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Safe and Voluntary Refugee Repatriation: From Principle to Practice

Jeff Crisp
University of Oxford

Katy Long
University of Edinburgh

Executive Summary

The article discusses the principles of voluntariness, safety, and dignity in the context of refugee repatriation. It begins by setting out the applicable legal framework, and discusses how that framework has been elaborated upon and refined since 1951. The article then discusses how the principles of voluntariness, safety, and dignity have, in practice, been applied (or, in a few unfortunate cases, ignored). After noting that we are now living in an era of protracted refugee emergencies, the article concludes with a number of recommendations regarding alternatives to repatriation and the conditions under which repatriation can take place without offense to the principles of voluntariness, safety, and dignity.

I. Introduction

In April 2016, the Kenyan government announced its intention to close Dadaab, the largest refugee camp complex in the world. Dadaab currently hosts around 400,000 refugees, the majority of them Somalis. According to Interior Cabinet Secretary Joseph Nkaissery, "the decision we have made to close the camps is explicit and final. . . . The refugees must be repatriated" (Psirmoi 2016).

The plan to close Dadaab and repatriate the Somali refugees has triggered widespread condemnation, with refugees and their advocates insisting that any returns must be both safe and voluntary. A Tripartite Agreement between Kenya, Somalia, and UNHCR was signed in November 2013 to facilitate such movements, but by May 2016 only 5,200 refugees had repatriated under its auspices (Mutamo 2016).

It is clear that a large number of Dadaab's refugees do not want to return to Somalia, and will only do so under pressure. The current Kenyan crisis thus perfectly illustrates the difficult policy issues that surround refugee repatriation. Under what conditions is it legal and ethical to promote refugee returns? Does voluntariness matter and, if so, why? Should safety take precedence over voluntariness?

This article examines these questions, setting out a brief history of refugee repatriation and underlining the reasons why the concept of "voluntary repatriation in safety and with dignity" should continue to be regarded as the foundation of all refugee returns. The article concludes with a set of recommendations involving not only how to strengthen this foundation, but also regarding possible alternatives to repatriation.

II. Legal and Normative Provisions

The cornerstone of refugee protection is the norm of *non-refoulement.* Codified in Article 33 of the 1951 UN Refugee Convention, it requires that "no contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened."[1]

That principle was further reinforced by Article 5 of the 1969 Organization of African Unity (OAU) Refugee Convention, which stipulates that "the essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will." The OAU Convention also introduces the notion of "safety" to the legal and normative framework of refugee repatriation, stating that "the country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of refugees who request repatriation."[2]

These principles were further elaborated in later years. UNHCR's Executive Committee, for instance, issued a Conclusion in 1985 that confirmed the need for voluntary repatriation "to be carried out under conditions of absolute safety" (UNHCR 1980). A 1992 UNHCR *Discussion Note on Protection Aspects of Voluntary Repatriation* added another concept to the discourse by insisting that the return of refugees to their country of origin "must be carried out under conditions of safety and dignity" (UNHCR 1992).

The contribution that the principle of voluntary repatriation makes to refugee protection is obvious. Yet it is equally clear that the limitations such a principle places on repatriation is frequently resented by states. Host countries are often impatient to see uninvited refugees leave. Countries of origin are sometimes impatient to see them return and signal the end of conflict. Donor states are eager to bring an end to the long-term refugee assistance programs that they fund.

UNHCR frequently plays an ambiguous role in such negotiations, seeking to uphold internationally recognized legal and ethical principles of which it is the custodian, while simultaneously meeting the concerns of these stakeholders. In the worst cases, the United Nations' refugee agency has capitulated to such pressures and actively engaged in repatriation operations that are far from safe or voluntary.

This is in part because the question of what voluntariness, safety, and dignity actually mean is open to different interpretations. In 1996, for example, UNHCR issued its *Voluntary Repatriation Handbook*, which defined voluntariness as "the absence of any physical,

1 Convention relating to the Status of Refugees (Geneva, 28 July 1951) 189 U.N.T.S. 137, *entered into force* 22 April 1954, 137, http://www.refworld.org/docid/3be01b964.html.
2 Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa (10 September 1969) 1001 U.N.T.S. 45, http://www.refworld.org/docid/3ae6b36018.html.

psychological or material pressure . . . which push the refugee to repatriate" (UNHCR 1996a).

With respect to safety and dignity, the handbook stated that such conditions are fulfilled when repatriating refugees "are not manhandled," when they "can return unconditionally," "at their own pace," "are not arbitrarily separated from family members" and are "treated with respect and full acceptance by their national authorities" (UNHCR 1996b).

Despite these very clear provisions, there was considerable debate within UNHCR at this time about the extent to which voluntariness should really be considered a necessary rather than a desirable condition for repatriation to take place.

One paper, originally intended to form a chapter of the repatriation handbook, argued that voluntary return was "not a non-derogable principle. Influential though it may be, it is not codified in any manner which requires its absolute respect by states. . . .The initiative for pursuing repatriation does not necessarily or exclusively belong to the refugee."[3]

Such reasoning was condemned by some staff members, who insisted that voluntariness was an "essential prerequisite for safe and viable return" and whose very purpose was to "stand in the way of impatient political action for mass returns lacking basic safeguards."[4] As the next section of this article explains, UNHCR was soon to capitulate to such demands for impatient action, with serious consequences for the organization's reputation.

III. The Practice of Voluntary Repatriation

The notion of voluntary repatriation emerged at a particular place and time. In the immediate aftermath of World War II, the Allies had forcibly returned to Stalinist Russia Soviet citizens who had fought alongside the Germans; many such citizens were shot or sentenced to forced labor and internal exile.

When the 1951 Refugee Convention was drafted and UNHCR established in 1950, the principles of *non-refoulement* and voluntary repatriation were deliberately intended to prevent a repetition of these events and to block the repatriation of refugees to Communist states. Large-scale repatriation movements did not occur until the 1960s and 1970s, when successful national liberation struggles in Africa allowed more than a million refugees to return to their homes.

In such cases, refugee returns were prompted by some very evident and fundamental changes in countries of origin. UNHCR's engagement in these repatriations was primarily a logistical one. The safety and voluntariness of such returns were not in question.

That situation began to change in the 1980s, a period when refugee numbers in the developing world grew rapidly. Many refugee-hosting states, struggling to cope with the effects of economic mismanagement and imposed structural adjustment programs, expressed mounting concern about the impact of the increasingly large-scale and long-term refugee populations living on their territory.

3 Anonymous paper cited in Long (2014, 134).
4 Statement of Dennis McNamara, cited in Long (2014, 136).

Donor states were equally frustrated by the apparent need to continue to fund assistance programs that persisted for years on end, but which did nothing to bring about lasting solutions. States were increasingly eager to promote repatriation, rather than just to facilitate it, with UNHCR playing a central role in that process.

Executive Committee Conclusion 29 of 1983, for example, called on states to facilitate the work of UNHCR "in creating conditions favourable to and promoting voluntary repatriation, which whenever appropriate and feasible is the most desirable solution for refugee problems" (UNHCR 1983).

In accordance with this principle, refugees came under mounting pressure to repatriate. In the 1970s and 1980s, a number of refugee populations — the Rohingya in Bangladesh, Ethiopians in Djibouti, and Cambodians in Thailand, for example — were all subjected to coerced repatriations which were at least tacitly condoned by UNHCR and the wider international community.

In the early 1990s, the end of Cold War proxy conflicts in Africa and Asia reinforced the belief that repatriation was the best — and often the only — way to bring refugee situations to an end. UN High Commissioner for Refugees Sadako Ogata declared that the 1990s would become known as "the decade of repatriation," and more than 10 million refugees returned to countries such as Afghanistan, Cambodia, Mozambique, and Nicaragua during this period.

While these repatriations were largely voluntary in nature, UNHCR now assumed a much more proactive role in repatriation processes. This included:

- promoting repatriation to countries which the organization deemed to be ready for refugee returns;
- creating Tripartite Commissions with countries of origin and asylum in order to initiate and accelerate repatriation movements;
- withdrawing food assistance, educational, and other services from refugee populations that were expected to repatriate;
- establishing repatriation targets and measuring operational success in terms of the speed and scale of return;
- invoking the cessation clauses of the 1951 Refugee Convention so as to make repatriation obligatory;
- cooperating with host states that engaged in forced repatriation movements; and
- developing the notions of "safe" and "imposed" return, which did not require the consent of refugees.[5]

In some cases, the notion of "imposed return" was put into practice. In December 1996, for example, the Tanzanian government and UNHCR issued a joint statement, affirming that "all Rwandese refugees can now return to their country." Up to half a million refugees were rounded up by the Tanzanian army, corralled into containment camps and forced to return to an authoritarian state where disappearances, arbitrary detentions, and extrajudicial killings were rife (see, e.g., Amnesty 1997).

5 This list is derived from an analysis of UNHCR repatriation operations between 1984 and 2002, focusing primarily on refugee returns from the Democratic Republic of Congo, Djibouti, Malawi, Myanmar, Pakistan, Tanzania, and Thailand.

Confronted with stinging criticism from organizations such as Amnesty International and Human Rights Watch, UNHCR quietly abandoned the notion that repatriation could legitimately take place on a non-consensual basis. It is now widely acknowledged — even within the organization — that the operation amounted to a *refoulement*, and thus fundamentally breached UNHCR's duty of refugee protection.

IV. Repatriation Today

If the 1990s were a decade of repatriation, the last 10 years are best described as "a decade of protracted emergencies." Millions of new refugees have been created as a result of intense violence in Burundi, Central African Republic, Iraq, Nigeria, South Sudan, Syria, Ukraine, and Yemen. At the same time, longstanding conflicts in countries such as Afghanistan, the Democratic Republic of Congo, Myanmar, Somalia, and Sudan have gone unresolved.

As a result of these developments, refugee numbers have jumped to an all-time high, while repatriation levels have dropped to an historic low. Thus, in 2014, the last year for which UNHCR figures are available, only 126,800 refugees returned to their country of origin, the lowest number recorded for 30 years (UNHCR 2015, 8). While there is now a degree of optimism about the potential for safe and voluntary return from Thailand to Myanmar, the same cannot be said of the other situations listed above.

And yet the pressure on refugees to return has not disappeared. While the outcome of Kenya's camp closure announcement is yet to be seen, there is a clear danger that some Somali refugees will repatriate, believing that they have no other option.

In broader context, Australia and the European Union have both put the principles of asylum and *non-refoulement* at risk by establishing agreements that enable refugees to be deported to other states. The recently convened World Humanitarian Summit was signally silent on the issue of safe and voluntary refugee repatriation.

The notion of "imposed return" also continues to have its advocates, who argue that postconflict development agendas should be prioritized once repatriation is "safe enough." Oxford economist Paul Collier, for example, has argued that "only host governments of asylum-seeking migrants have this power [to engineer a coordinated return] . . . they should use it" (Collier 2013, 263). This is exactly what Kenya is eager to do.

V. Recommendations and Conclusion

This article demonstrates that repatriation should not be engineered by states or by UNHCR. Every effort should be made to preserve the principles of safety, voluntariness, and dignity in the context of refugee returns. This is in part because refugee return is successful in the long term only if it is also sustainable. Refugees who are internally displaced upon their return, who are obliged to eke out a living in shanty towns or squatter settlements, or who feel obliged to move on to another country or continent in order to meet their basic needs, cannot be considered to have found a lasting solution to their plight.

The article consequently makes the following recommendations:

1. Voluntariness

- If situations arise in which refugees are forced or feel pressured to return to their country of origin, the international community should make no pretense with respect to their non-consensual nature. The notion of voluntariness should not be stretched so thin as to lose all meaning.
- UNHCR should scrupulously avoid an operational engagement in such operations where voluntariness is questionable, even in situations where it might be under pressure to engage by influential host and donor states.

2. Alternative Solutions

- The international refugee regime should abandon the hierarchy of solutions established in the 1980s and 1990s (with repatriation at the top) and give greater attention to the potential for local integration (of both a *de jure* and *de facto* nature) and resettlement to third countries.
- More attention should be paid to innovative approaches to solutions such as labor mobility, freedom of movement, and cross-border mobility arrangements for refugees.

3. Cessation and Promotion of Return

- There is a need to review the way in which the cessation clauses are applied to refugee populations, especially when linked to the promotion of refugee returns.
- UNHCR and its partners should review the practice of promoting repatriation to countries of origin which have not met the threshold for the cessation clauses to be invoked.
- In situations where refugees have established close social, economic, and personal links with their host states and communities, application of the cessation clauses should not lead automatically to an assumption that repatriation will take place. Instead, former refugees in these situations should be granted some kind of alternative residency status (e.g., as a resident alien) even if full naturalization is not available to them.
- Special consideration should be given to second and third generation refugees when planning for cessation of status or promotion of return, as they will never have seen their "home" country.
- The international community should consider the extent and ways in which humanitarian organizations and other members of the international refugee regime can contribute to broader foundations of peace building and development, crucial prerequisites for any durable repatriation.

4. Negotiating Repatriation

- In situations where safe and voluntary returns are feasible, the repatriation process should be made a more participatory one.
- Where possible, the international community should encourage the use of Quadripartite Commissions, in which refugees would take their place alongside

UNHCR and countries of origin and asylum to help to negotiate the conditions for return.

- Refugees should also be more extensively involved in monitoring the safety and ensuring the voluntariness of return.
- "Go and see" visits — which have become a valuable feature of repatriation operations, enabling refugees to spend some time in their homeland before making a final decision to return — should be complemented by "come and tell" visits, in which refugees who have already repatriated are able to relate their experiences to those who remain in countries of asylum.

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