylum Support Office which is tasked with supporting the implementation of CEAS by EU member states. It does so through capacity building and development trainings, information and analysis, offering emergency assistance, and cooperation with third countries.⁴³⁹

The five instruments governing refugee protection in Europe include: the Asylum Procedures Directive which sets the conditions for quick, quality and fair asylum decisions and offers specific attention to victims of torture and unaccompanied minors; the Reception and Conditions Directive aimed at ensuring that EU member states adopt common standards such as access to health care, food, housing, clothing, education and employment for the reception of refugees in order to guarantee standards of living which are dignified; the Qualification Directive which aims to clarify the grounds under which international protection can be granted; the Dublin Regulation which strengthens the protection of persons seeking asylum during the process of determining which Member States or other participating countries bear responsibility for the examination of applications and offers clarification of the rules governing relations between member states; and the EURODAC Regulation which supports the

⁴³⁸ European Commission, "Common European Asylum System".

⁴³⁹ Ibid.

determination and designation of EU states responsible for protection in any given case under the Dublin Regulation.⁴⁴⁰

Despite being the most developed system of refugee protection, the Common European Asylum System constantly faces criticism because of the actions of EU Member States and in particular the activities of FRONTEX.⁴⁴¹

Furthermore, EU refugee law is applied in conjunction with the 2007 Charter of Fundamental Human Rights which provides for the right of asylum, protection from expulsion, removal or extradition and freedom from torture and other degrading treatment.⁴⁴² The European Court of Justice is also able to make rulings and interpretations when Member States infringe on their obligations based on the principles in the European Convention on Human Rights and Fundamental Freedoms.⁴⁴³ Additionally, the Council of Europe's Special Representative on Migration and Refugees has been established with a mandate to assist and support Member States, alongside supplementing the endeavors of other pertinent Council of Europe entities and aligning efforts with various international collaborators, particularly the UNHCR and the International Organization for Migration (IOM), in addition to other national, regional, and global stakeholders, including civil society.⁴⁴⁴

⁴⁴⁰ Ibid.

⁴⁴¹ European Border and Coast Guard Agency, "FRONTEX".

⁴⁴² European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.

⁴⁴³ Council of Europe, "European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14," 4 November 1950, ETS 5.

⁴⁴⁴ "Special Representative of the Secretary General on Migration and Refugees." Council of Europe.

Any examination of the international refugee system is incomplete without reference to the New York Declaration for Refugees and Migrants of 2016.⁴⁴⁵ This declaration reaffirms the support of the global international community for people who are forced to flee their homes, restates the relevance of the international refugee regime and the importance of burden sharing and supporting asylum countries, and lays the ground for the adoption of the Global Compact on refugees in 2018.

In 2018, the Global Compact on Refugees was adopted by the UNGA.⁴⁴⁶ Although, the Global Compact is not a legally binding document, “it represents the political will and ambition of the international community as a whole for strengthened cooperation and solidarity with refugees and affected host countries.”⁴⁴⁷ It offers a blueprint for states, international organizations and other relevant stakeholders to ensure better support for refugees and the communities that host them, and is supposed to be a framework for more equitable and predictable responsibility sharing. Recognizing the importance of international cooperation in protecting refugees, its four main aims are: to enhance the self-reliance of refugee; ease the pressure on host countries by providing more support; support conditions in home countries for safe and dignified return; and expand access to third country solutions and other complementary pathways.⁴⁴⁸ The relevance of the Global Compact to the regime of refugee protection cannot be overstated. It is a sign of the times, and not only “signals new moral and political undertakings by the world’s governments” to protect, respect and assist

⁴⁴⁵ UNGA, ‘New York Declaration for Refugees and Migrants’, A/RES/71/1.

⁴⁴⁶ UN General Assembly. "Global Compact on Refugees, UN doc A/73/12 (Part II)".

⁴⁴⁷ Ibid., 2.

⁴⁴⁸ Ibid, 33-40.

forcibly displaced, but also treat them with dignity and empower them to live in dignity, or so it is claimed.⁴⁴⁹

4.3.4 Other International Legal Instruments that Protect Refugees

The protection of refugees under international law is not governed solely by international refugee law, but is also strengthened by other international human rights legal instruments, principally, international human rights law, international criminal law and international humanitarian law.

International humanitarian law as a body of law ensures that victims of war and armed conflicts are protected, respected and provided with assistance. Because many refugees are often victims of armed conflict, refugee law is intrinsically linked with humanitarian law. As a matter of fact, article 44 of the Fourth Geneva Convention of 1949 specifically provides for refugee protection,⁴⁵⁰ and its 1977 Additional Protocol I, includes provisions which allow for stateless persons and refugees to be protected under the provisions of Parts I and III of the IV Geneva Convention.⁴⁵¹

International refugee law has always been part of the broader regime of international human rights law. Indeed, refugee law is a subset of and is supported by human rights law. For instance, article 1 of the Universal Declaration of Human Rights affirms that

⁴⁴⁹ Jane McAdam, "The Global Compacts on Refugees and Migration: A New Era for International Protection?," 2018, 571.

⁴⁵⁰ International Committee of the Red Cross (ICRC), "Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)," 12 August 1949, 75 UNTS 287, accessed 19 August 2023, <https://www.refworld.org/docid/3ae6b36d2.html>, Article 44.

⁴⁵¹ International Committee of the Red Cross (ICRC), "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)," 8 June 1977, 1125 UNTS 3.

all humans are born free, equal and in dignity, (including refugees)⁴⁵² and in article 14(1) declares that every person can seek and enjoy asylum from persecution in other countries.⁴⁵³ Article 3 of the Convention Against Torture explicitly prohibits forced return or *refoulement* of any person back to a place where there is reason to fear that they may be tortured.⁴⁵⁴ Unlike the prohibition in the 1951 Convention which has exceptions, the prohibition on *non-refoulement* in the Convention Against Torture is absolute, and has no exceptions, even in cases of crimes committed.⁴⁵⁵ Another international human rights instrument which offers protection to refugees is the Convention on the Rights of the Child.⁴⁵⁶ This Convention is particularly important, because a number of its articles are specifically important for the protection of refugees who are children; article 9 for example, prohibits children from being separated from their parents unless it is in the best interest of the child; article 10 guarantees family reunification, article 20 requires states to offer special assistance and protection to children who have been permanently separated from their families; and article 22 affirms that children refugees or those seeking refuge have a right to appropriate protection.⁴⁵⁷ Other legal instruments such as the International Covenant on Civil and

⁴⁵² UN General Assembly, "Universal Declaration of Human Rights," 10 December 1948, 217 A (III), accessed 19 August 2023, article 1.

⁴⁵³ 'Universal Declaration of Human Rights', article 14(1).

⁴⁵⁴ UN General Assembly, "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, article 3.

⁴⁵⁵ Nicholson and Kumin, 'A guide to international refugee protection and building state asylum systems', 22.

⁴⁵⁶ UN General Assembly, "Convention on the Rights of the Child," 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

⁴⁵⁷ 'Convention on the Rights of the Child,' art. 9, 10, 20, and 22.

Political Rights,⁴⁵⁸ the International Covenant on Economic, Social and Cultural Rights,⁴⁵⁹ the Convention on the Elimination of All Forms of Racial Discrimination,⁴⁶⁰ the Convention on the Elimination of All Forms of Discrimination against Women,⁴⁶¹ the Convention on the Rights of Persons with Disabilities,⁴⁶² and the International Convention for the Protection of All Persons From Enforced Disappearance⁴⁶³ cover a range of rights that offer protection to refugees including, but are not limited to; the right to life, liberty and security of person, protection from expulsion, the principles of non-discrimination including against women, protection for persons living with disabilities, and protection from extradition.⁴⁶⁴

Together, international human rights law, humanitarian law, and refugee law form the basis of the international regime for refugee protection. Refugees are best served not when one or two of these regimes are applied, but when applied as complementary to one another.

⁴⁵⁸ UN General Assembly, "International Covenant on Civil and Political Rights," 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

⁴⁵⁹ UN General Assembly, "International Covenant on Economic, Social and Cultural Rights," 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

⁴⁶⁰ UN General Assembly, "International Convention on the Elimination of All Forms of Racial Discrimination," 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.

⁴⁶¹ UN General Assembly, "Convention on the Elimination of All Forms of Discrimination Against Women," 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

⁴⁶² UN General Assembly, Convention on the Rights of Persons with Disabilities, resolution adopted by the General Assembly on 24 January 2007, A/RES/61/106.

⁴⁶³ UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006.

⁴⁶⁴ Nicholson and Kumin, A guide to international refugee protection and building state asylum systems', 26.

Before going any further, it is important to contextualize the meaning of a refugee as understood in this study. This next section can also be considered an intellectual exercise attempting to harmonize the differing understandings of who constitutes a refugee in literature.

4.4 Conclusion

This chapter provides an overview of the international refugee regime with specific emphasis on the comparison between the international and regional regimes, in particular, the African regime of refugee protection. This will set the tone for examining the uniqueness of the African refugee system. Because this dissertation is principally quizzing into the position of the principle of voluntary repatriation within the African and the international systems of refugee protection, it was therefore important to first trace the development of international refugee law in general, and secondly, compare and contrast the African system of refugee protection with the international law system.

The next chapter is focused on the theoretical frameworks which this study is based on. The theoretical frameworks are borrowed from the field of international law and international relations theory with the intention of highlighting the contribution the researcher seeks to add to both fields of international law and international relations theory, as well as, supporting the view that both fields are complementary of one another and add to the robustness of research.

Chapter 5

UNDERSTANDING VOLUNTARY REPATRIATION

5.1 Introduction

International refugee law forbids the repatriation of refugees forcibly to their countries of origin, in so far as the conditions which led to the flight of these refugees continues to exist. In fact, the doctrine of *non-refoulement* is a fundamental principle of international law and a *jus cogens* from which there can be no and should be no derogation. International refugee law provides for the right to asylum which is a primary institution of international society.⁴⁶⁵ At the same time, international law also provides for the right of everyone to return to their home country.⁴⁶⁶ Therefore, if a person chooses to return to their country of origin, they are guaranteed this right under international law.

Traditionally, the UNHCR has promoted three durable solutions for refugees; voluntary repatriation, local integration and resettlement, although, it is today increasingly experimenting with different pathways – complementary solutions.⁴⁶⁷ Even though, the UNHCR declares that there is no hierarchy in the solutions available for the refugee situation, it however, also claims that voluntary repatriation is the

⁴⁶⁵ Nantermoz, ‘International refugee protection and the primary institutions of international society’, 256-277

⁴⁶⁶ ‘Universal Declaration of Human Rights’, art. 13.

⁴⁶⁷ UN High Commissioner for Refugees (UNHCR), "The 10-Point Plan in Action, 2016 Update, Chapter 7: Solutions for Refugees," December 2016. ‘Global Compact on Refugees’.

preferred choice for the majority of refugees.⁴⁶⁸ As a matter of fact, voluntary repatriation over the years has procured broad application internationally. This pre-eminent position of voluntary repatriation compared to other durable solutions is highlighted in the Global Compact on Refugees.⁴⁶⁹ This is important to highlight because while it is non-binding legally on states, the Global Compact is the first-ever worldwide agreement on a comprehensive strategy to address international migration in all of its forms, and reflects the common position of states vis-à-vis questions relating to international protection. As such, one could assert that in the hierarchy of durable solutions on the situation of refugees, voluntary repatriation is the dominant discourse and the preference by international actors is for refugees to be able to return back to their countries of origin.

It begs the question how this concept has become the dominant discourse and practice encouraged by the UNHCR, international organizations and states around the globe. What are the origins of voluntary repatriation as a norm and a practice under international law and how has it evolved to become the pre-eminent solution to the global refugee ‘problem’?

Naturally, the 1951 Convention is always the first place to look. However, no explicit mention of the term voluntary repatriation is provided for in the 1951 Convention. Still Art.1 (C)(4) – voluntary re-establishment in country of origin, Art. 33 – principle of *non-refoulement*, and Art. 35 – state cooperation with the UNHCR on the subject of repatriation implicitly make reference to the return of refugees back to their countries

⁴⁶⁸ UNHCR. "Voluntary Repatriation".

⁴⁶⁹ ‘Global Compact on Refugees’, 48

of origin. As such, the general understanding in the reading of the Convention has always favored its recognition of voluntary repatriation as one of the solutions to the refugee situation.

The institution tasked with supervising voluntary returns is the United Nations High Commission for Refugees (UNHCR) and derives its mandate not only from article 35 of the 1951 Convention, but also UN General Assembly Resolution 428 (V) of 14 December 1950 which calls on states to cooperate with the UNHCR in the promotion and protection of the voluntary repatriation of refugees.⁴⁷⁰ Subsequent developments including United Nations General Assembly Resolutions, UNHCR Executive Committee Decisions, and practice have refined and extended the mandate of the UNHCR.⁴⁷¹ While the instruments that have been developed belong to the category of ‘soft law’ and are not legally binding, there is significant consensus around them globally. General practice too is one which encourages an international law of voluntary repatriation as evidenced in the comprehensive refugee response framework proposed in the Global Compact on Refugees.⁴⁷²

Yet, the principle of voluntary repatriation is not just ‘soft law’ practices developed by UNGA Resolutions and UNHCR EXCOM decisions or indirect inferences in the 1951 Convention. As a matter of fact, the principle of voluntary repatriation is explicitly stated in a legally binding instrument – the 1969 OAU Convention. This is the only

⁴⁷⁰ General Assembly Resolution 428 (v) 14 December, 1950 which adopts the Statute of the UNHCR and calls on governments to cooperate with the UNHCR in exercising its functions, one of which is the promotion and protection of the voluntary repatriation of refugees.

⁴⁷¹ UNHCR, *Handbook Voluntary Repatriation: International Protection* (Geneva, 1996): 1.

⁴⁷² ‘Global Compact on Refugees’, 42 – 51.

international Convention which explicitly provides for and introduces voluntary repatriation, making it legally binding on those states that have ratified it. As such, it is but normal that any discussion on the nature of voluntary repatriation as a concept starts from here. In the context of massive displacements globally and the seemingly dominant position of the discourse of voluntary repatriation as the preferred option for refugees, and practices of return which have been met by criticisms from human rights activists globally, now more than ever, it is important to critically evaluate the principles behind this law.

5.2 Voluntary Repatriation in the 1969 OAU Convention

The only international refugee Convention that is legally binding and explicitly provides for voluntary repatriation is the 1969 OAU Convention on the problems and rights of refugees in Africa. Article 5 para 1 of this convention establishes the principle of repatriation, therefore transforming the doctrine from ‘soft law’ to ‘hard law’.⁴⁷³ “The essentially voluntary character of repatriation” is a cornerstone of the principle of voluntary repatriation,⁴⁷⁴ and in line with the principle of *non-refoulement*.⁴⁷⁵

Other parts of article 5 maintain that there should be cooperation between the country of origin and country of asylum with regards to making adequate arrangements for the return of refugees who choose repatriation safely (para 2); (para 3) insists on the granting of full rights and privileges to returned refugees; reiterates in (para 4) that returnees should not be prosecuted or penalized for reasons relating to their refugee

⁴⁷³ René Degni-Segui, "L'action des institutions africaines en matière de réfugiés," in *Droit d'Asile et des Réfugiés*, edited by Pédone (Paris, 1997): 232

⁴⁷⁴ ‘Convention Governing the Specific Aspects of Refugee Problems in Africa’.

⁴⁷⁵ Cristiano d’Orsi, "Sub-Saharan Africa: Is a New Special Regional Refugee Law Regime Emerging?" *Heidelberg Journal of International Law* 68 (2008): 1069.

situations; and provides that those refugees who have decided to return home by their own accord be provided with assistance by their country of origin, country of asylum, international agencies, as well as international and intergovernmental organizations in order to facilitate their return (para 5).⁴⁷⁶

In addition to the principles of voluntary repatriation outlined under the Convention, the 1975 resolution on voluntary repatriation by the OAU Commission on Refugees also provides additional legal and practical modalities not covered in the 1969 Convention.⁴⁷⁷ Some of these practical matters include: fundraising to assist newly independent states in creating necessary conditions for the return of refugees; the establishment of transit facilities in African states to facilitate return; transfer of refugee savings and properties; allowing for couples in mixed marriages to decide on their return; tasks Member States to prevent the formation of subversive groups on territories of return for refugees; and the provision of technical staff and equipment to cope with the return of refugees. It also authorizes the Administrative Secretary-General of the OAU Commission on Refugees to co-ordinate repatriation operations with the UNCHR. Breaking the steps down in this succinct manner, the intention of the OAU Convention is to ensure a harmonized and efficient approach, drawing on the expertise and resources of both the OAU and UNHCR to navigate the complexities of voluntary repatriation successfully.

Despite being the pioneer instrument that introduces voluntary repatriation, the 1969 convention is not without its critics. By adopting a narrow interpretation to the concept

⁴⁷⁶ Ibid

⁴⁷⁷ African Union (AU) Archives, "Resolutions on the Twenty Second Ordinary Session of the Council of Ministers, CM/Res. 399.

of voluntary repatriation, it only covers organized repatriations which require official and written agreements, and for which the UNHCR takes the responsibility for providing transportation, hence, failing to cover spontaneous repatriations which ironically are more prevalent on the African continent.⁴⁷⁸ Moreover, although it provides a working definition and the conditions under which voluntary repatriation should operate, it fails to elucidate on how the concept affects the cessation clauses on a refugee's status.⁴⁷⁹ Hence, it is difficult to ascertain if its provisions on voluntary repatriation also apply to persons who are no longer refugees (persons who have gained asylum in their host country) or whether it applies only to persons who are still refugees. The nature of the voluntariness provided for by article 5 of the 1969 Convention should be such that a former refugee can be repatriated only if it is their choice which in this case is not clear. It is possible that the interpretation of the clause on voluntary repatriation in article 5 is clearly meant only for individuals who are still refugees.⁴⁸⁰ Still, this begs the question as to what happens to those who are no longer refugees? As such this ambiguity gives way to possible competing interpretations. However, the fact that the article makes mention of the term 'refugee' makes it more probable that the voluntariness in repatriation holds only for those persons who are still refugees as defined by the 1969 Convention.

Whether one agrees with the critics or not, one thing known for certain is that the 1969 Convention is the only legal instrument that explicitly mentions voluntary repatriation

⁴⁷⁸ Okoth-Obbo, 'Thirty years on: a legal review of the 1969 OAU Refugee Convention governing the Specific Aspects of Refugee Problems in Africa', 123-126.

⁴⁷⁹ d'Orsi, 'Sub-Saharan Africa', 1069-1070.

⁴⁸⁰ James C. Hathaway, "The Right of States to Repatriate Former Refugees," *Ohio St. J. on Disp. Resol.* 20 (2005): 175.

in a legally binding document which is today a cornerstone of the global international refugee protection mechanism. But the point of this work is not to simply highlight the introduction of voluntary repatriation as a principle under the African refugee legal system. Rather, the purpose is to try to understand how and why voluntary repatriation is today the ‘preferred choice’ of refugees. How did this principle which is not explicitly mentioned in the 1951 Convention and its 1967 Protocol evolve to become the dominant discourse and the pre-eminent durable solution to the displacement of people in need of protection? It is also the point of this study to examine the legal nature of the principle of voluntary repatriation and to appraise its position under international refugee law. Basically, is voluntary repatriation hard law? What are the principles that guide the practice of voluntary repatriation?

This study seeks to critically assess whether, in a world where the causes of massive displacements are seldom resolved, and often times the reasons that cause people to flee their countries of origin continue to exist, how come is voluntary repatriation referred to as the preferred durable solution for refugee displacement? Given the customary character of the right to seek asylum under international law and the legally binding prohibition to not return persons to territories where their lives or liberties will be in danger, is the principle of voluntary repatriation as operationalized in today’s world compatible with the principles of asylum and *non-refoulement*, and the spirit of offering protection to persons in need? Is it possible that the so-called touted preferred option for refugees is in fact, the preferred option not for refugees, but for states to solve what they perceive as the global refugee problem?

Adopting the process theory which views international law as a continuous process of authoritative decision making processes,⁴⁸¹ and the legalization theory which argues for an understanding of international law as particular forms of institutionalization and a move to law,⁴⁸² the next sections critically assess the historicity, evolution and institutionalization of voluntary repatriation as a principle under international refugee law. These frameworks allow for the investigation of the principle of voluntary repatriation not just as a set of rules practiced today, but enables a critical evaluation of the social and political contexts within which this principle has emerged in order to give a better understanding of the social environment then and whether today's interpretations are consistent with the values and needs of modern society. Because the social process of understanding legal norms places emphasis on an interpretation of rules using their social context, this allows for an objective evaluation of legal rules to ascertain the *raison d'être* of the law. In this instance, understanding the socio-political contexts within which the principle of voluntary repatriation has been developed enables commentators to question whether it is fit for purpose.

However, it is not only in the assessment of the socio-political origins of rules that one can ascertain its fitness for purpose. A more complete assessment should also involve the operational nature of this rule. To put it simply, how does this rule work in practice? As such, evaluating the historical and contemporary practices of voluntary repatriations is also an essential part of this next section.

⁴⁸¹ Higgins, 'Problems and Process', 2.

⁴⁸² Abbott, et al., 'The Concept of Legalization', 401. Goldstein et al., 'Introduction: Legalization and World Politics', 388.

5.2.1 Understanding the Historical Roots of Voluntary Repatriation in Africa

To understand why the drafters of the OAU Convention felt the need to include provisions for the voluntary return of refugees, it is important to contextualize the causes of massive displacements of people in Africa during the decolonization processes and the struggles for independence in Africa. Ideas are made not born, and are by products of particular socio-economic, political and cultural circumstances. As a result, norms are not natural occurrences, they emerge and develop out of political contestations.⁴⁸³

It is commonly acknowledged that the colonial borders established in Africa lacked political logic. The diverse social and cultural landscape adhered to one framework, while the political boundaries adhered to another. In this context, the displacements caused due to liberation struggles against colonial domination and the grapple for central power within newly independent countries was not surprising. In many of the African countries, colonial rulers “established from the very beginning a narrow understanding of exactly who should inherit the central institutions of the state.”⁴⁸⁴ This created internal ruling classes and separate administrative systems, isolating significant social groups. Additionally, colonial policies for resource distribution had fueled intense political competition among these groups. During decolonization, these inequalities were amplified setting the stage for an exclusive power struggle as rival ethnic and national groups, as well as bordering states jostled for more land and economic and political resources. Put simply, Africa’s refugee crisis is lodged in a specific set of circumstances; a history of administrative divisiveness and socio-

⁴⁸³ Long, ‘ The point of no return’, 44.

⁴⁸⁴ Constance G. Anthony, "Africa's Refugee Crisis: State Building in Historical Perspective," *International Migration Review* 25, no. 3 (1991): 574.

economic conditions which led to explosive confrontations within and between newly independent states in Africa causing violence, conflicts and massive displacements of people. In fact, until the mid-1970s, most of Africa's refugees were as a result of the bloody wars of independence against colonial powers, wars launched by European settlers to suppress nationalist guerrillas, and internal power struggles between different competing nationalist groups.⁴⁸⁵ By the late 1960s, there were about 735,000 refugees across Africa.⁴⁸⁶

It is therefore unsurprising that the OAU Convention on refugees reflects the spirit of this historical moment wherein newly independent African states were anxious about establishing strong national boundaries while also being concerned about the human rights of displaced Africans who needed protection, as well as ill at ease of the potential frictions providing asylum to refugees could cause. This was a significant factor because newly independent states were cautious not to have other African nations misinterpret their provision of humanitarian assistance to refugees as an endorsement of the political causes of these refugees. These causes were frequently viewed as subversive actions by the countries from which the refugees had fled..⁴⁸⁷ This explains why paragraphs 1 to 5 of the Preamble of the OAU Convention for refugees recognized this complexity of the 'refugee problem' in Africa.⁴⁸⁸ One can argue that the attention to finding durable solutions to the 'refugee problem' in such a way as to guarantee the borders, territorial integrity and security of the newly independent African states

⁴⁸⁵ Benson C. Nindi, "Africa's Refugee Crisis in a Historical Perspective," *Transafrican Journal of History* 15 (1986): 97.

⁴⁸⁶ Aderanti Adepoju, "The Dimension of the Refugee Problem in Africa," *African Affairs* 81, no. 322 (1982): 22.

⁴⁸⁷ Awuku, 'Refugee Movements in Africa and the OAU Convention on Refugees', 83.

⁴⁸⁸ 'Convention Governing the Specific Aspects of Refugee Problems in Africa', para 1 - 5.

explains why there was a strong preference for voluntary repatriation in the Convention and its travaux préparatoires. The argument that a complex array of issues is bundled up in this Convention, which reflect the different preoccupations of the OAU Commission, ranging from security to political and friendly relations is also made Okoth-Obbo.⁴⁸⁹

Given the massive displacements of persons in Africa and the inadequacy of the 1951 Convention to address the ‘problem of refugees’ in a satisfactory manner for African states, mainly because the 1951 Convention had been drawn up in the context of events following the Second World War and as such was primarily aimed at finding solutions to displacements in Europe occasioned by the Second World War, there was the need for an instrument addressing the specific needs of refugees in Africa. It is within this historical context that in 1964, the OAU Council of Ministers adopted a resolution which set up a commission of ten states (Burundi, Cameroon, Congo Kinshasa, Ghana, Nigeria, Rwanda, Senegal, Sudan, Tanganyika (known today as Tanzania), and Uganda) to examine the problem of massive displacements in Africa, and propose recommendations to address these displacements.⁴⁹⁰ This Commission (henceforth referred to as the OAU Commission on Refugees) submitted its recommendations to the Council of Ministers in Cairo in 1964, following which it was tasked to draft a Convention covering all aspects of the problem of refugees in Africa.⁴⁹¹ In 1965 in Nairobi at its fourth session, the Council of Ministers established a Committee of Legal

⁴⁸⁹ 120. Okoth-Obbo, ‘Thirty years on’, 123.

⁴⁹⁰ Council of Ministers, "Council of Ministers Second Ordinary Session," African Union (AU), 24-29 February 1964.

⁴⁹¹ Council of Ministers, "Council of Ministers Third Ordinary Session," African Union (AU), 13-17 July 1964.

Experts nominated from member states of the ad hoc Commission⁴⁹² to study the draft Convention in light of member states' opinions and comments and to prepare the final draft of the Convention.⁴⁹³ In the same year, the Assembly of Heads of States meeting in Accra recognized “the gravity of the refugee situation in Africa and the complex problems it causes for the countries of origin as well as the host countries”, encouraged African states to adopt the 1951 Convention while calling on the UN High Commissioner for refugees to adopt a UN Convention addressing the needs of African refugees.⁴⁹⁴ The following year, the Assembly of Heads of States meeting in Addis Ababa adopted a resolution of the Council of Ministers which reiterated its call to Member States to ratify the 1951 Convention and for final comments on the draft text of the African Convention and recommended that this instrument govern the African aspects of the problem of refugees and for it to become an effective regional complement to the 1951 Convention.⁴⁹⁵ Meeting in Kinshasa in 1967, the Council of Ministers once more recommended to Member States of the OAU to adopt and ratify the 1951 Convention and its 1967 Protocol and called for the OAU Commission on Refugees to adopt the instrument governing the specific aspects of refugees in Africa.⁴⁹⁶ This resolution is particularly important as it highlighted the “considerable socio-economic, financial, cultural and security problems” African states had hosting

⁴⁹² "Report of the Administrative Secretary General for the Meeting of the OAU Commission on Refugees held in Addis Ababa from 17th To 23rd June 1968," African Union (AU) Archives.

⁴⁹³ Council of Ministers, "Council of Ministers Fourth Ordinary Session," African Union (AU), 26 February - 9 March 1965.

⁴⁹⁴ African Union, 'Assembly of Heads of State and Government Second Ordinary Session.'

⁴⁹⁵ Council of Ministers, "Council of Ministers Seventh Ordinary Session," African Union (AU), 31 October - 4 November 1966.

⁴⁹⁶ Council of Ministers, "Council of Ministers Ninth Ordinary Session," African Union (AU), 4-10 September 1967.

refugees.⁴⁹⁷ The report by the Administrative Secretary-General for the OAU Commission on refugees in 1968 also highlighted potential subversive activities by refugees as a grave concern for African states, hence, its recommendations made strong references to voluntary repatriation as “the best solution to refugee problems”.⁴⁹⁸ Following this report, the OAU Commission was tasked with devising ways for the return of refugees back to their countries of origin albeit in ‘complete security’.⁴⁹⁹

Although, it is not stated in this report out rightly that voluntary repatriation is recommended as the best solution for ‘refugee problems’ in Africa due to the fear of the potential subversive activities and other security concerns posed by refugees, when read within the context of the decolonization struggles in Africa at the time, as well as the strong considerations surrounding the territorial integrity and borders of newly independent states, and the security and socio-economic concerns of hosting refugees raised during the 9th ordinary session of the Council of Ministers in Kinshasa in 1967,⁵⁰⁰ one can assert with a degree of confidence that the introduction of voluntary repatriation as a concept under African refugee law to address the specific realities of the refugee situation in Africa was heavily influenced by the security concerns of African states which inadvertently ensured that the solution that was proffered to the

⁴⁹⁷ Ibid., 4.

⁴⁹⁸ "Report of the Administrative Secretary General for the Meeting of the OAU Commission on Refugees held in Addis Ababa from 17th To 23rd June 1968," African Union (AU) Archives, Recommendation IV: Voluntary repatriation and settlement of former refugees in their countries of origin; CM/228, annex III.

⁴⁹⁹ "CM/Res.88 (VII), Resolution on the Adoption of a Draft Convention on the Status of Refugees in Africa," Council of Ministers Seventh Ordinary Session, Addis Ababa, 31 October to 4 November 1966.

⁵⁰⁰ ‘Council of Ministers Ninth Ordinary Session’.

refugee situation ended up being one which provided a solution to the refugee problem for states, but not a solution for the problems refugees were facing.

As a matter of fact, the friction caused by refugees between newly independent African states is highlighted in the 'Declaration on the Problem of Subversion and Resolution on the Problem of Refugees' in 1965 where the Assembly of Heads of States and Governments called for Member States "never to allow the refugee question to become a source of dispute amongst them".⁵⁰¹ In a 1973 report by the Committee of Ten on the problem of refugees in Africa, the Commission reaffirmed "the idea that the ideal solution of the refugee problem was voluntary repatriation to the country of origin since it was the only lasting solution to the problem".⁵⁰² It is also telling that in 1975, the Council of Ministers calling on African states to observe June 20 as the African Refugee Day, adopted 'voluntary repatriation' as the theme of the occasion,⁵⁰³ and called on the Committee of Ten to contact the leaders of liberation movements and their newly independent governments on the question of "repatriating their compatriots".⁵⁰⁴ In essence, communicating to them the preference by hosting states to return refugees back to their home countries.

⁵⁰¹ African Union (AU), "Resolutions adopted by the Second Ordinary Session of the Assembly of Heads of State and Government held in Accra, Ghana from 21 to 26 October 1965: The problem of refugees in Africa" (AHG/Res. 26 (II)).

⁵⁰² "Recommendations of the Commission of Ten on Refugees Problem," Twentieth Ordinary Session, CM/Res. 485, African Union (AU) Archives, p. 6.

⁵⁰³ "Resolutions on the Twenty Second Ordinary Session of the Council of Ministers," CM/Res. 398, African Union (AU) Archives,

⁵⁰⁴ 'Resolutions on the Twenty Second Ordinary Session of the Council of Ministers: CM/Res. 399'.

How one conceives of solving a problem is inseparable from what one understands that problem to be.⁵⁰⁵ In this vein, how the OAU Commission on Refugees and the Summit of Heads of States conceived of solving the issue of massive displacements in Africa cannot be separated from what they considered as the major ‘problem’. That is, the potential subversive consequences of hosting refugees. This is evidenced by the accent they placed on voluntary repatriation as the only lasting solution to their perceived problem.

Similarly, to conclusions that the international refugee regime should be best understood as developed to solve the refugee problem,⁵⁰⁶ better put, refugees as the problem, and not the problems refugees are facing, the OAU Convention on the specific problems of refugees in Africa one could argue, was developed to address the concerns newly independent African states were facing with hosting refugees. Hence, while the solutions proffered attempted to address some of the humanitarian concerns caused by massive displacements, they were also heavily influenced by the security concerns of these newly independent African states who desperately wanted to preserve the integrity of their national borders and territories in the face of subversive activities sponsored by former colonial powers, minority European groups in Southern African states as well as from internal and inter-ethnic political violence in the wake of independence. In this context one can situate the considerations that went into the resolutions of the OAU Commission on Refugees. That is, the emphasis on the return of refugees to their countries of origin was driven by a number of factors amongst which were; the concern that refugees were being used by former colonial powers to

⁵⁰⁵ Saunders, ‘International political theory and the refugee problem. Routledge’, 3.

⁵⁰⁶ Ibid., 3-5.

cause subversion within newly independent states, the need to encourage political refugees to return back to their countries to support in the struggle to liberate their countries, the socio-economic and financial impact of hosting refugees on host countries, and other regional security concerns, least amongst which were inter-ethnic wars.

To add to the aforementioned revelation, a critical evaluation of the OAU Convention on Refugees makes apparent that despite its initial concern of the plight of African refugees and the recognition of a humanitarian approach towards ‘solving the problems of refugees’ in paragraphs 1 and 2 of the Preamble, the proceeding 3 paragraphs adopt an adversarial mode toward African refugees highlighting that they are a source of friction between African states which the Convention seeks to eliminate. This and the potential subversive activities of refugees set the tone for the rest of the Convention. It is therefore not surprising that voluntary repatriation is suggested as a permanent solution to this ‘problem’, even though at the time the Convention was drafted and adopted, it was not possible to see an end in sight of the conflicts that were generating these massive displacements within Africa.

The complexion of the provisions on repatriation which made the final draft of the OAU Convention reflects the preoccupation with favorable relations between African states affected by refugee caseloads, particularly on political and security predictability. One of the key functions of the OAU Commission during its establishment was to; “help the countries of origin and the host countries to devise ways and means for the return of the refugees to their country of origin in complete

security”.⁵⁰⁷ In many ways, the OAU Convention truly reflects at once the desire to maintain stability and order within the African continent during a time of great upheaval occasioned by independence movements, as well as a concrete desire to extend the application of refugee protection mechanisms developed under the 1951 Convention to the realities of the African context.

Even though, the OAU Convention provides an expanded refugee definition as well as other notable contributions including: the introduction of group assessments as opposed to individual assessments; the reinforcement of the absoluteness of the principle of *non-refoulement*; the codification of the right to asylum; and the emphasis on burden sharing and international cooperation, its introduction of the principle of voluntary repatriation as a durable solution has had the opposite effect of weakening the responsibility hosting states have toward refugees and in many ways, inadvertently, availed protection for persons who desperately need this protection. As developments over the years continue to show, hosting states often contribute in creating the conditions that leave refugees with no other options but to want to return back to their home countries, even under circumstances where the conditions that caused them to flee in the first place are not yet resolved. In fact, one could argue that this was perhaps not a coincidence but the effect desired by the OAU Council of Ministers when voluntary repatriation was suggested as a solution. After all, the resolutions adopted by the Council of Ministers at its 9th session in 1967 included recommendations for the OAU Commission on Refugees to assist countries of origin and host countries

⁵⁰⁷ CM/Res.88 (VII).

devise ways and means for the return of the refugees to their countries of origin. This as has been illustrated above, was the priority of African states.

But the introduction of voluntary repatriation within the African system of refugee protection albeit with the aim of solving the problem of refugees for African states does not explain how this principle has also developed globally into the ‘preferred durable solution’ for refugee displacement. After all, the OAU Convention is only binding on African states and not on other states. This next section is dedicated to tracing the evolution of voluntary repatriation within the global refugee protection system.

5.3 Assessing Voluntary Repatriation under International Refugee Law

Assessing the evolution of the discourse surrounding the principle of voluntary repatriation under international refugee law is important for two reasons. The first is to understand whether similarly to the introduction of voluntary repatriation in the 1969 OAU Convention where specific historical events influenced by security concerns were instrumental in the decision to include voluntary repatriation as a principle, if there are also specific circumstances set in history that explain the evolution of voluntary repatriation from a concept not mentioned at all in the 1951 Convention to a well-developed principle with specific guidelines, and touted as the preeminent solution to the situation of refugees under international refugee law. Because one is unable to go back physically in time to trace these developments, analyzing the evolution of the discourse surrounding the principle of voluntary repatriation is the only means of reaching at an objective conclusion. The second is a natural conclusion to the first. Is the dominance of voluntary repatriation as the

preferred durable solution to the refugee situation a consequence of the framing of refugees as securitized objects, thereby warranting extraordinary measures to address the problem they pose to the global order?

Further, evaluating state practice of voluntary repatriation is also crucial for a number of reasons. It allows for an understanding as to whether this practice is universal and consistent with specific guidelines in such a manner as to warrant the title of customary international practice. In addition, the practice of states and the discourse used to justify these practices are an important indication as to whether there is a consensus around voluntary repatriation as a principle of international refugee law. While state practice and discourse may or may not prove the existence of an international law of voluntary repatriation, one still needs to be able to evaluate whether practice conforms to the principles guiding this norm, in particular, questions surrounding the ‘voluntariness’ in repatriations and to ensure that they conform with the principle of ‘*non-refoulement*’.

Finally, the legal character of voluntary repatriation must also be inspected. Because voluntary repatriation is not mentioned in the only internationally recognized legal instrument governing the protection of refugees, the 1951 Convention, what is its place under international law? Hence, can voluntary repatriation be considered as hard law under international law or does it exist within a continuum of soft law and hard law?

5.3.1 Assessing the Discourse and Practice of Voluntary Repatriation

The evolution of the discourse surrounding the protection offered to refugees universally is inseparable from the evolution of the principle of voluntary repatriation and from power politics. After all, how states choose to offer protection to refugees reflects the dominant discourse of the time as influenced by states and ultimately, the

instruments created for this purpose. In the same way, this discourse and practices of repatriation by states go hand in hand. That is, the practices often reflect the dominant discourses. In many ways, this explains the changing nature of the understanding and practices of voluntary repatriation which has been influenced by “extra-legal considerations largely dominated by short-term political constraints”.⁵⁰⁸

To evaluate the evolution of this discourse, qualitative document analysis is used to look into UNGA Resolutions, UNHCR Executive Committee Decisions, and UNHCR Handbooks on voluntary repatriation. Indeed, the presence of 101 members in the UNHCR's Executive Committee,⁵⁰⁹ who operate by reaching a consensus, including not only states parties to the 1951 Convention or 1967 Protocol, who may act based on treaty obligations, but also other states who are not party to this Convention but still significantly impacted by refugee movements means that its Conclusions can be understood to represent the wider opinion of states on this subject. The same goes for the United Nations General Assembly resolutions as the UNGA made up of 193 members is considered the multilateral forum for global issues.

Additionally, secondary sources are also investigated, in particular, writings by well-renowned authors in the field of migration who observed and recorded these developments in their historical accounts of the evolution of voluntary repatriation.⁵¹⁰

⁵⁰⁸ Vincent Chetail, "Voluntary Repatriation in Public International Law: Concepts and Contents," *Refugee Survey Quarterly* 23, no. 3 (2004): 18.

⁵⁰⁹ UNHCR (United Nations High Commissioner for Refugees), "Executive Committee (ExCom) Plenary Sessions.

⁵¹⁰ Robert F. Gorman and Gaim Kibreab, "Repatriation Aid and Development Assistance," in *Reconceiving International Refugee Law*, edited by Brill Nijhoff, 35-82 (1997). Barbara Harrell-Bond, "Humanitarianism in a Straitjacket," *African Affairs* 84, no. 334 (1985): 3-13. Chetail, 'Voluntary repatriation in public international law: concepts and contents', 1-32. Barry N. Stein, "Durable Solutions for Developing Country Refugees," *International Migration Review* 20, no. 2 (1986): 264-282; Bupinder S. Chimni, "From Resettlement to Involuntary Repatriation: Towards a Critical History of

These secondary sources are important in explaining and interpreting the information in primary sources, as well as the socio-political climate within which these developments occurred. To buttress this analysis, state practice is also assessed as it is largely an indication of the position of states vis-à-vis a particular law/principle. The evaluation of the practice of states also serves to understand how voluntary repatriation truly works in practice.

5.3.2 The Evolution of Voluntary Repatriation: From the African System to the International Refugee Protection Regime?

Although, the 1969 Convention is and remains the only international treaty which explicitly codifies the principle of voluntary repatriation, it is commonly accepted that voluntary repatriation is also part and parcel of contemporary international refugee law, evidenced through general state practice and acceptance by the international community. An illustrative instance of states implementing voluntary repatriation occurred when Pakistan and Afghanistan reached a bilateral agreement in 1988 concerning the voluntary return of refugees.⁵¹¹ However, the principles and practice of voluntary repatriation under international refugee law precede this bilateral agreement between Pakistan and Afghanistan.

In the last couple of decades, state practice has been to promote voluntary repatriation; to call on states to respect the rights of refugees and to share responsibility for refugees;

Durable Solutions to Refugee Problems," *Refugee Survey Quarterly* 23, no. 3 (2004): 55-73; Marjoleine Zieck, *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (Martinus Nijhoff Publishers, 1997). Johnathan Bascom, "The Dynamics of Refugee Repatriation: The Case of Eritreans in Eastern Sudan," in *Population Migration and the Changing World Order* (1994): 225-248; James C. Hathaway, "The Meaning of Repatriation," *International Journal of Refugee Law* 9 (1997): 551. Feller, 'The evolution of the international refugee protection regime', 129. Saul Takahashi, "The UNHCR Handbook on Voluntary Repatriation: The Emphasis of Return Over Protection," *International Journal of Refugee Law* 9 (1997): 593; Long, 'The point of no return: Refugees, rights, and repatriation 2013'.

⁵¹¹ Marina Sharpe, "The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions," *McGill Law Journal* 58, no. 1 (2012): 110.

to require that certain conditions be met in the country of origin before voluntary repatriation can be considered acceptable; and to grant the UNHCR a continuing protection role until the refugees return in safety and dignity.⁵¹² It begs the question whether the development of voluntary repatriation under international refugee law owes its origins to the African system of refugee protection given the similarities between these operational rules, and the guidelines suggested in Article 5 of the 1969 Convention.⁵¹³ The answer is no.

Actually, the idealization with refugee repatriation can be traced as far back as the formation of the liberal nation-state in Europe in the early twentieth century with the repatriation of Russian refugees from Bulgaria to Russia between 1926 and 1929.⁵¹⁴ However, there is also no doubt that the introduction of voluntary repatriation and the emphasis on ‘voluntariness’ under the African system of refugee law has had a significant impact on the development and evolution of voluntary repatriation under general international refugee law.⁵¹⁵ The stress on the ‘voluntariness’ of repatriation provided for in Art. 5(1) of the African Convention is an integral part of the framework of the UNHCR Executive Committee guidance⁵¹⁶ and is today a cornerstone of the work of the UNHCR repatriation regime.⁵¹⁷ The UNHCR EXCOM which plays a key

⁵¹² UNHCR, "Comment on Draft 1 of the Global Compact on Refugees (GCR): International Law - Voluntary Repatriation".

⁵¹³ 'The OAU Convention Governing the Specific Aspects of Refugees in Africa', art. 5.

⁵¹⁴ International Labour Office Refugees Service. "Repatriation of Russian Refugees from Bulgaria." File C1463/359/Rr.413/1/10/1. United Nations Library and Archives. November 2021.

⁵¹⁵ Chetail, 'Voluntary repatriation in public international law: concepts and contents', 23.

⁵¹⁶ UN High Commissioner for Refugees (UNHCR), *Discussion Note: Protection Aspects of Voluntary Repatriation*, para. 7 and 8.

⁵¹⁷ UN High Commissioner for Refugees (UNHCR), *Handbook - Voluntary Repatriation: International Protection*, January 1996, p. 10.

role in the development of the principles guiding voluntary repatriation has underscored the value of regional instruments like the 1969 OAU Convention as an important reference for general principles of international refugee law.⁵¹⁸ The OAU Convention is also the subject of recommendations by the UNHCR to states when considering the question of the voluntary return of refugees.⁵¹⁹ The contribution of the OAU Convention to the development of voluntary repatriation as a principle under international refugee law cannot be overstated. While it may be dishonest to retrospectively claim that without codification in the OAU Convention, the development of voluntary repatriation as a norm under international refugee law would not have been possible, it is not an overstatement to assert that by dedicating an entire Article and providing clear guidelines under which voluntary repatriation could be operational, in particular: the stress on ‘voluntariness’; on collaboration between countries of asylum and host states to guarantee safe return; on the effective resettlement of returned refugees; and the prohibition against the persecution of returned refugees, the OAU Convention makes significant contributions to the development of the principles of practice of voluntary repatriation, which even today are still the norm.

With regards to refugee repatriation under international refugee law, usually, the starting point is the 1951 Convention and its 1967 Protocol as they set the principles and guidelines for refugee protection worldwide. The 1951 Convention also remains the only universally binding instrument for refugee protection. However, the 1951 Convention does not out rightly address the question of voluntary repatriation even

⁵¹⁸ UNHCR, ‘A Thematic Compilation of Executive Committee Conclusions: No. 103 (LVI) – 2005’.

⁵¹⁹ UN High Commissioner for Refugees (UNHCR), "Note on Voluntary Repatriation," 27 August 1980, EC/SCP/13, paras. 13 and 16.

though its Preamble references the enjoyment of fundamental rights and freedoms as affirmed in the Universal Declaration of Human Rights (UDHR), which guarantees the right of every person to return to their country of origin in article 13(2).⁵²⁰ While the UDHR is not legally binding, it establishes the guidelines for state behavior and acts as a reference point for universal and regional human rights agreements such as the International Covenant on Civil and Political Rights (Art. 12 (4))⁵²¹ and the International Convention on the Elimination of all Forms of Racial Discrimination (Art. 5 (d) (ii))⁵²² which enshrine the right to return under international law and are legally binding. Therefore, in international human rights law, the right to return to one's country of origin is a basic principle which states are duty-bound to respect.⁵²³

Aside from international human rights law, identifying the position of voluntary interpretation under international law requires reading beyond just the 1951 Convention, it involves an investigation into the early developments of international refugee law and the general practice of states during the inter-war and post-World War Two periods.

Prior to the Second World War, voluntary repatriation was not widely practiced or part of the dominant discourse among states, especially in Europe. Nonetheless, the notion of repatriating refugees was not an unfamiliar concept, having been previously experimented on Russian refugees in the early 1920s as a potential solution, albeit,

⁵²⁰ 'The Universal Declaration of Human Rights', art 13(2)

⁵²¹ 'International Covenant on Civil and Political Rights', p. 171..

⁵²² 'International Convention on the Elimination of All Forms of Racial Discrimination,' p. 195..

⁵²³ UNHCR, 'Handbook - Voluntary Repatriation: International Protection.'

unsuccessfully.⁵²⁴ However, by the mid-20s, the idea of repatriation was completely disregarded as a possible solution to forced displacement.⁵²⁵ Resettlement and integration were considered as the ‘final solution’ to the problem of refugees.⁵²⁶

In the immediate aftermath of World War Two, persons displaced by the War returned to their countries assisted by the United Nations Relief and Rehabilitation Agency (UNRRA) which had been set up for that purpose.⁵²⁷ Around this time, the first official reference to the idea that repatriations must be voluntary was made in 1946 by the UN General Assembly in a resolution that refugees could not be “compelled to return to their country of origin” unless they chose to do so of their own freewill, or in cases where they were considered as war criminals and had to be returned to face trials.⁵²⁸ This resolution requesting returns to be voluntary was in response to the forceful repatriation of Soviet refugees in 1944 following demands by Stalin.⁵²⁹ However, increased resistance from Soviet refugees against their repatriation and the difficulties to reconcile these forced repatriations with the political principle of human freedom which had been projected as the reason why the Second World War was fought, meant repatriation was difficult to justify.⁵³⁰ Nonetheless, during this period and under

⁵²⁴ Long, ‘The point of no return: Refugees, rights, and repatriation’, 45.

⁵²⁵ Haddad, ‘The Refugee in International Society’, 124-125.

⁵²⁶ Long, ‘The point of no return: Refugees, rights, and repatriation’, 58.

⁵²⁷ United Nations Relief and Rehabilitation Administration (UNRRA), "Agreement for United Nations Relief and Rehabilitation Agency," November 1943, New Delhi.

⁵²⁸ “United Nations, "A/RES/8(I) 1946: Question of Refugees.”

⁵²⁹ War Cabinet Conclusions (115/44). 4 September 1944. Prem 8/348 (PRO) cited in Long, ‘The point of no return: Refugees, rights, and repatriation’, 63.

⁵³⁰ Nicholas Bethell, *The Last Secret*, 2nd ed. (Sevenoaks: Coronet, 1987): 144.

exceptional circumstances in 1948, the UN General Assembly had recognized the right of Palestinian refugees to be able to return to their homes, for different reasons.⁵³¹

When the 1951 Convention is drafted in 1951, it reflects the dominant discourse of the time. The prohibition on forced returns is reiterated in Art 33 of the 1951 Convention,⁵³² partly because many Soviets displaced during World War Two were hesitant to return to the Soviet Union.⁵³³ Art. 19(2) called on states to use their best endeavours to secure the settlement of refugees in their territories and in Art. 34, contracting states were asked to facilitate the naturalization and assimilation of refugees.⁵³⁴ Indeed, Shevel argues that the Convention has an exilic bias and was drafted at a time when notions of voluntary repatriation were obsolete.⁵³⁵

5.3.3 Voluntary Repatriation Post-1951 Convention

The advent of the Cold War and the dynamics of international politics in the post-World War Two period, especially the need for labor to boost economic growth in Europe, necessitated a practice that encouraged the influx of refugees, resettlement and local integration.⁵³⁶ But by the mid-70s, this willingness to host and resettle refugees changes as is illustrated in this section. Here, this study, evaluates the development of

⁵³¹ UN General Assembly, "Palestine - Progress Report of the United Nations Mediator," Resolution 194 (III), A/RES/194, 1948: 11.

⁵³² 'Convention relating to the Status of Refugees', art. 33

⁵³³ Long, 63.

⁵³⁴ 'Convention relating to the Status of Refugees', art. 19(2) and 34.

⁵³⁵ Oxana Shevel, *Migration, Refugee Policy, and State Building in Postcommunist Europe* (Cambridge University Press, 2011): 312. Chimni, 'From resettlement to involuntary repatriation: towards a critical history of durable solutions to refugee problems', 61.

⁵³⁶ Gorman and Kibreab. 'Repatriation aid and development assistance', 1997.

voluntary repatriation in an attempt to understand how it has become part of customary international law.

The combination of state practice and *opinio juris* is essential in determining whether the conduct of states can be considered as part and parcel of customary international law. *Opinio juris* in this case is demonstrated either through the observance of the principle of *non-refoulement* or from instances of refugee repatriation, public declarations by states, and assuming that they have normative quality, the resolutions of the United Nations General Assembly and UNHCR EXCOM decisions.⁵³⁷ Additionally, because the United Nations has an objective legal identity as held in the advisory opinion of the ICJ,⁵³⁸ UN agencies like the UNHCR can also form custom making its practice in cooperation with states an indication of customary international law.

In fact, over the years, UNHCR Executive Committee decisions have provided evidence of a general practice of states and *opinio juris* for voluntary repatriation as a norm under international law.⁵³⁹ UNHCR EXCOM decisions evidencing this development of voluntary repatriation as customary international law include: Conclusion No. 18 (XXXI) – 1980 recognizing the essential voluntary character of repatriations and voluntary repatriation as “the most appropriate solution for refugee problems” when a country gains independence;⁵⁴⁰ No. 40 (XXXVI) – 1985 reaffirming

⁵³⁷ UNHCR. ‘Comment on Draft 1 of the Global Compact on Refugees (GCR)’, 2.

⁵³⁸ UN General Assembly, "Reparation for Injuries Incurred in the Service of the United Nations," Resolution A/RES/365, 1949.

⁵³⁹ UNHCR, ‘Handbook for Emergencies: 7th edition’, 538-559:

⁵⁴⁰ UNHCR, ‘Conclusions Specific to Voluntary Repatriation: - No. 18 (XXXI) – 1980’.

the need for international cooperation in the conduct of voluntary repatriation;⁵⁴¹ No. 90 (LII) – 2001 emphasizing achieving a durable solution as the ultimate goal of international protection, “notably voluntary repatriation” and only “where appropriate and feasible, local integration and resettlement”;⁵⁴² and No. 101 (LV) – 2004 maintaining that voluntary repatriation “remains the preferred solution”;⁵⁴³ stressing the need for travel documents to be provided by countries of origin to facilitate “conditions conducive to voluntary repatriation”.⁵⁴⁴ These EXCOM decisions are supported by the UNGA resolution that reaffirms:

the function of the Office of the High Commissioner of providing international protection to refugees and seeking durable solutions to refugee situations, and recalls that those solutions include voluntary repatriation and, where appropriate and feasible, local integration and resettlement in a third country, while reaffirming that voluntary repatriation, supported, as necessary, by rehabilitation and development assistance to facilitate sustainable reintegration, remains the preferred solution.⁵⁴⁵

This development of voluntary repatriation from a concept barely referenced in the Refugee Convention to a practice described by the UNHCR as illustrated above as the preferred solution for the refugee displacement reflects a discrepancy between the framework provided for in the Convention versus the practical responsibilities and political reality of the function and mandate of the UNHCR. This perhaps explains why it has been argued that voluntary repatriation as a norm is a creation of UNHCR

⁵⁴¹ UNHCR, ‘Conclusions Specific to Voluntary Repatriation: - No. 40 (XXXVI) – 1985’.

⁵⁴² UNHCR, ‘Conclusions Specific to Voluntary Repatriation: - No. 90 (LII) – 2001’.

⁵⁴³ UNHCR, ‘Conclusions Specific to Voluntary Repatriation: - No. 101 (LV) – 2004’.

⁵⁴⁴ UN High Commissioner for Refugees (UNHCR), "Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 – 2017 (Conclusion No. 114 (LXVIII))," HCR/IP/3/Eng/REV, 2017.

⁵⁴⁵ United Nations High Commissioner for Refugees (UNHCR), "A/RES/72/150, para 39," 2018, accessed August 1, 2023, URL: <https://www.unhcr.org/sites/default/files/legacy-pdf/5ad5e9ca7.pdf>.

practice as part of its mandate for the development of durable solutions for the problem of refugees,⁵⁴⁶ influenced by state interests⁵⁴⁷

But is this necessarily true? Is voluntary repatriation simply the creation of UNHCR practice? Historical accounts do not necessarily support this. To understand how the norm of voluntary repatriation has developed to occupy such a prominent position among durable solutions, it is important to remember that the idea of repatriation is traceable as far back as the early twentieth century, as well as to keep in mind developments during the interwar and post-World War Two periods as was explained in the previous section. At neither of these periods in history was the norm of voluntary repatriation considered the dominant discourse and practice. This can be attributed to developments that transpired in the mid-1970s and beyond.

Between the 1950s to the late 1970s, debates on voluntary repatriation had quietened and the practice discouraged among states. Then High Commissioner for Refugees, Dr. Goedhart van Heuven had even declared that “voluntary repatriation” was “no longer of great importance”.⁵⁴⁸

But, from the middle of the 1970s onwards, voluntary repatriation, at least globally began receiving a lot of attention once more.⁵⁴⁹ Prior to this, the development of voluntary repatriation had mostly been confined to the African system of refugee

⁵⁴⁶ UNGA ‘Statute of the Office of the United Nations High Commissioner for Refugees’, art. 1.

⁵⁴⁷ Chetail, ‘Voluntary repatriation in public international law: concepts and contents,’ 11.

⁵⁴⁸ UNHCR, “Refugee Problems and Their Solutions: Address by Dr. Gerrit Jan van Heuven Goedhart, United Nations High Commissioner for Refugees, on the Occasion of the Forthcoming International Refugee Year, 1959”.

⁵⁴⁹ Chetail, ‘Voluntary repatriation in public international law’, 12.

protection as a solution to refugee displacement with the introduction of voluntary repatriation as a principle in the 1969 Convention. Into the mid-1970s, the majority of refugees had been displaced as a result of independence struggles and were hosted in the Global South. These refugees either returned voluntarily at the end of wars of independence, a lot of them spontaneously or were resettled in rural areas in their host countries.⁵⁵⁰

However, by the mid-1970s, most refugees displaced came from newly independent states and the likelihood they would return to their countries of origin looked slim. Sympathy towards these new crop of refugees in host countries in the Global South were at all-time lows as they were considered as traitors fleeing from sisterly neighbouring states that had also just gained independence. Further, the economic hardships in the new states meant that refugees were increasingly seen as a burden, one that could had to be temporary and were therefore expected to leave.⁵⁵¹ At the same time, for states in the Global North, efforts to reduce the financial costs associated with refugee protection and concerns that supporting resettlement would mean these refugees from the Global South would have to be resettled in the Global North, meant support for local integration and resettlement as solutions was low.⁵⁵² As new types of asylum seekers from the Global South made it to the Global North and the demand for labour which had been needed to rebuild Europe's infrastructure post World War Two no longer a priority, added to the rise in racist populism and anti-

⁵⁵⁰ Poul Hartling, "Opening Statement to Meeting of Experts on Refugee Aid and Development," Mont Pelerin, Switzerland 29 (1983), cited in Stein, 'Durable solutions for developing country refugees', 265-266.

⁵⁵¹ Stein, 'Durable solutions for developing country refugees', 266.

⁵⁵² Ibid

immigrant sentiments, states in the Global North pushed for a rethinking of durable solutions disguised in euphemistic language as attempts to guarantee the individual right to return and the wellbeing of the societies from which they were fleeing.⁵⁵³ This meant that voluntary repatriation became an attractive proposition for all parties involved, except for the refugees who were not consulted in this process, and when they were, it was only in efforts to encourage repatriation.

During this time, the UNHCR was not just assisting in return efforts, but had also been actively trying to initiate repatriations. For instance, they helped organized the ‘voluntary’ repatriation of Indochinese and Zairan (known as Congo DRC today) refugees claiming that voluntary repatriation was “naturally the most desirable solution to refugee problems”.⁵⁵⁴ Initially, the UNHCR had been hesitant that this solution had not yet been examined by experts,⁵⁵⁵ however, in 1980, the Executive Committee recognized voluntary repatriation as the “most appropriate solution for refugee problems”,⁵⁵⁶ by 1983 it had developed an “absolute character”,⁵⁵⁷ and in 1985, had become a basic right under international law as per the UNHCR.⁵⁵⁸ A few years later, the UNHCR had declared the 1990s ‘the decade of repatriation’, ignoring warnings from scholars that voluntary repatriation was still a poorly understood

⁵⁵³ Chimni, ‘From resettlement to involuntary repatriation’, 58; Long, ‘The Point of no return’, 88.

⁵⁵⁴ UNHCR, “Report of the United Nations High Commissioner for Refugees,” October 1979.

⁵⁵⁵ Chimni, ‘From resettlement to involuntary repatriation’, 58-59.

⁵⁵⁶ UNHCR, ‘Conclusions Specific to Voluntary Repatriation: - No. 18 (XXXI) – 1980’.

⁵⁵⁷ Zieck, ‘UNHCR and voluntary repatriation of refugees’, 81.

⁵⁵⁸ UNHCR, ‘Conclusions Specific to Voluntary Repatriation: - No. 40 (XXXVI) – 1985’.

phenomenon.⁵⁵⁹ However, this could not have been helped in the face of idealized notions of home encouraged by hosting states who were uncomfortable with the refugee situations at their borders. Up until this period, the UNHCR's role historically had been to provide support to asylum countries with processes of resettlement and integration, with very little aid provision for returnees in the form of short-term food grants and travel allowances paid to refugees who were mostly spontaneous returnees.

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Significantly, during this era marked by escalating numbers of displaced people, there emerged an increasing imperative within the international community to confront the underlying factors driving refugee displacement. This shift in focus was influenced by a UN report linking mass displacements to economic underdevelopment. Consequently, a novel strategy emerged, centered around promoting state rebuilding initiatives as a mechanism to tackle the fundamental triggers of migration.⁵⁶¹ An approach still favoured today and anchored on the belief that if rebuilding processes within states are successful, refugee repatriation either voluntarily or not would be justifiable.

By the late 1980s and early 1990s, the wind changed from an emphasis on 'voluntariness' to 'safe return' in repatriations.⁵⁶² The argument was that the 1951

⁵⁵⁹ Bascom, 'The dynamics of refugee repatriation', 226; and Barbara E. Harrell-Bond, "Repatriation: Under What Conditions Is It the Most Desirable Solution for Refugees? An Agenda for Research," *African Studies Review* 32, no. 1 (1989): 43.

⁵⁶⁰ Gorman and Kibreab. 'Repatriation aid and development assistance', 41. Zieck, 'UNHCR and voluntary repatriation of refugees', 94.

⁵⁶¹ Jovica Patrnogic, "Refugees: Dynamics of Displacement. A Report for the Independent Commission on International Humanitarian Issues," 1987, 78-84.

⁵⁶² Feller, 'The evolution of the international refugee protection regime', 134.

Convention did not impose a 'voluntariness' test, rather it simply asked states to ensure that return was safe.⁵⁶³ This was in part a response to the reluctance of states to uphold their asylum commitments particularly because the refugees were coming not from Europe, but from other parts of the world.⁵⁶⁴ States began engaging in objective assessments eliminating the combination of subjective and objective factors that usually went into refugee status determinations. As host states enforced objective determinism focusing on so-called 'objective standards' of safety in countries of origin, the whole meaning of the term 'refugee' changed as the voice of the refugee was eliminated from the decision making process, leading to an extreme form of injustice where the refugee was deprived not only of the means in deciding their fate, but also of a means to rectify the injury caused to them through this process.⁵⁶⁵

This perspective was also applied to the 'voluntariness' in repatriation, as states contended that conditions in refugees' countries of origin had undergone substantial improvements, rendering them safe for return. Precedence for this can be traced back to the UNGA A/Res/8 (I) (d) where an exception to 'voluntariness' was inserted in the event where the person concerned was considered a "war criminal, quisling or a traitor",⁵⁶⁶ indicating, the continued importance of realpolitik over 'voluntariness' as the determining factor in making decisions regarding the situation of refugees.

⁵⁶³ Hathaway, 'The meaning of repatriation', 553.

⁵⁶⁴ Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (OUP Oxford, 2001): 249.

⁵⁶⁵ Costas Douzinas and Ronnie Warrington, "A Well-Founded Fear of Justice: Law and Ethics in Postmodernity," *Law and Critique* 2, no. 2 (1991): 115-147 cited in Chimni, 'From resettlement to involuntary repatriation', 60-61.

⁵⁶⁶ United Nations, 'A/RES/8(I) 1946: Question of Refugees'.

As a matter of fact, the 1985 UNHCR EXCOM Conclusion on voluntary repatriation allowed states “to encourage” repatriation when it was “deemed” (by the states and participating organizations) to be in the best interests of the refugees.⁵⁶⁷ The problem with this was twofold; first, the refugee was not part of this process, and secondly, who and how the process of determining that repatriation was in the best interests of the refugees was going to be defined was not outlined. This allowed for state abuse and for assessments by states on behalf of refugees. These attempts to move away from the voluntary character in repatriations was not surprising when one considers that ‘voluntariness’ in the first place was part of the deliberate politicization of post-war displacement crisis in Europe in the 1940s as part of efforts to specifically support Soviet refugees.⁵⁶⁸

In the context of refugee protection, a significant issue arose from the persistent neglect of refugees' voices and the paradoxical treatment of subjectivity. While refugees' voluntary return was applauded, their decisions to stay were often side-lined in favour of objective assessments by other actors determining on their behalf the conduciveness of their home countries for return. This inconsistency reflects a problematic approach that underplays the agency and autonomy of refugees in shaping their own futures even today, thereby, limiting their meaningful participation in decisions concerning their displacement and rights.⁵⁶⁹ In the case of the return of Tigrean refugees from Sudan to Ethiopia organized by the Relief Society of Tigre (REST), termed for political reasons by UNHCR as ‘spontaneous’ voluntary repatriation, the international community soon

⁵⁶⁷ UNHCR ‘Conclusion No. 40’, 1985.

⁵⁶⁸ Long, ‘The point of no return’, 69.

⁵⁶⁹ Long, ‘The point of no return’, 44.

realized that for many refugees, the choice to return was connected with ideas of ‘autonomy’, which was in stark contrast to Western political ideas of repatriation which were more associated with returning to an imagined state or national order.⁵⁷⁰ Obviously, this was met with resistance by Western states in particular who wanted to maintain the unquestionable position and power of the liberal nation-state as the sole guarantor of the rights of individuals and reduce as much as possible, the influence refugees had on their choices to return and how the manner through which chose to return. It was therefore important for ‘voluntariness’ to signify consent rather than autonomy.

Despite this, refugees resisted the reconfiguration of the understanding of voluntary repatriation and many disappeared from their camps to evade ‘voluntary’ repatriations organized by states and the UNHCR.⁵⁷¹ What this indicated was a disconnect between the political and structural causes of refugee displacement and solutions as understood by the refugees themselves and the socio-economic and security risks assessments conducted by states and UN agencies. Nonetheless, by the end of the 1980s, the UNHCR’s public discourse shows that repatriation was in effect the only durable solution it was willing to promote above all others.⁵⁷²

The end of the Cold War continued to have significant consequences on refugee protection as some of the Western ideological oppositions to repatriations that existed

⁵⁷⁰ Barbara Hendrie, "The Politics of Repatriation: The Tigrayan Refugee Repatriation 1985–1987," *Journal of Refugee Studies* 4, no. 2 (1991): 206-208.

⁵⁷¹ A. Phillips, *Djibouti: A Voluntary Repatriation Programme?* (London: British Refugee Council, 1983), 6.

⁵⁷² UNHCR’ Conclusions No. 40 (XXXVI) 1980 to No. 62 (XLI) 1990’.

mainly as a political bulwark against the Soviet bloc had begun to disappear. During the Cold War, the super powers had welcomed refugees from around the globe in order to boost their images and for political gains. However, at the end of the Cold War, the incentive to attract refugees into their countries was no longer needed, hence, Western states started favoring any and all means which could be employed to restrict the number of refugees flowing toward their territories.⁵⁷³ The immediate impact of this post-Cold War attitude can be seen in the return of Cambodian refugees and Central American refugees to Guatemala, Nicaragua and EL Salvador.⁵⁷⁴ Even though, the UNHCR participated in monitoring these repatriations, they emphasized the challenges encountered in conducting these ‘voluntary’ repatriations due to the unchanged conditions in countries of origin, and the reluctance among refugees to return.⁵⁷⁵ However, at the same time, host states had been pressuring for these refugees to leave, leaving the UNHCR with no choice but to participate in these returns which were not always voluntary but disguised as such.⁵⁷⁶

Recognizing that the ‘refugee problem’ had unfortunately survived the Cold War, and as new wars continued to cause massive displacements, and the attitudes of states to not host refugees remained unchanged, the UNHCR was left with no other option, but to increase its support for repatriation as the solution to displacements, declared 1992

⁵⁷³ Bill Frelick, "Preventing Refugee Flows: Protection or Peril?," *World Refugee Survey* (1993): 5.

⁵⁷⁴ Catherine L. Hanlon, Nolin, and W. George Lovell, "Huida, Exilio, Repatriación y Retorno: Escenarios de los Refugiados Guatemaltecos, 1981-1997," *Mesoamérica* 18, no. 34 (1997): 559-582.

⁵⁷⁵ Robin Davies, "UNHCR at the Crossroads: Who's in the Driving Seat?," *Forced Migration Review*, October 1996.

⁵⁷⁶ Ibid

as “the first year in a decade of repatriation”.⁵⁷⁷ As such, refugees were increasingly returning, but under duress because it was in their best interest to do so even though the conditions were not safe.⁵⁷⁸ It was in this context that Dennis McNamara, Director of the UNHCR’s International Protection Division, had echoed that the UN agency under certain circumstances would support imposed returns in less than optimal situations.⁵⁷⁹ As the idea of ‘voluntariness’ in return was weakening, others played with ideas such as ‘mandatory non-voluntary return’ and ‘safe and sustainable return’ in situations where host countries were unable to guarantee the safety of refugees as the conditions of asylum had become “more dangerous and debilitating” than those in the countries of origin.⁵⁸⁰

Indeed, a UNHCR officer had also argued for the use of “action-orientated approach” wherein cessation clauses could be used against refugees who vetoed their return, drawing heavy criticism from UNHCR brass.⁵⁸¹ However, what did not change was there had been an ongoing redefinition of the meaning of voluntary repatriation and the ‘voluntariness’ aspect had been increasingly losing ground as it became clearer that this was an inadequate framework through which to solve the new refugee

⁵⁷⁷ UNHCR, "Statement by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees, International Conference on National and International Refugee Protection, Washington D.C., 7-9 December 1997.

⁵⁷⁸ Office of the United Nations High Commissioner for Refugees, *The State of the World's Refugees, 1997-98: A Humanitarian Agenda* (Oxford University Press, 1997): 92, 148 and John R. Rogge, *Repatriation of Refugees: A Not-so-simple "Optimum" Solution* (University of Manitoba, Disaster Research Unit, 1991): 10.

⁵⁷⁹ Dennis McNamara, UNHCR Director for International Protection. Speech in Washington cited in Chimni, ‘From resettlement to involuntary repatriation’, 63-64.

⁵⁸⁰ Bayefsky and Doyle, "Sustainable Refugee Return: A Report of a Workshop at Princeton University, 13-14 February 1998": 23-24 cited in Nina Fraiha de Faria, "Dilemas e Impasses da Integração dos Refugiados Venezuelanos no Brasil Contemporâneo" (2020).

⁵⁸¹ Peter van Krieken, "Repatriation of Refugees under International Law," *Netherlands Yearbook of International Law* 13 (1982): 93-123.

problems that were emerging.⁵⁸² The space for asylum was eroding as international actors mainly Western states experimented with different ways to abscond their refugee protection mandates. While some sought ways to build barriers between potential asylum seekers and their borders, others explored ways to ensure repatriations without out rightly skirting the 1951 Convention.⁵⁸³ By this time, the UNHCR had manoeuvred its way into reasserting the importance of voluntariness in repatriations.⁵⁸⁴

Certainly, during this period, a notable shift occurred in the discourse as Western states increasingly regarded refugee movement through a lens of international security. The corresponding protection response departed from the previous globalist humanitarian principles advocated by the West in the aftermath of World War Two. This shift was highlighted in the 1991 Security Council statement concerning Kurdish refugees fleeing Iraq, where the situation was portrayed as “cross border incursions” posing a threat to “international peace and security.”⁵⁸⁵ It has also been documented that the idea to ‘voluntary’ repatriate *en masse* Iraqi Kurds was heavily influenced by US military interests.⁵⁸⁶ Refugee displacement had become unequivocally regarded as an international security concern, leading to the pursuit of repatriation as a durable

⁵⁸² Long, ‘The point of no return’, 104.

⁵⁸³ James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2021): 279-301 and; Matthew J. Gibney and Randall Hansen, *Deportation and the Liberal State: The Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany, and the United Kingdom* (UNHCR Evaluation and Policy Analysis Unit, 2003)..

⁵⁸⁴ UNHCR, ‘Conclusion No. 81 (XLVIII) – 1997’.

⁵⁸⁵ UN Security Council, "Security Council Resolution 688 (1991) [Iraq], 5 April 1991," S/RES/688 (1991).

⁵⁸⁶ Long, ‘The point of no return’, 107.

solution, primarily due to its potential to reaffirm state authority.⁵⁸⁷ In the instance of the displacement of persons from former Yugoslavia into Europe, temporary protection regimes were enacted with the reasoning that at the end of the war and return to stability, these ‘temporary’ refugees would return back to their homelands.⁵⁸⁸ Repatriation was seen as the only solution as with their stay only temporary, these refugees were effectively barred from the possibility of resettlement or local integration.

As the security and political interests of states, particularly Western states increasingly took precedence over questions surrounding international protection, the place of ‘voluntariness’ in repatriations and the voices of refugees took the back scene. Evidence of this can be seen in the difference between the initial draft of the voluntary repatriation UNHCR Handbook completed in 1993 and the final version. The initial draft included references to engaging refugees in the process of repatriation in a possible quadripartite process.⁵⁸⁹ However, the final text published in 1996 only made reference to informing refugees of the process of repatriation, reinforcing the position of tripartite agreements between hosting states, countries of origin and the UNHCR.⁵⁹⁰ This ultimately sidelined the refugee whose voluntary choice to return was supposed to have been the deciding factor in this process.

⁵⁸⁷ Feller, ‘The evolution of the international refugee protection regime’, 134-135.

⁵⁸⁸ Fitzpatrick, Joan. "Temporary Protection of Refugees: Elements of a Formalized Regime." *American Journal of International Law* 94, no. 2 (2000): 286.

⁵⁸⁹ Zieck, ‘ UNHCR and voluntary repatriation of refugees’, 119-120.

⁵⁹⁰ UN High Commissioner for Refugees (UNHCR). *Handbook - Voluntary Repatriation: International Protection*. January 1996.

By the end of the 1990s, the regime of protection had moved to imposed returns with forcible repatriations disguised as ‘voluntary’, and the UNHCR acquiescing to state pressure as high level UNHCR officials actively participated in designing behind closed doors, handbooks on imposed returns.⁵⁹¹ This was exemplified in the forcible repatriation of Burundian and Rwandan refugees from the Congo DRC and Tanzania, and the second attempt to repatriate Rohingya refugees back to Myanmar.⁵⁹² The UNHCR had a vested interest to justify these returns as ‘safe returns’ or as returns wherein the UNHCR’s involvement had been under circumstances beyond their control.⁵⁹³ However, critics at the time highlighted the complicity of the UNHCR in violating internationally agreed standards of refugee protection,⁵⁹⁴ throwing doubts on the expediency of voluntary repatriations in a post-Cold War era.

Similarly, to the resistance to the changes in voluntariness in the early 1980s, the idea of ‘safe return’, and the conceptualization of voluntary repatriation as a durable solution continued facing resistance given that for many refugees, perceptions of home had changed over time, and home had become for many, where they made it to be.⁵⁹⁵ For others the concept of home was changing constantly as they frequently moved between host and country of origin depending on the security situations and other

⁵⁹¹ Long, ‘The point of no return’, 122-123

⁵⁹² Davies, Robin. "UNHCR at the Crossroads: Who's in the Driving Seat?" Forced Migration Review, October 1996.

⁵⁹³ Long, ‘The point of no return’, 133

⁵⁹⁴ Chimni, ‘From resettlement to involuntary repatriation’, 55-73.

⁵⁹⁵ Tunga Tarodi, *Revisiting Home: Tibetan Refugees, Perceptions of Home (Land) and Politics of Return* (Bangalore, India, 2011): 3 -4.

complex reasons.⁵⁹⁶ Depending on whether they were older, younger or second class generation of refugees, home meant something completely different from return.⁵⁹⁷

At the turn of the century, repatriation became connected with the idea of 'peacebuilding' as Western states saw repatriation as an opportunity to rebuild what they considered as peace in conflict zones. The ulterior motive was because this offered a solution to the pressure of financing resettlement and integration packages. Both positions wide off the mark and not reflected by the reality of the failure of attempts at repatriating refugees.⁵⁹⁸

Today, the conceptualization and practice of voluntary repatriation continues to be mired in controversies as states in attempts to evade commitments under the Convention, continue to mask forced returns as voluntary in the face of inherent.⁵⁹⁹ While refugees retain the option to return on their own accord facilitated by the UNHCR or states, the practice of voluntary repatriation still prioritizes state interests over the protection of refugees. The interpretation of the legal framework pertaining to voluntary repatriation by both the UNHCR and states presents concerns due to its

⁵⁹⁶ Zetter, Roger. "Refugees and Their Return Home: Unsettling Matters." *Journal of Refugee Studies* 34, no. 1 (2021): 10-11.

⁵⁹⁷ Žíla, Ondřej. "The Myth of Return: Bosnian Refugees and the Perception of 'Home'." *Geographica Pannonica* 19, no. 3 (2015): 138-139.

⁵⁹⁸ Afghanistan Research and Evaluation Unit (AREU). "Taking Refugees for a Ride: The Politics of Refugee Return to Afghanistan." December 2002.

⁵⁹⁹ Natasha Yacoub, "Voluntary Repatriation: A Thinly Veiled Durable Solution for Refugee Women," *Voelkerrechtsblog*, March 8, 2023.

reliance on a limited set of legal norms, which tend to obscure the intricate socio-political nature of voluntary repatriation and the processes involved.⁶⁰⁰

To summarize, the evolution of voluntary repatriation within the international refugee protection framework has consistently been intertwined with geopolitical and strategic security considerations, driven by the security and political priorities of states, rather than by humanitarian considerations or the well-being of refugees. This much is true in this analysis of the development of the norm of voluntary repatriation. Where opposition to repatriation did not align with the political interests of states, it was discouraged, and where repatriation was in the interest of the state, it was encouraged. Today, this is still true. When the Global Compact for Refugees states that repatriation is the preferred option for refugees, what states are actually saying is that ‘repatriation is in their best interest’.

Yet, to fully grasp the essence of the norm of voluntary repatriation, it is equally essential to recognize the significance of the Office of the High Commissioner for Refugees, which serves as the steward for durable solutions to the problem of refugees.

5.3.4 Voluntary Repatriation and the Mandate of the UNHCR

The mandate of the UNHCR when it comes to voluntary repatriation has developed and been refined over the decades through practice, instruments and texts, and extends today beyond just facilitating return, to meaningful involvement in providing assistance and securing the protection of returnees.⁶⁰¹ Its role is grounded in General Assembly Resolution 428 (V) of 14 December 1950 on the adoption of the statutes of

⁶⁰⁰ Ibid.

⁶⁰¹ UN High Commissioner for Refugees (UNHCR). Handbook - Voluntary Repatriation, 5.

the UNHCR which called on state cooperation with the High Commissioner for Refugees in the performance of its functions including “assisting the High Commissioner in efforts to promote the voluntary repatriation of refugees.”⁶⁰² This Resolution also tasks the UNHCR to assist governmental and “private efforts to promote voluntary repatriation”.⁶⁰³

The 1951 Convention and the 1969 OAU Convention on refugee problems in Africa are also relevant to the statutes of the UNHCR. While the 1951 Convention does not address voluntary repatriation directly, the Art. 33 provision on *non-refoulement* prohibits states from returning refugees to territories where they may be exposed to persecution. The 1969 OAU Convention dedicates an entire Article to the principle of voluntary repatriation. The essential voluntary character of repatriation which is a cornerstone of the UNHCR’s work is first highlighted in the 1969 Convention (Art. 5(1)). Other provisions regarding safe return and collaboration between host and countries of origin, on the need for effective resettlement and on the prohibition against persecuting returnees are all fundamental to the work of the UNHCR. In particular, Art. V (5) requests for assistance from “voluntary agencies and international and intergovernmental organizations” to facilitate the return of refugees.⁶⁰⁴

⁶⁰² UNGA, ‘Statute of the Office of the United Nations High Commissioner for Refugees’, art. 2(d).

⁶⁰³ Ibid., Chapter II (8) (C).

⁶⁰⁴ ‘Convention Governing the Specific Aspects of Refugee Problems in Africa’, art. V(5).

Subsequent UNGA Resolutions have highlighted the humanitarian and non-political nature of the UNHCR's function in seeking durable solutions including voluntary repatriation,⁶⁰⁵ even though in practice, the UNHCR has often been far from apolitical.

The UNGA as a matter of expediency during the 1961 Algerian repatriation operation specifically requested that the UNHCR assist in rehabilitating refugees in their countries of origin.⁶⁰⁶ This resolution is often quoted as evidence of an international consensus not only on the principle of voluntary repatriation, but also on the role of the UNHCR in repatriation schemes.

The most important developments underscoring the role of the UNHCR are the decisions of its Executive Committee. While not legally binding on states, they fall under the category of 'soft law' and as such are not only important, but signify an international consensus for the practice of voluntary repatriation and consequently the role of the UNHCR. These decisions have made important contributions to the principle of voluntary repatriation: reaffirming the voluntariness in repatriations; the safety of returns, the provision of guarantees of amnesties for returnees and advising returnees of these guarantees as well as the prevailing conditions in their country of origin; cooperation with hosting states and countries of origin; accessing and monitoring the repatriation procedures; and ensuring that resettlement is effective.⁶⁰⁷

⁶⁰⁵ United Nations High Commissioner for Refugees (UNHCR). A/RES/72/150, para 39.

⁶⁰⁶ James M. Read, "The United Nations and Refugees: Changing Concepts," *International Conciliation* 34 (1961): 5.

⁶⁰⁷ UNHCR. Conclusions Specific to Voluntary Repatriation: - No. 18 (XXXI) – 1980; No. 40 (XXXVI) – 1985; No. 90 (LII) – 2001; No. 101 (LV) – 2004; and No. 114 (LXVIII) – 2017.

The role of the UNHCR has been that of facilitating and promoting repatriation. This ideally should mean that the UNHCR facilitates processes of repatriation only when it is satisfied that the desire to return is voluntary. However, the UNHCR in the past has aired the doctrine of involuntary return to highlight some practical limitations that might force it to acknowledge the possibility of involuntary repatriation.⁶⁰⁸ The desirous practice is one which favors the doctrine that if the legal and practical conditions within a state changes, and refugees as a result, willfully choose to go back to their country of origin, then the UNHCR can and should promote and protect the repatriation of refugees in both the categories of organized and spontaneous returns.⁶⁰⁹ Once in their country of origin, the UNHCR has the mandate to ensure that the government of the country of origin respects the rights of these refugees as provided for by international law. On the other hand, if there is no change in the legal and practical conditions in the home country, the UNHCR has no mandate to try and cause such a change. This would be in contravention of its mandate. The task to create the necessary conditions preceding voluntary repatriation should be the task of the international community, and not that of the UNHCR.⁶¹⁰

To sum, the 1951 Convention when read together in conjunction with the customary practices of states, developments in international human rights law, and general principles of international law suggests that a principle of voluntary repatriation exists under international law. Part of the evidence of this is the introduction of voluntary repatriation in the 1969 OAU Convention. While this 1969 Convention is only binding

⁶⁰⁸ Chimni, 'From resettlement to involuntary repatriation', 55.

⁶⁰⁹ d'Orsi, 'Sub-Saharan Africa: Is a New Special Regional Refugee Law Regime Emerging', 1071.

⁶¹⁰ Ibid.

on African states that are party to it, because it is referenced in General Assembly resolutions and UNHCR EXCOM decisions, it can be inferred that the intention is for such a principle to have a legal character under international. This customary practice is buttressed by the *opinio juris* of states evidenced in the decisions and resolutions of the UNHCR Executive Committee and the United Nations General Assembly.

5.3.5 The Practice of Voluntary Repatriation

In international refugee law, the underlying source of refugees' distress is perceived as the deprivation of state-based protection.⁶¹¹ This explains why repatriation is considered as a final solution, that is, to repair this loss of statehood. The main aim of repatriation it is claimed, is to empower the refugee and address their state of exile by allowing them to fully exercise and express their fundamental freedoms and rights, restoring their citizenship. It is as stated by the UNGA the only option which strengthens the bond between a refugee and their country of origin provided their safety is not endangered.⁶¹² The promotion and monitoring of this process is the responsibility of the UNHCR in coordination with host and countries of origin.⁶¹³

The reality however is that states in the global south remain peripheral, dependent, and autocratic, but nevertheless their 'authoritarian leaders' are supported by the global north as 'partners' when it comes to addressing, through 'deals' the issue of refugees, at the expenses of the latter. The recent examples of the 2015 deal between the European Union and Turkey to host Syrian refugees, the EU sponsored agreement between Italy and Libya in 2017, the 2022 deal struck between the UK and Rwanda to

⁶¹¹ John Hope Simpson, "The Refugee Problem," *International Affairs* (Royal Institute of International Affairs 1931-1939) 17, no. 5 (1938): 607-628.

⁶¹² van Krieken, *Repatriation of Refugees under International Law*, 93.

⁶¹³ General, Assembly Resolution 428 (v) 14 December, 1950

deport asylum seekers to the latter, and the EU deal with Tunisia in 2023 to manage migration, reflect the asymmetrical nature of the relationship between countries in the global north and those in the global south, and how these relationships are exploited to exert pressure on countries of origin and transit to accept the return of asylum seekers and migrants to their territories and to prevent asylum seekers and migrants from reaching the borders of the affluent states.

Any discussion on the practice of voluntary repatriation must start with an assessment of the ‘voluntariness’ in repatriation which is well explained in UNHCR handbooks as well as in art. 5 of the 1969 OAU Convention.⁶¹⁴ The first and most important component involves the choice of returning, a process that must be of one’s own volition. This entails ensuring that refugees possess comprehensive knowledge regarding the conditions prevailing in their home countries, that their decision should remain uninfluenced by any ‘push factors’ originating from the host country, but rather should be prompted by constructive ‘pull factors’ stemming from their country of origin. The conditions under which this takes place should be safe and dignified, and by safety the understanding is that the focus should not only be on repatriation itself, but also on the conditions under which refugees are resettled, that is, effective resettlement.⁶¹⁵ Dignity means, throughout the repatriation process, refugees should receive fair treatment, with their return being unconditional, and the process conducted at their preferred pace. That is, they should be treated respectfully by authorities, and once returned, their rights should be restored in full. And, safety should be understood

⁶¹⁴ UNHCR, ‘Handbook -Voluntary Repatriation: International Protection, January 1996’. ‘Convention Governing the Specific Aspects of Refugee Problems In Africa’.

⁶¹⁵ Richard Black, "Return of Refugees: Retrospect and Prospect," in *Palestinian Refugee Repatriation*, ed. Rex Brynen (Routledge, 2006), 23.

as taking place under conditions of physical security (protection from mines and armed attacks), legal safety (assurances of safety, freedom from prosecution or fear of prosecution, amnesties and citizenship status), and material security (access to property, land and a means of livelihood).⁶¹⁶ Notwithstanding, repatriation should not only be voluntary, but the application, timing and management of repatriations have to be taken into consideration, as well as, the state of mind of the refugee.⁶¹⁷

Voluntary repatriation can take two forms: spontaneous and organized. With spontaneous repatriation, also referred to as self-repatriation, refugees return on their own, and the UNHCR only provides assistance once they have returned to their country of origin.⁶¹⁸ On the other hand, organized repatriation involves the UNHCR providing return means, which includes transportation and other necessary support for the refugees' journey back home. Whether the repatriation is organized or spontaneous, should not preclude the responsibility of the UNHCR or interested states in the provision of assistance and protection for refugees during this process of repatriation⁶¹⁹

The voluntariness in repatriations is absolute and is stated in the 1969 OAU Convention as well as UNHCR Executive Committee Decisions.⁶²⁰ The challenge of

⁶¹⁶ ARC (Action for the Rights of Children). (1999). Durable Solutions (Voluntary Repatriation) 1/99 Page 1 Module Two: Foundation-Durable Solutions” Voluntary Repatriation.

⁶¹⁷ F. Hansen, J. J. Mutabaraka, and P. Ubricao, *Repatriation, Resettlement, Integration: A study of the three refugee solutions. The Niapele Project* (2008), 5.

⁶¹⁸ David K. Androff, *Refugee Solutions in the Age of Global Crisis: Human Rights, Integration, and Sustainable Development* (Oxford University Press, 2022), 52.

⁶¹⁹ UNHCR. Handbook Voluntary Repatriation: 19.

⁶²⁰ ‘Convention Governing the Specific Aspects of Refugee Problems in Africa’, Art V (1). UNHCR, Conclusions Specific to Voluntary Repatriation: - No. 40 (XXXVI) – 1985.

determining whether “voluntariness” is genuine or not underscores the necessity for the actors to objectively assess the refugees’ circumstances.⁶²¹ An important factor in ascertaining voluntariness is the legal status of the refugees in their host country. When refugees are legally granted protection, and have the option to settle, their decision to repatriate is more likely to be genuine, free and voluntary. However, if their rights are not recognized, and they face pressures, restrictions, and confinement in closed camps, any decision to return may not truly reflect their free will.⁶²² At the same time, the objectivity of the UNHCR in assessing ‘voluntariness’ has been questioned. As early as the 1970s as repatriations were increasingly becoming common, the UNHCR sought to not only assist but to also initiate ‘voluntary’ returns.⁶²³ During this period, it became harder to tell if many repatriations were truly voluntary or not.⁶²⁴ In the most optimistic scenarios, it had become a straw to clutch at, and at worst, resembled an illusion. The issue of voluntariness in returns still remains a subject of much debate and criticism today. Practice too often has raised doubts as to whether when refugees choose to return home, they are doing so of their own free will. But this is not a new phenomenon as the examples below demonstrate.

Unlike numerous studies that narrow their focus to one or two specific case studies, this work employs a distinct style. It aims to underscore the extensive prevalence of the ‘voluntariness’ issue in repatriations by employing a chronological approach, drawing upon multiple instances spanning from the 1960s to contemporary times for

⁶²¹ Mollie Gerver, "Refugee Repatriation and Voluntariness," *The International Journal of Human Rights* 19, no. 1 (2015): 48-49.

⁶²² UNHCR, Handbook Voluntary Repatriation, 10.

⁶²³ Long, ‘No point of return’, 88.

⁶²⁴ Ibid

illustrative purposes. Notably, the examination of the voluntariness aspect in repatriations is not novel, having been explored by numerous scholars previously.⁶²⁵ Therefore, the intention is not to revisit a well-researched area, but rather to substantiate the concerns surrounding the practice of voluntary repatriation by extensively referencing instances from the existing body of literature. Through a compilation of diverse examples, this study aims to comprehensively illuminate the challenges that have been consistently highlighted in the practice of voluntary repatriations.

There have been longstanding questions with regards to the ‘voluntariness’ of repatriations in Africa given that African states have historically used different methods to coerce refugees to return to their countries of origin, as well, as other political, economic and social forces which have been at play, including the problem of guaranteeing that returnees will be safe upon their return.⁶²⁶ The capability and responsibility of African governments to be able to ensure that such return is indeed safe and guaranteed, and properly monitored has been a contested issue.⁶²⁷ This explains why it is contended that voluntary repatriation can only be promoted after the circumstances of change in the country of origin are at a level that justifies the end of the cessation clause.⁶²⁸ To assess ‘voluntariness’ requires an impartial human rights

⁶²⁵ Gerver, ‘Refugee Repatriation and Voluntariness’, 2015; Long, ‘The point of no return’, 2013’, Chimni, ‘From Resettlement to Involuntary Repatriation’, 2004; Chetail, ‘Voluntary Repatriation in Public International Law’, 2004; Zieck, ‘UNHCR and Voluntary Repatriation of Refugees,’ 1997; Bascom, ‘The Dynamics of Refugee Repatriation,’ etc.

⁶²⁶ Okoth-Obbo, ‘Thirty years on’, 120.

⁶²⁷ Ibid

⁶²⁸ Takahashi, ‘The UNHCR handbook on voluntary repatriation’, 593 – 602.

assessment of the conditions in the country of origin as well as determining whether the human rights conditions in the host country have also dropped. However, how such an impartial process can be conducted remains the issue, and by who?⁶²⁹ This should normally be the role of the UNHCR, but as highlighted earlier in this work, the UNHCR's objectivity in questions of repatriations has come under much criticism.⁶³⁰

But this is not only an African problem, globally, practices by states to coerce refugees to choose to voluntary return is well documented as will be illustrated in a chronological manner in the proceeding paragraphs.

Perhaps, no starting point is more fitting to question the 'voluntariness' in repatriations, than the complicity of the UNHCR in the repatriation of Rohingya refugees in 1978 from Bangladesh back to Burma despite the UNHCR being aware that Baghladeshi authorities had been intimidating and rationing food which had led to the deaths of about 10,000 refugees. To put into context, the UNHCR had to relocate personnel who objected to these repatriations and the chief nutritionist contracted by the UNHCR chose to resign.⁶³¹ The UNHCR claimed that it participated in the repatriation with the belief that conditions for the Rohingya in Bangladesh would improve. They also held that they had had some doubts about the extent of persecution faced by the Rohingya from the Myanmar state. The reality however is that the "UNHCR had in effect moved away from above all protecting refugees...towards making a subjective assessment about how reasonable it was not to return home."⁶³²

⁶²⁹ Ibid

⁶³⁰ Gerver, 'Refugee repatriation and voluntariness', 32.

⁶³¹ Long, 'The Point of No Return', 90-91.

⁶³² Ibid., 91.

These new style subjective and questionable repatriations are still common in repatriation policies today.

When evaluating the potential solutions for refugees, policymakers and authorities often weigh various factors, including administrative feasibility, economic considerations, social dynamics, and geopolitical concerns. In the case of Congolese refugees in Tanzania in 1984, voluntary repatriation was prioritized over all other solutions. The emphasis on creating conducive situations to encourage voluntary repatriation was accentuated due to the perception that integration was deemed incompatible with the objectives and capacities of the local administration.⁶³³ There had been an option to relocate the refugees, but the choice was taken not to relocate them as this was considered a more expensive option. Also, relocating some refugees inland in Tanzania was considered as undercutting and compromising repatriation efforts which authorities claimed “must always remain the first and preferred option for a durable solution”.⁶³⁴

In another instance of states engaging in deceptive maneuvers, reduction of food rations in the camps of Burundian refugees in Tanzania forced many of them to choose to voluntarily return. This came after then Minister of Home Affairs of Tanzania, Mrema, had declared that Tanzania could not continue to harbor Burundian refugees indefinitely, and had asked for them to leave. Tanzanian authorities had put in place such unbearable conditions in the camps, that by 1996 many Burundian refugees chose

⁶³³ Nindi, ‘Africa’s Refugee Crisis in a Historical Perspective’, 103.

⁶³⁴ Ibid

to return.⁶³⁵ In that same year, Tanzania gave an ultimatum to Rwandan refugees, putting a deadline before which they were supposed to choose to ‘voluntarily’ return to their countries of origin.⁶³⁶

Consider then again the case of individuals returning to post-conflict Bosnia. Their experiences with the Commission on Real Property Claims, established in accordance with the 1995 Dayton Peace Accord, revealed a noteworthy trend: the decisions rendered by this commission often were not executed by the respective local authorities, endangering the safety of the returnees. But this was not unexpected because the process of return had been questioned prior as there had been uncertainties about the conditions under which they were returning.⁶³⁷ However, returnees were provided with false promises in efforts to encourage them to choose return. Further, despite the efforts by UNHCR to encourage returns, by the end of 1999, only about 3% of the minority population forced to flee had returned.⁶³⁸

In the mid-1990s, the UNHCR had conceded that much of the repatriation of Rohingya refugees from Bangladesh to Myanmar were in less than optimal conditions and did not necessarily meet the standard of ‘voluntariness’ as many of the refugees had not wanted to return. Also, the conditions that led to displacement from Myanmar in the

⁶³⁵ James Milner, *Refugees, the State and the Politics of Asylum in Africa* (2009), 108. Marc Sommers, *Fear in Bongoland: Burundi Refugees in Urban Tanzania* (Berghahn Books, 2022), 102.

⁶³⁶ D’Orsi, ‘Is a New Special Regional Refugee Law Regime Emerging?’, 1077.

⁶³⁷ "Bosnian Property Commission Struggles to Fulfill its Potential," *The Forced Migration Monitor*, No. 25 (New York: Open Society Institute, September 1998), 1-3. Cited in Chimni, ‘From resettlement to involuntary repatriation’, 63.

⁶³⁸ J. S. Sorensen, "International Crisis Group, Is Dayton Failing: Bosnia Four Years after the Peace Agreement; International Crisis Group, Reality Demands: Documenting Violations of International Humanitarian Law in Kosovo 1999; David Chandler, Bosnia-Faking Democracy after Dayton," *Journal of Ethnic and Migration Studies* 27, no. 3 (2001): 551-552.

first place had not objectively changed.⁶³⁹ Around this same time, a significant number of Nicaraguan refugees were forced to return from Honduras because of insecurity in their camps.⁶⁴⁰ Life in exile for many refugees has often been rife with dependency, frustration and misery, necessitating many to want to return to their countries where insecurity persists. Under such circumstances like in the case of Rwandan refugees returning back from Sudan and Congo DRC in the mid-1980s, it is hardly adequate to claim that they exercised a free choice.⁶⁴¹

Voluntary repatriation has occasionally served as a pretext for other actions that result in the reduction of the protection offered to refugees. In 2002, Rwandan authorities permitted members from a Congolese rebel group to meet with refugees from the Democratic Republic of the Congo. This meeting was intended to subtly encourage the refugees' return back to Congo. These refugees were subjected to threats and warnings that provisions such as camp services and transportation back to their home country would be terminated for those who chose not to agree with the repatriation process.⁶⁴² We notice similar tactics in 2000 in Sudanese camps in Uganda where starvation and hostility forced many to make the choice to return.⁶⁴³ Similarly, in the Buduburam refugee camp in Ghana which habited Liberian refugees, assistance to

⁶³⁹ Davies, 'UNHCR at the Crossroads: Who's in the Driving Seat?', 1996.

⁶⁴⁰ United Nations. Office of the United Nations High Commissioner for Refugees. *The State of the World's Refugees, 1997-98: A Humanitarian Agenda*. Oxford University Press, 1997. 148.

⁶⁴¹ Jeff Crisp, "Ugandan Refugees in Sudan and Zaire: The Problem of Repatriation," *African Affairs* 85, no. 339 (1986): 163-180.

⁶⁴² d'Orsi, 'Is a New Special Regional Refugee Law Regime Emerging', 1064

⁶⁴³ Ibid. See Lucy Hovil, "Self-settled refugees in Uganda: An alternative approach to displacement?," *Journal of Refugee Studies* 20, no. 4 (2007): 604-605.

these refugees was reduced so as to force them to consider the option of repatriation.⁶⁴⁴ Unfortunately, idealized images of return have often justified actions by states compelling refugees to return back to their countries of origin.

In certain instances, refugees who had previously made the decision to voluntarily repatriate to their countries of origin, subsequently reverted to returning to their host countries after the realization that the conditions in their homelands were not as favorable as expected. This was the case with the attempts to repatriate Liberian refugees from Ghana in 2004. Not only did many of the refugees refuse the option to return because the conditions of repatriation were less than optimal as well as a consequence of the inadequate support for reintegration and very low incentive packages coupled with a preference for resettlement, but, for those who chose to return to Liberia, the conditions were not as expected.⁶⁴⁵ Upon return to Liberia, many found it difficult to integrate and construct new lives in Liberia.⁶⁴⁶ At other times, refugees felt unwelcome in host countries due to a lack of access to schools, to health care, and to the labor market, leading to tougher experiences of integration in the new community and causing many to consider repatriation as preferable, as was the case of these refugees in Ghana.⁶⁴⁷

⁶⁴⁴ Shelly Dick, "Review of CORD community services for Congolese refugees in Tanzania" (Geneva: United Nations High Commissioner for Refugees, 2002), 8.

⁶⁴⁵ Augustine Tanle, "Refugees' reflections on their stay in the Buduburam Camp in Ghana," *GeoJournal* 78 (2013): 879.

⁶⁴⁶ Naohiko Omata, "Repatriation is Not for Everyone": The Life and Livelihoods of Former Refugees in Liberia (UNHCR, Policy Development and Evaluation Service, 2011), 2.

⁶⁴⁷ International Refugee Rights News, « Refugee Protests derailed in Ghana », vol. 4, issue 1, April 2008

Interestingly enough, the language of voluntary repatriation has been used in cases where the returnees are not necessarily refugees, showing desperate attempts by states to justify all forms of forced returns as voluntarily. For instance, in 2010, the French government under Sarkozy repatriated thousands of Romas to Romania and Bulgaria. When criticized about this, Sarkozy claimed the returns were voluntary.⁶⁴⁸ As a matter of fact, it is well documented that none of the voluntary repatriation schemes in Europe meet the criteria of ‘voluntariness’ as it is generally impossible for returnees to make informed opinions, and in reality are simply less painful alternatives to forced deportation.⁶⁴⁹ Usually, they are not in response to a desire by refugees to want to return to their home countries, but because of public or political pressure to remove ‘excessive’ numbers of asylum seekers.⁶⁵⁰ This in effect, demonstrates the true nature of these programs. A case in point is the attempts by the government of the United Kingdom in 2010 to set up ‘reintegration centers’ for child asylum seekers in Afghanistan with the understanding that once those centers were set up, they could start forcibly removing child asylum seekers from the UK to Afghanistan. Some of the children faced with this development choose to ‘voluntarily’ return with some support rather than to be forcibly removed.⁶⁵¹

Interviews with Afghani refugees returning from Pakistan by Human Rights Watch also illustrates a policy of deliberate repatriations by Pakistani authorities under the

⁶⁴⁸ Frances Webber, "How voluntary are voluntary returns?" *Race & Class* 52, no. 4 (2011): 99.

⁶⁴⁹ *Ibid.*, 103.

⁶⁵⁰ *Ibid*

⁶⁵¹ *Ibid*

guise of voluntary repatriation.⁶⁵² Some of the tactics employed included; placing limits on means of generating income and work activities, and the provision of incomplete information to them about the conditions in their country of origin.⁶⁵³

Threats of closure of camps are a preferred tactic by many states. Since 2016, Kenyan authorities have threatened to close the Dadaab and Kakuma camps which host hundreds of thousands of refugees, the majority from Somalia, South Sudan, and the Democratic Republic of Congo.⁶⁵⁴ In response, the UNHCR engaged in negotiations for a "sustainable rights-based measures" plan, primarily aimed at finding solutions, with one of the key objectives being the voluntary repatriation of thousands of refugees. Between 2014 and 2017, about 68,000 Somalian refugees from the Dadaab camp were voluntarily repatriated with the assistance of the UNHCR.⁶⁵⁵ This, even coming after the Kenyan High Court had ruled that the closures of the camps were unconstitutional.⁶⁵⁶ Showing yet another example where states engage in unscrupulous actions to create conditions where refugees have no choice but to choose repatriation. Similarly, Uganda began encouraging the repatriation of Rwandan refugees citing

⁶⁵² Human Rights Watch, "Pakistan: Coercion, UN Complicity in Mass Forced Return of Afghan Refugees," February 13, 2017.

⁶⁵³ Ibid

⁶⁵⁴ Nhial Deng, "Refugees in Kenya's Kakuma and Dadaab Camps Are Still in Limbo," Al Jazeera, May 28, 2022.

⁶⁵⁵ Norwegian Refugee Council, "A Review of the Legal Framework Relating to the Proposed Closure of the Dadaab Refugee Camp and Repatriation of Somali Refugees," Thomson Reuters Foundation, November 2017; 8-9.

⁶⁵⁶ Ibid

decrease in donor funding, lack of adequate burden sharing in the region, regional geopolitics and increasing security concerns.⁶⁵⁷

The 12 Montagnard who voluntarily returned to Vietnam in 2017 according to the UNHCR had not been offered minimum standards to guarantee their protection in Cambodia. Rather, they had been completely barred from accessing Cambodia's asylum and refugee regime.⁶⁵⁸ While in this case Cambodian authorities may not have forcefully returned them, the conditions created in Cambodia for these asylum seekers left them with no choice but to choose to return. Likewise, in 2018, India's Supreme Court's decision to endorse the Government's request to return Rohingya refugees to Myanmar despite continuous reports of the persecution of Rohingyas in Myanmar came under severe scrutiny. The Supreme Court's decision was based on the claim by the Government that the refugees had consented to repatriation without taking into consideration that these men had been jailed for three months for illegal entry and subsequently held in a detention center for an additional six years in suboptimal conditions.⁶⁵⁹

Further, efforts at encouraging repatriations often treat refugee groups as homogeneous without paying specific attention to the political and socio-economic differences between different refugees.⁶⁶⁰ By treating them as homogeneous, host

⁶⁵⁷ Frank Ahimbisibwe, "The Politics of Repatriation: Rwandan Refugees in Uganda, 2003-2017" (2017), 13.

⁶⁵⁸ Amnesty International, "Cambodia: Refoulement and the Question of 'Voluntariness'" (July 2015), ASA 23/2157/2015.

⁶⁵⁹ Aman Vijayaraghavan and Hamsa Vijayaraghavan, "The Illusion of Consent – Voluntary Repatriation or Refoulement?" Migration & Asylum Project (M.A.P), New Delhi, India, September 2019,

⁶⁶⁰ Omata, 'Repatriation is Not for Everyone', 25.

countries often engage in actions to encourage repatriation which for some members of the group may not be problematic, but for other members of the group, may infringe on their right to seek and enjoy asylum and not to be *refouler*. Oftentimes, the debate is not in those cases where there is clear evidence that the refugees have been forced to return home, but usually when it is claimed that the choice to return is voluntary but there question marks as to whether the conditions were optimal.⁶⁶¹ This is commonplace with Syrian refugees in Turkey. It is always claimed by Turkish authorities that they are ‘voluntarily’ choosing to return despite surveys indicating that the majority do now want to return back to Syria.⁶⁶²

While this is not an exhaustive lists of voluntary repatriations, they are some of the most widely covered instances of repatriations involving the UNHCR and host and origin countries, what is often referred to in literature as tripartite repatriation agreements. Clearly what these few examples demonstrate is the concern throughout the historical timeline from the 1960s to present, of the abuse of ‘voluntariness’ and actors engaging in different tactics to encourage refugee repatriation under the guise of voluntary returns.

One could argue that the criticism given to the conceptual understanding of voluntary repatriation in no way means that the practice is a negative one. In fact, the UNHCR should and has the ability to play an important role in creating the necessary conditions conducive for voluntary repatriation. But the problem is the behind-the-scene powerful

⁶⁶¹ "Syrian Refugees Returning Home as Part of Turkey's Voluntary Program Compelled to Leave Due to Increasing Anti-Migrant Sentiment," Stockholm Center for Freedom, 2023.

⁶⁶² UNHCR, "UNHCR Statistical Yearbook 2021. Syrians Barometer 2021: A Framework for Achieving Social Cohesion with Syrians in Türkiye".

states that constantly turn innovative ideas to their benefit. Because the UNHCR relies on these powerful states for financial and logistical assistance, it is difficult for the UN agency to take a firm stance against them. As such, a potentially great innovation has been turned into a murky and questionable one.⁶⁶³

However, the argument offered in this work is that the failure of the UNHCR to be able to objectively monitor voluntary repatriation processes due to the overriding factor of state interests, encapsulates the fundamental challenge inherent in the practice of voluntary repatriations. Therefore, voluntary repatriation as a solution to the refugee situation simply affords states the opportunity to evade their responsibilities of granting asylum. Consequently, it is not wrong to assert that rather than voluntary repatriation, involuntary repatriation is the new norm.⁶⁶⁴

The UNHCR likes to claim that most refugees prefer to return home, but this is a stereotype rather than a statement of fact. Take for example, the account of Angolan refugees in Zambia who chose to settle in their host country rather than in their country of origin.⁶⁶⁵ When refugees do decide to return home, it is often because the conditions in their homeland are safer and better,⁶⁶⁶ but as is well documented, worsening conditions in refugee camps may precipitate the return of refugees to their countries of origin.⁶⁶⁷ The creation of conditions which lead to the repatriation of refugees is

⁶⁶³ Chimni, 'The UNHCR's Role in Voluntary Repatriation', 7.

⁶⁶⁴ Ibid, 6.

⁶⁶⁵ Oliver Bakewell, "Returning refugees or migrating villagers? Voluntary repatriation programmes in Africa reconsidered," *Refugee Survey Quarterly* 21, no. 1/2 (2002): 42-73.

⁶⁶⁶ Stein, 'Refugee Repatriation During Conflict', 19.

⁶⁶⁷ John Sorenson, *Afghan Refugees in Pakistan: Prospects for Repatriation: a Report to the Canadian International Development Agency (Disaster Research Unit, University of Manitoba, 1991)*, 80.

contrary to the internationally recognized principle of *non-refoulement* and asylum. It also contravenes the principle that a *bona fide* refugee should not be forced to return to a country in which they may suffer persecution. Actually, forced repatriation is merely another form of forced migration, with the only difference being that they are returning to their country of origin.⁶⁶⁸ To put in other words, it is hard to call it voluntary repatriation if the alternative is misery and destitution in the host country. Signing a voluntary repatriation form should not be misconstrued to mean that the refugee is exercising a free will to return.⁶⁶⁹

Another pertinent matter to address is the restricted interpretation of the practice of voluntary repatriation, particularly within the African context. Notably, this concept as delineated in the OAU convention tends to be construed within a narrow scope rather than a more comprehensive perspective. The mandate of the UNHCR covers only organized repatriation and not spontaneous repatriation.⁶⁷⁰ Because the majority of voluntary repatriations are spontaneous and take place during periods of ongoing conflicts, most of these refugees are forced to return to countries which are still experiencing the same conditions which caused their flight in the first place.⁶⁷¹ Perhaps this explains why the Council of Ministers of the OAU passed a resolution in 1975 which touched on a number of practical and legal issues which had not been mentioned in the 1969 convention, including: the conditions which would lead to implementation

⁶⁶⁸ Laura Hammond, "Examining the discourse of repatriation: Towards a more proactive theory of return migration," in *The End of the Refugee Cycle* (1999), 176-179.

⁶⁶⁹ Mollie Gerver, "Testing repatriation contracts for unconscionability: The case of refugees in Israel," *International Journal of Refugee Law* 26, no. 2 (2014): 198.

⁶⁷⁰ D'Orsi, 'Is a New Special Regional Refugee Law Regime Emerging?', 1070.

⁶⁷¹ Barry Nathan Stein, Frederick C. Cuny, and Pat Reed, eds., "Refugee Repatriation During Conflict: A New Conventional Wisdom: Papers from the Conference in Addis Ababa, Ethiopia" (Center for the Study of Societies in Crisis, 1995), 15.

of repatriation; the facilitation of the aptitude for refugees to return home with their savings and properties; and the right to return in cases of mixed marriages.⁶⁷² Nonetheless, this has not done much to improve conditions of repatriations especially as many are as a result of ‘push factors’ and conditions in host countries.

The reality is that host countries frequently display eagerness for refugees to depart, while countries of origin may anticipate their return as a symbol to the world of stability and end of conflict. Similarly, donor states express a keen interest in concluding long-standing refugee assistance programs that they financially support. In these intricate dynamics, the UNHCR often navigates a complex role within negotiations, aiming to uphold globally recognized legal and ethical principles for which it is the custodian, all while addressing the concerns of various stakeholders. Regrettably, in the most challenging instances, the United Nations' refugee agency has yielded to such pressures, actively involving itself in repatriation endeavors that significantly deviate from being secure or voluntary.⁶⁷³ When one considers that the majority of refugee producing countries like Syria (6.8 million), Afghanistan (2.8 million), South Sudan (2.3 million), Myanmar (1.2 million), DRC Congo (900,000), Sudan (800,000), Somalia (790,000), and Central African Republic (730,000) are not only affected by security issues but are often low income countries,⁶⁷⁴ the expectancy that these countries are able to effectively resettle returnees is not based in objective

⁶⁷² African Union, Voluntary Repatriation of African Refugees, 13-21 February 1975, Council of Ministers, Resolution CM/Res.399 (XXIV).

⁶⁷³ Crisp and Long, ‘Safe and voluntary refugee repatriation’, 142.

⁶⁷⁴ "Refugees by Source Country - Statistics & Facts." Statista, 2023.

reality, rather it is a callous aspiration by states and the UNHCR, one which often has fatal impacts on refugees.

Having traced the historical origins of the norm of voluntary repatriation and analyzed the questionable practice by the international community, it would not be far-fetched to contend that voluntary repatriation is a solution for the problem refugees cause states, and not a solution to the problems refugees are facing. It would also not be outrageous to claim that repatriation albeit ‘voluntarily’ does not necessarily offer protection to refugees and asylum seekers. However, this will not be the first study that makes such an assertion. This author prefers not to simply make such a claim based on the historical analysis of the securitized origins of voluntary repatriation both within the African system of refugee protection and the international protection regime, as well as its practice between the 1960s to present, but prefers to show that not only is voluntary repatriation born out of the securitization of refugees, but the norm of voluntary repatriation itself also contravenes a fundamental institution of modern society. A norm without which the formation of the modern state is less meaningful. This is the international law of asylum. That is to say, the norm of voluntary repatriation will be weighed against the right to seek and enjoy asylum, after which conclusions are made as to which of them takes precedence, and which has a questionable position under international law and in modern international society.

But before conducting this test, it is necessary to objectively identify the position of voluntary repatriation under international law. After all, it is a principle which is not yet codified under international refugee law.

5.3.6 Evaluating the Legal Character of the Principle of Voluntary Repatriation

A part of the quest of this dissertation is to attempt to identify the position of the principle of voluntary repatriation in the international protection mechanism. Often, when the principle of voluntary repatriation is discussed, its legal character is assumed. One may wonder what the purpose of this inquiry is. After all, voluntary repatriation is a common practice by states under international law. Whether the efficiency of this practice is questionable or not does not negate that it is a practice customary to states. As such, it is part of customary international law. Therefore, why is it necessary to dissect its legal character? This may be true, but if one sets out to question the legality of the principle of voluntary repatriation which is one of the main aims of this dissertation, and if one tries to juxtapose this principle against the right to seek and enjoy asylum as part of a critical exercise, then it is important that the legal character of this principle is robustly investigated. Part of the claim advanced in this dissertation is that not only is the conduct of voluntary repatriation in far too many instances questionable and in contravention of the principle of *non-refoulement* and the right of refugees to seek and enjoy asylum, but its legal position is one which has never been absolute. If this is the case, then is it time for a reassessment of the principle and practice of voluntary repatriation? The position that voluntary repatriation denotes an institutional policy largely developed by the UNHCR outside of the framework of the 1951 Convention and not an inter-state norm has also been made by Chetail.⁶⁷⁵

In order to investigate the legality of voluntary repatriation, a robust formula is needed and none is more appropriate for this test, than the legalization framework suggested by Goldstein and Abbott. While the theory of legalization has already been explained

⁶⁷⁵ Chetail, 'Voluntary repatriation in public international law: concepts and contents', 11.

in Chapter 3 of this work, to ease comprehension of the analysis provided in the proceeding paragraphs, it will be briefly explained here one more time. Simply put, legalization is a ‘*move to law*’, a specific mode of institutionalization which involves three principal variables; obligation, precision and delegation.⁶⁷⁶ Obligation means it is legally binding on states, precision that the rules are specific and delegation that the authority to interpret and implement is delegated to a neutral entity. However, legalization should not be confused with legalism. The former takes into consideration the realities of interest and power in the process as states either oppose or favor legalization based on their interests.⁶⁷⁷

As illustrated in Figure 1, legalization ranges from an ideal type wherein the properties of obligation, precision and delegation are maximized to several forms of limited or soft legalization involving one or more attributes, to another ideal type where there is a complete lack of legalization. Best described as a ‘multidimensional continuum’.⁶⁷⁸ But this move to law is never entirely coherent or uniform and the properties are always an issue of degree or gradation. Abbott suggests a typology (Table 3).

⁶⁷⁶ Goldstein et al., ‘Legalization and World Politics’, 387; Abbott, et al., ‘The Concept of Legalization’, 401.

⁶⁷⁷ Goldstein et al., ‘Legalization and World Politics’, 386

⁶⁷⁸ Abbott, et al., ‘The Concept of Legalization’, 401-402

Table 3: Abbot OPD test. (W. Abbott et al. 405-406)

Form	Obligation	Precision	Delegation	Examples
1	High	High	High	International Criminal Court
2	High	Low	High	World Trade Organization
3	High	High	Low	Montreal Protocol
4	Low	High	High/Moderate	UN Committee on Sustainable Development
5	High	Low	Low	Vienna Ozone Convention
6	Low	Low	High/Moderate	World Bank
7	Low	High	Low	Helsinki Final Act
8	Low	Low	Low	Concept of Balance of power

Form 1 represents the ideal type of legalization, while Form 8 represents the ideal type of anarchy. However, a complete lack of legalization does not mean the inexistence of a ‘*softer variance of law*’. Neither is the view adopted that even though legalization is on the rise, this increased legalization is inevitable; rather, they recognize soft law as equally important as hard law.⁶⁷⁹

To test the degree of legalization of voluntary repatriation, it will be subjected to Abbot’s typology of legalization. For the purposes of this exercise, the principle of voluntary repatriation as codified under the African refugee system will be analyzed separately from the principle of voluntary repatriation practiced under international refugee law. Although, the African system of refugee law is a part of the global refugee

⁶⁷⁹ Goldstein et al., ‘ Legalization and World Politics’, 388.

protection mechanism, it is also a distinct understanding and system of refugee protection geared toward solving the specific needs of refugees in Africa. For coherence this distinction is also important as the legality of voluntary repatriation under the African system of refugee protection is seldom criticized as it is codified in a legally binding instrument. Under the international protection regime, and as has been explained earlier in this dissertation, the legality of voluntary repatriation can be inferred from the 1951 Convention which even though is legally binding, makes no direct reference to voluntary repatriation, and from the practices of states, which is argued constitutes part of customary international law. Still, one could argue otherwise given the absence of codification as with the case of voluntary repatriation in the African system. The point of the legalization test is to isolate the components of this principle and to evaluate them using the variables of obligation, precision and delegation.

Table 4: Abbot OPD test

Form	Obligation	Precision	Delegation	Examples
1	High	High	High	Case 1: Voluntary repatriation – 1969 OAU Convention
2	Moderate/High	High	High	Case 2: Voluntary repatriation – international refugee law

As previously stated, the level of legalization varies. The obligations can range from explicit non-legal norms to '*jus cogens*' and the precision can vary from vague

principles to highly detailed and elaborate rules. Likewise, delegation can range from simple diplomacy to institutionalization within domestic and international courts. In both cases, the degree of legalization is closer to the ideal type of legalization, although case 1 illustrates a higher degree of legalization. In case 1, which is the principle of voluntary repatriation under the African system of refugee protection, there is no doubt that the principle is equal to hard law. Because the 1969 OAU Convention is legally binding on African states, consequently, Art. V which introduces the principle of voluntary repatriation meets the obligation criterion of the test. At the same time, Art. V sets out clear and specific rules under which voluntary repatriation can be done, meeting the precision criterion. With regards to delegation, the OAU Convention is also specific as in Art. VIII (1) it requests for Member States to cooperate with the UNHCR in the exercise of their duties, and in Art. IX, delegates the power to settle disputes to the Commission for Mediation, Conciliation and Arbitration of the Organization of African Unity which in 1993 changed into the OAU Mechanism for Conflict Prevention, Management and Resolution⁶⁸⁰ and is today the Peace and Security Council.⁶⁸¹

In case two, the legalization of voluntary repatriation under international refugee law, this test also illustrates a high degree of legalization. Although this is the ideal type of legalization, it is still very close and almost indistinguishable. As a matter of fact, softer variances of legalization are equally important.⁶⁸² In terms of obligation, legalization ranges between moderate and high. Moderate because unlike the 1969

⁶⁸⁰ Monde Muyangwa and Margaret A. Vogt, "An Assessment of the OAU Mechanism for Conflict Prevention, Management and Resolution, 1993-2000" (2000), 9.

⁶⁸¹ African Union (AU) Peace and Security Council.

⁶⁸² Goldstein et al., 'Legalization and World Politics', 388.

Convention which is legally binding and directly references voluntary repatriation, the 1951 Convention does not directly reference the principle of voluntary repatriation. Rather one has to infer its support for voluntary repatriation within the Convention. For instance, the Preamble references the enjoyment of fundamental rights and freedoms as affirmed in the Universal Declaration of Human Rights including the right of every person to return to their home country.⁶⁸³ Article 33 prohibits states from returning ("refouler") refugees back to territories in any manner that would expose them to persecution. This is understood to mean safe return which is also a key component of the principle of voluntary repatriation. Moreover, UNHCR EXCOM decisions and UNGA Resolutions on principles of voluntary repatriation form part of customary international law. Outside of international refugee law, international human rights law is also used to argue in favor of voluntary repatriation being hard law. The provision of the right to return in Art. 12 (4) of the Covenant on Civil and Political Rights⁶⁸⁴ and Art. 5 (d) (ii) of the Convention on the Elimination of Racism,⁶⁸⁵ both of which are legally binding on state parties evidences this. Despite, some questions as to the degree of obligation, the rules of the principle under international law are unambiguous and specific. UNHCR EXCOM decisions neatly outline the specific rules in all cases of voluntary repatriation,⁶⁸⁶ and the authority is vested in the UNHCR by the General Assembly Resolution 428 (V) of 1950.⁶⁸⁷

⁶⁸³ 'The Universal Declaration of Human Rights', art 13(2),

⁶⁸⁴ 'International Covenant on Civil and Political Rights', 171

⁶⁸⁵ 'International Convention on the Elimination of All Forms of Racial Discrimination', 195

⁶⁸⁶ 'UNHCR Handbook for Emergencies', 538-559:

⁶⁸⁷ UNGA A/RES/428(V), art. 2(d).

The legalization test employed here illustrates that the principle of voluntary repatriation under the African system of refugee protection is hard law and legally binding on state parties signatory to this Convention. Even though, under international law the main instrument for refugee protection, the 1951 Convention does not out rightly address the notion of voluntary repatriation, its provisions when read in conjunction with UNHCR EXCOM Decisions, UNGA Resolutions, and international human rights law, demonstrates a very high degree of legalization. Therefore, to state that voluntary repatriation is merely an institutional policy and not an inter-state norm, may not be accurate. Abbott and Goldstein argue that softer forms of legalization are equally as important as hard law. Taking this into account as well as state practice over the decades and repeated statements in the UN General Assembly and the High Commissioner's Executive Committee, there is sufficient evidence that there is an international law of voluntary repatriation.⁶⁸⁸

But, whether there is an international law of voluntary repatriation or not, does not answer the question as to whether this law is fit for purpose. As has been argued in the previous chapters of this work, a critical historical analysis of the origins and evolution of voluntary repatriation both within the African system of refugee protection and the international system of protection indicate that this norm exists not to solve the problems refugees are facing which should be the point of international refugee law, but to solve the refugee problem for states. After all, how we conceive of solving a problem is inseparable from what we understand that problem to be.⁶⁸⁹ Refugees are a

⁶⁸⁸ Geoff, 'The International Law Of Voluntary Repatriation', 5.

⁶⁸⁹ Saunders, 'International political theory', 3.

flaw in the formula of the formation of the nation-state.⁶⁹⁰ Because refugees are framed in a particular way as threats to global peace and security, a distortion of global international order, a problem which needs to be solved in the best interest of states, the ideal solution developed is one which addresses this issue, that is, solves the problem of refugees for states, but not necessarily the problems refugees are facing. Repatriation is thus considered as a final solution to the refugee problem as it is the only solution that repairs the loss of state protection and restores balance to the global international order. As a matter of fact, it is this framing of refugees as security threats that justifies the extraordinary measures adopted to handle them, that is, repatriation, albeit, ‘voluntarily’ if possible, and when not possible, involuntarily, but disguised as the former.

Furthermore, the conduct of voluntary repatriation puts into question the efficiency of this practice as well as the absence of the key requirement of ‘voluntariness’ in many instances coupled with unsafe returns caused by push factors in hosting countries, and the inadequacy of effective resettlement for many refugees. As voluntary repatriation morphs today into involuntary return, those who are in desperate need of international protection are exposed to human rights abuses, illegal deportations, separation of families, violence at borders, detention, starvation, trafficking, persecution and death. Taken into consideration as well as the issue of the protractedness and complexity of many of the conflicts in refugee producing countries, it is no wonder the principle of voluntary repatriation has many critics.

⁶⁹⁰ Long, ‘The point of no return’, 44

However, simply stating that the principle of voluntary repatriation is not fit for purpose is not enough to convince its advocates. This is why this thesis goes a step further to argue that not only is this principle inadequate for modern refugee protection, it contravenes a core principle of international society, the right to seek and enjoy asylum. This is the focus of the next chapter.

Chapter 6

THE RIGHT TO SEEK AND ENJOY ASYLUM AND THE PRINCIPLE OF NON-REFOULEMENT

6.1 Refugee Protection (The Right to Seek and Enjoy Asylum) as a Co-Constitutive Principle of International Society

Nantermoz contends that refugee protection, that is, the right to seek and enjoy asylum, is a primary institution of modern international society.⁶⁹¹ She argues that refugees are not simply ‘an anomaly’ in international society, rather their existence is bound up in the anarchical organization of international society.⁶⁹² As a matter of fact, refugees in her view serve to naturalize and consolidate the fundamental principles upon which the international society of states rely on; - territoriality, sovereignty, and the primacy of the nation-state.⁶⁹³

Examining the emergence of international institutions, Buzan and Falkner define a primary institution as “a clearly defined value or principle applicable across international society” with “a significant degree of social consolidation around the

⁶⁹¹ Nantermoz, ‘International refugee protection and the primary institutions of international society’, 262.

⁶⁹² Ibid., 259

⁶⁹³ Ibid.

norm.”⁶⁹⁴ Nantermoz adds that ‘rules, norms and practices can be observed, and used as proxies to conceptualize the primary institution of refugee protection.’⁶⁹⁵

Using this definition, a model through which to examine whether refugee protection is a primary institution of refugee protection can be developed. This model involves three distinct but interrelated tests.⁶⁹⁶ The first is the identification of the constitutive principle of the primary institution. That is, what core principles exist that are definitive of the normative identity of the primary institution. The second, the set of additional rules (norms and practices) which have been generated by this constitutive principle, what is referred to as the ‘process of social consolidation’.⁶⁹⁷ And the third element, refers to the co-constitutive effects of the institution on the identity of states and international society. Using this model, it can be argued that the principle of asylum which obliges states to protect refugees is the constitutive element of the international regime of refugee protection,⁶⁹⁸ and evidence of consistent and persistent state practice and the development of a rich set of rules and guidelines at the national, regional and international levels, along with the establishment of secondary, international, and regional organizations is indicative that the protection of refugees, premised on providing asylum, is a primary institution of international society.⁶⁹⁹

⁶⁹⁴ Falkner and Buzan, ‘The emergence of environmental stewardship as a primary institution of global international society: 131-136 cited in Nantermoz, 271.

⁶⁹⁵ *Ibid.*, 273.

⁶⁹⁶ *Ibid.*, 273-274.

⁶⁹⁷ Falkner and Buzan, ‘The emergence of environmental stewardship as a primary institution of global international society’, 136.

⁶⁹⁸ Nantermoz, ‘International refugee protection and the primary institutions of international society’, 274

⁶⁹⁹ *Ibid.*, 289-290.

Even though, practice is not necessarily uniform, following Buzan's 'changeability within a constant'⁷⁰⁰ it is possible to argue that in so far as the core constitutive principle which in this case, is providing asylum, is constant, even if the rules and norms borne out of this change, the primary institution will continue to exist.⁷⁰¹ Furthermore, the existence of refugees serves to naturalize and reproduce the modern nation-state system and the principles of territoriality and sovereignty on the one hand, and on the other hand, the protection of refugees plays a part in constituting the identities of states, making it a co-constitutive character of modern society and national identities.⁷⁰² International society claims that refugees are a 'blip', a problem which needs to be solved in order to restore stability to the international order.⁷⁰³ However, refugees are not just 'marginal figures', but historically have participated in the constitution of modern society's institutions and states, and one cannot exist without the other.⁷⁰⁴ By requiring states according to article 34 of the 1951 Convention to facilitate the naturalization and assimilation of refugees, the idea is reinforced that refugees are deviations of the norm which need to be resolved.⁷⁰⁵ As a matter of fact, the displacement of persons is of vital importance in reproducing statist hierarchy in the sense that statelessness contrasts with citizenship which is the only model viable

⁷⁰⁰ Buzan, Barry. *From International to World Society?: English School Theory and the Social Structure of Globalisation*. Vol. 95. Cambridge University Press, 2004. cited in Nantermoz, 278.

⁷⁰¹ Brems Knudsen, Tonny. "Fundamental Institutions and International Organizations: Theorizing Continuity and Change." In *International Organization in the Anarchical Society: The Institutional Structure of World Order*, 2019, 23-50 cited in Nantermoz 268.

⁷⁰² Nantermoz, 'International refugee protection and the primary institutions of international society', 290.

⁷⁰³ Simpson, 'The refugee problem.' *International Affairs*, 608.

⁷⁰⁴ Nantermoz, 'International refugee protection and the primary institutions of international society', 291 and 293.

⁷⁰⁵ Haddad, 'The refugee in international society: between sovereigns', 60.

in the modern international system of states.⁷⁰⁶ As such, the granting of asylum ‘normalizes’ this aberration and justifies the view of states as the sole form of recognized political organization in the international system.

Providing refuge has always been a practice in human history, however, it became a primary institution of international society by the end of World War One.⁷⁰⁷ Since then, and with the development of state practice, the codification of rules and the establishment of secondary institutions to regulate this regime has developed based on the core constitutive principle of asylum, all the while co-constituting the character of states and the nature of the international society and refugees. Where there have been violations of core practices and norms, one only needs to look at the response of states (acquiescence or outrage) as indications of the importance of the primary institution of asylum. What is important is not the contestation of the norm, but the reaction from actors in the international system. In essence, while states may attempt to develop means to navigate their way out of not providing asylum, and it is the assertion in this study that voluntary repatriation is one of such methods, states will never state that they do not agree with the fundamental principle of the right to seek and enjoy asylum.

6.2 Balancing the Right to Seek Asylum and the Principle of Non-Refoulement against the Norm of Voluntary Repatriation

If one agrees that the right to seek and enjoy asylum is the core principle of the international refugee protection regime, and as such a primary institution, then one must concede that all other norms and rules that emerge as part of this regime are

⁷⁰⁶ Nantermoz, ‘International refugee protection and the primary institutions of international society’, 294.

⁷⁰⁷ Nantermoz, ‘International refugee protection and the primary institutions of international society’, 306.

secondary institutions aimed at strengthening the primary institution, which in this case is the right to seek asylum. Following this logic, voluntary repatriation is a secondary institution that has emerged within the international refugee protection regime and should therefore serve the purpose of reinforcing the primary institution (the right to seek asylum) of the regime of refugee protection.

Even if one disagrees with this assertion, it is hard to deny that the practice of voluntary repatriation is a component of broader institutional frameworks relating to addressing the displacement of people. Secondary institutions are typically specific practices, rules, and norms that have emerged within the international society to address specific challenges or issues.⁷⁰⁸ Either way, the practice of voluntary repatriation either by itself or otherwise is closely linked to other secondary institutions and practices within international law. For instance, the practice of voluntary repatriation is underpinned by normative frameworks that have emerged from the secondary institution of international refugee law such as the 1969 OAU Convention and UNHCR EXCOM decisions. These legal instruments put an emphasis on the principle of *non-refoulement* which prohibits states from returning individuals to places where their life and security may be in danger. Additionally, taking into consideration that voluntary repatriation is supervised by the UNHCR in a suppose-to-be post-conflict scenario and supported by international developmental and humanitarian assistance, it is possible to contend that the practice of voluntary repatriation operates within the secondary international law institutions of international humanitarian and development assistance, as well as, the institution of conflict resolution and peacebuilding.

⁷⁰⁸ Navari, 'Primary and secondary institutions: Quo vadit', 121-127.

Whether one considers voluntary repatriation as a distinct secondary institution or simply a component of broader secondary institutions is subjective. This author argues that voluntary repatriation is a distinct secondary institution of international refugee protection in its own right. Secondary institutions are meant to reproduce and reflect primary institutions,⁷⁰⁹ and the practice of voluntary repatriation taken at face value, certainly aims to do so. That is, to ensure the final protection of refugees. If refugees are a flaw in the formula of the formation of nation states, then repatriation albeit ‘voluntarily’, offers the ideal solution to guarantee their protection.⁷¹⁰ As a matter of fact, supporters of voluntary repatriation would argue that the main cause of the refugee’s suffering is their loss of statehood, as such the development of the institution of voluntary repatriation is meant to repair this loss by connecting the individual back to their state.

The problem lies in that secondary institutions are developed to reflect and reproduce primary institutions, not to contest or facilitate the erosion of the primary institution. While the practice of voluntary repatriation calls for the ‘voluntary’ aspect of repatriation to be respected, practice by states has often disregarded the humanitarian needs and the protection element in favor of *realpolitik*. If anything, the precedence for *realpolitik* as the key concern for states is enshrined in the UN General Assembly Resolution of 1946 where an exception to considering the voluntary aspect of repatriations is enshrined.⁷¹¹ This resolution prohibits the return of refugees except in

⁷⁰⁹ Buzan, ‘The emergence of environmental stewardship as a primary institution of global international society’, 141-142.

⁷¹⁰ Long, ‘The point of no return’, 44

⁷¹¹ United Nations, ‘Question of Refugees’, A/RES/8(I) 1946

cases where these persons are “war criminals, quislings and traitors”.⁷¹² The aim of including this subsection was to appease the Soviet desire at the time to be able to demand the forcible repatriation of persons deemed traitors to the Soviet republic. By acquiescing to the Soviet demand, the General Assembly implicitly recognized that the interests of states take precedence over the protection of refugees. After all, whether traitors or not, the prohibition of *non-refoulement* is supposed to be absolute.

Navarro has asserted that secondary institutions sometimes play an important role in the decay of primary institutions. The logic of this assertion is not debated in this dissertation. Rather, it is asked whether the emergence of voluntary repatriation as a secondary norm of international society is intended by states to weaken the fundamental principle of refugee protection which is the right to seek and enjoy asylum. The answer here is No. This would be the case if state declarations and actions could be understood as attempts to weaken the principle of refugee protection. This is not the case. As a matter of fact, voluntary repatriation is paraded as a solution to refugee protection and not as an alternative to refugee protection. States and other actors claim that when refugees are repatriated albeit ‘voluntarily’, this is the best solution that refugees themselves want and is consistent with international refugee law. If states questioned the legitimacy of the right to seek asylum or the legitimacy of the fundamental norm of refugee protection, then one could claim that the secondary norm of voluntary repatriation decays that of asylum. But this is not the case. The problem is rather that the norm of voluntary repatriation contests against the norm of refugee protection without seeking to challenge it, but claiming to enhance it.

⁷¹² Ibid.

The right to seek and enjoy asylum is the core principle of the international refugee protection regime. As long as this core principle of providing refuge to persons in need of protection remains constant, the primary institution continues to exist. As such, all other norms and rules which are developed to compliment this core principle at different historical moments should reproduce and reflect it. When these norms and rules that have emerged lead to a practice that contravenes the intention or contests with the core principle of this primary institution, then they must be subjected to processes of change. The position put forward in this dissertation is this. Asylum is a core principle of the primary institution of refugee protection and as such a co-constitutive element of modern international society. The emergence of the secondary institution of voluntary repatriation which at face value was supposed to reflect and reproduce the core principle of refugee protection, rather indicates that it was necessitated not by an interest to protect refugees, but as a means to solve the problem refugees pose to hosting states. Despite significant investment in the discourse and practice of voluntary repatriation over the last decades, notable issues surrounding its practice raise serious concerns with regards to considerations of ‘voluntariness’. But this is not surprising because how we conceive of solving a problem is inseparable from what we understand that problem to be.⁷¹³ Therefore, it is not wrong to assert that rather than voluntary repatriation, involuntary repatriation is the new norm.⁷¹⁴ This being the case, and given that the core principle of refugee protection is the right to seek asylum (refuge), the norm of (in)voluntary repatriation is inconsistent with and

⁷¹³ Saunders, ‘International political theory and the refugee problem’, 3.

⁷¹⁴ Ibid., 6.

certainly does not reflect or reproduce the main aim of the primary institution of refugee protection. It must be subjected to change as a result.

Chapter 7

CONCLUSIONS

How one conceives of solving a problem is inseparable from what one understands that problem to be.⁷¹⁵ Refugees are a flaw in the formula of the formation of the nation-state⁷¹⁶ and because refugees are considered to be a threat to global peace and security, a distortion of global international order, a flaw in the system, a problem which needs to be solved in the best interest of states, the ideal solution developed is one which solves the problem of refugees for states, but not necessarily the problems refugees are facing. Repatriation is considered as a final solution to the refugee problem as it is the only solution as states see it, that repairs the loss of state protection and restores balance to the global international order. As a matter of fact, the securitization of refugees justifies the extraordinary measures adopted to deal with them, that is, repatriation albeit, ‘voluntarily’ if possible and when not possible, involuntarily disguised as the former.

This study was undertaken with the overarching objectives of understanding the precise nature of voluntary repatriation, conducting an in-depth evaluation of its legal standing within the framework of African refugee law, investigating the potential exclusivity of voluntary repatriation to the African refugee protection system, critically analyzing its progressive emergence as the preeminent durable resolution for refugee-

⁷¹⁵ Saunders, ‘International political theory and the refugee problem’, 3

⁷¹⁶ Long. ‘The point of no return’, 44

related issues, and delving into the intricate interplay between the principles of voluntary repatriation, the principle of *non-refoulement*, and the fundamental right to seek and enjoy asylum. To accomplish these aims, an interdisciplinary approach was employed, integrating various international law frameworks including process theory, legalization applied as a theory, the English School's theory of international institutions, and Fragmentation understood as a framework of analysis, alongside the analytical tool of threat framing from the field of international relations. This study adopted an eclectic approach, combining the method of policy-oriented jurisprudence from international law with qualitative document analysis and historical analysis from international relations methods. This comprehensive and nuanced approach was utilized to assess the substance of documents and contextualize the evolution of the norm of voluntary repatriation within its socio-political and historical backdrop.

7.1 Conclusion

The 1969 Convention is and remains the only international treaty which explicitly introduces the principle of voluntary repatriation.⁷¹⁷ While voluntary repatriation does not necessarily originate from the African system of refugee protection, there is also no doubt that the introduction of the norm of voluntary repatriation and the emphasis on 'voluntariness' under the African system of refugee law has had a significant impact on the development and evolution of voluntary repatriation under general international refugee law.⁷¹⁸ The emphasis on the 'voluntariness' of repatriation stipulated in Article V(1) of this Convention is an inherent component of the structure outlined in the guidance of the UNHCR Executive Committee,⁷¹⁹ and is today a cornerstone of the

⁷¹⁷ 'Convention Governing the Specific Problems of refugees in Africa', Art. V

⁷¹⁸ Chetail, 'Voluntary repatriation in public international law: concepts and contents', 23.

⁷¹⁹ UNHCR, 'Discussion Note: Protection Aspects of Voluntary Repatriation', Para 7 and 8.

work of the UNHCR repatriation regime.⁷²⁰ UNHCR EXCOM decisions which today play a key role in shaping the principles governing voluntary repatriation underscores the importance of the 1969 OAU Convention as a significant point of reference for fundamental principles of international refugee law.⁷²¹ The OAU Convention is also the subject of recommendations by the UNHCR to states when considering the question of the voluntary return of refugees.⁷²²

Yet it is dishonest to claim that without introduction in the OAU Convention, the development of voluntary repatriation as a norm under international refugee law would not have been possible as there were also some specific and unique set of circumstances in the pre-and post-World War Two era that led to the rapid development of voluntary repatriation from a solution not mentioned in the 1951 Convention and barely referred in the immediate aftermath of World War Two to being by the early 1980s henceforth, the preeminent durable solution for refugee-related situations.

The historical progression of voluntary repatriation within the international refugee protection framework has invariably been entangled with geopolitical and strategic security factors, steered by the security and political preferences of states, rather than being primarily driven by humanitarian concerns or the welfare of refugees. This holds particularly true in this examination of the evolution of the voluntary repatriation norm. Where opposition to repatriation contradicted the political agendas of states, it

⁷²⁰ UNHCR, 'Handbook - Voluntary Repatriation: International Protection',.

⁷²¹ UNHCR A Thematic Compilation of Executive Committee Conclusions: No. 103 (LVI) – 2005

⁷²² UNHCR, 'Note on Voluntary Repatriation', Para 13 and 16.

was discouraged, where repatriation aligned with state interests it was promoted. Similarly to the introduction of voluntary repatriation in the 1969 OAU Convention where specific historical events influenced by security concerns were instrumental in the decision to include voluntary repatriation, the development of this norm under international refugee law from a concept not mentioned at all in the 1951 Convention to a well-developed principle with specific guidelines, and touted as the preeminent solution to the situation of refugees under international refugee law was influenced by the security interests of states, in particular, those of the global powers.

Because voluntary repatriation as a norm originated within a specific set of circumstances in Africa where the territorial integrity and security of newly independent states was the most important consideration, and globally in the mid-1970s where the influx of new types of asylum seekers particularly in the Global North, coupled with labor demand shifts, financial considerations, resettlement concerns overshadowing support for integration and resettlement, and anti-immigrant sentiments necessitating a reevaluation of durable solutions of durable solutions with a preference for voluntary repatriation, it is logical to assert that the social context of the evolution of voluntary repatriation as a norm is one which suggests the framing of refugees as securitized objects, anomalies and a problem for the global international order of states.

Furthermore, the evolution and practice of voluntary repatriation in Africa and globally demonstrates a practice that has often raised doubts as to whether the ‘voluntary’ aspect of returns which is the key component is always respected. In many of the cases discussed in this work, ‘*push*’ rather than ‘*pull factors*’ are responsible for the choice of return prompting a conclusion that rather than voluntary repatriation, involuntary

repatriation is the new norm.⁷²³ Considering the prolonged and intricate conflicts seen today, along with instances of refugees voluntarily returning only to flee again due to ongoing turmoil, the question arises: can we continue to advocate for voluntary repatriation as the favored durable solution in the current global displacement scenario?

Given the securitized origins of voluntary repatriation and the questionable practice over the decades, and given the position of asylum as the core principle of refugee protection as a co-constitutive element of international society, what places does the norm of voluntary repatriation hold under international refugee law? Is the very existence and practice of voluntary repatriation not a contradiction of the right to asylum and the *non-derogable* right to not be *refouler*? Can both the right to asylum and the norm of voluntary repatriation coexist under the very same regime of refugee protection?

Yet, it is argued that while the practice of voluntary repatriation is often questionable, the principle behind the norm is sound and reflects core normative values of international society.⁷²⁴ However, if the responsibility of the international refugee regime is to protect refugees, therefore, even if international law provides for a norm of voluntary repatriation, because the ‘voluntariness’ is questioned and the root causes of the displacement are in most cases unsolved then can we really say that international law is living up to its expectations of protecting refugees? If we understand law as a

⁷²³ Chimni, ‘The UNHCR’s Role in Voluntary Repatriation’, 7.

⁷²⁴ United Nations High Commissioner for Refugees Policy Development and Evaluation Service (PDES). “A Historical Review of UNHCR Policy and Practice on Refugee Repatriation.” September 2013.

social process, then, one cannot just assert that because international refugee law and customary international practice supports a practice of voluntary repatriation, its merit-ness cannot be debated. After all, the researcher subscribes to the understanding of law as it ought to be and simply not law as it is. At the same time, the Universal Declaration of Human Rights prohibits states from stopping persons to return back to their countries.⁷²⁵ So, the real questions should be; why are refugees choosing to return?

The choice for many refugees to return is full of micro-level complexities and depends on circumstances such as likelihood of third country resettlement, the extent and conditions of local integration, concerns surrounding their rights and protection in countries of origin, and the cultural and historical contexts within which their return or initial exile is embedded.⁷²⁶ But many refugees do not return or when they in fact do, they do so spontaneously and in the moment, and many constantly move back and forth between host and home countries of origin.⁷²⁷ The durability promised in voluntary repatriation fails in this context. But this should not be surprising. The history of voluntary repatriation is a history of how the refugee ‘problem’ has been theorized, debated and framed by actors over time, influenced by the interests of predominantly powerful states.

As outlined in this study, in the middle of the independence struggles in Africa in the 1960s, refugees were considered as potential subversive actors and security concerns necessitating the OAU Commission to recommend for voluntary repatriation as the

⁷²⁵ ‘Universal Declaration of Human Rights’, Art. 13(2)

⁷²⁶ Zetter, ‘Refugees and Their Return Home: Unsettling Matters’, 10

⁷²⁷ Ibid., 11

only viable solution to resolve this problem.⁷²⁸ During this time, the practice of voluntary repatriation was uncommon at the global level. Post-war reconstruction necessitated cheap labor and resettlement and integration were viable and attractive options. But by the middle of the 1970s, things were changing. The previous solidarity shown between newly-independent states toward refugees who during the struggle for independence were considered as liberation fighters had disappeared. The new crop of refugees was looked upon with less fondness as they were considered as dissidents from sisterly nations who had also just gained independence. The incapacity to host large numbers of refugees because of economic reasons meant that new ways of solving the ‘problem’ were needed. At the same time, the economic resurgence of the post-war period in the Global North had been slowing down. Cheap labor in the form of refugees was no longer a priority, and resettlement and local integration were becoming less favorable considerations. Another solution was needed. The idea of refugees returning to their countries of origin looked like a good one. The only problem was that international law forbade returning refugees back to territories where their lives or security would be in danger.⁷²⁹ Political expediency necessitated the development of ‘voluntariness’ as an integral part of the norm for repatriation. Scholars at the time warned that this was a poorly understood phenomena,⁷³⁰ and the UNHCR, the organization tasked with monitoring voluntary repatriation was initially hesitant to declare voluntary repatriation as a durable solution.⁷³¹ However, pressure from state actions eventually led the UNHCR to declare voluntary repatriation as the

⁷²⁸ African Union, ‘Council of Ministers Ninth Ordinary Session’, 4

⁷²⁹ The 1951 Convention, art. 33(1)

⁷³⁰ Bascom, ‘The dynamics of refugee repatriation’, 226. Harrell-Bond, ‘Under What Conditions Is It the Most Desirable Solution for Refugees?’, 43.

⁷³¹ Chimni, ‘From resettlement to involuntary repatriation’, 58-59.

“the most appropriate solution for refugees”.⁷³² Not much later, and continuing today, the message is one of confusion. The voluntary character of repatriation must be respected, but objective determinism also means if states judged the country of origin of the refugee to be safe, refugees could be repatriated, effectively taking out the subjective character of ‘voluntariness’ and the individual from the occasion.

If one concedes to this historical version of truths, it becomes harder to argue for a law of voluntary repatriation. Not only is the purpose of this durable solution meant to solve the problems refugees pose to states, but in practice as the literature illustrates, the choice of return is often influenced by factors other than the end of a fear of persecution in their country of origin or a return to normalcy. Additionally, the major source countries for refugees; Syria, Afghanistan, Ukraine, South Sudan, Myanmar, the Democratic republic of Congo, Sudan, Somalia, Nigeria, Eritrea, Iraq have ongoing protracted and complex security situations, even though, host countries continue to attempt to force refugees to return ‘voluntarily’ by creating hosting conditions that are intolerable for many refugees.⁷³³ Some of these countries have also been in conflict situations for decades. As a matter of fact, the current outlook warrants the assertion that “the possibility of ultimate repatriation belongs to the realm of political prophecy and aspiration” and as such it is unwise to plan “a programme of action cannot be based on uncontrollable speculation.”⁷³⁴ Moreover, durable solutions remain malleable rather than fixed. They are fundamentally political in nature, deriving their

⁷³² UNHCR, Conclusions Specific to Voluntary Repatriation: - No. 18 (XXXI) – 1980;

⁷³³ “Syrian Refugees Returning Home as Part of Turkey's Voluntary Program Compelled to Leave Due to Increasing Anti-Migrant Sentiment” and UNHCR. "UNHCR Statistical Yearbook 2021. Syrians Barometer 2021: A Framework for Achieving Social Cohesion with Syrians in Türkiye."

⁷³⁴ Simpson, ‘The Refugee Problem: Preliminary Report of a Survey’, 74.

efficacy from the dynamic interplay of political will, diplomatic efforts, and statesmanship exhibited by governing bodies and as such can change.

Admittedly, even with all of this taken into account, supporters of a law of voluntary repatriation could argue, and rightly so, that every law is a cumulating social process and its relationship with power is intimate, dynamic and reciprocal,⁷³⁵ voluntary repatriation is not exceptional in this sense. They may well contend that inefficiency in the practice of voluntary repatriation does not in itself negate the existence of this norm. After all, the problem of implementation in international human rights law is not uncommon.⁷³⁶ They could assert that the law of voluntary repatriation may not be perfect, but it is the most appropriate durable solution for refugees as it reconnects them with their homes. The problem is these arguments do not hold up to scrutiny.

Yes, it is true that the relationship between law and power is inextricable, but the practical application of laws necessitates an initial assessment of their intended purpose and value.⁷³⁷ And while it is true that laws are a series of authoritative decision making processes linked to power, this is not enough reason for not-fit-for-purpose laws to continue to exist. One cannot be expected to simply ignore the specific social, political, economic and cultural circumstances under which the norm of refugee repatriation has developed, nor simply disregard the moral, social and the humanitarian aim of the regime of refugee protection. The purpose of international refugee law is to

⁷³⁵ Higgins, 'Problems and Process', 252. Goldstein et al., 'Introduction: Legalization and World Politics', 388.

⁷³⁶ Humphrey, John P. "The Implementation of International Human Rights Law." *New York Law School Law Review* 24 (1978): 31 – 32.

⁷³⁷ Lon Luvois, Fuller. *The Morality of Law*. 1964.

protect refugees, the “inner morality” using Fuller’s language is to guarantee the safety of persons who have been availed this guarantee by their own states. This is why providing asylum (refuge) is a customary international practice amongst states and also dates back to thousands of years before the creation of the modern nation state.

While practical implementation of international legal norms may not necessarily always be efficient, when practice is consistently ineffective as with the case of ‘voluntary repatriation’, it raises questions. Sincere and effective enforcement machinery is needed for a law to be effective and when laws fail to attain the objectives for which they were created, they become ineffective laws,⁷³⁸ especially when there are significant differences between the administration of the law and the law itself.⁷³⁹ It is also known that the claim of ‘return to home’ is not always true as meanings of home for refugees change over time and are complex.⁷⁴⁰ Because laws are not just rules, but continuous processes of decision making by authorities, if no longer fit-for-purpose, they should be subjected to processes of adjustment.

The norm of voluntary repatriation cannot coexist in its current form with the right to seek and enjoy asylum, and the principle of *non-refoulement*. *Non-refoulement* is a ‘*jus cogens*’, a norm for which there can be no derogation and asylum a co-constitutive principle of modern international society. In line with articles 53 and 64 of the Vienna Convention, where a norm is in conflict with a *jus cogens*, this law becomes void and non-applicable. In the case of voluntary repatriation as a norm, its incompatibility with

⁷³⁸ Atul Setalvad, "Paper Laws," *Economic and Political Weekly* (1988): 1468.

⁷³⁹ Grunbaum, Werner F. "The Morality of Law." (1966): 473-475.

⁷⁴⁰ Žila, ‘The myth of return: Bosnian refugees and the perception of home’, 138-139; Zetter, ‘Refugees and Their Return Home’, 10-11; and Tunga, ‘Revisiting home’, 3 -4.

the principle of *non-refoulement* means that it should not be applicable under international refugee law. Further, because the existence of refugees serve to naturalize and reproduce the modern nation-state system, and the principles of territoriality and sovereignty, and the protection of refugees play a key part in constituting the identities of states, making it a constitutive character of modern society and national identities,⁷⁴¹ the practice of returning refugees albeit, ‘voluntarily’ undermines this process of naturalizing the state and its role as a protector.

Furthermore, in line with the doctrine of *lex specialis* which holds that where there is a conflict between a specific law (which in this case is the norm of voluntary repatriation), and a general law (the right to seek and enjoy asylum), the law that is more favorable to the protected interest is usually held to be overriding. In this case, the protected interest is the protection which refugees have a right to (asylum). Therefore, the right to seek and enjoy asylum overrides the norm of voluntary repatriation.

At worst, the principle and practice of voluntary repatriation is incompatible with the principle of *non-refoulement* and the customary right to seek and enjoy asylum which is in contradiction of the purpose of international refugee law. At best, it is a part of the process of fragmentation of international law. But, as it conflicts with two other norms of international law, the additional applicable test set in art. 31 - 33 of the Vienna Convention on the Law of Treaties,⁷⁴² reads that when two norms are in

⁷⁴¹ Nantermoz, ‘International Refugee Protection and the Primary Institutions of International Society’, 290; Long, ‘The point of no return’, 44.

⁷⁴² United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155: 331.

conflict, they have to be read in “good faith” and in light of their object and purpose. Determining the context of the purpose involves a reading of ‘*travaux préparatoires*’ and the socio-political context within which the law came to exist. In this sense and as demonstrated in this work, the context and purpose of the norm of repatriating refugees was never to protect refugees but to safeguard the interests of states. Conversely, the objective of the right to seek asylum and the principle of ‘*non-refoulement*’ aims to ensure a safeguarding mechanism for individuals who have been forced to flee, by preventing their return to situations of danger or persecution. Undoubtedly, in the hierarchy of norms under international law,⁷⁴³ the right to seek and enjoy asylum and the principle not to return persons to territories where their life and liberty will be in danger, occupy a higher place than the norm of voluntary repatriation, which should be null and void.

Yet, the incompatibility of voluntary repatriation with the principle of asylum should not negate the important contribution of regional refugee regimes to the international protection regime. If anything, it highlights how important regional regimes are in the development of international refugee law. For instance, the OAU Convention and the Cartagena Declaration expand upon the refugee definition outlined in the 1951 Convention and its 1967 Protocol. These treaties emerged from the recognition in Africa and Latin America that the 1951 Convention, as amended by the 1967 Protocol, required supplementation to effectively address novel aspects of significant population displacements in different parts of the world.

⁷⁴³ Koskenniemi, ‘Fragmentation of International Law’, 36.

7.2 The Way Forward

Addressing the root causes of displacement is often offered as a solution to refugee-related situations. This study rather contends that while addressing the root causes of refugee displacement is a noble cause, this is outside of the arena of refugee law. This is often the task of international diplomacy, laws on conflict and peace and environmental law. Refugee law may not be able to address the root causes of displacement directly, but it can address the immediate consequences such as massive displacements of people. As such, the solutions provided must on the one hand be based on pragmatic considerations (political solutions) and on the other, based on global legal values which prioritize the dignity and welfare of the person. Unfortunately, humanitarianism does not shape the refugee policies of the major states, they only pursue a façade of humanitarianism.⁷⁴⁴ Pragmatism urges us to see that the cost of hosting large numbers of hosting refugees is often high. This is particularly important to highlight because the majority of states hosting refugees today are in the low-income bracket and often do not have the financial capacity to efficiently host large numbers of refugees.⁷⁴⁵ With unequitable and unenforceable responsibility sharing mechanisms, the burden to host refugees falls on a few states causing compassion fatigue in populations. This sometimes leads to anti-immigrant hate fueled by far-right and extremist politicians.

The lack of commitments to upholding burden sharing principles is not the fault of refugees and as such they should not be the ones to suffer the consequences of the

⁷⁴⁴ Kim Salomon, *Refugees in the Cold War: Toward a New International Refugee Regime in the Early Postwar Era* (Lund University Press, 1991): 255

⁷⁴⁵ UNHCR, 'Refugee Statistics, 2023.

malpractices of states. The problem is not the existence of refugees. It certainly is not that refugees are a threat to global international order nor that they are a flaw in the system which needs to be repaired. The problem is state refusal to uphold internationally agreed upon rules of behavior including but not limited to; failure to practice fair and equitable burden sharing and the principle of *non-refoulement*.

The solution is political, and that is by encouraging and incentivizing states to adopt pragmatic burden sharing agreements. Of course, this should not mean that states in the Global North can simply pay-off the states in the Global South to host refugees on their behalf. In recent years, we have seen the problems of such an approach in Libya and Tunisia.⁷⁴⁶ Real burden sharing entails both financial contributions to countries hosting refugees and physical burden sharing which entails ‘dispersal of refugees among states.’⁷⁴⁷

The solution is also legal. Voluntary repatriation as is argued in this study, contravenes the right to seek and enjoy asylum. It is no longer a norm of voluntary repatriation (if ever it was), but a norm of involuntary repatriation. In the hierarchy of legal norms as proposed in texts on the fragmentation of international law,⁷⁴⁸ it is necessary to clarify in legal instruments such as the UNGA resolutions and UNHCR EXCOM decisions that the right to seek and enjoy asylum is an internationally recognized human right which is legally binding on all states and for which there can be no derogation. Now

⁷⁴⁶ "EU Strikes Deal With Tunisia to Curb Migration." The New York Times, July 17, 2023.

⁷⁴⁷ Christina Boswell, "Burden-sharing in the New Age of Immigration," *Migration Information Source* (2003).

⁷⁴⁸ Koskenniemi, and Leino, 'Fragmentation of International Law? Postmodern Anxieties', 553-579. Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', 2014.

more than ever, we need an internationally agreed convention of the right to seek, but to also receive and enjoy asylum.

States even though they have ulterior motives, often claim that voluntary repatriation is a human right. This claim is not wrong as the right to return to one's country is enshrined under international law in binding instruments like the ICCPR⁷⁴⁹ and CERD.⁷⁵⁰ However, we also know that the literature questions whether states always represent the interests of displaced persons.⁷⁵¹ As such for voluntary repatriation to meet the requirement of voluntary return, the 'voluntariness' of the choice to return cannot be questioned and cannot be for states to assess. This voluntariness must be the sole purview of the refugee with the role of states and international organizations to ensure that the conditions influencing returns are not in violation of the right to seek asylum as well as the principle of *non-refoulement*. Today, we need to move away from tripartite agreements which exclude the voices of refugees and refugee leaders to quadripartite agreements which includes and empowers refugees in the decision making processes about their lives. Refugees should not be returned if they are still at risk of persecution. This much is true of the 1951 Convention. Indeed, as long as they satisfy the conditions in the 1951 Convention, refugees should not be sent back to places where their lives or security could be in danger.

Voluntary repatriation is today spoken of as the best durable solution for refugee-related situations. What this study proves is that this is the language of states,

⁷⁴⁹ 'International Covenant on Civil and Political Rights', 171.

⁷⁵⁰ 'International Convention on the Elimination of All Forms of Racial Discrimination', 195.

⁷⁵¹ Harrell-Bond, 'Humanitarianism in a Straitjacket', 12.

representing their own interests. The analysis further demonstrates that this practice is not in the best interest of refugees. As a matter of fact, the principle itself contravenes fundamental international principles of refugee law; asylum and *non-refoulement*. It is not too late to stop the reference to voluntary repatriation as a durable solution. As a matter of fact, durable solutions are not set in stone, they are political solutions and based on “the political will, diplomacy and statesmanship of governments”,⁷⁵² And as such subject to change.

⁷⁵² Stein, ‘Durable solutions for developing country refugees’, 265.

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