Oxford Pro Bono Publico
www.law.ox.ac.uk/opbp

INTERNATIONAL REFUGEE LAW IN TANZANIA

International refugee and human rights law in application to refugee policy in Tanzania

August 2013

CONTRIBUTORS

Faculty supervisors:

Kirsten McConnachie
Joyce Pearce Junior Research Fellow at Lady Margaret Hall and the Refugee Studies Centre.
University of Oxford

Roland Bank
Departmental Lecturer in International Refugee and Human Rights Law, Refugee Studies Centre
University of Oxford

Research co-ordinators:

Rowena Moffatt
DPhil Candidate, University of Oxford

Emma Webber
MPhil Candidate, University of Oxford

Researchers:

Isabel Knott
BCL Candidate, University of Oxford

Anita Davies
BCL Candidate, University of Oxford

Yolanda Lee
MSc Candidate, University of Oxford

Lauren Dancer
BCL Candidate, University of Oxford

Aman Bhattacharya
BCL Candidate, University of Oxford

Celeste Robinson
MSc Candidate, University of Oxford

Kelly O'Connor
MSc Candidate, University of Oxford

Alex Petre
MSc Candidate, University of Oxford

The research co-ordinators would like to thank:

- **Dr James Milner**, Assistant Professor, Department of Political Science, Carleton University, for his insightful comments on a draft of this document;
- **Professor Timothy Endicott**, Dean of the Oxford Law Faculty, for his support of this project;
- The Members of the Oxford Pro Bono Publico Executive Committee, **Professor Sandra Fredman**, **Dr Jacob Rowbottom, Mr Miles Jackson, Chris McConnachie, Ingrid Cloete, Tamas Szigeti, Chintan Chandrachud** and **Richmond Glasgow**, for their support and assistance with the project.

Indemnity

Oxford Pro Bono Publico (OPBP) is a programme run by the Law Faculty of the University of Oxford, an exempt charity (and a public authority for the purpose of the Freedom of Information Act). The programme does not itself provide legal advice, represent clients or litigate in courts or tribunals. The University accepts no responsibility or liability for the work which its members carry out in this context. The onus is on those in receipt of the programme's assistance or submissions to establish the accuracy and relevance of whatever they receive from the programme; and they will indemnify the University against all losses, costs, claims, demands and liabilities which may arise out of or in consequence of the work done by the University and its members.

Intellectual property

TABLE OF CONTENTS

EXECUTIVE SUMMARY

1. This research was prepared for the Women's Legal Aid Centre (WLAC) and Womankind Worldwide. WLAC has been providing legal aid in Tanzania since 1994 and has reached more than 40,000 women across the country in the last 5 years. Womankind Worldwide has been working together with WLAC on a four-year project (2011-2014) to promote and protect the rights of refugee women and girls in the Mtabila and Nyarugusu refugee camps in western Tanzania. The organisations requested Oxford Pro Bono Publico's assistance in researching specific aspects of international refugee law so that they would be able to effectively represent and campaign for the legal rights of their clients. In addition, they have been invited by the Tanzanian government to participate in a high-level working group on the country's refugee policy and have requested research relevant to the issues that will be raised there.

2. In response to these requests, Oxford Pro Bono Publico produced this report. It reviews certain aspects of refugee law and policy in the United Republic of Tanzania from an international law perspective. In particular, Oxford Pro Bono Publico has addressed three questions. The first two questions consider the 2012 Tanzanian declaration of cessation in respect of approximately 38,050 Burundian refugees from an international refugee and human rights law perspective, respectively, and the third considers the Tanzanian encampment policy under international human rights law. More specifically, the questions are as follows:

    a. Question One: What are the requirements of a lawful declaration of cessation of refugee status in international law and was the Tanzanian declaration of cessation compliant?
    b. Question Two: What are the obligations of the refugee hosting country after invoking the cessation clause? Was the repatriation of Burundi former refugees by the Tanzanian government lawful?
    c. Question Three: Is the Tanzanian government's encampment policy compliant with international standards?

3. An overview of the key findings is provided below.

CESSATION: COMPLIANCE WITH INTERNATIONAL REFUGEE LAW

4. Under the 1951 Convention Relating to the Status of Refugees (Refugee Convention), refugee status is maintained unless and until one of the cessation clauses may be invoked. There are four voluntary cessation clauses and one non-voluntary clause. The relevant cessation clause in relation to the Tanzanian declaration of cessation is Article 1C(5) of the Refugee Convention. Article 1C(5) may be validly invoked if the circumstances in the country of origin have changed such that refugees can no longer refuse to avail themselves of the protection of that country. In practice, this requirement is likely to be satisfied where there is i) substantial and fundamental change which is ii) enduring and iii) effective protection has been restored. The restoration of effective protection includes the right to a basic livelihood.

5. There are procedural requirements which accompany determinations of the cessation of refugee status. Refugees are, *inter alia,* entitled to: proper notice; some form of hearing in which they can rely on supporting documents; suspensive effect until a final decision has been taken; legal representation; interpretation; notification of the decision in writing; and an effective remedy including an appeal. Cessation must be considered on an individualised basis and the state has the burden of proving the existence of ceased circumstances on a similar standard of proof as that used in refugee status determinations.

6. In application to the Tanzanian case, whilst the Tanzanian Government carried out an individualised assessment of each case, there is no document known to Oxford Pro Bono Publico which assesses the protection conditions in Burundi. From the evidence available of the situation in Burundi, and in particular, in relation to the economic situation and land disputes, it appears that protection may not be effectively restored as the right to a basic livelihood is precarious. Further, there is some evidence that certain of the procedures followed by the Tanzanian Government did not meet international standards. In particular, there is some evidence that the results of the final decisions on cessation were not properly promulgated, and insofar as rights relating to the status of refugee were withdrawn prior to the final decision on cessation, the Tanzanian Government may have breached its international obligations. Moreover, the number of successful appeals (approximately 10%) is low when it is considered that the Burundian refugees subject to the 2012 declaration of cessation had been transferred from other camps in Tanzania (which had closed prior to 2012) because they had reasons not to

be returned to Burundi. However, a stronger conclusion would require more concrete evidence of the acts and omission of the Tanzanian Government and/or UNHCR.

CESSATION AND REPATRIATION: COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS LAW

7. The obligations of host states do not terminate upon the declaration of cessation of refugee status. Host states must comply with the requirements of international human rights law and there are also non-binding UNHCR standards, in particular, that return should be effected with regard to the safety and dignity of the former refugees. The following norms of international human rights law are relevant to situaitons of repatriation: personal security and freedom from torture, cruel, inhuman or degrading treatment; family unity; the rights of children; due process and effective remedy; and freedom from collective expulsion.

8. In application to the Tanzanian repatriation of Burundian former refugees in 2012, on the available evidence it does not appear that the conditions of return in safety and dignity were satisfied in all respects. In particular, this is applicable to the separation of families, the depletion of living conditions in the camps prior to removal, and the fear of physical violence. As regards compliance with international human rights law, there is some suggestion that family unity was interfered with and relatedly, that the best interests of children were not taken into account properly or at all. Further, there is some suggestion that the right to security of the person was interfered with in the forced removal process. However, given the limited evidence available, further investigation is needed in order to reach firm conclusions on these points.

ENCAMPMENT: COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS LAW

9. The existence of camps as a concept within refugee law is generally accepted by UNHCR as unavoidable. Whilst encampment policies necessarily impair the rights of their inhabitants, the majority of these rights are derogable and host states may, therefore, justify these violations. However, the cumulative infringement of rights within camps may provide the basis of a legal challenge to encampment policies.

10. The Tanzanian long term encampment policy may be called into question if the rights violations are arbitary and discriminatory in nature. In particular, the Tanzanian encampment policy restricts rights to freedom of movement and liberty, security, work and training, and health.

11. There are currently legal proceedings in Kenya challenging the legality of a state encampment policy for urban refugees. By an interlocutory judgment, the court prohibited the transfer of refugees to camps on the basis of Kenya's international obligations.[1]

12. Whilst there are some differences between the situations in Tanzania and Kenya, the outcome of the Kenyan case will be of relevance to Tanzanian encampment policy. The cumulative effect of infringments of rights, in particular those of movement and liberty points towards the need for policy reform. In the interim it is recommended that the Tanzanian Government revisit its policy on long term encampment.

[1] Kutuo Cha Sheria v Attorney General, High Court of Kenya. Ruling/Direction 23rd January 2013. <www.urpn.org/uploads/1/3/1/5/13155817/petition_19_of_2013_ruling_23.1.2013.pdf> accessed 1 July 2013.

QUESTION ONE

INTRODUCTION

The first question is as follows: What are the requirements of a lawful declaration of cessation of refugee status in international law and was the Tanzanian declaration of cessation compliant?

Following independence in 1962, Burundi experienced ethnic conflict between the ruling minority Tutsis and the majority Hutu population. In 1972, a Hutu rebellion was repressed by the majority Tutsi army. In the violence that ensued, it is estimated that 80,000-100,000 people were killed and over 160,000 Burundians fled to neighbouring states of Rwanda, the Democratic Republic of Congo (DRC) and Tanzania.[2] In 1993, the assassination of the first elected president, Melchior Ndadaye, lead to further massacres in which both Hutu and Tutsi civilians were targeted by the army and the rebels, respectively. As a result, an estimated 500,000 Burundians fled and many others became internally displaced. The relative stability of Tanzania in comparison with its neighbours,[3] has made it a primary recipient state for Burundian refugees. Given the protracted nature of the Burundian refugee situation, many refugees have spent their lives in settlements or camps in Tanzania. The Tanzanian Government's official policy of repatriating Burundians started in 2002. In 2012 the Tanzanian Government declared the cessation of refugee status in respect of approximately 33,700 refugees living in the Mtabila refugee camp in Tanzania. These individuals were then returned to Burundi.[4]

1) REFUGEE CESSATION CLAUSES IN INTERNATIONAL LAW

a) Criteria for invoking the cessation clauses

i) General observations

The purpose of cessation of refugee status is to ensure that refugee protection does not extend beyond the situation in which it is required. Thus, cessation applies when 'the refugee, having

[2] Gitte Robinson and Maria Riiskjaer, 'Joint Evaluation: Evaluation of the protracted refugee situation (PRS) for Burundians in Tanzania' (UNCHR, October 2010) <http://www.unhcr.org/4a1d43986.html#evaluation> accessed1 July 2013. See also, Internal Displacement Monitoring Centre (IDMC), *Burundi: secure tenure and land access still challenges for long-term IDPs: a profile of the internal displacement situation*, (18 August, 2011) <http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/7F8593C16A45E842C12578F000525A48/$file/Burundi+-+August+2011.pdf> accessed 1 July 2013, which estimates that over 300,000 Burundians fled to Tanzania.

[3] E.g. the genocide in Rwanda in 1994 and the major wars in the DRC in 1990s.

[4] See generally, Press Release on Ministry of Home Affairs website <http://www.moha.go.tz/index.php/82-news-and-events/181-the-government-of-tanzania-determined-to-close-mtabila-refugee-camp-in-kigoma> accessed 1 July 2013.

secured or being able to secure national protection, either of the country of origin or of another country, no longer needs international protection."[5] There are three international instruments that include mechanisms for cessation of refugee status, namely, 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (hereafter OAU 1969),[6] the 1951 Convention Relating to the Status of Refugees (hereafter Refugee Convention), and the UNHCR Statute.[7] UNHCR's statute is enacted by the UNCHR and the Refugee Convention and OAU 1969 are enacted by states. There is broad similarly between all three instruments:[8] they all contain a clause relating 'to a change in personal circumstances of the refugee, brought about by the refugee's own act, and which results in the acquisition of national protection' and a clause relating 'to a change in the objective circumstances in connection with which the refugee has been recognized' (the 'ceased circumstances' cessation clause)."[9] However, whilst the ceased circumstances clause may be invoked by states without the consent of a refugee, the UNCHR Statute does not provide for mandatory repatriation. Therefore, in relation to UNCHR's mandate, under Article 8(c) of the UNHCR Statute the High Commissioner may assist state efforts to promote only voluntary repatriation. As the Tanzanian cessation and tripartite agreement between Tanzania, Burundi and UNHCR is based on the Refugee Convention, it will be the focus of the following analysis.

ii) Cessation under the Refugee Convention

In order to avoid unilateral or arbitrary declarations of cessation of status, refugee status is maintained unless and until one of the cessation clauses may be invoked.[10] The cessation clauses are exhaustive of the situations in which refugee status may be terminated. It is possible to declare cessation on an individual or group basis, although in both cases cessation must address the causes of flight for an individual refugee. Under the Refugee Convention, a refugee may cease to qualify for international protection if circumstances arise to bring about the operation of

---

[5] UNHCR, Note on Cessation Clauses, (1997), para 4 (UNHCR Note on Cessation 1997) <http://www.refworld.org/docid/47fdfaf1d.html> accessed 1 July 2013. See also the underlying rationale for the cessation clauses expressed to the Conference of Plenipotentiaries in the drafting of the 1951 Convention by the first United Nations High Commissioner for Refugees, G. J. van Heuven Goedhart, who stated that refugee status should 'not be granted for a day longer than was absolutely necessary, and should come to an end ... if, in accordance with the terms of the Convention or the Statute, a person had the status of de facto citizenship, that is to say, if he really had the rights and obligations of a citizen of a given country,'. UNHCR Note on Cessation 1997, para 4.

[6] There is little case law on OAU cessation: Joan Fitzpatrick and Rafael Bonoan, 'Cessation of refugee protection' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consulations on International Protection* (CUP 2003) , 529-30.

[7] ibid 493.

[8] ibid.

[9] UNHCR Note on Cessation 1997, para 5.

[10] ibid, para 6.

the cessation clauses contained in Article 1C the Refugee Convention. These are: i) voluntary reavailment of the protection of the country of nationality; ii) voluntary reacquisition of the refugee's old nationality; iii) acquisition of a new nationality and enjoyment of the protection of the country of new nationality; iv) voluntary reestablishment in the country where persecution was feared; and v) a change of the circumstances which give rise to recognition as a refugee.

Accordingly, there are four 'voluntary' and one 'non-voluntary' cessation clauses.[11] As regards non-voluntary cessation, Article 1C(5) provides that the Refugee Convention 'shall cease to apply to any person falling under the terms of section A if... [h]e can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to avail himself of the protection of the country of his nationality.' Article 1C(5) may be validly invoked if the circumstances in the country of nationality have changed such that refugees can no longer refuse to avail themselves of the protection of that country. The change of circumstances cessation clause is subject to a proviso in relation to 'statutory refugees' (namely, pre-1939 refugees still recognised as such under Article 1A(1) of the Refugee Convention). The proviso disapplies Article 1C(5) to statutory refugees 'where there are compelling reasons arising out of previous persecution for refusing to avail themselves' of the protection of the country of nationality. The position of UNHCR is that since the proviso is an expression of a general humanitarian requirement, it could apply to all refugees whose repatriation is objected to on grounds beyond mere inconvenience.[12] Many jurisdictions have legislated to this effect,[13] however, as a matter of interpretation of the Refugee Convention, the position appears otherwise.[14]

iii) Requirements of cessation based on 'ceased circumstances'

In order to lawfully invoke Article 1C(5) of the Refugee Convention it must be established that following a change in circumstances in the country of origin there is no longer a need for protection. To forcibly return an individual otherwise would amount to *refoulement*. Whilst this is the only legal requirement, in practice, it is likely to be satisfied where there is i) substantial and fundamental change which is ii) enduring and iii) effective protection has been restored.[15] There

[11] Article 1C(6) of the Refugee Convention applies the ceased circumstances clause to stateless persons.
[12] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979 (UNHCR Handbook), para 136; UNCHR *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) & (6),* paras 20-21.
[13] See G Goodwin Gill & J McAdam, *The Refugee in International Law* (OUP 2007) 145-148.
[14] See, for example, *R (oao Hoxha) v SSHD* [2005] UKHL 19, [2005] 1 WLR 1063.
[15] UNHCR Note on Cessation, para 19; see also UNHCR, *Guidelines on Exemption Procedures in respect of Cessation Declarations*, December 2011, available at: <http://www.refworld.org/docid/4eef5c3a2.html> accessed 1 July 2013,

should be an individualised assessment in each case. These requirements are examined below, in turn.

The notion of fundamental change requires the elimination of the cause of fear of persecution.[16] In particular, there should be evidence of basic reforms and a causal connection between the reforms and the reduction of risk.[17] The change in circumstances should be 'significant and profound'.[18] Examples of changes in circumstances that may point to a 'fundamental' change include:[19] the end to hostilities, a complete political change, 'significant reforms altering the basic legal or social structure of the State',[20] return to a situation of peace and stability, democratic elections,[21] declarations of amnesties,[22] repeal of oppressive laws,[23] and dismantling of former security services.[24] The changes are often interlinked (i.e. an improvement in one area may lead to an improvement in all others) and all relevant factors must be taken into account. [25] There are limits, however, on the ability of states to invoke Article 1C(5) where there has been a change of circumstances. For instance, where the particular circumstances leading to flight or to non-return have changed, only to be replaced by different circumstances which may also give rise to refugee status, Article 1C(5) or (6) cannot be invoked.'[26] Similarly, cessation may not be invoked where the return of former refugees would be likely to generate fresh tension in the country of origin. This itself could signal an absence of effective, fundamental change.[27]

'Enduring change' requires that the fundamental changes also be 'stable and durable.'[28] Further, the changes 'should be given time to consolidate before any decision on cessation is made.'[29] Thus, a situation which has changed, but which also continues to change or shows signs of volatility is not by definition stable and cannot be described as durable.[30] UNHCR does not

(UNHCR Guidelines on Cessation 2011) and Case C-175/08 *Salahadin Abdulla and Others v Bundesrepublik Deutschland* [2010] ECR 113.

16 UNHCR Guidelines on Cessation 2011, para 11.

17 James C. Hathaway, *The Rights of Refugees Under International Law* (2005 CUP).

18 UNHCR Guidelines on Cessation 2011, para 13.

19 ibid paras 11-12.

20 UNHCR Note on Cessation 2011, para 20.

21 ibid.

22 ibid.

23 ibid.

24 ibid.

25 UNHCR Guidelines on Cessation 2011, para 11.

26 ibid para 12.

27 ibid.

28 UNHCR Note on Cessation 1997, para 21.

29 UNHCR Guidelines on Cessation 2011, para 13.

30 UNHCR Note on Cessation 1997, para 21.

recommend a set timeline,[31] although 12-18 months is recommended as a 'minimum for assessment purposes.'[32] Durable, fundamental changes may take place on a short timescale in the event of peaceful changes that take place under a constitutional process, with free and fair democratic elections and a real change of government committed to respecting fundamental human rights, and where there is relative political and economic stability in the country.[33] This is to be contrasted with the situation in which the changes have taken place violently, for instance, following the overthrow of a regime. Generally, a longer period of time will need to have elapsed before the durability of change can be tested in these circumstances. Where change is achieved through violent means, the human rights situation needs to be assessed with particular care and any peace arrangements with opposing militant groups must be carefully monitored. In the case of peace agreements following conflicts involving different ethnic groups there is a need for enhanced scrutiny since progress towards genuine reconciliation has often proven difficult in such cases.[34] In assessing the durability of the change, practical developments such as voluntary repatriation and the experience of returnees should be given considerable weight, as well as reports from independent observers.[35]

In order to ensure that protection has been restored, it must be effective and available. This 'requires more than mere physical security or safety. It needs to include the existence of a functioning government and basic administrative structures, as evidenced for instance through a functioning system of law and justice, as well as the existence of adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood.'[36] The general human rights situation in the country of origin is an important factor to be taken into account.[37] Further, relevant factors include:[38] the level of democratic development in the country, including the holding of free and fair elections; adherence to international human rights instruments; and access for independent national or international organisations freely to verify respect for human rights. There is no requirement, however, that the human rights standards must be exemplary. Rather, '[w]hat matters is that significant improvements have been made, as illustrated at least by respect for the right to life and liberty and the prohibition of torture; marked progress in establishing an independent judiciary, fair trials and access to courts; as well as protection

[31] UNHCR Guidelines on Cessation 2011, para 13.
[32] UNHCR Note on Cessation 1997, para 21.
[33] UNHCR Guidelines on Cessation 2011, para 13.
[34] ibid para 14.
[35] UNHCR Note on Cessation 1997, para 21.
[36] UNHCR Guidelines on Cessation 2011, para 15.
[37] UNHCR Excom No. 69; UNHCR Guidelines on Cessation 2011, para 16.
[38] UNHCR Guidelines on Cessation 2011, para 16.

amongst others of the fundamental rights to freedom of expression, association and religion.'[39] Fundamental and enduring changes are only effective if they remove the basis of risk of persecution. Accordingly, the changes must be assessed in the light of the risks that faced a refugee when he or she was granted status.[40]

iv) Cessation and repatriation

If cessation is validly invoked, it does not lead inexorably to repatriation or return. Whilst cessation and repatriation are often linked, one does not necessarily flow from the other. In particular, cessation of individual or group status does not necessarily trigger and should not automatically lead to repatriation.[41] An individual may have proper claims to an alternative legal status in the host country, complimentary protection or other humanitarian claims, or in relation to a third country that should be considered prior to repatriation. In the absence of other durable solutions, however, repatriation is often the de facto solution. [42]

b) Procedural requirements in the cessation of refugee status

i) General observations

Procedural safeguards are vital in cessation determinations. They are important for at least two reasons: first, because refugees do not always agree with state proclamations that protection exists in their country of origin, and secondly, the consequences of a declaration of cessation may be extreme. Thus, 'a premature or insufficiently grounded application of the cessation clauses can have extremely serious consequences as refugees who need to remain in the country of asylum may be forced to do so illegally, or may be threatened with refoulement.'[43] The content of procedures in refugee cessations should be informed by the machinery in existence for the determination of refugee status. This is because refugee status determination and cessation exemption procedures are two sides of one overall process and thus should have similar procedural safeguards and processes.[44] Further, in light of their nature and the consequences flowing from their invocation, cessation clauses should be interpreted restrictively.[45] The necessary procedural elements required by the invocation of the cessation clauses are examined below, in turn.

---

[39] ibid.
[40] UNHCR Note on Cessation 1997, para 19.
[41] Joan Fitzpatrick and Rafael Bonoan, 'Cessation of refugee protection' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consulations on International Protection* (CUP 2003) 517.
[42] UNHCR Note on Cessation 1997, paras 10, 36.
[43] ibid para 8; see also UNHCR 2011 para 7.
[44] UNHCR Guidelines on Cessation 2011, paras 14-15.
[45] UNHCR Note on Cessation 1997, para 8; see also UNHCR Guidelines on Cessation 2011, para 7.

ii) Specific procedures

Procedures should be established to allow refugees to challenge the decision to invoke the cessation clause.[46] The procedures for determining cessation should be 'fair, clear, and transparent' and respect minimum safeguards.[47] The standards are germane to general principles of administrative law, including the principles of consistency, due care, equality, fairness, good faith, legality, impartiality, proportionality and rationality. In particular, refugees are *inter alia* entitled to:

- be informed, in a language they understand and with reasonable notice, of: the cessation declaration, the process, scope and rationale of cessation, the timeframe for its entry into effect, and its consequences; other durable solutions available, including any other legal options to remain in the country of asylum; the exemption procedure to be followed as well as their rights and obligations during the procedure, including deadlines; the possible consequences of not complying with their obligations and/or deadlines;
- suspensive effect until a final decision has been taken on their application for exemption from cessation;
- consult and/or have in attendance a legal adviser or representative;
- a competent interpreter at registration and interview, as required;
- be informed of the choice to have interviewers and interpreters of the same sex as themselves;
- be heard, including an individual interview at first instance;
- file supporting documents after registration but subject to reasonable timeframes;
- be notified of the decision in writing; and
- an effective remedy for possible erroneous decisions, including an opportunity to appeal the first instance decision.[48] The exemption procedures should include at least one instance of appeal, which offers a review of all aspects of the decisions, including questions of law and fact.[49]

States are responsible for ensuring proper exemption procedures, ideally with UNHCR providing technical assistance. This means that states should ensure that protection standards and general principles of administrative law reflected in international and regional legal

[46] ibid, para 35.
[47] UNHCR Guidelines on Cessation 2011, para 7; see also UNHCR Note on Cessation 1997, para 35.
[48] UNHCR Guidelines on Cessation 2011, para 29.
[49] ibid para 62. See also UNHCR Excom No. 8 para (e)(vi).

instruments are followed. Further, exemption procedures should be regulated by law, this 'could be a law or a policy adopted in pursuance of the relevant legislation, or an administrative decision. The criteria determining the personal scope of the declaration of cessation should be clear from the legal act to declare cessation and/or set up the exemption procedures.'[50] Other actors, including refugees, should also be involved in the design and implementation of exemption procedures. Refugee participation 'can help ensure that their concerns are properly addressed and that age, gender and diversity considerations are taken into account.'[51]

iii) Individualised assessment

In situations of mass influx where groups of persons have been recognised as refugees on a group basis because of the readily apparent and objective reasons for flight in the country of origin, it may also be appropriate to make a general declaration of cessation.[52] However, in view of the potential consequences of cessation, all refugees affected by a group decision to cease that status must have the possibility to have the application of the cessation clause reconsidered on grounds relevant to their individual case.[53] The withdrawal of the rights of the refugee should not be acted upon until a final decision has been taken. Therefore, cessation is not necessarily automatic and it must do justice to the individual dimensions of each case.[54] In other words, just as refugee status in an individualized status, cessation should also take and individualized approach to the cessation of causes for flight.[55]

iv) Burden and standard of proof

The host state has the burden of proving the existence of ceased circumstances on a similar standard of proof as that used in refugee status determination.[56] Further, where the circumstances which gave rise to the recognition of refugee status have ceased and other circumstances are claimed to justify a fear of persecution, the same standard of proof as that

---

[50] UNHCR Guidelines on Cessation 2011, para 8.

[51] ibid para 11.

[52] UNHCR Guidelines on Cessation 2011, para 23. Although in such cases it is difficult to identify whether the circumstances that led to an individual refugee's flight have been addressed as the exact causes of flight for an individual are not always known. It is particularly important for such individuals to have access to 'comprehensive and rigorous' exemption procedures, because 'For such refugees, the exemption interview may well be the first articulation of the reasons for their refugee status.' (UNHCR Guidelines exemptions, para 50). The focus, however, should be on the reasons why the person cannot avail him- or herself of the protection of the country of origin at the present time.' (UNHCR Guidelines exemptions, para 21).

[53] UNHCR Guidelines on Cessation 2011, para vii; UNHCR Excom No. 69, para d.

[54] *QAAH of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs Australia* cited in Goodwin-Gill G and McAdam J,(n 11) 140, fn 28)

[55] See, for example, *Grand Chamber of the European Court of Human Rights in Hirsi Jamaa and Others v. Italy* (Application no. 27765/09) which found a violation of Article 4 of Protocol 4 to the ECHR.

[56] UNHCR Guidelines on Cessation 2011, para ii and 60.

used in refugee status determination should be applied.[57] A decision by the host State to apply the 'ceased circumstances' cessation clause operates as a rebuttable presumption against the individual refugee concerned, or, where it is applied to a group of refugees, against each individual in the group.'[58] Nonetheless, the duty to ascertain and evaluate all the facts is shared between the examiner and the applicant.'[59] In the event that there is any doubt as to the application of the clause in the particular case, refugee status should be maintained.'[60]

v) Objective and verifiable decision to declare cessation of status

The decision that the situation which justified the granting of refugee status has ceased to exist should be objective and verifiable.[61] In other words, the assessment should be based on the general human rights situation[62] and make use of information from relevant specialised bodies, such as UNCHR, foreign ministries, diplomats, NGOs, the press and academics.[63] Further, the declaration and implementation of cessation should be public,[64] consultative and transparent, involving refugees, NGOs, and UNHCR.[65] This could include the facilitation of 'go and see' visits to the country of origin to examine conditions there and an examination of the situation of refugees who have already returned voluntarily.[66] It may also include counselling of refugees and the provision of assistance to returnees.[67]

vi) Time lapse

Finally, there should be a time lapse between the declaration and implementation of cessation to allow individuals to prepare to rebut the declaration, seek alternative status, or make preparations to leave.[68] Registration for exemption or appeal should be open for a minimum of two months, and ideally three to six months before the date of cessation.[69]

---

[57] See *Salahadin Abdulla and Others v Bundesrepublik Deutschland.*
[58] UNHCR Note on Cessation 1997, para 37.
[59] UNHCR Guidelines on Cessation 2011, para 58; see also UNHCR Handbook 2011, paras 195-196.
[60] UNHCR Note on Cessation 1997, para 37.
[61] UNHCR Excom No. 69, para a.
[62] UNHCR Guidelines on Cessation 2011.
[63] UNHCR Excom No. 69.
[64] UNHCR Guidelines on Cessation 2011, para iv.
[65] ibid para iii.
[66] ibid.
[67] ibid para v.
[68] ibid para vi.
[69] Guidelines on Cessation 2011, paras 32, 34.

2) COMPARATIVE EXAMPLES OF THE USE OF CESSATION CLAUSES

It is rare for states to invoke articles 1C(5) and 1C(6) of the Refugee Convention explicitly and unilaterally. In many situations states have mandated repatriation without any reliance on cessation clauses (for instance, return of refugees from Thailand and Bangladesh to Burma from 1989 to 1993; from Iran and Pakistan to Afghanistan in the 1990s; from India to Sri Lanka from 1991 to 1993; from Tanzania to Rwanda in 1996; and from Burundi to Rwanda in 2005).[70] In most other situations, it is ambiguous whether the state has invoked the cessation clauses.[71] For this reason, little reliance can be placed on the practice of states in identifying circumstances in which cessation clauses could be invoked.

Although it is for the states which have granted refugee status to invoke the cessation clauses, UNHCR may invoke cessation under the Statute of the Office of the United Nations High Commissioner for Refugees.[72] This invocation, however, does not imply the end of the obligation for the host state to inquire into the circumstances permitting the invocation but 'may be useful to States in connection with the application of the cessation clauses as well as the 1951 Convention.'[73] In other words, since the declaration of cessation by the UNHCR is to 'provide a legal framework for discontinuation of UNHCR's protection and material assistance to the refugees',[74] it does not automatically mark the end of the host state's obligations to follow the procedures for invocation of cessation clauses.[75]

---

[70] Jeremy R. Tarwater, 'Analysis and case studies of the "ceased circumstances" cessation clause of the 1951 Refugee Convention' (2001) 15 Geo. Immigr. L.J. 563, 607.

[71] ibid at 605, 606. However, Tarwater also suggests that some situations such as refugee repatriation from Thailand to Cambodia in 1991, South Africa to Mozambique in 1993, and Iran to Iraq in 1996 are instances where the invocation can be *implied*. In Thailand, for instance, he places reliance on an MOU between the UNHCR, the Thai government, and the temporary government of Cambodia which was 'to ensure that there would be no residual problems in Thailand' to decipher cessation. Similarly, he considers the repatriation that follows the tri-partite agreement between South Africa, Mozambique and the UNCHR which *considers* the invocation of cessation as an implied invocation. It is difficult to count these instances as an actual instance owing to the ambiguity involved. Hence, this report shall not rely on these practices.

[72] Statute of the Office of the United Nations High Commissioner for Refugees UNGA Res 428(V) (14 Dec 1950) art. 6(A)(ii)(e) and (f).

[73] See Executive Committee of the High Commissioner's Programme, Conclusion No. 69 (XLIII) UN doc. A/AC.96/804 (1992), third preambular paragraph.

[74] UNHCR, 'Note on Cessation Clauses', EC/47/SC/CRP.30 (30 May 1997) <http://www.refworld.org/docid/47fdfaf1d.html> accessed 1 July 2013.

[75] See also Marissa Elizabeth Cwik 'Forced to Flee and Forced to Repatriate? How the Cessation Clause of Article 1C(5) and (6) of the 1951 Refugee Convention Operates in International Law and Practice' (2011) 44 Vanderbilt Journal of Transnational Law 711. Since states, as per Cwik, can mandate repatriation through the invocation of cessation the burden of inquiry of the changed circumstances is higher in cases of states.

In respect of UNHCR's invocation of cessation, all practices reflect UNHCR's attempt to find a 'fundamental' and 'durable' change in circumstances of the country of origin so as to ensure that the returnees get effective protection against persecution in the country of origin. For example, in respect of Sierra Leone,[76] the UNHCR recommended states to implement the cessation clauses by 31 December 2008 for Sierra Leoneans who fled their country during the decade-long civil war which started in 1991. This decision was made following UNHCR's consultations with the governments of the main countries of asylum and Sierra Leone. The UNHCR believed that there was a fundamental change in circumstances since declaration of peace in January, 2002. It concluded so for a variety of reasons: first, the UN Mission in Sierra Leone completed its withdrawal in January 2006, handing over to the UN Integrated Office in Sierra Leone responsibilities for peace consolidation, development and respect for human rights; secondly, individuals responsible for the atrocities committed during the conflict had been indicted/tried or were in the process of being tried by the Special Court for Sierra Leone; thirdly, improvements had been made in respecting human rights; fourthly, two sets of elections – in 2002 and in 2007 – had been considered free and fair by the international community; and fifthly, many Sierra Leonean refugees had returned under UNHCR's voluntary repatriation operation (and many through their own means) from September 2000 to July 2004.

Similarly, in relation to Liberia,[77] the signing of the Comprehensive Peace Agreement and the creation of the transitional government marked the end of the Liberian civil war. This was followed by a number of positive developments, such as two successful presidential and legislative elections in 2005 and 2009 and the creation of the Independent National Commission on Human Rights and Truth and Reconciliation Commission for investigating gross human rights violations and war crimes, including massacres, sexual violations, murder, extra-judicial killings and economic crimes. Further, there was a reduction in the number of United Nations Mission in Liberia peacekeeping soldiers needed to ensure general security by 2011 and the majority of Liberians had voluntarily been repatriation. All these factors influenced the UNHCR (together with consultations with the principal countries of asylum and the country of origin) to declare a cessation in relation to refugees who fled the country as a result of the civil wars from 1989 to 2003 to be enforced by states by June 2012.

---

[76] UNHCR, 'Applicability of Ceased Circumstances Cessation Clauses to Refugees from Sierra Leone' (2 June 2008), <http://www.refworld.org/docid/4848ea752.html> accessed 1 July 2013.

[77] UNHCR, 'Implementation of the Comprehensive Strategy for the Liherian Refugee Situation, including UNHCR's recommendations on the applicability of the "ceased circumstances" cessation clauses' (13 January 2012), <http://www.refworld.org/pdfid/4f3399002.pdf> accessed 1 July 2013.

However, UNHCR's decision on cessation in relation to Rwanda[78] has attracted criticism. Following consultations with the principal countries of asylum and the country of origin, UNHCR expressed the need to invoke the cessation clause to end the refugee status of Rwandan refugees who left Rwanda between 1959 and 1998 as a result of the different episodes of inter-ethnic violence between 1959 and 1994; the genocide of 1994 and its aftermath; and the renewed armed conflict that erupted in north-western Rwanda from 1997 to 1998. UNHCR suggested that the cessation clauses must be invoked by all asylum countries by June 2013. Consequently many states (e.g. Uganda) are currently taking steps towards applying the cessation clauses. The UNHCR cited various positive developments since 1998 to defend its move, for example, the adoption of a new constitution and the holding of parliamentary and presidential elections; attempts at reconciliation between the ethnic communities; accession to various human rights treaties and the creation of National Human Rights Commission; abolition of death penalty; and the conclusion of the proceedings of the *Gacaca* courts, which have been a source of apprehension for many refugees. However, there has been criticism of UNCHR's reasoning. All critics point out that there is still anxiety and fear of return amongst the refugee population. Guillaume Cliche-Rivard and Evi Kyprioti point to testimonies from Rwandan refugees, including some who had fled Rwanda again after a brief return, which indicate that the circumstances have not improved. These critics also highlight that the Rwandan legal system is selectively prosecuting, especially in relation to the political opposition.[79] Further, defence witnesses at the ICTR are afraid of going back to Rwanda and the Government has invaded the DRC twice post 1998 to fight Hutu forces and withdrew only in 2009.

---

[78] UNHCR, 'Implementation of the Comprehensive Strategy for the Rwandan Refugee Situation, including UNHCR's recommendations on the Applicability of the "Ceased Circumstances" Cessation Clauses' (31 December 2011), <http://www.refworld.org/docid/4f33a1642.html> accessed 17 May 2013; Ministerial meeting reviews timeline for solving Rwandan refugee situation (19 April 2013) <http://www.unhcr.org/51712a034.html> accessed 1 July 2013.

For criticisms cited see Cwik. Also see Opening remarks by Home Affairs Minister Ms GNM Pandor during UNHCR meeting on the Implementation of the Comprehensive Durable Solutions Strategy including the applicability of the 'ceased circumstances' cessation clauses for the Rwandan refugees (18 April 2013) <http://www.home-affairs.gov.za/index.php/statements-speeches/152-opening-remarks-by-home-affairs-minister-ms-naledi-pandor-during-unhcr-meeting-on-the-implementation-of-the-comprehensive-durable-solutions-strategy> accessed 17 May 2013; Guillaume Cliche-Rivard and Evi Kyprioti, 'The Cessation Clause and the Rwandans in Uganda: Is the Countdown beginning?', (September 2012) <http://frlan.tumblr.com/post/30649821466/the-cessation-clause-and-rwandans-in-uganda-is-the> accessed 1 July 2013. Kelly McMillan, 'Uganda's Invocation of Cessation Regarding its Rwandan Refugee Caseload: Lessons for International Protection' (2012) 24(2) International Journal of Refugee Law 231, 235-243.

[79] See, e.g., the prosecution of Victoire Ingabire, the Hutu president of the FDU-Inkingi who was arrested three months after returning to Rwanda following a period of exile and was charged with the promotion of 'genocide ideology' and 'divisionism', and was subsequently barred from 2010 elections.

3) APPLICATION TO TANZANIA

a) Tanzania's refugee policy

i) Background: development of Tanzania's refugee policy

Tanzania has a long history of hosting refugees from its regional neighbours. Since independence in 1961, the country has had no armed conflicts, making it a safe place of refuge for millions of refugees over the decades.[80] Upon independence, Tanzania's first President, Julian Nyerere, promoted a generous and tolerant 'Open Door' refugee policy characterised by group (rather than individual) determination of refugee status, substantial allocations of land, and the potential for attainment of Tanzanian citizenship through naturalisation.[81] Thus over 160,000[82] Burundians fleeing ethnic violence between Hutus and Tutsis in 1972 took refuge in Tanzania. This group constitutes the first wave of Burundian refugees. They settled in border villages throughout the Kigoma region until the Tanzanian government created the Ulyankulu, Katumba and Mishamo settlements in the Tabora and Rukwa regions. The original 'settlements' are different from refugee camps in Tanzania (where more recently arrived refugees are accommodated). Established under a village system of collective agriculture, they were deemed to be self-sufficient by 1985 and administration was handed over to the Tanzanian government by UNHCR.[83] This permitted the refugees to resume their rural livelihoods. Though there are differences between camps and settlements, both are confined areas where refugees are subject to restrictions on freedom of movement. In a move to find 'durable solutions' for this group of refugees, the government of Tanzania announced in 2008 a plan to grant citizenship to the 1972 Burundian refugees.[84] However, by the end of 2011, UNHCR estimated that although 162,000 members of this group qualified for naturalisation, only 750 individuals had received formal confirmation of their new status.[85] Other refugees in the 1972 group accepted voluntary repatriation: the preferred option of the Tanzanian Government. Those Burundian refugees who did not move into the settlements were considered to be 'self-settled'. They were eventually given refugee identity cards (administered by a Settlement Commander based in Kigoma)[86] but did not qualify for naturalisation.

---

[80] International Refugee Rights Initiative and Social Science Research Council, *Going Home or Staying Home? Ending Displacement for Burundian Refugees in Tanzania.* (Working Paper 1, 2008), 9.
[81] K Kamanga, 'The (Tanzania) Refugees Act of 1998: Some Legal and Policy Implications' [2005] JRS 100, 103-104.
[82]UNHCR, *Evaluation of the Protracted Refugee Situation for Burundians in Tanzania* (October 2012).
[83] International Refugee Rights Initiative and Social Science Research Council, *Going Home or Staying Home? Ending Displacement for Burundian Refugees in Tanzania.*(Working Paper 1, 2008), 8-9.
[84] UNHCR, 'UNHCR welcomes Tanzania's decision to naturalise tens of thousands of Burundian refugees', April 2010).
[85] United Nations High Commissioner for Refugees, 'Global Report 2011', (June 2012).
[86] International Refugee Rights Initiative and Social Science Research Council, *Going Home or Staying Home? Ending Displacement for Burundian Refugees in Tanzania.*(Working Paper 1, 2008) 8-9.

Many refugees returned to Burundi when Melchior Ndadaye, the first Hutu president was elected. However, upon his assassination in 1993, Tanzania experienced a second influx of Burundians. Tanzanian refugee policy changed dramatically through the 1980s and 1990s and this affected the reception of the new refugees. Rather than being received in self-sufficient settlements, they were housed in refugee camps and relied heavily upon humanitarian assistance. The 1993 refugees are not eligible for naturalisation and have been the focus of recent repatriation efforts. The voluntary repatriation exercise for Burundian refugees commenced officially in 2002. Prior to the closure of Mtabila in 2012, eight refugee camps which were hosting the Burundian refugee population have already been closed. The camps include Karago, Mtendeli, Kanembwa, and Nduta which were situated in Kibondo district, and Muyovosi camp in Kasulu district, Kigoma.

As a result of the closures of the Mtabila camp, approximately 38,050 Burundians were deemed to no longer require international protection.[87] Another 2,700 Burundians who, following an individual assessment, were deemed to still require international protection were relocated to neighbouring Nyarugusu camp to await an alternative durable solution.[88] The international organizations involved, as well as the government of Burundi have acknowledged the scale of this operation, as well as the costs and challenges involved. For example, the International Organization for Migration (IOM) appealed in April 2013 for US $2.8 million to assist in the voluntary return and reintegration of approximately 38,000 former refugees from Burundi.[89] IOM, in close partnership with UNHCR and the Government of Burundi, plans to use US$ 1.1 million to pay for transportation to move the former refugees and their belongings back to Burundi. It added that another $1.7million go towards assessing the socio-economic reintegration needs of the returnees, with a view of developing reintegration programs to assist returnees.[90]

[87] Press release on Tanzanian Ministry of Home Affairs website <http://www.moha.go.tz/index.php/82-news-and-events/181-the-government-of-tanzania-determined-to-close-mtabila-refugee-camp-in-kigoma> accessed 17 June 2013.
[88] UNHCR Tanzania country profile, 2013 <http://www.unhcr.org/pages/49e45c736.html> accessed 1 July 2013.
[89] Panapress, 'IOM appeals for funds to return Burundi ex-refugees from Tanzania', (27 November 2012) <http://www.panapress.com/iOM-appeals-for-funds-to-return-Burundi-ex-refugees-from-Tanzania--12-852644-101-lang2-index.html> accessed 1 July 2013.
[90] ibid.

ii) Declaration of cessation in respect of Burundian refugees in the Mtabila camp

In July 2012, Tanzanian President Jakaya Kikwete declared that all camps hosting Burundian refugees would be closed down.[91] He cited the restoration of peace in Burundi as a driving force behind this action. The population of the Mtabila camp was the target of the camp closure policy. On 31 July 2012 the Government of Tanzania issued a formal statement stating that the Mtabila camp would be closed by the end of 2012. A press release from the Tanzanian Ministry of Home Affairs explains that 'the decision means that with effect from 1st August, 2012, these individuals are no longer refugees. The government has provided up to 31st December, 2012 for these individuals to return to Burundi voluntarily, failure of which they will be subjected to measures as per the Immigration Laws.'[92] The decision to invoke the cessation clauses was made by the Minister of Home Affairs, Dr. Emmanuel Nchimbi, pursuant to the powers conferred on him by Section 4 of the Tanzanian Refugees Act No. 9 of 1998. The decision is based on the existence of ceased circumstances under international refugee law.

Prior to this announcement, in 2011 UNHCR and the Tanzanian government undertook a widespread screening exercise. Following the first phase of screening 2,045 persons were deemed to require continued protection, 33,708 were considered no longer in need of protection and 2,625 cases required further examination.[93] The screening process included an appeals process (approximately 10% of appeals were reversed). However, there was confusion surrounding the screening process. In particular, refugees were not made aware of the standards used in the interview to determine whether refugee status remained necessary. Further, the dissemination of the outcomes of the interviews was also problematic. The decisions were posted in public spaces of the camp, but many refugees did not understand this posting to be the official decision and instead awaited a personal letter as had detailed during the interview. Equally, the lack of information about the reason for failing to retain refugee status restricted the ability to appeal effectively. Many refugees perceived that undertaking the appeals process would expedite their repatriation if they were not successful.[94] Furthermore, there was uncertainty amongst refugees

---

[91] International Refugee Rights Initiative and Rema Ministries, *An urgent briefing on the situation of Burundian refugees in Mtabila camp in Tanzania,* (Briefing Document, 2012), 1.

[92] <http://www.moha.go.tz/index.php/82-news-and-events/181-the-government-of-tanzania-determined-to-close-mtabila-refugee-camp-in-kigoma#sthash.oqRklosI.dpuf > accessed 17 June 2013.

[93] International Refugee Rights Initiative and Rema Ministries, *An urgent briefing on the situation of Burundian refugees in Mtabila camp in Tanzania,* (Briefing Document, 2012), 8. These figures diverge in a non-significant way from the approximate number provided by the Tanzanian Ministry of Home Affairs. See, e.g., <http://www.moha.go.tz/index.php/82-news-and-events/181-the-government-of-tanzania-determined-to-close-mtabila-refugee-camp-in-kigoma> accessed 17 June 2013.

[94] See interviews in International Refugee Rights Initiative and Rema Ministries, *An urgent briefing on the situation of Burundian refugees in Mtabila camp in Tanzania,* (Briefing Document, 2012), 7-9.

concerning whether the final decision on refugee status lay with UNHCR or the Tanzanian Government.

The screening entailed the re-zoning of the Mtabila camp and differential assistance programmes were applied to those who were successful in retaining refugee status: unsuccessful refugees had their rations reduced by half[95] and were subject to a decrease in medication and assistance. Notably, this policy was later discontinued. Further, the increased presence of military and police placed further restrictions upon the Mtabila population's freedom of movement. This hindered practical tasks such as gathering firewood, harvesting crops that had been planted outside the camp, and inhibited refugees from searching for food in nearby villages. There are reports of alleged police and military brutality against refugees who tried to leave the camp to look for food. Community leaders who counsel refugees on resisting return were arrested. Overall, it appears that the depletion in the standard of the living conditions created an atmosphere which facilitated repatriation.

b) Situation in Burundi

i) Background – resolution of conflict

In 2000, the Burundian Government, opposition parties and armed groups signed a peace agreement in Arusha, Tanzania. However, the army continued to fight two rebel groups which had not signed the peace agreement. In 2003, the larger of the two remaining rebel groups, the Forces for the Defence of Democracy-National Coalition for the Defence of Democracy (*Forces pour la défense de la démocratie-Coalition nationale pour la défense de la démocratie*, or FDD-CNDD) signed a ceasefire agreement. In 2005, in the first democratic elections since 1993, Pierre Nkurunziza, a Hutu and former head of the rebel movement FDD was elected as president. The remaining rebel group, the Party for the Liberation of the Hutu People-National Liberation Forces (*Parti pour la libération du peuple hutu-Forces nationales de libération*, or Palipehutu-FNL), continued to fight until September 2006 when it too signed a peace agreement. However, it was not until 2008 that Palipehutu-FNL renounced the use of force. In 2010 Nkurunziza was re-elected for a second term. The peace process was facilitated by the UN and regional actors.[96]

[95] ibid 9.

[96] BBC News wesbite <http://www.bbc.co.uk/news/world-africa-13085064> accessed 1 July 2013.

ii) Repatriation of Burundians

Since the initiation of the peace process, Burundi, a country of 8.9 million, has witnessed the return of more than 500,000 refugees.[97] Some communities, such as Makamba, Ruyigi and Muyinga have equal numbers of stayees and returnees.[98] The first wave of returns involved the refugees who fled the country in the early 1970s. Given they had spent at least two decades out of the country, they faced reintegration challenges.[99] In order to assist their reintegration, the government provided help in the form of different food and non-food items, as well as two years of free education and three or six months of health care.[100] According to UNHCR, 60 per cent of returnees are children under the age of 18, most born in exile to parents who fled Burundi. Some do not know their origin because their parents died in Tanzania in the refugee camp.[101] In the case of the returning Mtabila former refugees, three communities are preferred destinations, namely Kayogoro, Nyanza- Lac and Makamba. Many of the returnees (and in particular those who are unaware of their origins) stayed in Nyanza-Lac, the first main town in Burundi when crossing the border from the Mtabila camp in Tanzania. MIPAREC, a Burundian NGO, reports that:

> [e]ach family decided to look for way to continue living, some by buying very small plot from the 50,000 [Burundian] Francs [more or less £21] given to each person where they install a small tent to live in, others hired small houses (2 rooms), and some live in their neighbour's houses or friends that they knew from the refugee camp. By the way, they wait for any support to help them continue to accommodate to the new life. What is sure is that in few months situation will be worse for some.102

iii) Availability of protection in Burundi

In terms of its official obligations, Burundi is a State party to the Refugee Convention and its 1967 Protocol (with reservations which UNHCR continues its advocacy for Burundi to lift) as well as the 1969 OAU Convention on Refugees in Africa. Burundi has also signed the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, otherwise known as the Kampala Convention. At the political level, efforts have been made to welcome returnees. Burundi's Minister of Home Affairs and the Minister of National

---

[97] UNHCR Guidelines on Cessation, 2011.

[98] Fransen and Kuschminder, New Issues In Refugee Research, Research Paper No.242, 'Back to the land: the long-term challenges of refugee return and reintegration in Burundi' (UNHCR August 2012) <http://www.unhcr.org/5040ad9e9.pdf> accessed 1 July 2013.

[99] ibid.

[100] ibid 7.

[101] Burundian refugees, <http://www.resolutionpossible.co.uk/contribution-%E2%94%82-burundian-refugees-leave-tanzania#.UUXJWBySKSo> accessed 1 July 2013.

[102] Elie Nahimana, MIPAREC, 20 February 2013 <http://www.resolutionpossible.co.uk/contribution-burundian-refugees-return-from-tanzania#.UUXJWBySKSo> accessed 1 July 2013.

Solidarity, Human Rights and Gender offered words of welcome and comfort to returnees. However, in terms of service provision, assistance has not been able to meet the needs of the returnees. Given that since the end of the conflict, Burundi has had to reintegrate approximately 10% of its population, the strains on the social services have been notable.[103] Economically, those who are returning have received limited assistance: many of the promises made in Tanzania were not delivered and people continue to struggle as they wait for decisions to be made regarding the status of their land. Serious problems with regard to employment remain prevalent: returnees report a rate of 84% unemployment, while residents report only a 43% rate.[104] This occurs in part due to the lack of recognition of skills acquired in exile. A 2012 study done by the Rema Ministries additionally reports that 68% of respondents report serious problems regarding access to and use of identification, professional and education documents, due to the clear differences between returnees and residents of host communities. Further, returnees have no access to credit. A recent study found that returnees experience challenges of discrimination, language barriers, employment barriers and problems in relation to land. The current popular discourse in Burundi is that returnees are referred to as *rapatriés* whilst the locals are referred to as residents. This distinction implies that a differential treatment in terms of legal rights exists between residents and repatriates.[105] The problems of poverty and unemployment are linked to problems of population density and land shortage. According to the 2011 Human Development Index, Burundi is the third lowest rated country in the world.[106] Many of the returnees report being food insecure.

All of the returnees have spent significant periods (two decades or more) outside Burundi. Many were born in Tanzania and had never visited Burundi. Thus, as is often the case, repatriation is not going 'home.' The returnees are frequently unable to return to the actual house or even community they left. Access to land is a critical issue. In the context of Burundi, given that over 80% of the population rely on subsistence agriculture, land is vital to survival. Many of the returnees have no land to which to return. Such returnees face further displacement within Burundi and sufficient food or housing cannot be guaranteed. Further, Burundian property law states that land that has been peacefully occupied for thirty years by a particular owner may not be challenged. Thus many refugees who have been in exile since the 1970s do not even have a

[103] Verwimp, P. 'Returning Home after Civil War', (CEB Working Paper N° 12/027 2012: 2012), 4.
[104] Rema Ministeries, 2012: <http://www.refugee-rights.org/African%20NGO%20directory/Great%20Lakes%20region/Burundi-REMA.html> accessed on 1 July 2013.
[105] Fransen and Kuschminder, 2012.
[106] UNDP, Human Development Report, 2011.

claim to regaining their land. Given that there are no viable alternatives to agriculture in Burundi, returnees are frustrated by the lack of economic possibilities. Land is not only critical to livelihoods, but its ownership and inheritance also has important cultural and identity-giving value.[107] The Commission Nationale de Terres et Autres Biens (CNTB) (National Commission on Land and Other Property) was established in 2006 to adhere to the Arusha Agreement that stated that 'all refugees ... must be able to recover their property, especially their land.'[108] More than 20,000 disputes over land have been registered by the CNTB, of which some 13,000 have been resolved. However, the process has not always been successful and many returnees are marginalized due to their inability to regain access to land and former properties. Large land plots were given to corporate or government ventures, such as sugar plantations or infrastructure projects. As a result of this redistribution as well as land disputes, many refugees have been forced to live in 'Peace Villages', which are deeply unpopular. Peace villages were re-envisioned as part of the 2008 ad-hoc commission for return and reintegration. The new model of peace villages are supposed to have basic services, make additional land available, accommodate various ethnic groups in the same location in order to foster reconciliation, peace and security.[109] However, a recent study found that those living in 'Peace Villages' or 'Rural Integrated Villages' are particularly likely to have negative perceptions of the reintegration process. Many of those who have returned are now living semi-permanently in overcrowded transit centres waiting to be allocated land.[110] For those who cannot reclaim their land, there are very limited options with regard to accessing alternative land: in this respect, those who are 'sans reference' (unable to provide a destination address on the repatriation process) are particularly affected. The 'sans reference' group was born in Tanzania and as such cannot identify the areas from which their parents came. According to UNHCR, this group constitutes approximately 10% of the returning 1972 refugees.[111]

The Burundian government is clearly concerned about the potential for renewed conflict if all those who had fled were to return home. Out of the 34,000 Burundian former refugees returning, 60% of them are children under the age of 18, most born in exile to parents who fled

[107] Fransen and Kuschminder, 14.
[108] Arusha Agreement, Protocol IV, Chapter 1, Article 8, p 80, cited in ibid 14.
[109] IDMC, 'Durable solutions, support for return and reintegration', 18 August 2011 <http://www.internal-displacement.org/idmc/website/countries.nsf/(httpEnvelopes)/5C3194A1AFFFE079C12578D5002DAE1C?OpenDocument> accessed 1 July 2013.
[110] Rema Ministries, the International Refugee Rights Initiative (IRRI), and the Social Science Research Council (SSRC), 'Two people can't wear the same pair of shoes: Citizenship, Land and the Return of Refugees to Burundi' Citizenship and Forced Migration in the Great Lakes Region Working Paper No. 2 November 2009, 14 <http://www.refugee-rights.org/Publications/Papers/2009/TwoPeopleCantWeartheSamePairofShoes.111009.pdf> accessed 1 July 2013.
[111] ibid 15.

civil strife in Burundi in the 1990s.[112] The children have been subjected to narratives of civil war and conflict and thus find it hard to understand how, or truly believe that, Burundi is a country at peace. Further, the culture of violence and impunity which developed throughout the years of conflict is not only deeply feared, but is also considered to have become engrained in Burundian society. For example, sexual violence against women and children remains an issue of particular concerns, while cases of extra-judicial killings and torture continue to be reported.[113]

c) Conclusions

The conclusions of this paper are tentative as they do not claim to be based on a complete account of Tanzanian refugee law and policy and the events leading to the return of approximately 38,000 Burundians. Thus, the limited availability of information relating to the Tanzanian Government's invocation of the cessation clause and its actions in returning the former refugees means that any conclusions or proposals made below call for further research.

i) Application of cessation criteria by Tanzania

In order for there to a valid declaration of cessation, the Tanzanian Government was required to prove on the balance of probabilities that there was a fundamental, durable and effective change of circumstances in Burundi such that approximately 33,700 inhabitants of the Mtabila camp no longer required protection. It was then required to conduct an individualised assessment of the Burundian refugees to ensure that protection was no longer required on a case-by-case basis. Whilst the Tanzanian Government carried out an individualised assessment, there does not appear to be any document accessible to the public which explains and justifies the existence of a fundamental, durable and effective change of circumstances in Burundi. The Tanzanian government should have conducted an assessment of protection conditions in *Burundi* in order to evaluate the criteria for an application of the cessation clause more generally and see whether individual refugees may have continued protection needs in the screening process.

Whilst any full consideration of cessation in relation to the country situation in Burundi would require a more detailed appreciation of the factual background than the confines of this paper permit, some general comments in relation to establishing whether 'ceased circumstances' exist are made below. In application to Burundi, the Arusha Agreement and cease-fire are indicative of the type of circumstances constituting a 'fundamental change', namely, the end of hostilities, restoration of peace and stability and democratic elections. Similarly, the timescale involved in

[112] Alertnet, 'Burundi Refugees arrive in homeland they've never seen' (26 December 2012).
[113] Norwegian Refugee Council, *Fostering integrated communities in Burundi* (2008).

the Burundian peace process equally points to the satisfaction of the cessation criteria. However, it is less clear that the third criterion, namely that protection has been restored, is satisfied by the current situation in Burundi. In particular, as the UNHCR Guidelines on Cessation make clear, effective protection 'requires more than mere physical security or safety. It needs to include… the existence of adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood.'[114] From the evidence available, it appears that the economic situation in Burundi may not satisfy the right to a basic livelihood as required by the international standards. Thus whilst in general terms, the types of problems encountered by returnees are social and economic (i.e. those relating to land, occupation and subsistence) rather than civil and political, this does not automatically mean that the cessation criteria are met. In the absence of a more detailed assessment, it is not possible to conclude that the substantive criteria have been met.

ii) Procedures followed by Tanzania

In respect of the procedural requirements accompanying a declaration of cessation of refugee status, the Tanzanian Government was required to conduct an individualised assessment and provide a mechanism for recourse. It is clear that there was an appeals process in place and the process yielded results, some of which were favourable for individuals. It included, for example, an appeals process in which it is understood that of those who appealed, some 10% of initial negative decisions were reversed.[115] Thus, in general terms the framework created for the comprehensive screening exercise which was conducted in Mtabila reflected the due process guarantees expected of refugee cessation determination. Refugees commented that they felt that they had been heard and listened to during the procedure.[116] However, there are some aspects of the procedural regime which are more equivocal and warrant further attention, namely, the transparency of the appeals process and the withdrawal of the rights and benefits of refugee status. In relation to the first, it is unclear whether proper reasons were given for the cessation of refugee status on an individualised basis and whether decisions were properly promulgated. In relation to the second, it appears that rights and benefits of refugee status were withdrawn from part of the divided camp. However, it is unclear whether or not rights and privileges were withdrawn prior to a final decision on cessation. If they were withdrawn prematurely, the actions

[114] UNHCR Guidelines on International Protection No. 3, 2003, para. 15.
[115] ICG Central Africa Report, 23 <http://www.crisisgroup.org/en/regions/africa/central-africa.aspx> accessed 1 July 2013.
[116] ibid.

could contravene the non-binding procedural standards of UNHCR and potentially due process requirements of international human rights law (see Question Two).

Further, the quantity of successful appeals raises questions in the context of the particularities of Burundian refugees in Tanzania. As noted above, the Mtabila residents constituted those Burundian refugees who had already been subjected to the closure of refugee camps in Tanzania. Prior to the closure of Mtabila, eight camps had already been closed. Thus, the Mtabila refugees were those who had reasons not to return to Burundi. They did not represent, therefore, an ordinary cross section of Burundian refugees, but rather a concentrated group of Burundian refugees presenting on-going protection concerns. In light of this, the 10% figure appears lower than expected.

Overall, therefore, there are numerous problems in international refugee law terms concerning the Tanzanian declaration of the cessation of refugee status in respect of the Mtabila refugees. However, a stronger conclusion would require more concrete evidence of the acts and omission of the Tanzanian Government and/or UNHCR.

QUESTION TWO

INTRODUCTION

The second question is as follows: What are the standards and requirements governing return and repatriation under unhcr standards and international human rights law?

The obligations of receiving country governments (and UNHCR) do not terminate upon the declaration of cessation of refugee status. The effect of cessation is to remove the rights and benefits of refugee status from individuals and to subject them the municipal aliens law of the receiving state. However, UNHCR requires that former refugees whose status is ceased are treated in accordance with humanitarian standards and international and regional human rights norms are applicable to the actions of states following a declaration of cessation. Further, given that refugee status and cessation are declaratory, rather than constitutive, of rights,[117] if an individual is forcibly returned to a situation in which (s)he faces persecution this would amount to *refoulement*.

Host state governments and UNHCR's obligations with regard to repatriation and return have developed through texts, instruments and practice.[118] Some of the instruments from which these obligations are derived, such as the Refugee Convention, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other multilateral agreements, have the force of law and are binding on states that sign and ratify them. Others, such as General Assembly Resolutions and UNHCR guidelines are not in themselves legally binding, but may reflect or be consistent with principles of international human rights law. Where this is not the case, they may still carry moral or persuasive force. The requirements under UNHCR standards and international human rights law (IHRL) are considered below, in turn.

1) UNHCR STANDARDS

a) Host country responsibilities under UNHCR standards

[117] UNHCR Handbook 2011, para 28; UNHCR Note on Cessation 1997, para 6.
[118] UNHCR 'Handbook on Voluntary Repatriation: International Protection' (Geneva 1996) ch 1. (Handbook on Voluntary Repatriation).

States are legally bound to cooperate with UNHCR in the exercise of its international protection function pursuant to the Refugee Convention and the 1967 Protocol, or if not a party to either of these agreements, then pursuant to Article 56 of the United Nations Charter.[119] Yet, the specific content of what states must do to cooperate with UNHCR in connection with its international protection function is undefined.[120] Neither the UNHCR Statute, nor the conclusions of the Executive Committee of the High Commissioner's Programme, nor any of the recommendations or guidelines published by UNHCR are legally binding.[121] Nonetheless, these standards and procedures are important, as they may influence states' policies and practices.[122]

If after a fundamental change of circumstances the cessation clause is applied, refugee status may legitimately be terminated.[123] However, as discussed above, some 'residual cases' may not be subject to cessation, or may be eligible for protection against return.[124] First, individuals whose personal risk of persecution has not ceased, despite general changes in their state of origin, will remain refugees.[125] Second, even when circumstances have generally changed to such an extent that refugee status is no longer necessary, the specific circumstances of an individual's case may warrant continued international protection.[126] There may be compelling reasons arising out of previous persecution that justify the continuation of international protection on humanitarian grounds.[127] Alternatively, an individual may be eligible for protection against return under human rights treaties.[128] Hence, to determine what UNHCR standards and procedures govern the treatment of persons after a cessation clause has been applied, it is necessary to distinguish between: persons who retain refugee status; persons still in need of international protection on

---

[119] See Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Refugee Convention) art 35(1); Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) (1945) 1 UNTS XVI (United Nations Charter) art 56; and Corinne Lewis, *UNHCR and International Refugee Law: From Treaties to Innovation* (Routledge 2012) 99.

[120] ibid.

[121] Corinne Lewis, 'UNHCR's Contribution to the Development of International Refugee Law' (2005) 17 *Int'l J. Refugee L.* 67, 98.

[122] ibid 89.

[123] UNHCR 'Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the 'Ceased Circumstances' Clauses)' (Geneva 2003) paras 19-22 (UNHCR Cessation Guidelines 2003).

[124] Joan Fitzpatrick and Rafael Bonoan, 'Cessation of refugee protection' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consulations on International Protection* (CUP 2003) 517-518.

[125] ibid.

[126] UNHCR Cessation Guidelines 2003, para 19.

[127] While the words of these provisions indicate that this exception applies only to 'statutory refugees', the UNHCR has taken the position that this exception reflects a general humanitarian principle. See 1951 Refugee Convention arts 1C(5) and (6); UNHCR Cessation Guidelines 2003 paras 20-21; UNHCR EXCOM Conclusion No 69 (XLIII) 'Cessation of Status' (1992); and Handbook on Voluntary Repatriation (n 118) 3.8.

[128] Fitzpatrick and Benoan, 518.

other grounds; and persons no longer in need of international protection. 'Voluntary repatriation' is the term applied to refugees and persons in need of international protection, whereas the terms 'voluntary return' or 'return' are generally used in relation to persons found to no longer be in need of international protection.[129]

i) Voluntary repatriation of refugees and persons in need of international protection

Refugees may not be forcibly repatriated. Accordingly, voluntary repatriation is the only option for host states in relation to individuals who retain refugee status. Given that the Tanzanian Government declared the cessation of status in respect of the Burundian Mtabila refugees, it is not applicable to the situation under consideration in this paper and is not considered further save to note that there are two specific obligations, namely that the repatriation is truly voluntary and ensures and respects the safety and dignity of the returnee. The latter is examined below in relation to the return of persons no longer in need of international protection.

ii) Return of persons not in need of international protection

UNHCR has adopted the following definition of persons not in need of international protection:

> Persons who, after due consideration of their claims to asylum in fair procedures, are found not to qualify for refugee status on the basis of criteria laid down in the 1951 Convention, nor to be in need of international protection on other grounds, and who are not authorised to stay in the country concerned for other compelling reasons.[130]

In Conclusion No. 69 (XLIII) of 1992, the Executive Committee recommended that: in giving effect to a decision to invoke the cessation clauses, states should in all situations deal humanely with the consequences for the affected individuals or group.[131] In order to avoid hardship, states seriously consider an appropriate status, preserving previously acquired rights, for persons who have compelling reasons arising out of previous persecution for refusing to re-avail themselves of the protection of their country.[132] Countries of asylum and countries of origin should together facilitate return and ensure that it takes place in a fair and dignified manner;[133] and where

---

[129] See UNHCR 'UNHCR Protection Training Manual for European Border and Entry Officials: The Return of Persons not in Need of International Protection' (Geneva 2011) 4 (UNHCR Protection Training Manual).
[130] See UNHCR EXCOM Conclusion No 96 (LIV) 'Conclusion on the return of persons found not to be in need of international protection' (2003); and UNHCR 'Return of Persons Not in Need of International Protection', Report of the Third Meeting of the Standing Committee (28 May 1996) UN Doc EC/46/SC/CRP.36 (Report of the Third Meeting of the Standing Committee).
[131] UNHCR EXCOM Conclusion No 69 (XLIII) 'Cessation of Status' (1992) para (f).
[132] ibid para (e).
[133] ibid para (f).

appropriate, return and reintegration assistance should be made available to returnees by the international community, including through relevant international agencies.[134]

In its *Handbook on Voluntary Repatriation*, UNHCR provides that unless the host country grants them permission to stay as a group, persons no longer in need of international protection should be treated according to the applicable aliens or immigration laws of the host country, with due consideration given to granting residence permits or naturalization to compelling humanitarian cases.[135] UNHCR also notes in its *Handbook on Voluntary Repatriation*, that after many years of exile, there may be a group of especially vulnerable individuals without family support (in particular elderly and seriously handicapped refugees) who have lost all contacts with their country of origin and where tracing efforts for relatives, who could support them upon return, have failed. For these persons, UNHCR recommends that the host government work closely with it to seek a durable solution in the host country on humanitarian grounds, although they are no longer in need of international protection as refugees.[136]

In addition, in Conclusion No. 85 (XLIX) of 1998, the Executive Committee affirmed that 'irrespective of the status of the persons concerned, returns should be undertaken in a humane manner and in full respect for their human rights and dignity and without resort to excessive force.'[137] In Conclusion No. 96 (LIV) of 2003 the Executive Committee added that 'force, should it be necessary, [should] be proportional and undertaken in a manner consistent with human rights law'.[138] It also emphasized that 'in all actions concerning children, the best interests of the child shall be a primary consideration.'[139]

In relation to the requirement that repatriation must respect the safety and dignity of the individuals involved, UNHCR describes conditions of safety as requiring 'legal safety' (such as amnesties or public assurances of personal safety, integrity, non-discrimination and freedom from fear of persecution of punishment upon return); 'physical safety' (including protection from armed attacks, and mine-free routes and if not mine-free then at least demarcated settlement sites); and 'material safety' (access to land or means of livelihood).[140] The concept of

---

134 ibid.
135 Handbook on Voluntary Repatriation, para 3.8.
136 ibid.
137 UNHCR EXCOM Conclusion No 85 (XLIX) 'Conclusion on International Protection' (1998) para (bb).
138 UNHCR EXCOM Conclusion No 96 (LIV) 'Conclusion on the return of persons found not to be in need of international protection' (2003).
139 ibid para (c).
140 Handbook on Voluntary Repatriation, para 2.4.

dignity is described as 'less self-evident' than safety.[141] According to UNHCR, in practice, conditions of dignity must include:

> [T]hat refugees are not manhandled; that they can return unconditionally and that if they are returning spontaneously they can do so at their own pace; that they are not arbitrarily separated from family members; and that they are treated with respect and full acceptance by their national authorities, including the full restoration of their rights.[142]

The same requirements of safety and dignity as apply to voluntary repatriation apply in relation to the safety and dignity of the return of former refugees.[143] In its *Handbook on Voluntary Repatriation*, UNHCR lists the elements of safety and dignity to be considered as: physical safety at all stages during and after return including en route, at reception points and at the destination; the need for family unity; attention to the needs of vulnerable groups; the waiver or, if not possible, reduction to a minimum of border crossing formalities; permission for individuals to bring their movable possessions when returning; respect for school and planting seasons in the timing of such movements; and freedom of movement.[144]

.

Further, UNHCR has observed that its standards require serious efforts to be made to effect return in the first instance on a voluntary basis wherever possible.[145] Individuals who do not have the right to stay are to be provided with an opportunity to comply with a removal order of their own accord. Forced return is to be a measure of last resort, proportional and consistent with international human rights law.[146]

b) Host country responsibilities under tripartite agreements

The repatriation of refugees and the return of persons not in need of international protection may also be regulated by special or tripartite agreements, signed between governments: the host country, the country of origin, as well as UNHCR. These agreements are directed by international law and constitute legally binding treaties.[147] They set out the respective duties and responsibilities of their signatories, as well as the rights or refugees and returnees.

---

[141] ibid.
[142] ibid.
[143] UNHCR 'The return of persons found not to be in need of international protection to their countries of origin: UNHCR's role', Protection Policy Paper (Division of International Protection Geneva 2010) (UNHCR Protection Policy Paper); UNHCR Protection Training Manual.
[144] Handbook on Voluntary Repatriation, para 2.4.
[145] UNHCR Protection Policy Paper (n **Error! Bookmark not defined.**) para 11.
[146] ibid.
[147] UNHCR, 'Background Note on Voluntary Repatriation; Global Consultations on International Protection, 4th Meeting' (2004) 23(3) *Refugee Survey Quarterly* 247, 249.

In May 2001, the Tanzanian government entered into a tripartite agreement with UNHCR and the Burundi government to facilitate the voluntary repatriation of Burundian refugees from Tanzania.[148] According to a joint communique issued by UNHCR and both governments, the signed agreement affirmed that refugees had the right to return voluntarily and unconditionally, but would not be repatriated against their will.[149] The 2012 Tripartite Agreement is not readily accessible in the UK.

c) UNHCR's role and responsibilities

UNHCR's role and responsibilities in relation to voluntary repatriation and return are set out in its Statute and in subsequent resolutions and conclusions of the General Assembly and its Economic and Social Council (ECOSOC), as well as in conclusions of the Executive Committee of the High Commissioner's Programme.[150]

i) UNHCR responsibilities in relation to identifying persons in need of international protection

Ensuring that persons of concern to UNHCR are properly identified as being 'in need of international protection' forms part of UNHCR's core protection activities.[151] According to UNHCR, the exhaustion of legal remedies in the host country is critical, and frequent monitoring of the decision-making process by UNHCR Field or Regional Offices is necessary.[152] In addition, in a 2010 Policy Protection Paper, UNHCR outlined criteria for determining whether it can provide a state with assistance to return persons found not be in need of international protection, without compromising its humanitarian mandate. The first of these criteria is that:

> The return movement involves only those persons who have been rejected by a final decision through a formal refugee determination process that UNHCR considers fair and in line with international standards, or through a UNHCR mandate refugee status determination procedure. Such a process would need to involve the examination of available complementary forms of protection. Nor should there be any compelling humanitarian reasons for the person's continued stay in the host country.[153]

---

[148] Sonja Fransen and Katie Kuschminder, 'Back to the land: the long-term challenges of refugee return and reintegration in Burundi' (2012) UNHCR Research Paper No. 242 (Policy Development and Evaluation Service) <http://www.unhcr.org/5040ad9e9.html> accessed 14 April 2013.

[149] See IRIN, 'Burundi: refugee agreement signed' (*IRIN News*, 14 May 2001) <http://www.irinnews.org/Report/21173/BURUNDI-Refugee-agreement-signed> accessed 15 April 2013. The text of the signed agreement does not appear to be readily available to the public.

[150] UNHCR, 'Governance and Organisation' (*UNHCR website*) <http://www.unhcr.org/pages/49c3646c80.html> accessed 10 April 2013.

[151] UNHCR Protection Policy Paper, para 2.

[152] ibid para 12.

[153] ibid para 11.

As such, after cessation, UNHCR's mandate extends to assisting host countries to identify persons who will retain refugee status and persons who are still in need of international protection on other grounds.

ii) UNHCR responsibilities in relation to voluntary repatriation of refugees and persons in need of international protection

The UNHCR Statute calls upon the High Commissioner to seek 'permanent solutions for the problems of refugees by assisting Governments … to facilitate the voluntary repatriation of refugees.'[154] The Statute also calls upon the High Commissioner to provide for the protection of refugees by 'assisting governmental and private efforts to promote voluntary repatriation …'[155] UNHCR's role in promoting and facilitating voluntary repatriation is clarified and elaborated on in Executive Conclusions Nos. 18 (XXXI) of 1980 and 40 (XXXVI) of 1985.[156] In addition, Executive Conclusion No. 74 (XLV) of 1994 underscores:

> [T]he leading role of UNHCR in promoting, facilitating, and coordinating voluntary repatriation of refugees, in cooperation with States concerned, including ensuring that international protection continues to be extended to those in need until such time as they can return in safety and dignity to their country of origin, assisting, where needed, the return and reintegration of repatriating refugees and monitoring their safety and well-being upon return.[157]

In its *Handbook on Voluntary* Repatriation, UNHCR summarises its mandate for voluntary repatriation as including responsibilities to: verify the voluntary character of refugee repatriation; promote the creation of conditions that are conducive to voluntary return in safety and with dignity; promote the voluntary repatriation of refugees once conditions are conducive to return; facilitate the voluntary repatriation of refugees when it is taking place spontaneously, even if conditions are not conducive to return; organise, in cooperation with NGOs and other agencies, the transportation and reception of returnees, provided that such arrangements are necessary to protect their interests and well-being; monitor the status of returnees in their country of origin and intervene on their behalf if necessary; undertake activities in support of national legal and judicial capacity-building to help states address causes of refugee movements; raise funds from the donor community in order to assist governments by providing active support to repatriation

---

[154] Statute of the Office of the United Nations High Commissioner for Refugees, UNGA Res 428(V) (14 Dec 1950) para 1 (UNHCR Statute).
[155] ibid para 8(c).
[156] Marjoleine Zieck, *UNHCR and voluntary repatriation of refugees: a legal analysis* (Martinus Nijhoff 1997) 84.
[157] UNHCR EXCOM Conclusion No 74 (XLV) 'General Conclusion on International Protection' (1994) para (y).

and reintegration programmes; and act as a catalyst for medium and long term rehabilitation assistance provided by NGOs, specialized development agencies and bilateral donors.[158]

UNHCR's *Voluntary Repatriation Training Module* provides that 'it is the UNHCR's task to verify the voluntary character of repatriation.'[159] Similarly, UNHCR's *Handbook on Voluntary Repatriation* states that UNHCR needs to 'ensure and satisfy itself that repatriation is voluntary'.[160] The Handbook requires UNHCR to: monitor conditions and developments inside refugee camps and in spontaneously settled communities which could affect the voluntary character of the decision to repatriate; play an active role in ensuring that collective decision-making mechanisms respect the position of those refugees who do not wish to repatriate; and intervene where there is any evidence of coercion or pressure.[161] Where there is evidence of coercion or pressure, the UNHCR must declare clearly to the authorities concerned that UNHCR is opposed to the action, and must seek corrective measures.[162]

UNHCR's *Handbook on Voluntary Repatriation* describes the promotion of repatriation as '[t]he practical measures which can be taken to help refugees return voluntarily once the conditions for this exist.'[163] The Handbook also provides that there are essential preconditions that must be met before UNHCR can promote voluntary repatriation movements, including: the existence of an overall, general improvement in the situation in the country of origin so that return in safety and in dignity becomes possible for the large majority of refugees; full respect of the voluntary character of repatriation; a formal guarantee, or adequate assurances for the safety of repatriating refugees, as appropriate from the country of origin; free and unhindered access to refugees and returnees for UNHCR; and a formal repatriation agreement, including the basic terms and conditions of return, between UNHCR and the authorities concerned.[164]

According to the Handbook, where these preconditions are met, UNHCR may promote repatriation through planning and organising the voluntary repatriation of refugees under conditions which are conducive to their safe return and durable reintegration, by: gaining full access to the refugee population, whether in camps or in settlements, to ensure voluntariness;

---

158 Handbook on Voluntary Repatriation, 1.6.
159 UNHCR 'Voluntary Repatriation (RP1) Training Module' (2nd edn Geneva 1993) (Voluntary Repatriation Training Module).
160 Handbook on Voluntary Repatriation, 4.1.
161 ibid.
162 ibid.
163 ibid 2.6.
164 ibid 3.1.

undertaking a comprehensive information campaign to enable the refugees to make their decisions in full knowledge of the facts; interviewing, counselling and registering potential repatriants, organising safe and orderly return movements and adequate reception arrangements; developing and implementing (directly or through implementing partners) rehabilitation and initial reintegration programmes; and monitoring the legal, physical and material security of returnees.[165]

In addition, the Executive Committee has acknowledged the usefulness, in appropriate circumstances, of visits by representatives of the countries of origin to refugee camps in host countries within the framework of information campaigns to promote voluntary repatriation, and has requested UNHCR, in cooperation with the host countries concerned, to facilitate such visits.[166] Executive Committee Conclusion No. 40 (XXXVI) of 1985 provides that: '[o]n all occasions the High Commissioner should be fully involved from the outset in assessing the feasibility and, thereafter, in both the planning and implementation stages of repatriation.'[167] According to the UNHCR's *Handbook on Voluntary Repatriation*, UNHCR's role in facilitating voluntary repatriations may include: providing information on conditions prevailing in the country of origin in general, and in areas of intended return in particular, which is both accurate and complete; providing those returning with limited material assistance for their return; advising returnees of the limits of UNHCR protection and assistance in such situations; in addition to this, UNHCR should seek to make refugees aware of any obstacles which may exist to their re-entry to the present country of refuge; where possible, in the context of facilitating refugee-induced repatriation UNHCR should also try to seek ways to improve the safety of refugees in their country of origin; when return has become a fact, UNHCR should attempt to negotiate amnesties and guarantees, UNHCR presence in the areas of return and so on; and if UNHCR is able to establish a presence in the areas of return, UNHCR should aim, to the extent possible, at exercising its returnee monitoring function, while still not promoting voluntary repatriation in the host country until such time as the conditions in the country of origin may allow UNHCR to consider moving from facilitating to promotion of repatriation.[168]

[165] ibid.
[166] UNHCR EXCOM Conclusion No 74 (XLV) 'General Conclusion on International Protection' (1994) para (z).
[167] UNHCR EXCOM Conclusion No 40 (XXXVI) 'Voluntary Repatriation' (1985) para (g).
[168] Handbook on Voluntary Repatriation, 3.1.

In human rights terms, primary responsibility for the protection of returnees rests upon the state of origin.[169] However, UNHCR also has a duty to protect repatriating refugees, especially where it is involved in the process of return. 'Returnees' are included in UNHCR's category of 'persons of concern'.[170] Both the Executive Committee conclusions on voluntary repatriation (Conclusions Nos. 18 (XXXI) and 40 (XXXVI)), recognise that UNHCR may be called on to monitor the situation of returning refugees, particularly with regard to any guarantees provided by the governments of the countries of origin.[171] The Executive Committee's Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees has recently reiterated that:

> UNHCR, in line with its mandate responsibility, be given free and unhindered access to returning refugees, as needed, in particular, so as to monitor the latter's proper treatment in accordance with international standards, including as regards the fulfilment of amnesties, guarantees or assurances on the basis of which refugees have returned.[172]

Further, according to the UNHCR's *Handbook on Voluntary Repatriation*:

> In any voluntary repatriation where UNHCR plays a part, the principle of return in safety and with dignity does not cease to apply once the return movement is completed, but applies and should be monitored until such time as the situation in the country of origin can be considered stable, national protection is again available, and the refugee is integrated.[173]

According to the handbook, 'UNHCR's involvement in returnees monitoring is not fixed or pre-ordained … [i]t is preferable to avoid arbitrary deadlines.'[174] Monitoring must cover both the immediate consequences of repatriation, such as the fulfilment of amnesties or guarantees provided by the government, as well as the general enjoyment by returnees of human rights and fundamental freedoms on an equal footing with their fellow citizens.[175] Where there are indications or there is evidence that the freedom of security of returnees is at risk due to a lack of adequate state protection, UNHCR must do whatever it can to remedy the situation and relieve

---

169 Chaloka Beyani, 'The Content, Scope and Duration of Returnee Protection' (1993) UNHCR Roundtable Consultation on Voluntary Repatriation (Division of International Protection Geneva) <http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CDUQFjAA&url=http%3A%2F%2Frepository.forcedmigration.org%2Fpdf%2F%3Fpid%3Dfmo%3A1063&ei=U-VyUfaPK6Sf0QXRlIDQBw&usg=AFQjCNFYwM7ISzCCSJzfamsUW1OTO6yzxg&sig2=SRA4LtOci6IFUrGJ6PpMKA> accessed 1 July 2013.

170 UNHCR, 'Returnees' *(UNHCR website)* <http://www.unhcr.org/pages/49c3646c1ca.html> accessed 1 July 2013.

171 UNHCR EXCOM Conclusion No 18 (XXXI) 'Voluntary Repatriation' (1980) para (h); UNHCR EXCOM Conclusion No 40 (XXXVI) 'Voluntary Repatriation' (1985) para (l).

172 UNHCR EXCOM Conclusion No 101 (LV) 'Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees' (2004) para (q).

173 Handbook on Voluntary Repatriation, 6.1.

174 ibid.

175 ibid.

the plight of the returnees. UNHCR must intervene where human rights abuses or severe discrimination come to light.[176] The handbook also recommends that to fulfil its monitoring mandate for returnees, UNHCR must consider courses of action in relation to social and economic reintegration, re-establishment of the rule of law, human rights monitoring, witness protection and confidence-building. In addition, the handbook recommends that UNHCR make vulnerable individuals a special focus of returnee monitoring, such as returnee women.[177]

ii) UNHCR responsibilities in relation to the return of persons not in need of international protection

By definition, persons not in need of international protection fall outside UNHCR's mandate.[178] Therefore, it is not normally UNHCR's role to be directly involved in the returns of persons not in need of international protection.[179] However, the 1990 Note on International Protection stated that:

> 'UNHCR could, if so requested by the Secretary-General or the General Assembly, and in cooperation with other appropriate agencies, assume responsibilities outside his traditional mandate, but compatible with his strictly humanitarian competence, to coordinate the safe and dignified return of rejected asylum-seekers.'[180]

Thus, on various occasions in recent years UNHCR has expressed its preparedness 'on good offices' basis, to support states upon their request to return persons found not to be in need of international protection, provided its involvement would not be inconsistent with its humanitarian mandate.[181] For example, Executive Committee Conclusion No. 96 (LIV) of 2003: '[…] takes note of UNHCR's readiness, on a good offices basis, to support States, upon their request, in their endeavours to return persons found not to be in need of international protection, in particular where obstacles to return are encountered …'.[182] As noted above, UNHCR has recently adopted criteria for determining whether it can respond positively to a State's request for assistance to return persons found not to be in need of international protection.[183] One of those criteria is that UNHCR assumes only a supportive or facilitatory role, and only where the host government can demonstrate that the support is necessary.[184] The

[176] ibid 6.2.
[177] ibid.
[178] UNHCR Protection Training Manual, 4.
[179] ibid.
[180] UNHCR 'International Protection', EXCOM Report (27 August 1990) UN Doc A/AC.96/750 para (xi).
[181] UNHCR Protection Policy Paper, paras 10-11.
[182] UNHCR EXCOM Conclusion No 96 (LIV) 'Conclusion on the return of persons found not to be in need of international protection' (2003) para (k).
[183] UNHCR Protection Policy Paper, para 11.
[184] ibid.

UNHCR emphasises that responsibility for conducting the returns in a manner that respects the returnees' rights and dignity remains vested in the two involved States (host country and country of origin).[185]

Nonetheless, Executive Committee Conclusion No. 96 (LIV) of 2003 recommends that UNHCR complement the efforts of states in the return of persons found not to be in need of international protection by: taking clear public positions on the acceptability of return; promoting the principle of responsibility of states to readmit their nationals; promoting the principles on reduction of statelessness; and
engaging in dialogue with states whose citizenship law allows the renunciation of nationality in a way which could delay, hamper or stop return.[186] In addition, UNHCR has, in a small number of cases, played a limited role in monitoring the treatment of rejected cases upon return, or in being available for the referral of problems encountered by individuals following such return.[187]

2) INTERNATIONAL HUMAN RIGHTS LAW

a) Relevant provisions

In addition to the non-binding UNHCR standards, repatriation and return must also respect binding norms of international human rights law (IHRL). In situations of repatriation and/or return, the following rights may be of relevance: rights to security of person, the right to family unity, the rights of children, the right to due process and an effective remedy, and the right not to be collectively expelled. A State is bound by international human rights insofar as it has acceded to the various instruments. Tanzania has acceded to the ICCPR, the ICESCR, and the Convention on the Rights of the Child 1989 (CRC). Tanzania has not signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Tanzanian has also ratified a regional human rights instrument, namely the African Charter on Human and Peoples Rights (ACHPR).[188] IHRL may be invoked by migrants, including refugees and former

[185] ibid.
[186] UNHCR EXCOM Conclusion No 96 (LIV) 'Conclusion on the return of persons found not to be in need of international protection' (2003) para (j).
[187] Report of the Third Meeting of the Standing Committee, para 19.
[188] Ratified by Tanzania on 18 February 1984: African Union, List of Countries which have signed, ratified/acceded to the African Charter on Human and People's rights, available at http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf)).

refugees, against the host state and its agents provided that they are within its effective jurisdiction.[189]

i) Personal security and freedom from torture, cruel, inhuman or degrading treatment

Articles 7 and 9 of the ICCPR prohibit torture and cruel, inhuman or degrading treatment and protect the liberty and security of the person. The Human Rights Committee has held that removing an individual to face a real risk of violation of Articles 7 and 9 ICCPR right could amount to *refoulement.*[190] Article 7 ICCPR requires governments to take affirmative steps to protect those under their authority from the relevant risks, in addition to prohibiting negative state conduct.[191] Article 7 is non-derogable and may not be justified on the grounds of an exceptional or emergency situation.

ii) Family unity

Several provisions of IHRL protect against unlawful or arbitrary interference with family unity.[192] Article 17 ICCPR provides that '[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence... Everyone has the right to the protection of the law against such interference...'. Article 23(1)-(2) ICCPR provides that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State'. Further, Article 10(1) ICESCR provides: '[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.' Thus, family unity should be respected, maintained and protected by states under IHRL[193] and States must stake affirmative steps to 'protect' family unity.[194] This applies irrespective of whether or not an individual has refugee status and thus to the treatment of former refugees. The family re-unification provisions attendant on the recognition of refugee status would be rendered nugatory if the right to protection from arbitrary or unlawful interference with family unity could be overridden upon the cessation of status. Thus under IHRL, interference by states with family unity may only take place on the basis of law, which itself must comply with standards of family unity in the ICCPR and ICESCR.[195] Further, even if

[189] Hathaway *The Rights of Refugees Under International Law* (Cambridge University Press, 2005), p 450.
[190] (UNHCR General Comment No 15 para 5, General Comment 18) (Goodwin-Gill and McAdam 2007: 308)
[191] Hathaway, p 453.
[192] ICCPR (see UN Human Rights Committee General Comment No 15 at 140 paras 5 and 7, UN Human Rights Committee General Comment No 17, at 144 para 5). See also Hathaway, p 948.
[193] Hathaway, p 547.
[194] ibid, 547.
[195] ibid, 548.

authorised by law, the provisions of IHRL are breached if the actions which interfere with family life are 'arbitrary.' An interference is likely to be considered to be 'arbitrary' where there is a capricious or unpredictable interference with family unity.[196]

iii) Rights of children

Article 3 of the CRC provides: '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.' This may 'constitute a complementary ground of protection in its own right.'[197] Thus, children may be permitted to stay in the receiving state even when they cannot demonstrate the level of harm normally required to be shown, for example when they are physically or mentally ill, disabled or have come from States involved in armed conflict.[198]

iv) Due process and effective remedy

Human rights instruments typically provide also for a right to an effective remedy in respect of the norms contained in that instrument. The ICCPR contains a requirement of effective remedies cast in broad terms in relation to violation of the 'rights and freedoms' recognised in the Covenant (ICCPR, Article 2(3)). In its General Comment No 31 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant', the Human Rights Committee stated:

> Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law… A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.

Further, Article 7 ACHPR guarantees 'the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force'. An effective remedy is generally one that is 'timely, adequate and effective'. The right of access to justice is significant in this context, although judicial

[196] See ibid 550.
[197] Goodwin-Gill and McAdam, 324.
[198] ibid 325.

remedies may not be required where adequate administrative remedies are available. Commentary further suggests that victims have a right to substantive reparations varying according to the nature of the violation and the needs of the victims'.[199]

v) Freedom from collective expulsion

Article 12(4) ACHPR provides that any non-nationals who have been 'legally admitted' to a country have the right not to be expelled without a legal decision to that effect. Article 12(5) ACHPR prohibits 'mass expulsions' on the basis of nationality, race, ethnicity, and religion. The approach of the European Court of Human Rights (ECtHR) under its counterpart provision (Article 4 of Protocol 4 of the European Convention on Human Rights (ECHR)) may provide an indication of the operation of Article 12(5) ACHPR. In its recent judgment of *Hirsi Jamaa and Others v. Italy*[200] the Grand Chamber of the ECtHR held that the purpose of the prohibition on collective expulsion is to 'prevent States being able to remove certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority.'[201] On the facts of *Hirsi*, the Grand Chamber found a violation of Article 4 of Protocol No 4 in the absence of 'sufficient guarantees ensuring that the individual circumstances of each of those concerned were actually the subject of a detailed examination.'[202] Adopting the reasoning of the Grand Chamber in *Hirsi*, to the obligations of state parties to the ACHPR, forced repatriation without individual examination would constitute a breach of Article 12(5) ACHPR.

3) APPLICATION TO TANZANIA

a) Compliance of Tanzanian cessation with UNHCR Standards

Given that the Tanzanian Government returned only those refugees whose status was ceased, there was no obligation of voluntariness. However, the return should have been conducted in safety and dignity. As to this, the forcible return of Burundian refugees may have lacked the requisite safety and dignity in several respects. In particular, the following is of concern: the separation of families in the removal process; the depletion of living conditions (including the ability to subsist) in the camps; and the fear of physical violence.

[199] Shelton: Part 1, 4.
[200] Application no. 27765/09.
[201] ibid para 177.
[202] ibid para 185.

Further, it appears to be the case that the Burundian residents of the Mtabila camp were divided into two groups: those whose refugee status was continued and those whose status was ceased. There were no durable alternatives to return discussed and it appears that all of those whose status was ceased were forced to return to Burundi. It is unclear whether the specific concerns, unrelated to refugee recognition, such as old age or other vulnerability were taken into account in the determination of cessation. It is also unclear whether the humanitarian proviso was applied in the cessation appeals process. However, and in any event, insofar as there existed Burundi Mtabila residents who had no ties in Burundi or were very elderly but who were returned to Burundi, under the UNHCR Guidelines, a durable solution should have been found in Tanzania.

b) Compliance of Tanzanian cessation with IHRL

In relation to the compliance of the Tanzanian Government's actions with IHRL, there are four rights which may warrant further investigation. As above, on the limited evidence, it is not possible to provide firmer conclusions. First, there is some suggestion (although an absence of concrete evidence) that family unity was interfered with in the return process. It has been suggested that families were divided in the initial individualised assessment process and/or when the former refugees were forcibly returned. Secondly and relatedly, the best interests of children may not have been properly taken into account. Thirdly, there is some suggestion (although again, there is no clear evidence) that the right to security of the person may have been impaired in the forced removal process. Finally, as noted above in respect of procedural obligations implied into determinations of cessation, it is unclear whether the screening and appeals process was sufficiently transparent. There does not appear to be any infringement of the prohibition on collective expulsion given the existence of individualised assessment and there is no evidence that the Burundian former refugees were subjected to human rights violations amounting to torture, inhuman or degrading treatment upon return.

QUESTION THREE

INTRODUCTION

The third and final question is the following: Is the Tanzanian government's encampment policy compliant with international standards?

Following the closure of Mtabila camp the only remaining Tanzanian refugee camp is that of Nyarugusu. Nyagarusu is currently home to 63,000 refugees from the DRC and 2,700 Burundian refugees who were relocated from Mtabila whilst their status is clarified. UNHCR is currently working on a 'durable' solution for the refugees in the camp, and in the meantime the remaining refugees can neither work nor move outside the camp. However, this 'durable' solution sought seems neither clear nor forthcoming, and the resulting uncertainty has ongoing consequences for the rights of the displaced.[203]

The legitimacy of camps as a concept within refugee law is controversial and contested.[204] There is a general consensus that refugee camps, by their nature, deprive individuals of the fulfilment of certain rights.[205] Many of the rights relevant to encampment are derogable and thus host governments may justify encampment with relative ease on grounds of national security, scarce resources and the dangers of a mass influx of refugees. These justifications, although sometimes questionable, appear to have been largely accepted by UNHCR.[206] Guidance issued by UNHCR focuses on improving the conditions of camps and their administration, rather than discouraging the use of camps altogether.[207] In part this is because the 'rights-based proposal that long-term refugees should not be confined to camps but should be allowed to settle wherever they wish in their country of asylum does not appear to be politically feasible in many refugee-hosting

---

[203] UNHCR, '2013 UNHCR Country Operations Profile – United Republic of Tanzania' <www.unhcr.org/pages/49e45c736.html> Accessed 2 Apr 2013.

[204] Deardoff, 'How long is too long? Questioning the legality of long-term encampment through a human rights lens' RSC Working Papers Series no.54, 13; Jamal, 'Camps and freedoms: long-term refugee situations in Africa', Forced Migration Review 16, 2003, 4; Harrell-Bond, 'Camps: A Literature Review', Forced Migration Review 2, 1998, 22; Sytnik, 'Rights Displaced: The Effects of Long-term Encampment on the Human Rights of Refugees' Refugee Law Initiative, Working Paper no. 4 2012; Schmidt, 'FMO Thematic Guide: Camps versus settlements'; Smith, 'Warehousing Refugees: A Denial of Rights, a Waste of Humanity' USCRI. <www.uscrirefugees.org/2010Website/5_Resources/5_5_Refugee_Warehousing/5_5_3_Translations/Warehousing_Refugees_A_Denial_of_Rights.pdf> Accessed 2 Apr 2013

[205] Crisp, 'No solutions in sight, the problem of protracted refugee situations in Africa' Refugee Survey Quarterly, Vol. 22, No. 4, 2003, 125.

[206] Black, 'Putting Refugees in Camps', Forced Migration Review 2, 1998, 5.

[207] UNHCR, Operational Protection in Camps and Settlements 2006

countries.'[208] However, while the legal existence of camps may be accepted, encampment policies may still be challenged on the basis of cumulative infringements of rights within the camps. In other words: 'Camps as a space on their own are not necessarily illegal . . . However, the human rights violations that occur because of LTE (Long Term Encampment), mainly concerning the right to work and freedom of movement, do provide grounds for questioning the legality of LTE.'[209] In light of these general comments, Tanzanian refugee policy with particular reference to the Nyarugusu Camp is analysed below under international human rights law and in comparison with other situations of encampment.

1) COMPLIANCE OF TANZANIAN ENCAMPMENT POLICY WITH UNHCR, IHRL AND TANZANIAN LAW

Restrictions on derogable rights may not render encampment illegal if reasonably justified, but it has been noted that the 'arbitrary and discriminatory nature' of rights violations resulting from LTE arrangements are problematic—particularly when the conditions of emergency have not been clearly defined. It is in this context that the current legality of LTE in Tanzania is called into question,[210] with particular reference to the following rights:[211] freedom of movement; the right to work; the right to education; the right to a fair and public hearing; and freedom from degrading treatment. In addition, it is critical to consider the public health obligations under international law as they relate to encampment conditions, population movements, and mass expulsions. These rights will be collectively addressed below with reference to (a) security, (b) work and education, and (c) individual and public health.

a) Freedom of movement/deprivation of liberty

The right to freedom of movement is contained Articles 26 and 31 of the 1951 Refugee Convention,[212] Article 13 of the Universal Declaration of Human Rights,[213] The Banjul Charter,[214] and Article 12 of the ICCPR.[215] The right is derogable and may be restricted on the

---

[208] Crisp, 139
[209] Deardoff, 14
[210] ibid.
[211] Refugee Law Initiative, Working Paper No. 4: 'Rights Displaced': <www.sas-space.sas.ac.uk/4691/1/RLI_Working_Paper_No.4.pdf> Accessed 28 Mar 2013
[212] UN General Assembly (28 July 1951). *Convention Relating to the Status of Refugees,* United Nations, Treaty Series, vol. 189. <http://treaties.un.org/doc/Publication/UNTS/Volume%20189/volume-189-I-2545-English.pdf > accessed 1 July 2013.
[213] UN General Assembly (1948, December 10). *Universal Declaration of Human Rights,* 217 A(III) <www.un.org/en/documents/udhr/> accessed 1 July 2013.
[214] Organization of African Unity, *African Charter on Human and Peoples' Rights ('Banjul Charter')*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <www.unhcr.org/refworld/docid/3ae6b3630.html> accessed 1 July 2013.
[215] UN General Assembly (1966, December 16). *International Covenant on Civil and Political Rights,* United Nations,

grounds of national security, public order, public health and the rights and freedoms of others (restrictions permitted by ICCPR); and if the restrictions and regulations are those to which aliens are generally subject (Refugees Convention). Tanzania is not only a signatory to all three instruments, but Article 17 of the Tanzanian Constitution also guarantees freedom of movement.[216]

Article 9 of the ICCPR protects the liberty and security of the person and prohibits arbitrary detention. Article 9(4) entitles anyone deprived of their liberty to take proceedings before a court, "in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".[217] With regard to Article 9(1), the Human Rights Committee has found that detention "should not continue beyond the period for which a State Party can provide appropriate justification".[218] The Human Rights Committee has further specified that certain factors, such as such as illegal entry, the risk of flight or lack of cooperation may justify detention for a period of time but that "without such factors detention may be considered arbitrary, even if entry was illegal".[219] Further, Contracting States should be able to demonstrate that there are no less restrictive means of obtaining their objectives.[220]Article 10 ICCPR further establishes that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

i) Tanzanian Encampment Policy

Refugees in Nyagarusu cannot work or move outside the camp. UNHCR is currently working on a 'durable' solution for the refugees in the camp. According to UNHCR:

> the lack of prospects for local integration and the deteriorating situation in the DRC point to the need to increase resettlement opportunities for Congolese refugees. A similar approach is required for the small number of Burundian refugees still residing in Nyarugusu, as the Government has clearly indicated that naturalization is not possible for Burundian refugees who arrived in the 1990s or later.[221]

Treaty Series, vol. 999. <www.un.org/ga/search/view_doc.asp?symbol=A/RES/2200%28XXI%29> accessed 1 July 2013.

[216] Constitution of the United Republic of Tanzania <www.judiciary.go.tz/downloads/constitution.pdf> accessed 2 Apr 2013.

[217] In its General Comment No. 8, 1892, the Human Rights Committee affirmed the applicability of Article 9 to immigration control: see, for more detail <http://www.globaldetentionproject.org/law/legal-framework/international/treaties-and-protocols.html> accessed 17 June 2013.

[218] *Shafiq v Australia* 2006, para 7.2; *A. v. Australia*, 1997, para 9.4; *Bakhtiyari v. Australia* 2003, para 9.2. See also <http://www.globaldetentionproject.org/law/legal-framework/international/treaties-and-protocols.html> accessed 17 June 2013.

[219] *A. v. Australia* 1997, para 9.4.

[220] *C v Australia* 2002, para 8.2; *Shams and others v Australia* 2007, para 7.2.

[221] UNHCR, '2013 UNHCR Country Operations Profile – United Republic of Tanzania' <www.unhcr.org/pages/49e45c736.html> accessed 2 Apr 2013.

Sections 16-20 of the 2006 Refugee Act govern Tanzanian encampment policy. Sections 16-18 relevantly provide:

> 16 (I) The Minister may, by notice in the Gazette, declare any part of the United Republic of Tanzania to be a designated area.
>
> (2) The Director of Refugees Services shall appoint a settlement officer to be in charge of such refugee settlement or of such reception, transit or residence area for asylum seekers or refugees.
>
> 17 (I) The competent authority in consultation with the Minister or Director may by order, require any asylum seeker or refugee or group or category of refugees to whom this section applies who is within his area to reside within a designated area whether or not such area is within jurisdiction of competent authority.
>
> (2) consultation with the Minister, or the Director may require any asylum seeker or refugee or group or category of refugees to whom this section applies who is within a designated, area, within such competent authority's area to-move to or reside in any other designated area whether within such competent authority's area or not.
>
> (3) Any asylum seeker or refugee to whom an order made under this section applies who-
>
> (a) fails to comply with order-or
>
> (b) fails to or take up residence in a designated area in accordance with such order within reasonable time; or
>
> (c) having arrived at a designated area, in pursuance of such order, leaves or attempts to leave such area, except in pursuance of some other order or permit made under this section, shall be guilty of an offence against this Act.
>
> …
>
> (5) (a) No asylum seeker or refugee shall be allowed to leave a designated area as directed under this section unless he has sought and obtained a permit from the Director or Settlement Officer as the case may be, and, subject to' such terms and conditions as the Director or a Settlement Officer may, pre- scribe in the permit.
>
> (b) No asylum seeker or refugee may be allowed to be out of a designated area for more than fourteen days unless the Director has allowed in the permit a longer period upon which an asylum seeker or a refugee may stay outside the designated area.
>
> (6) Any asylum seeker or refugee to whom a permit or travel document has been issued under this section who fails to comply with the terms and conditions thereof shall be guilty of an offence against this Act.'
>
> 18 ... (3) (a) to preserve orderly conduct and discipline in the designated area.
>
> Any asylum seeker or refugee without a permit in that behalf issued under section 17 leaves or attempts to leave a designated area in which he has been earmarked to reside;

…. shall be deemed to have committed a disciplinary offence.

(4) The Director or a settlement officer may inquire into any disciplinary offence and if he finds that an asylum seeker or a refugee has been guilty of such disciplinary offence may punish him by-

(a) ordering his confinement in a settlement or camp lock-up for a period not exceeding three days;

(b) fining him a sum not exceeding five thousands shillings'.

Section 24 provides for penalties for infringements of the Tanzanian refugee law:

'(1) Any asylum seeker or refugee who fails to obey any lawful order of the Minister, the competent authority, the Director or of a settlement officer or who obstructs any officer in exercise of his power under this act, shall be guilty of an offence and shall be liable on conviction to imprisonment for a period not exceeding six months or fine not exceeding fifty thousand shillings or both.

(2) Any person, who is guilty of an offence against this Act for which not penalty is specifically provided shall be liable on conviction to imprisonment for a period not exceeding six months or fine not exceeding fifty thousand shillings or both.

(3) Where any act or omission constitutes both a disciplinary offence under section 18 and an offence punishable under this Act on conviction, an asylum seeker or a refugee shall not be punished for the same act or omission both as a disciplinary offence and a penal offence punishable on conviction.'[222]

According to the 2009 Tanzania Report from the US Committee for Refugees and Immigrants:

'the Government vigorously enforces restrictions on unauthorized movement . . . The Government allows a few refugees to live outside of the camps for educational, medical, or security reasons. . . . Refugees have to apply to the Director of Immigration for a Convention travel document (CTD), stating a reason for travel such as study, medical treatment, religious purposes, or resettlement. The CTD costs 20,000 shillings (about $15). UNHCR typically pays the cost of CTDs, which are valid for two years and can be renewed at Tanzanian embassies abroad.'[223]

The prohibition on refugees leaving 'designated areas' without permits is a clear limitation of the right to freedom of movement. Movement restrictions also have direct effects on other rights and livelihood strategies, making it difficult for refugees to find work and leading to deteriorating food security and an increase in crime (see below).[224] Further, the measures preventing refugees from leaving the camps may amount to an unlawful deprivation of liberty. The fact that the

[222] Tanzania Refugees Act 1998 <www.unhcr.org/refworld/type,LEGISLATION,,TZA,3ae6b50bf,0.html> accessed 1 July 2013.
[223] United States Committee for Refugees and Immigrants, *World Refugee Survey 2009 - Tanzania*, 17 June 2009, <www.unhcr.org/refworld/docid/4a40d2b383.html> accessed 1 July 2013.
[224] Deardoff, 16.

refugees were relocated to Nyarugusu after Mtabila was closed and are not permitted to leave the camp links the purpose of keeping refugees in camps to the repatriation objective.

The Tanzanian government appears to have offered no justification for its encampment policy or any explicit derogation from the right to freedom of movement as contained in the international instruments to which it is a party or as contained in the Tanzanian constitution. UNHCR, in its report on the protracted Burundian refugee situation in Tanzania, suggests that scarcity of resources was a significant factor in leading to more restrictive refugee policies. Whilst scarcity of resources may lead to a break down in public order or public health, the link to a valid ground for derogation does not appear to have been made by the Tanzanian government.[225]

ii) UNHCR Guidelines

UNHCR supports the Tanzanian camps by necessity, however, the 2009 UNHCR guidelines on Urban Refugee Policy suggest a general movement away from camps towards integration and urban settlement. The policy states that: '[t]he Office considers urban areas to be a legitimate place for refugees to enjoy their rights, including those stemming from their status as refugees as well as those that they hold in common with all other human beings.'[226] The policy also refers to the idea of a 'protection space', defined as: 'a concept employed by the Office to denote the extent to which a conducive environment exists for the internationally recognized rights of refugees to be respected and their needs to be met.'[227]

On this definition of 'protection space' it would appear that Nyagarusu does provide a broad enough concept of protection space in terms of access to facilities and rights fulfilment. The urban policy also refers explicitly to movement from camps to urban areas:

> **'**146. Freedom of movement is a principle enshrined in international human rights law, and UNHCR encourages all states to respect it. While recognizing the difficulties that can arise for the Office and the authorities when large numbers of refugees leave their camp or another designated place of residence and move to a city, there may also be good reasons for them to do so.
>
> 147. Any mobility restrictions placed on camp-based refugees should take account of those reasons, such as a need to reunite with family members or to seek medical treatment. There is also considerable evidence to suggest that many refugees move to urban areas because their physical and material security are at risk in their camps, because secondary and tertiary education opportunities are non-existent there, because they do not have

[225] On whether 'scarcity of resources' may be subsumed under permissible grounds for limitation see Verdirame Guglielmo, 'The UN and Human Rights: Who Guards the Guardians?' (2011) 281.
[226] UNHCR, 'UNHCR Policy on Refugee Protection and Solutions in Urban Areas' (September 2009) <www.unhcr.org/refworld/docid/4ab8e7f72.html> Accessed 2 April 2013, para 14.
[227] ibid para 20.

access to livelihoods and because they have no immediate prospect of finding a solution to their plight.

148. Working in close association with its partners, UNHCR will endeavour to ensure that acceptable standards of protection and assistance are available in camps, as well as educational, recreational, wage-earning and other income-generating opportunities. As indicated previously, camp-based refugees will also have the same access to durable solutions opportunities, including resettlement, as refugees living in urban centres.

149. The Office will strive to ensure that refugees who travel to urban areas are provided with adequate documents and will advocate with the authorities and security services to ensure that they are not penalized for travelling and that they are allowed to remain in an urban area for as long as necessary.'[228]

The stringent restrictions on refugee movements in Tanzania suggests that such guidelines are not being followed.

b) Security

Tanzania has long represented relative stability for refugees fleeing the Great Lakes' many conflicts. Hosting nationals of Rwanda, DRC, Burundi, Somalia and beyond, Tanzania's camps have previously confronted criminalization, lawlessness, and even conflict spill-over. According to the International Crisis Group, this includes: 'military mobilisation, recruitment, training, fundraising, political strategizing, communications, arms trafficking, resource distribution, medical treatment, naval operations and the launching of cross-border attacks.'[229] In some ways, these problems have justified the Tanzanian position on aggressive repatriation and derogation of certain rights under cover of national security. However, it should be noted that not all crime constitutes an emergency and the Government of Tanzania should assume certain obligations to promote the security of refugees, particularly when the situation is exacerbated by its own policies, including restrictions on additional rights (income generation, movement, etc) protected by international law. For instance, a strong correlation has previously been made between increased crime and the decision to decrease food rations in camps.[230] It has also been noted that restrictions on freedom of movement and the right to work can increase both insecurity and crime.[231] The problem is highlighted in respect of women and girls who, in attempts to meet

[228] UNHCR, 'UNHCR Policy on Refugee Protection and Solutions in Urban Areas' (September 2009) <www.unhcr.org/refworld/docid/4ab8e7f72.html> accessed 1 July 2013, para 20.
[229] International Crisis Group, 'Burundian Refugees in Tanzania: The Key Factor to the Burundi Peace Process' (CG Central Africa Report N° 12, 30 November 1999) <www.crisisgroup.org/~/media/Files/africa/central-africa/burundi/Burundian%20Refugees%20in%20Tanzania%20The%20Key%20Factor%20to%20the%20Burundi%20Peace%20Process.pdf> accessed 1 July 2013.
[230] Sarah Collier, 'Refugees in Tanzania: from 'resident guests' to 'threats to national security' (ThinkAfrica Press, 20 June 2011) <thinkafricapress.com/refugees/refugees-tanzania-%E2%80%9Cresident-guests%E2%80%9D-%E2%80%9Cthreats-national-security%E2%80%9D> accessed 1 July 2013.
[231] Deardoff; See also Chen.

basic survival needs, become vulnerable to violence and abuse:

> 'Adolescent girls in Nyarugusu Refugee Camp in North-Western Tanzania are facing violence, abuse, neglect, exploitation and discrimination that threaten their lives and impede their growth and development. They regularly engage in unsafe livelihood activities to supplement household income and lack opportunities to build protective social assets.'[232]

Both the African Charter on Human and Peoples' Rights (Article 6) and the Universal Declaration of Human Rights (Article 3) guarantee the right to security. Policies to promote repatriation that inadvertently encourage criminal behaviour should be reconsidered in light of the fundamental human rights violations that they may engender. This is a particularly timely issue as remaining Burundian refugees are resettled alongside recent arrivals fleeing a brutal and violent civil war in the DRC, where the situation is deteriorating.[233] By mixing asylum-seekers with pending cases alongside newly arrived groups or even those awaiting repatriation in uncertain circumstances, the conditions of emergency become even less clear, and rights may inappropriately be derogated with detrimental effects. This may most notably include the right to work, given its centrality to both successful repatriation and integration.

c) Work and Training

The right to work is protected under Article 23 of the UDHR, Article 15 of the ACHPR, and Article 6 of the ICESCR. Whilst other legal arguments have focused on right to work as inherent to protection of dignity—citing national (e.g. South Africa) and international case law—it must also be considered in context of refugee livelihood and successful repatriation. In accordance with Article 24 of the ACHPR: 'All peoples shall have the right to a general satisfactory environment favourable to their development.' Additionally, Article 22 of the UDHR proclaims that:

> 'Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.'

And Article 6 of the ICESCR states:

---

[232] Women's Refugee Commission: 'The Path to Hope' (December 2012) <reliefweb.int/sites/reliefweb.int/files/resources/The%20Path%20to%20Hope%20Congolese%20Refugee%20Adolescent%20Girls%20in%20Nyarugusu%20Refugee%20Camp%20Tanzania.pdf> accessed 1 July 2013.

[233] International Federation of Red Cross and Red Crescent Societies (All Africa, 10 December 2012) <http://allafrica.com/stories/201212110716.html> accessed 1 July 2013.

> 'The Steps to be taken by a State Party to the present Covenant to achieve the full realization of this right [to work] shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.'

In Nyarugusu, as with Mtabila prior to its closure, repatriation has been promoted by the Government of Tanzania, which shut down 'all livelihood activities' in the camps. Most refugees are not able to take part in income generating and common market activities, particularly as the process for obtaining a permit is unclear, with no reported cases of successful issuance.[234] Without 'legal self-reliance opportunities', refugees in Nyagurusu are rendered entirely dependent on relief assistance, even amidst current cutbacks.[235] It is worth considering whether Tanzania can continue to derogate from certain human rights, particularly the right to work, whilst simultaneously scaling down relief efforts in order to encourage peaceful returns, as this could communicate a contradictory position. Thus, although freedom of movement may continue to be restricted on spurious national security grounds, the absence of a clear declaration of emergency renders the continuing derogation of other rights legally questionable.

Without access to legal or formal markets, refugees may remain in conditions that appear to encourage repatriation, but their incentives to leave may be inadvertently diminished. It has been suggested that the lack of food combined with the increase in insecurity and crime (see above) encourages refugees to leave the camps, jeopardizing the voluntary repatriation process.[236] Further, access to agriculture, employment, and income-generating activities may not only be understood as coping mechanisms during encampment,[237] but can also be considered essential prerequisites to successful repatriation in terms of generating adequate savings and developing practical skills. Refugees who may have lost their assets, property, and land in their home country would experience a more secure, dignified return if their prospects for economic self-reliance were sustained or improved during encampment. This is particularly true for individuals who grew up in the camps reliant on aid and without access to vocational training or practical experience participating in an active economy.

While 'it is common for refugee skills and capacities to be ignored in long-term camp situations',

---

[234] Women's Refugee Commission: 'The Path to Hope' (December 2012) <reliefweb.int/sites/reliefweb.int/files/resources/The%20Path%20to%20Hope%20Congolese%20Refugee%20Adolescent%20Girls%20in%20Nyarugusu%20Refugee%20Camp%20Tanzania.pdf> accessed 1 July 2013.
[235] DIFD, 'Protracted Relief and Recovery Operation (PRRO) 2012 – Assistance to Refugees in Camps in North-Western Tanzania' (no date)<projects.dfid.gov.uk/IATI/document/3755667> accessed 1 July 2013.
[236] ibid.
[237] ibid.

limiting their participation to self-sustaining activities,[238] it is important to note that these capacities are likewise not developed in the interest of their successful repatriation, perhaps due to the increased and overbearing focus on 'temporary' encampment, even in protracted situations. According to Article 26 of the UDHR, 'technical and professional education shall be made generally available', a right that may assist—rather than hinder—a dignified and peaceable repatriation process. Without sufficient training, economic engagement, or labour development, the current situation only serves in 'limiting their capacities and increasing their vulnerabilities',[239] particularly as they seek new, self-sustaining means of existence once repatriated.

d) Individual and Public Health

Articles 24 and 25 of the UDHR and Article 12 of the ICESCR promote the highest attainable standard of physical and mental health. Similarly, Article 16 of the ACHPR asserts that 'Every individual shall have the right to enjoy the best attainable state of physical and mental health' and that 'States parties to the present Charter shall take the necessary measures to protect the health of their people.' Additionally, Article 2.2.3 of the ICESCR obliges the state to prevent, treat and control 'epidemic, endemic, occupational, and other diseases.'

Both of these concepts—right to health and the state obligation to prevent disease—are important to the continuing derogation from rights in Protracted Refugee Situations in Tanzania, both with reference to the closure of Mtabila as well as ongoing LTE in Nyagurusu. This is not only true in the case of nutrition and well-being during encampment, but also during returns. Article 8.3 of ICCPR and Article 12 of the ACHPR allow freedom of movement to be derogated in the context of public health, but in the case of Tanzania-Burundi population movements, refugee flows across the border are contributing to a public health hazard and the exacerbation of a cholera epidemic[240] that could threaten both communities and introduce additional burdens to an already overstretched relief and repatriation effort.

It is worth exploring whether the derogation of particular rights should not be undertaken when one or more of the possible claims for derogation are violated in the process. This is particularly true in the case of the right to health, as it may introduce an unexpected strain on available resources in addition to having consequences for the health and successful transfer of those seeking repatriation. Multiple aid agencies and international development organisations have reported on food insecurity at Tanzanian refugee camps. Commonly perceived as a means to

[238] Deardoff, p 17.
[239] ibid, p 6.
[240] International Federation of Red Cross and Red Crescent Societies (All Africa, 10 December 2012) <http://allafrica.com/stories/201212110716.html> accessed 1 July 2013.

encourage repatriation, ration reductions can have 'serious implications on refugee health ... [particularly] at a time when access to coping mechanisms (agriculture, employment, income generating activities) is severely constrained.'[241] Commitments have been made by various agencies to make up the funding shortfall (e.g. DfID, USAID, ECHO); however, these are temporary stop-gap measures that in no way guarantee sustained improvements even past June 2013. They can have further negative consequences despite already poor nutrition rates: according to DfID almost half of the children under five in Nyarugusu show signs of stunting.[242] Article 24 of UDHR states: 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age *or other lack of livelihood in circumstances beyond his control.*' (Emphasis added).

More problematically, this reinforces the notion of cumulative rights and the collective derogation from these rights despite clear declaration of emergency conditions. If aid efforts are being reduced and repatriation measures are being undertaken, key universal, political, economic and social rights should not be denied, particularly when coordinated denial of these rights exacerbates conditions further. In the same way that insecurity has been connected with denial of work, DfID suggests that 'the high level of stunting is likely associated with the unvaried diet of the refugee population as they are prevented from farming and accessing markets.' It is for this reason that Hathaway concludes: 'without the right to work all other rights were meaningless'.[243] Thus, 'the prioritizing of some rights over others may make sense during the initial emergency phase, but not as time goes on.'[244] A definition of emergency seems necessary to fully assess whether Tanzania is meeting its obligations under international law in good faith. If it is when repatriation is being negotiated and in some cases finalized, then this might be the time to re-introduce measures to respect the rights previously derogated. Furthermore, with multiple communities of differing national origins together in the same camp, it is necessary to respect the nuances and needs of their respective circumstances.

---

241 DIFD, 'Protracted Relief and Recovery Operation (PRRO) 2012 – Assistance to Refugees in Camps in North-Western Tanzania' (no date)<projects.dfid.gov.uk/IATI/document/3755667> accessed 1 July 2013.
242 ibid.
243 As cited in Deardoff.
244 As cited in ibid.

2) COMPARATIVE: CURRENT LEGAL PROCEEDINGS IN KENYA CHALLENGING ENCAMPMENT

A useful comparator to the Tanzanian situation is that of Kenya, where there is a current legal challenge to the legality of a government encampment policy for refugees.

a) Background

By a notice published in the Daily Nation on 18th December 2012, the Commissioner of Refugees Affairs issued a press release which stated that the Government of Kenya had decided to stop reception, registration of asylum seekers and close down all registration centres in urban areas with immediate effect.[245] The directive was issued on the grounds of an 'unbearable and uncontrollable threat to national security' following a number of grenade attacks in areas with large ethnic Somali populations. It stated that all asylum seekers/refugees would be registered and hosted at the refugee camp and that all asylum seekers and refugees from Somali should report to Dadaab refugee camps while asylum seekers from other countries should report to Kakuma refugee camp. The notice directed UNHCR and other partners serving refugees to stop providing direct services to asylum seekers and refugees in urban areas and transfer the same services to refugee camp.

b) Court Proceedings

An NGO, Kituo Cha Sheria, filed a public interest challenge to the government directive. So far, two hearings have been held, both in front of D.S David Majanga. The first was on the 21st January 2013 and the second on the 4th February 2013. Following the 21st January hearing an interlocutory order restraining state actors from relocating refugees to camps was handed down.[246] Following the 4th February hearing the interlocutory order was extended to 19th February. It is currently unclear whether or not the order is still in place. It is evident from the order handed down by D. S Majanga on the 23rd January 2013 that the court was persuaded by: '[t]he international obligations Kenya has with respect to refugees and the fact that under [Kenya's] Constitution refugees are vulnerable persons,' to find that 'the petitioner has an arguable case before the court.' [247]

---

[245] Department of Refugee Affairs Press Release, 13 Dec 2012 <www.urpn.org/uploads/1/3/1/5/13155817/dra_press_release_131212.pdf> accessed 1 July 2013.

[246] Kutuo Cha Sheria v Attorney General, High Court of Kenya. Ruling/Direction 23rd January 2013. <www.urpn.org/uploads/1/3/1/5/13155817/petition_19_of_2013_ruling_23.1.2013.pdf> accessed 1 July 2013.

[247] Unfortunately it has not been possible to find a copy of the arguments laid before the court by Kituo Cha Seria, or by the UNHCR and the Katiba Institute, who were added to the case as amici curiae on 4th February.

Kenya is a signatory the UDHR, ICCPR and the Refuge Convention, and has explicitly incorporated them into domestic law via Article 16.1 of the 2006 Refugee Act. The Kenyan Constitution also guarantees freedom of movement in Article 39.[248] The Kenyan government appears to have relied on the national security exception of Article 12(3) ICCPR in order to justify the restrictions of freedom of movement, although the government is currently refusing to release the full text of the directive upon which the notice from the Commissioner of Refugee Affairs was based. However, the references to the bombings within the notice suggest that the government is relying on the national security exception. Press Releases from Human Rights Watch, Refugees International and Amnesty International argue that the Kenyan directive will: restrict the right to freedom of movement on the part of Refugees and affect refugees' ability to make a living and unlawfully reduce their access to adequate food, clothing, housing, health care and education.[249] The Kenyan directive is a probable violation of the right to freedom of movement on (at least) two grounds. First, compulsory encampment is not the 'least restrictive measure' necessary to protect national security. The policy can be viewed as a retrogressive measure breaching Kenya's obligation to progressively realise rights. Secondly, the policy clearly discriminates between Kenyan citizens and foreign nationals and/or different types of non-nationals.

Whilst differing from the Tanzanian situation in significant respects (primarily in that the directive involves moving already settled refugees from urban areas to camps), the Kenyan case is a useful comparator and, dependent on the decision, could be used to pursue similar proceedings against the Tanzanian government with regard to the international obligations owed by governments to refugees in terms of encampment.

3) CONCLUSIONS AND RECOMMENDATIONS

Tanzanian Refugee policies have been geared toward securitisation and criticised for restrictions on fundamental freedoms such as movement and work.[250] At times, this may have been justified but a less security-focused interpretation is necessary following the 2002 Tripartite Agreement as

---

[248] Kenyan Constitution <www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf> accessed 1 July 2013.

[249] Amnesty International, 20th Dec 2013, 'Kenya's decision to confine refugees and asylum-seekers in camps is unlawful' <www.amnesty.org/en/for-media/press-releases/kenya-s-decision-confine-refugees-and-asylum-seekers-camps-unlawful-2012-12> accessed 1 July 2013; Human Rights Watch 21st January 2013, 'Kenya: don't force 55,000 refugees into camps' <www.hrw.org/news/2013/01/21/kenya-don-t-force-55000-refugees-camps> accessed 1 July 2013; Refugees International, 23rd January 2013, 'Kenyan plan to force refugees into camps leads to abuse, violates international law' <www.refintl.org/press-room/press-release/kenyan-plan-force-refugees-camps-leads-abuse-violates-international-law> accessed 1 July 2013.

[250] Global Detention Project, 'Tanzania Detention Profile' <http://www.globaldetentionproject.org/countries/africa/tanzania/introduction.html> accessed 1 July 2013.

repatriation becomes the immediate goal. It is recommended that the Government of Tanzania include in its relevant policies a clear derogation clause,[251] including definition of emergency. In the absence of clear justification for the prohibition on refugees leaving the camps, this amounts to a prima facie violation of their right to freedom of movement and protection of liberty. As per the UNHCR guidance on Operational Protection in Camps and Settlements, there should be a regular review of the need to maintain camp arrangements. UNHCR, when negotiating with governments, has an obligation to promote camp policy, location and operation such that camp conditions do not amount to refugee detention.[252]

As per the UNHCR's Urban Refugee Policy, restrictions on the movement of refugees in camps should be loosened. Any restrictions on movement should take into account the good reasons why refugees move outside of camps, including a need to reunite with family members, to seek medical treatment, to seek secondary and tertiary education opportunities and employment. Access to the above within the camp is virtually non-existent. Camps should offer equal access to vocational or professional training that can be practised and used during encampment, including French language skills. As per the World Food Programme's recommendations, food assistance should be continued at current levels while also enabling refugees to access more livelihood activities.[253] Attention should be paid to the nutritional well-being as well as the safety and security of young children, with a nuanced understanding of the encampment risks particular to young girls. It should be advocated that the Tanzanian Ministry of Home Affairs should permit the resumption of income generation and market activities within and around the camp.[254]

Further, in terms of due process rights, Article 7 of ACHPR contains a 'right to have one's case heard.' While this is typically understood in the context of criminal accusations, it is important to remember that the invocation of cessation transforms the refugee's protected status into that of illegal alien without the right to reside in Tanzania and that remaining as such without seeking regularisation of immigration status is contrary to Tanzanian law (Tanzania Immigration Act

---

[251] See Durieux and McAdam 2004, 21.

[252] UN High Commissioner for Refugees, 'Operational Protection in Camps and Settlements. A Reference Guide of Good Practices in the Protection of Refugees and Other Persons of Concern' (Division of Internal Protection Services, June 2006) <www.refworld.org/docid/44b381994.html> accessed 1 July 2013.

[253] World Food Programme and UN High Commissioner for Refugees, 'Community and Household Surveillance in North Western Tanzania: Programme Outcome Monitoring in Nyarugusu Refugee Camp' (May 2010) <home.wfp.org/stellent/groups/public/documents/ena/wfp226889.pdf> accessed 1 July 2013.

[254] Women's Refugee Commission: 'The Path to Hope' (December 2012) <reliefweb.int/sites/reliefweb.int/files/resources/The%20Path%20to%20Hope%20Congolese%20Refugee%20Adolescent%20Girls%20in%20Nyarugusu%20Refugee%20Camp%20Tanzania.pdf> accessed 1 July 2013.

Article 31(1)).[255] Thus, consistent with Article 13 of ICCPR (right to competent case review) and Article 9 of the ACHPR (right to information), the procedure for informing refugees of (a) a case review process and (b) a decision appeals process should both be improved.

[255] Global Detention Project, 'Tanzania Detention Profile' <http://www.globaldetentionproject.org/countries/africa/tanzania/introduction.html> accessed 1 July 2013, see also Mohamed Kazingumbe, 'Due diligence urged as Tanzania prepares to close Mtabila Refugee camp' (Business Times, 23 March 2012) <http://www.businesstimes.co.tz/index.php?option=com_content&view=article&id=1782:due-diligence-urged-as-tanzania-prepares-to-close-mtabila-refugee-camp&catid=35:features&Itemid=29> accessed 1 July 2013.