



**ENCAMPMENT POLICIES, PROTRACTED REFUGEE SITUATIONS AND  
NATIONAL SECURITY CONCERNS: THE CHALLENGES OF REFUGEE  
PROTECTION IN KENYA**

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## ABSTRACT

In Africa, there is an overwhelming majority of displaced people. About 25% of the world's refugees come into being due to conflicts in Africa. The majority of these refugees find themselves in either Kenya or Ethiopia where they invariably end up in refugee camps. While refugee camps may be suitable to provide immediate assistance to refugees, when they evolve into long term solutions, they end up creating conditions that amount to violations of human rights. In Kenya, the government has used national security concerns as a means to enforce strict encampment policies that have resulted in denying refugees basic human rights and that have exacerbated the protracted nature of the camps there.

In Ethiopia, the approach is only slightly different. Camp situations are the norm, but the government routinely sets up new camps in order to alleviate the population pressure of existing ones. In addition, a few refugees are allowed to leave the refugee camps under an out of camp policy, or to register as urban refugees. In these situations, refugees are able to lead independent and dignified lives.

There are better outcomes for refugees when governments address the human rights violations that occur within refugee camps. Ultimately, it is better for both the refugees and the host country when refugees are allowed to move freely, to obtain documentation that allows them to work and to establish residences away from the refugee camps. The result is that the camp situations stop being the norm when it comes to refugee protection, but alternative durable solutions, such as local integration are embraced.

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## LIST OF ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
AU	African Union
ARRA	Administration for Refugee and Returnee Affairs
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
ICAT	International Covenant Against Torture and Other Cruel, Inhuman or Degrading Treatment
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
OAU	Organisation of African Unity
RCK	Refugee Consortium of Kenya
UDHR	Universal Declaration on Human Rights
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees

## INTRODUCTION

As of 2015, it was estimated that over 21 million people in the world were living in refugee situations arising from several ongoing conflict situations which are continually displacing people from their states of origin. Of these 21 million refugees, a majority are hosted in third world or developing countries, presenting various problems to the host countries<sup>1</sup>. In addition, challenges such as terrorism and insecurity, nationalism, xenophobia and intolerance, have brought forth legitimate questions and fears regarding the protection of refugees.<sup>2</sup> Other protection challenges such as protracted refugee situations and mass influxes remain constant. Against this background, countries who currently host refugees have also taken up the rhetoric that other more developed states need to contribute to the burden of refugee protection.<sup>3</sup> As a result, the issue of protection of refugees, in the background of continued conflict remains a cause for concern in many countries.<sup>4</sup>

One of the foremost questions now in the realm of refugee protection is the question of creating mechanisms that better protect refugees while equitably distributing the responsibility to care for them, with the ultimate aim of creating durable solutions to refugee situations. In addition, challenges associated with xenophobia, rising nationalism and insecurity, and intolerance, have brought forth legitimate questions and fears regarding the protection of refugees.<sup>5</sup>

The question of protection of refugees is particularly important in Africa because an “overwhelming majority of displaced people are hosted in developing countries, either as

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<sup>1</sup> Amnesty International, ‘Tackling the Global Refugee Crisis: From Shirking to Sharing Responsibility’ (Amnesty International 2016) POL 40/4905/2016.

<sup>2</sup> Volker Turk and Frances Nicholson, ‘Refugee Protection in International Law: An Overall Perspective’, *Refugee protection in international law: UNHCR’s global consultations on international protection* (2003).

<sup>3</sup> James C Hathaway, ‘Why Refugee Law Still Matters’ (2007) 8 Melbourne Journal of International Law 89 <<http://repository.law.umich.edu/articles/297/>> accessed 28 October 2016.

<sup>4</sup> ACHPR ‘40th Activity Report of the African Commission on Human and Peoples’ Rights’ <[http://www.achpr.org/files/activity-reports/40/actrep40\\_2016\\_eng.pdf](http://www.achpr.org/files/activity-reports/40/actrep40_2016_eng.pdf)> (2016) accessed 2 November 2016.

<sup>5</sup> Turk and Nicholson (n 2).

Internally Displaced People (IDPs) or as refugees in countries usually neighboring conflict zones.”<sup>6</sup> UNHCR shows that 4.4 million of the world’s refugees are hosted in sub-saharan Africa including Kenya, Ethiopia, Chad, South Sudan and Uganda.<sup>7</sup> Of these countries, Kenya and Ethiopia hosted the largest number of refugees from Somalia.<sup>8</sup>

In Kenya, the regime for refugee protection encompasses the international instruments as well as its own domestic law, the Refugee Act of 2006. Until 1994, Kenya received only a small number of refugees. Between 1991 and 1994, due to political events in neighbouring states, in particular in Ethiopia, Rwanda, Somalia and Sudan, the influx of refugees grew.<sup>9</sup> As at June 2016, there are 562,357 refugees and asylum-seekers in the country, and a majority of those are from Somalia.<sup>10</sup> Until now, Kenya remains the main refugee receiving country in the East African region.<sup>11</sup> Kenya hosts over 500,000 recognised refugees, which makes it one of the biggest refugee destinations in the world. Most of the refugees originate from neighbouring Somalia but with the civil war ongoing in South Sudan, most new arrivals come from there.<sup>12</sup> However, despite the fact that Kenya has ratified the major international treaties on human rights and refugee law, refugee protection in Kenya drastically deteriorated from the 1990s in the face of declining economic conditions and increasingly large refugee influxes.<sup>13</sup>

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<sup>6</sup> Philip Verwimp and Jean-Francois Maystadt, ‘Forced Displacement and Refugees in Sub-Saharan Africa: An Economic Inquiry’ 2 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2704163](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2704163)> accessed 11 February 2017.

<sup>7</sup> United Nations High Commissioner for Refugees, ‘UNHCR Global Trends 2015’ (*UNHCR*) 14 <<http://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html>> accessed 16 February 2017.

<sup>8</sup> *ibid* 15.

<sup>9</sup> Tamara Wood, ‘Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention’s Expanded Refugee Definition’ (2014) 26 *International Journal of Refugee Law* 555 <<http://ijrl.oxfordjournals.org/content/26/4/555>> accessed 28 October 2016.

<sup>10</sup> Hargrave Karen, Pantuliano Sara and Idris Ahmed, ‘Closing Borders: The Ripple Effects of Australian and European Refugee Policy: Case Studies from Indonesia, Kenya and Jordan’ (Overseas Development Institute 2016) HPG Working Paper.

<sup>11</sup> Wood (n 9).

<sup>12</sup> Lucy Kanya and Sunday Smith, ‘Analysis of the Legal and Policy Framework on Migration and Health in Kenya’ (International Organization for Migration 2013) 7.

<sup>13</sup> Elizabeth Holzer, ‘What Happens to Law in a Refugee Camp?’ (2013) 47 *Law & Society Review* 837, 845.

From 1992, successive Kenyan governments have relinquished their obligations to refugees to the UNHCR.<sup>14</sup> As Edwin Abuya explains, many of the functions that the Kenyan government should undertake with regard to refugee protection are undertaken by the UNHCR, save for the provision of space for refugee camps.<sup>15</sup> Kenya has an encampment policy, and most of the refugees and asylum seekers present in the country are hosted in two main refugee complexes: Dadaab and Kakuma camps.<sup>16</sup> The situation that faces refugees who are confined to camps has been a question of concern because they suffer from a lack of access to education, proliferation of violence and a lack of basic needs such as shelter, food and clothing.<sup>17</sup>

National security concerns also play into refugee protection matters. The Kenyan government has used security concerns as a major component in formulating policy in relation to refugee protection. This comes in the background of various reports linking refugees, especially those who reside in camp situations to insecurity in those regions. For example, in Kakuma, one of Kenya's refugee camps, it is often reported that there are frequent outbreaks of violence and unrest. In Dadaab, an increase in small arms and light weapons was evident after mass influx situations.<sup>18</sup> Insecurity within Dadaab and in Garissa County generally increased and has been attributed on the refugee population residing there.<sup>19</sup> The situation deteriorated with the influx of Somali refugees in 2006. There were increased attacks, often attributed to Al-Shabaab, which eventually led to the government deciding to close the border

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<sup>14</sup> Edwin Odhiambo Abuya, 'Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective' (2007) 19 *International Journal of Refugee Law* 51, 54 <<https://academic.oup.com/ijrl/article/19/1/51/1562112/Past-Reflections-Future-Insights-African-Asylum>> accessed 4 February 2017.

<sup>15</sup> *ibid*

<sup>16</sup> The Dadaab Complex consists of five refugee camps: Dagahaley, Hagadere, Ifo, Ifo II, and Kambios. It is located in Garissa County in North Eastern Kenya. Kakuma Refugee Camp is located in Turkana County

<sup>17</sup> Kate Ogg, 'Protection from "Refuge": On What Legal Grounds Will a Refugee Be Saved from Camp Life?' [2016] *International Journal of Refugee Law* eew034 <<http://ijrl.oxfordjournals.org/content/early/2016/10/07/ijrl.eew034>> accessed 28 October 2016.

<sup>18</sup> Peter Kirui and John Mwaruvie, 'The Dilemma of Hosting Refugees: A Focus on the Insecurity in North-Eastern Kenya' (2012) 3 *International Journal of Business and Social Science* 165.

<sup>19</sup> *ibid*.

and not allowing any more asylum seekers into the country.<sup>20</sup> The Kenyan government continues to see Somali refugees as posing a great security risk because extremist groups, often belonging to Al Shabaab, who find their way into the country under the guise of being refugees.<sup>21</sup> Kenya has taken various actions in the past, such as temporarily closing its border between itself and Somalia as well as engaging in forced repatriation of Somali refugees, suggesting that its commitment to its obligations to protect is conditional.<sup>22</sup>

In Ethiopia, the international and regional framework is similar to Kenya's. The country is a party to both the Convention relating to the Status of Refugees as well as the protocol. It is also a party to the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. Ethiopia has also been described as one of the most stable countries in Eastern Africa, and presently hosts approximately 736,100 refugees.<sup>23</sup> Despite being a third world country, Ethiopia is considered relatively successful in terms of fulfilling its obligations under international refugee law. In his submission to the Office of the High Commissioner for Human Rights during the 19<sup>th</sup> Session of the Universal Periodic Review the United Nations High Commissioner for Refugees the "generosity of the Government of Ethiopia for hosting large numbers of refugees, for keeping its borders open for those in need of international protection and for respecting the principle of *non-refoulement*."<sup>24</sup> Despite the successes that have been seen in Ethiopia, protection of vulnerable refugees continues to be a cause for concern, and in particularly with respect to those who have been victims of sexual and gender based violence.<sup>25</sup>

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<sup>20</sup> *ibid.*

<sup>21</sup> *ibid* 167.

<sup>22</sup> Rose Jaji, 'Somali Asylum Seekers and *Refoulement* at the Kenya-Somalia Border' (2013) 28 *Journal of Borderlands Studies* 355, 366.

<sup>23</sup> Amnesty International (n 2).

<sup>24</sup> United Nations High Commissioner for Refugees, 'Refworld | Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: Ethiopia' (*Refworld*) 2 <<http://www.refworld.org/topic,50ffbce51b1,50ffbce5208,5283488c4,0,,ETH.html>> accessed 28 October 2016.

<sup>25</sup> UN High Commissioner for Refugees (n 14).

This thesis explores the obligations created by the legal frameworks under refugee law and how Kenya responds to its obligations. The main research question driving this thesis is to establish what the refugee protection regime is and the challenges faced by countries in Africa in respecting their obligations under international refugee law. Using Kenya as a case study, and Ethiopia as a comparator, this thesis will examine the approaches taken with regards to refugee protection and the challenges that arise. The subsidiary questions that are discussed include whether there is a link between refugee protection and human rights law, the issues that create obstacles in refugee protection and finally how can these challenges be addressed in order to make refugee protection more effective.

It is proposed to answer these questions by outlining the various obligations that two jurisdictions in Eastern Africa, Kenya and Ethiopia, afford to refugees through the various treaties, domestic legislation and policies, and examine how they are fulfilling their obligations under international refugee law with a view to making recommendations.

This research is a comparative study. It will draw from primary sources including domestic legislation from the jurisdictions under review, the international and domestic legal instruments, and judgments from court to which the countries subscribe. The research will also draw from secondary resources such as text books, journal articles, conference reports, and reports from organisations who work in refugee protection.

The thesis is structured in three chapters. The first chapter sets out the key concepts that arise in refugee protection. The main supposition driving this thesis is that the comprehensive refugee protection framework in place which provides a link between refugee protection and human rights law. This chapter also sets out the theories of refugee with an aim to determine why there is an obligation to protect, and the legal framework within which this protection is envisaged in each of the jurisdictions.

After establishing the legal framework, the second chapter discusses how and why encampment camp policies have been adopted by Kenya and Ethiopia as a means of refugee protection. Other policies adopted by the countries such as policies towards urban refugees and out of camp policies for specific refugees will also be discussed. The challenges and the human rights violations that arise out of the policies that have been adopted will also be discussed. The final chapter will discuss alternatives to the encampment policy that would improve refugee protection. Possible remedies that do not involve long term encampment will be suggested as well as a discussion on how adopting these remedies would lead to better outcomes for human rights.

## CHAPTER ONE: THE CONCEPTS, THE LEGAL AND THE THEORETICAL FRAMEWORK FOR REFUGEE PROTECTION

### 1.1 Definition of the term ‘Refugee’, Refugee Protection and the International Framework for the Protection of Refugees

The primary sources of international refugee law are the Convention Relating to the Status of Refugees of 1951 (hereinafter referred to as the 1951 Convention) as read together with the 1967 Protocol Relating to the Status of Refugees (hereinafter referred to as the 1967 protocol). The most commonly accepted definition of the term ‘refugee’ is derived from Article 1 of the 1951 Convention which provides that a refugee is any person who “is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.”<sup>26</sup> The 1951 Convention is lauded as containing a system of protection to those in need by providing protection to those who no longer have it from their countries of origin.<sup>27</sup>

Under international law, a more expanded definition of the term refugee is used, which includes a person who is considered a refugee under a different treaty agreement, that is prior to the 1951 Convention, as well as a person who is away from the country of his nationality, or who does not have a nationality and is unwilling, or unable, to go under the country of his habitual residence for protection due to a “well-founded fear of persecution.”<sup>28</sup>

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<sup>26</sup> United Nations High Commissioner for Refugees, ‘Convention and Protocol Relating to the Status of Refugees’ (UNHCR) 2 <<http://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>> accessed 8 December 2016. (See also the introductory note by the Office of the High Commissioner for Refugees on Page 2)

<sup>27</sup> Paul Weis, ‘The Refugee Convention, 1951 The Travaux Préparatoires Analysed with a Commentary by Dr Paul Weis’ (UNCHR 1983) 6 <<http://www.unhcr.org/4ca34be29.pdf>> accessed 8 December 2016.

<sup>28</sup> William Thomas Worster, ‘The Evolving Definition of the Refugee in Contemporary International Law’ (2012) 30 Berkeley J. Int’l L. 94, 95 <[http://heinonline.org/hol-cgi-bin/get\\_pdf.cgi?handle=hein.journals/berkjintlw30&section=6](http://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/berkjintlw30&section=6)> accessed 4 February 2017.

In the African context, the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969<sup>29</sup> (hereinafter referred to as the African Convention) complements the international framework of refugee protection by providing, as its main purpose, as to “establish a firm legal standard for refugees and ensure their safety and security, thus decreasing the likelihood of mass population displacement.”<sup>30</sup>

The African Convention was a result of the perception that the 1951 Convention did not adequately address the refugee problem in Africa.<sup>31</sup> Adopted by the organization formerly known as the Organisation of African Unity, this instrument specifically provides a wider definition of the term refugee.<sup>32</sup> The result of the wider definition is that it includes persons who are forced to leave their homes or countries of origin due to events that have significantly disrupted public law and order.<sup>33</sup> In 1964, various African countries were facing problems in hosting refugees, and it seemed like the international community would not address the problems in the host countries, or the refugee problem itself.<sup>34</sup> In an effort to find a means to address this problem, the Organisation of African Unity (OAU), through its Council of Ministers, appointed a commission of ten countries, giving it the mandate to conduct an assessment of the issue of refugees hosted in Africa and make suitable proposals on the resolution of the problem. The commission wrote a report after visiting Uganda, Burundi and Tanzania, which were then facing the biggest challenges in hosting refugees.<sup>35</sup>

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<sup>29</sup> OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session, Addis-Ababa, 10 September 1969.

<sup>30</sup> Jeremy Levitt, ‘Conflict Prevention, Management, and Resolution: Africa—Regional Strategies for the Prevention of Displacement and Protection of Displaced Persons: The Cases of the Oau, ECOWAS, Sadc, and Igad’ (2001) 20 *Refugee Survey Quarterly* 156, 170.

<sup>31</sup> Jamil Mujuzi, ‘The African Commission on Human and Peoples’ Rights and the Promotion and Protection of Refugees’ Rights’ [2009] *African Human Rights Law Journal* 160, 164 <[http://www.ahrlj.up.ac.za/images/ahrlj/2009/ahrlj\\_vol09\\_no1\\_2009.pdf](http://www.ahrlj.up.ac.za/images/ahrlj/2009/ahrlj_vol09_no1_2009.pdf)> accessed 6 December 2016.

<sup>32</sup> Organisation of African Unity: Convention on Specific Aspects of the Refugee Problem in Africa para 1(1).

<sup>33</sup> Tamara Wood, ‘Fragile States and Protection under the 1969 African Refugee Convention’ [2013] *Forced Migration Review* 17 <<http://search.proquest.com/openview/348831a69411c3dcb05ba5ed2d6b7611/1?pq-origsite=gscholar>> accessed 2 November 2016.

<sup>34</sup> Mujuzi (n 28) 162.

<sup>35</sup> *ibid.*

Drawing on the findings of this undertaking, the OAU took two steps. The first was to call upon the African Group of the United Nations to put before the United Nations General Assembly a resolution for an increase in the assistance that the UNHCR was providing to refugees in Africa. The second step was to the commission to draft a convention for African states which would complement the 1951 Convention in the better protection of refugees in Africa.<sup>36</sup> This led to the establishment of a Committee of Legal experts whose work culminated in the African Convention of 1969. The Convention which offers a wider scope of protection for refugees complements the international system and is widely acknowledged as “the cornerstone of refugee protection”<sup>37</sup> in Africa.

The major difference between the 1951 Convention and the African Convention is in its “extended definition” of who a refugee is. According to Wood, the definition of a refugee is more expansive because it focuses mainly on “the objective criteria of fear of persecution”.<sup>38</sup> This means that instead of the asylum seekers being required to show what it is s/he fears, the more significant consideration is the conditions in the country from which the refugee is coming from. Moreover, the phrase “events seriously disturbing public order”<sup>39</sup> is more general, meaning it encompasses all those “fleeing widespread or indiscriminate forms of harm, such as civil war”.<sup>40</sup> Under the African Convention, asylum seekers are not required to pursue alternative safeguards from harm from within their own country before they can apply to be recognized as a refugee in a different country, and finally, due to the broad situations to which the definition can be applied, it incorporates mass influx situations. This is important and more appropriate because in the context of African refugees, movements are more likely to occur in

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<sup>36</sup> *ibid.*

<sup>37</sup> Tamara Wood, ‘Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention’s Expanded Refugee Definition’ (2014) 26 *International Journal of Refugee Law* 555, 558 <<http://ijrl.oxfordjournals.org/content/26/4/555>> accessed 28 October 2016.

<sup>38</sup> *ibid* 559.

<sup>39</sup> *ibid.*

<sup>40</sup> *ibid.*

the context of armed conflicts and as such, would not fall under the limited scope and definition of the 1951 Convention.<sup>41</sup>

Even though this instrument does not use the “language of rights” it contains important provisions for the protection of refugees - rights which have been elaborated upon in other instruments.<sup>42</sup> The significance of this Convention, at least in theoretical terms, cannot be gain said. It deals with the “massive and often overpowering migrations of desperately needy people.”<sup>43</sup> Its adoption is indicative of African governments having committed themselves to the protection of refugees, and more importantly, it influenced the manner in which the Cartagena Declaration<sup>44</sup> was developed.

While this Convention has been lauded as being well suited to address the typical well suited to the specific problems of the refugees in Africa, it should be noted that it does not have an institutional mechanism through which implementation of the Convention can be tracked.<sup>45</sup> Refugee status is legally constitutive, meaning that refugees would be so termed under the law, whether or not either the UNHCR or the country of asylum has given them refugee status.<sup>46</sup> For the purpose of this thesis, the term refugee is used in accordance with the Bangkok Principles<sup>47</sup>, which provide that the term applies to every person who faces persecution due to external aggression (in his country of origin), foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, and is therefore

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<sup>41</sup> Rainer Hofmann, ‘Refugee Law in the African Context’ (1992) 52 HEIDELBERG J. INT’L L. 318, 324.

<sup>42</sup> Gina Bekker “The Protection of Asylum Seekers and Refugees within the African Regional Human Rights System.” *African Human Rights Law Journal* 13, no. 1 (2013): 1–29. <http://www.ahrlj.up.ac.za/bekker-g-1>.

<sup>43</sup> Robert F Gorman, ‘African Convention Expands the Definition of Refugees’ [2015] Salem Press Encyclopedia.

<sup>44</sup> Used in the context of Latin American countries

<sup>45</sup> Marina Sharpe, ‘New Issues in Refugee Research’ 16 <<http://www.unhcr.org/en-us/4edf8e959.pdf>> accessed 2 June 2017.

<sup>46</sup> Anna Wirth, Cara Defilippis and Jessica Therkelsen, ‘Refugee Work Rights Report: Taking the Movement from Theory to Practice’ (2014) 1 <<http://146.141.12.21/handle/10539/1995>> accessed 27 March 2017.

<sup>47</sup> AALCO, ‘Bangkok Principles on the Status and Treatment of Refugees (“Bangkok Principles”)’ <<http://www.refworld.org/docid/3de5f2d52.html>> accessed 27 March 2017.

compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.<sup>48</sup>

Some scholars argue that the definition of refugee exists only under treaty law.<sup>49</sup> By virtue of the fact that in order to qualify for refugee status, a person must satisfy two tests, the definition of a refugee remains a complex one. Some authors<sup>50</sup>, argue that there is no legal obligation to grant protection to those who are victims of war or general violence, and further, prolific authors in the area of refugee law have stated that in the time since the coming into force of the 1951 Convention, it has not been certain that there is ample practice, applied consistently over time, as well as opinion juris that amounts to a customary international norm of provision of refuge.<sup>51</sup> However, the fact that the definition of refugee as contained in the African Convention has greatly influenced the state law definitions in other countries and has influence the norms with respect to treatment of victims seeking refuge and therefore can be said to be as a contribution to a general rule of customary international law.

The African Convention is complemented by the Asian–African Legal Consultative Organisational Bangkok Principles. These principles cover the meaning of the term refugees to include “every person, who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality”<sup>52</sup>

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<sup>48</sup> *ibid* 2.

<sup>49</sup> William Thomas Worster, ‘The Evolving Definition of the Refugee in Contemporary International Law’ (2012) 30 SSRN Electronic Journal 101, 112.

<sup>50</sup> Mark R Von Sternberg, ‘Reconfiguring the Law of Non-Refoulement: Procedural and Substantive Barriers for Those Seeking to Access Surrogate International Human Rights Protection’ (2014) 2 J. on Migration & Hum. Sec. 329, 344.

<sup>51</sup> Worster (n 49) 113.

<sup>52</sup> *ibid* note 48 Art 1.

The concept of refugee protection is viewed as meaning the legal protection, that is, the entitlements that are provided to refugees which are provided under the law, and for which they can claim effective redress.<sup>53</sup> It includes ensuring that the right to asylum as provided in the 1951 Convention as well as the African Convention, alongside all other international human rights instruments is implemented, and that the rights of refugees, their wellbeing and their safety is assured.<sup>54</sup>

One aspect of refugee protection is the manner in which refugees are treated and accommodated in camps after they are allowed into the receiving country. Once refugees leave their countries of origin, they lose the protection of their countries, but in most cases, are not afforded protection that is similar to that given to the nationals of the host country.<sup>55</sup> The international refugee law framework does not provide standards that govern the treatment of refugees who are in camps, therefore, the relevant United Nations agreements and other human rights instruments apply in these cases.<sup>56</sup>

While it is recognised that countries who first receive refugees are themselves under economic and social strain, the 1951 Convention requires them to protect refugees found within its borders and declares that all states are under the “duty to protect refugees residing within [their] borders and shall afford them similar treatment to that which is given to aliens”. This duty is a now a well – established principle of international law and even countries who are not a party to the refugee conventions are obliged to respect it.<sup>57</sup> As noted above, in the African context, three major international instruments are used to determine the manner in which refugees are afforded protection. One major thread in these documents is the issue of

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<sup>53</sup> Arthur C Helton, ‘What Is Refugee Protection?’, *Problems of protection: the UNHCR, refugees, and human rights* (Routledge 2003) 20.

<sup>54</sup> Dr Ken Oluoch, ‘Reconciling Security Concerns and Refugee Protection’ [2017] *Review of History and Political Science* 30 <<http://rhpsnet.com/vol-5-no-1-june-2017-abstract-3-rhps>> accessed 27 October 2017.

<sup>55</sup> Helton (n 53) 23.

<sup>56</sup> *ibid.*

<sup>57</sup> *ibid.*

repatriation.<sup>58</sup> In addition there right of a refugee not to be ‘*refouled*’ or returned to the country of origin against their will, or during a situation that their life may still be in danger is provided for. This is an important issue in refugee protection especially because it safeguards against governments or other stake holders rushing to return refugees or asylum seekers in the name of achieving a solution to the refugee problem.<sup>59</sup>

Another issue that rears up in refugee protection is the relationship of the host country with refugees. Many times, refugees are hosted at the pleasure of the receiving country, whose authorities sometimes exploit them for cheap labour or as a market for their goods. Refugees also find themselves in competition with local communities for food, work and housing, and many governments to obviate potential conflicts between refugees and local communities usually restrict refugees to camps which only provide basic services.<sup>60</sup>

## 1.2 Refugee Protection and the interplay with other International Human Rights Instruments

It has been argued that other human rights instruments, and the larger international human rights system does not provide enough detail or coherent structure towards refugee protection. It is criticised for being “strong on principle but weak on delivery”<sup>61</sup> for being too broad, with states primarily undertaking only token steps to ensure that human rights obligations are strengthened. Therefore, the human rights that are subscribed to in many international human rights instruments cannot actually be claimed unless the state in question undertakes specific measures to incorporate those provisions into domestic law.<sup>62</sup> Despite these shortcomings, the

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<sup>58</sup> John R Rogge and Joshua O Akol, ‘Repatriation: Its Role in Resolving Africa’s Refugee Dilemma’ [1989] *International Migration Review* 184, 186.

<sup>59</sup> *ibid.*

<sup>60</sup> Bonaventure Rutinwa, ‘The End of Asylum? The Changing Nature of Refugee Policies in Africa’ (2002) 21 *Refugee survey quarterly* 12, 14.

<sup>61</sup> Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press 2007) 202.

<sup>62</sup> *ibid.* 202.

role of human rights law cannot be ignored in refugee protection.<sup>63</sup> It is important to consider human rights because the focus on whether or not the state enforces refugee law alone would produce an incomplete account of the dynamics of refugee law and human rights law. It is therefore imperative to take a broader perspective that situates refugee law within other spheres of international human rights law must be adopted in order to grasp their effect on the protection that is afforded to those living as refugees.<sup>64</sup>

The direct link of the 1951 Convention to human rights principles is noted in its preamble which affirms that all human beings must enjoy fundamental rights and freedoms without discrimination.<sup>65</sup> Vincent Chetail rightly notes that while international refugee law and international human rights law were initially “conceived as two distinct bodies of international law”<sup>66</sup> but a new understanding of the interrelatedness of refugee law and human rights law has evolved and thus resulted in new linkages between the two bodies of international law. As a result the wider international human rights framework plays a role in protection of refugees. In this context, human rights norms are the primary source of refugee law.<sup>67</sup> An evolutive interpretation of the 1951 Convention results in a construction that adapts human rights treaties into the refugee protection. Human rights law also “provides a universal and uniform set of standards”<sup>68</sup> which ensure the harmonisation of different interpretations of the 1951 Convention. In addition, human rights law provides a predictable normative framework for the designation of refugees and for the rights that they hold.<sup>69</sup>

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<sup>63</sup> Vincent Chetail, ‘Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law - Oxford Scholarship’, *Human Rights and Immigration* (2014) 19.

<sup>64</sup> Holzer (n 13) 845.

<sup>65</sup> The 1951 Convention relating to the Status of Refugees and its 1967 Protocol Preamble.

<sup>66</sup> Brian Gorlick, ‘Human Rights and Refugees: Enhancing Protection through International Human Rights Law’ (2000) 69 *Nordic Journal of International Law* 1 <<http://www.unhcr.org/research/RESEARCH/3ae6a0cf4.pdf>> accessed 4 February 2017.

<sup>67</sup> Chetail (n 63) 22.

<sup>68</sup> *ibid* 26.

<sup>69</sup> *ibid*.

This means that international human rights law provides a valuable standard through which the repatriation or integration of refugees can be undertaken. Moreover, international human rights law is more protective because it goes beyond the minimum standards that are provided in the 1951 Convention. This can be seen, for example, when considering the principle of non-discrimination provided under Article 3 of the 1951. Under the Convention this principle is limited in three ways: the first is that it only prohibits discrimination between refugees, therefore the possibility of discrimination against refugees as against the nationals of a state or other alien is not prohibited; the second is that the 1951 Convention provides an exhaustive list of factors, that is race, religion or country of origin, upon which discrimination may be based<sup>70</sup>. In contrast, under international human rights law, all forms of discrimination, or any manifestation of discrimination is prohibited and the third is that the scope of the article is only limited with regard to the application of the provisions of the 1951 Convention.<sup>71</sup> This is in total contrast to the provisions of the core international human rights instruments which provide guarantees for the rights contained therein without any form of discrimination.<sup>72</sup>

A review of the 1951 Convention show that it is a bill of rights for the protection of refugees, providing various protections from the deprivation of life, liberty and personal security. These rights are granted to refugees without any restrictions and other provisions direct state parties to provide these rights as they would to other foreigners who are resident in the receiving state.<sup>73</sup> However, the other human rights instruments complement the core refugee protection conventions and therefore provide a wider scope of human rights protection.

The first of these is the Universal Declaration of Human Rights (UDHR) which underscores the universality of human rights and the applicability of all human rights without

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<sup>70</sup> The 1951 Convention relating to the Status of Refugees and its 1967 Protocol (n 65).

<sup>71</sup> Chetail (n 63) 48.

<sup>72</sup> *ibid.*

<sup>73</sup> Brian Gorlick, 'Refugee Protection in Troubled Times: Reflections on Institutional and Legal Developments at the Crossroads', *Problems of Protection: The UNHCR, Refugees, and Human Rights* (2003) 88.

distinction on among other grounds, national or social origin.<sup>74</sup> In the International Convention on Civil and Political Rights (ICCPR) it is provided that “all persons are equal before the law” and that the “law shall prohibit discrimination on any grounds, including national and social origin.”<sup>75</sup> The state must guarantee the rights that are protected in the ICCPR without any distinction between nationals and non-nationals. The Human Rights Committee has also stated in General Comment No 15<sup>76</sup> that non-nationals have various rights, among the freedom from arbitrary killings, from arbitrary detention, from torture or cruel, inhuman or degrading treatment or punishment, and the freedom of thought, conscience and religion. In addition to these freedoms, non-nationals also have the right to marry, to receive protection if they are minors and the right to not to have their homes, privacy, family life or correspondence interfered with. With respect to all of these rights, there ought not to be any discrimination between the entitlements to non-nationals and citizens.<sup>77</sup>

The International Convention on Economic, Social and Cultural Rights (ICESCR) provides that states must protect the rights of all people, irrespective of their national or social origin. The rights accorded to individuals under this Convention include the right to work, to have just and favourable working conditions, to an adequate standard of living and to the highest attainable standard of health.<sup>78</sup>

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), the International Convention on the Elimination of all Forms of

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<sup>74</sup> Article 2 of the Universal Declaration on Human Rights.

<sup>75</sup> Article 26 of the ICCPR.

<sup>76</sup> Human Rights Committee, ‘General Comment No. 15: The Position of Aliens Under the Covenant’ para 7 <<http://www.refworld.org/docid/45139acfc.html>> accessed 7 June 2017.

<sup>77</sup> *ibid.*

<sup>78</sup> Brian R Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), ‘International Human Rights of Migrants’, *Foundations of international migration law* (Cambridge ; New York : Cambridge University Press, 2012 2012) 158.

Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) operate to provide additional protection to asylum seekers and also to refugees.<sup>79</sup>

Instruments of the African Union such as the African Charter on Human and Peoples' Rights (African Charter) contains civil and political rights that accrue to every person, meaning that they also apply to people who are not nationals of, but are present in, a state that is signatory to the Charter, including refugees. In particular, Article 5 of the African Charter provides that every individual shall be protected from all forms of exploitation, degradation and cruel, inhuman and degrading punishment and treatment<sup>80</sup> while Article 12 of the African Charter provides that all "individuals shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions"<sup>81</sup> Nyanduga<sup>82</sup> explains that "the development of legal instruments and the adoption of ... resolutions have been important in [providing political pressure to solve] the refugee problem."<sup>83</sup> Even so, should any rights guaranteed in the Charter be violated, by either the host nation or by the country from which he is from, the victim is entitled to relief from the African Commission.<sup>84</sup>

The Children's Rights Charter contains specific provisions for the protection of refugees. These include Article 23 which requires state parties to take "all appropriate measures" to ensure that children seeking refugee status receive<sup>85</sup> appropriate protection and humanitarian assistance" as set out in the African Charter. The application of these different instruments

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<sup>79</sup> Cynthia Orchard and Andrew Miller, 'Protection in Europe for Refugees from Syria' [2014] Policy Briefing, Oxford: University of Oxford 18 <<http://www.alnap.org/pool/files/520-pb10-protection-europe-refugees-syria-2014.pdf>> accessed 28 October 2016.

<sup>80</sup> African Charter on Human and Peoples' Rights / Legal Instruments / ACHPR para 5.

<sup>81</sup> *ibid* 12(3).

<sup>82</sup> Bahame Nyanduga, 'Refugee Protection under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (2005) 47 *German Year Book of International Law* 85.

<sup>83</sup> *ibid* 102.

<sup>84</sup> Marina Sharpe, 'Engaging with Refugee Protection? The Organization of African Unity and African Union since 1963' 28 <[http://www.operationspaix.net/DATA/DOCUMENT/6554~v~Engaging\\_with\\_Refugee\\_Protection\\_\\_The\\_Organization\\_of\\_African\\_Unity\\_and\\_African\\_Union\\_Since\\_1963.pdf](http://www.operationspaix.net/DATA/DOCUMENT/6554~v~Engaging_with_Refugee_Protection__The_Organization_of_African_Unity_and_African_Union_Since_1963.pdf)> accessed 8 December 2016.

<sup>85</sup> Sharpe (n 45) 27.

result a refugee protection regime which according to Turk and Nicholson, poses other “questions concerning the inter-relationship between international refugee law on the one hand and international humanitarian and human rights law on the other.”<sup>86</sup> The rights and freedoms espoused in different international and regional human rights instruments accrue to everyone, refugees included.<sup>87</sup>

The reason behind establishing the rights that accrue out of refugee law and human rights law is to identify “the full range of states’ obligations and thereby inform their practice towards refugees and asylum seekers.”<sup>88</sup> Generally, the rights that arise from the core refugee protection instruments are that refugees are vulnerable, they should not be forced to return to places where they are at risk of suffering more abuse of their rights and they be granted access to basic rights such as housing, freedom from discrimination and movement.<sup>89</sup> There is therefore a relationship between refugee law and human rights law. International human rights law provides a framework for an expanded understanding of the concepts found within refugee law. In this way, there is a better understanding of what ‘persecution as the sustained or systemic denial of core or basic human rights’ that are usually present when the state fails in its obligation to provide state protection.<sup>90</sup>

Indeed, the UNCHR undertakes a rights enforcement approach to refugee matters. The UNHCR adopted a policy paper on human rights<sup>91</sup> in which the UNHCR states that in pursuit of its goals aims and objectives, it will comply with international human rights

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<sup>86</sup> Volker Turk and Frances Nicholson, ‘Refugee Protection in International Law: An Overall Perspective’, *Refugee protection in international law: UNHCR’s global consultations on international protection* (2003) 5.

<sup>87</sup> Sarah Swart, ‘Unaccompanied Minor Refugees and the Protection of Their Socio-Economic Rights under Human Rights Law’ (2009) 9 *African Human Rights Law Journal* 102.

<sup>88</sup> Chetail (n 39) 21.

<sup>89</sup> ‘People on the Move’. *Amnesty International*. Accessed October 28, 2016. <https://www.amnesty.org/en/what-we-do/people-on-the-move/>.

<sup>90</sup> James C Simeon (ed), *Critical Issues in International Refugee Law: Strategies toward Interpretative Harmony* (Cambridge University Press 2010). Kate Jastram Economic Harm as a basis for refugee status and the application of human rights law to the interpretation of economic persecution in Simeon 2010

<sup>91</sup> United Nations High Commissioner for Refugees, ‘UNHCR and Human Rights’ (*Refworld*) <<http://www.refworld.org/docid/3ae6b332c.html>> accessed 2 June 2017.

standards, and requires its staff to undertake program goals without compromising not only the fundamental protection norms or the international human rights standards.

It is therefore apparent that there is a convergence of international human rights law and refugee law. Where refugee law is undermined, then international human rights norms and enforcement mechanisms can be used to bolster the system of refugee protection. In addition, non-derogable legal standards found in international human rights instruments can be engaged to buttress refugee law.<sup>92</sup>

### 1.3 Key Notions in Refuge Protection

#### 1.3.1 Well Founded fear of persecution

The first requirement that a person seeking refugee status must show is that they have a well-founded fear of persecution. This concept is not defined by the 1951 Convention and this “indeterminacy is advantageous as it provides a more flexible and therefore wider application”.<sup>93</sup> The meaning of the term is understood to include “sustained or systemic violation of basic human rights demonstrative of a failure of state protection.”<sup>94</sup>

Refugee status thus should apply to those people who are in an intolerable situation in their countries of origin, and the ways through which these situations may arise are dynamic and more often than not, change over time. The UNHCR has recognised that a harmonious definition of persecution does not exist, and therefore states that “a threat to life or freedom”<sup>95</sup> on the grounds set out in the 1951 Convention amounts to persecution, as well as other “serious violations of human rights meted out on people on those grounds.”<sup>96</sup>

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<sup>92</sup> *ibid* 98.

<sup>93</sup> Francesco Maiani, ‘The Concept of “Persecution” in Refugee Law: Indeterminacy, Context-Sensitivity, and the Quest for a Principled Approach’ [2010] *Les Dossiers du Grihl* para 9 <<https://dossiersgrihl.revues.org/3896>> accessed 6 February 2017.

<sup>94</sup> James Hathaway, *The Rights of Refugees under International Law* (2005) 306 <[core/books/the-rights-of-refugees-under-international-law/1D1B37200D80D23C727BE17711FB14FD](https://core/books/the-rights-of-refugees-under-international-law/1D1B37200D80D23C727BE17711FB14FD)> accessed 16 February 2017.

<sup>95</sup> UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’ [1992] Office of the United Nations High Commissioner for Refugees para 51 <<http://immi.se/asyl/handbook.htm>> accessed 7 June 2017.

<sup>96</sup> *ibid* 51.

As a general rule, a well-founded fear of persecution comprises a bipartite test: the first is the “subjective element of fear and the objective criterion of whether this fear is well-founded.”<sup>97</sup> In assessing the subjective element, it is the asylum seeker’s personal perceptions, circumstances, membership of groups and interpretation of the situation that causes fear that are taken into account. The second test is an objective one where the factors taken into consideration involves evaluating the situation in the country of origin and discerning what violations may be occurring there and in what way they affect individuals with characteristics that are similar to the asylum seeker.<sup>98</sup> The fear of persecution need not extend to the entire territory of the country of nationality. As such, persons who shows that they have a well founded fear of persecution, refugee status would not be refused on the sole ground that he or she could have sought safety in another part of the same country.<sup>99</sup>

### 1.3.2 Protection of Vulnerable Groups of Refugees, Women and Children

Female refugees are one group of refugees that remain vulnerable to harm; this may arise during flight, after exiting their homes or even after entering in the country of asylum. Whether the women stay in refugee camps or move towards urban areas, their safety can still be compromised.<sup>100</sup> The 1951 Convention does not provide any special protection to women, and neither does the African Convention. However, as signatories to Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, both Kenya and Ethiopia have a responsibility to take measures to eliminate violence against women, including violence that “results from situations of armed conflict or war”.<sup>101</sup>

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<sup>97</sup> David S Weissbrodt, *The Human Rights of Non-Citizens* (Oxford Univ Press 2008) 153.

<sup>98</sup> *ibid* 154.

<sup>99</sup> Nergis Canefe, ‘The Fragmented Nature of the International Refugee Regime and Its Consequences: A Comparative Analysis of the Applications of the 1951 Convention’ in James C Simeon (ed), *Critical issues in international refugee law: strategies toward interpretive harmony* (Cambridge Univ Press 2010) 177.

<sup>100</sup> Marija Obradovic, ‘Protecting Female Refugees against Sexual and Gender-Based Violence in Camps - Our World’ (2015) <<https://ourworld.unu.edu/en/protecting-female-refugees-against-sexual-and-gender-based-violence-in-camps>> accessed 23 November 2016.

<sup>101</sup> Refugee Consortium of Kenya, ‘Asylum Under Threat Assessing the Protection of Somali Refugees in Dadaab Refugee Camps and along the Migration Corridor’ (Refugee Consortium of Kenya 2012) 54 <[http://reliefweb.int/sites/reliefweb.int/files/resources/Asylum\\_Under\\_Threat.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/Asylum_Under_Threat.pdf)> accessed 23 November 2016.

In addition to the protection afforded to refugees generally, child refugees are, at least in theory, entitled to various protections contained in international conventions, guidelines and policies. Child refugees, like women, require special protection to ensure that their human rights are not violated. In the case of children, it often becomes the case that children become separated from their parents, and they are therefore in need of even greater protection because they are more vulnerable to abuse and exploitation.<sup>102</sup>

### 1.3.3 The Principle of Non-refoulement

According to D’Orsi, “the most urgent need of refugees is to secure entry into a territory that will protect them from the risk of persecution.”<sup>103</sup> When refugees arrive at a border point, however, they are confronted with the reality that most sovereign governments will often “prevent or restrict” access to those who are not citizens of that country. The principle of non-refoulement, as a traditional doctrine, has existed for a long time. Even at the beginning of the twentieth century, political refugees could not be returned or deported to countries that would persecute them.<sup>104</sup> Article 33 of the 1951 Convention sets out the concept of non-refoulement. It states that no party to the Convention may “expel or return a refugee back to a country in which she fears persecution.”<sup>105</sup>

The prohibition from return is one of a fundamental nature, and there is an absolute prohibition on it.<sup>106</sup> In the context of the OAU convention, because of the expanded refugee definition which expands people fleeing from disturbances of public order in their countries of

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<sup>102</sup> Sarah Swart (n 46) 104.

<sup>103</sup> Cristiano D’Orsi, ‘Sub-Saharan Africa: Is a New Special Regional Refugee Law Regime Emerging?’ (2008) 68 Heidelberg Journal of International Law 1057, 1058 <[http://www.zaoerv.de/68\\_2008/68\\_2008\\_4\\_b\\_1057\\_1082.pdf](http://www.zaoerv.de/68_2008/68_2008_4_b_1057_1082.pdf)> accessed 6 December 2016.

<sup>104</sup> *ibid* 1059.

<sup>105</sup> Convention relating to the Status of Refugees 1951 para 33.

<sup>106</sup> Jennifer Moore, *Humanitarian Law in Action within Africa* (Oxford University Press 2012) 158 <<http://www.oxfordscholarship.com/view/10.1093/acprof:osobl/9780199856961.001.0001/acprof-9780199856961>> accessed 6 December 2016.

origin “the norm of non-refoulement entitles civilians to safe harbour from armed conflict.”<sup>107</sup> It in fact reconciles the principle of non-refoulement under the 1951 Convention and a norm that is integral to international humanitarian law. Non – refoulement in this context therefore requires that countries do not return refugees or asylum seekers to territories where there is a conflict situation. In addition, there is the obligation to provide temporary protection to asylum seekers, imposing an obligation on states to either grant asylum, or to ensure that the asylum seeker is given asylum in a different country until he or she no longer faces the fear of persecution in the country of origin and can therefore return safely.<sup>108</sup>

The principle of non-refoulement is expressed in other human rights treaties as well. It is a non-derogable principle which requires that “regardless of the activities that a person has been involved in, or their immigration status,” a person may not be return not only to their own country, nor to any other country where he runs the risk of persecution.<sup>109</sup>

#### 1.4 The Normative Theory of Refugee Protection

This section sets out the arguments for refugee protection and their feasibility. Generally, it is recognized that there exists a special obligation toward refugee protection, but the extent of this obligation is understood differently from the perspective of different approaches because the arrival of refugees, especially in situations of mass influx create moral dilemmas.<sup>110</sup>

##### 1.4.1 The Liberal Universal or Cosmopolitan Impartial Approach

The cosmopolitan approach recognizes that there is a moral responsibility, rooted in human dignity, to fellow citizens and to all of humankind.<sup>111</sup> Under this theory, it is suggested

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<sup>107</sup> *ibid.*

<sup>108</sup> *ibid.*

<sup>109</sup> REDRESS, ‘Non-Refoulement under Threat’ (REDRESS 2006) 2 <<http://www.redress.org/downloads/publications/Non-refoulementUnderThreat.pdf>> accessed 27 March 2017.

<sup>110</sup> Alexander Betts, ‘The Normative Terrain of the Global Refugee Regime’ <<https://www.ethicsandinternationalaffairs.org/2015/the-normative-terrain-of-the-global-refugee-regime/>> accessed 22 May 2017.

<sup>111</sup> David Hollenbach, ‘Borders and Duties to the Displaced: Ethical Perspectives on the Refugee Protection System’ (2016) 4 J. on Migration & Hum. Sec. 148, 150.

that refugees should be protected because all human beings are equal, and due to being human, they have equal measure of dignity and freedom. As part of the “undivided community of mankind” human beings have equal entitlements and rights including the right to adequate food, the right to health care and the right to education, as well as the right to work to enable them take steps to fulfill these rights by themselves.<sup>112</sup> Under this theory refugees are vulnerable people and we should approach their care in a manner that does not cause them further harm; when our actions inflict harm on others, then we should refrain from those actions, thus decreasing those people’s vulnerability.<sup>113</sup> This argument suggests that when a country takes on the responsibility of protecting refugees, it later leads to them being of benefit to the country. Using this approach, borders would generally be unacceptable or unethical because all humans share a common humanity despite their differences.<sup>114</sup>

#### 1.4.2 The Communitarian or Nationalist Partial Approach

This theory is based on identity and membership of a group. Partiality is based on the notion that states are distinct cultural communities who have a right to self-determination. They justify the interests of their own citizens over those of the refugees.<sup>115</sup> Under this theory, states have the exclusive right to the “widest possible degree of autonomy” in decisions that shape their lives. This right stems from the cultural community, composed of citizens who are committed to each other and who share a way of life which binds them together. This way of life can be seen through specific “national mores, customs and traditions” developed over time by the membership, so that the state therefore share membership in a rich cultural community

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<sup>112</sup> Boldizar Nagy, ‘Indeed Why? Thoughts on the Reasons and Motivations for Protecting Refugees’ in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Protecting the rights of others: festschrift til Jens Vedsted-Hansen* (1 ed, DJØF 2013) 588 <[https://www.academia.edu/10060786/Indeed\\_why\\_Thoughts\\_on\\_the\\_reasons\\_and\\_motivations\\_for\\_protectin\\_g\\_refugees](https://www.academia.edu/10060786/Indeed_why_Thoughts_on_the_reasons_and_motivations_for_protectin_g_refugees)>.

<sup>113</sup> *ibid* 590.

<sup>114</sup> Hollenbach (n 111) 152.

<sup>115</sup> Matthew J Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge University Press 2004) 23.

“constituted by common social practices, cultural traditions and shared ethical understandings”.<sup>116</sup>

Within this society, collective policies for the common good are easily developed and are done so by reflecting on the shared social and cultural history. Foreigners would therefore not fit into this state: some partialists consider that citizens of a state do not have any responsibility to foreigners not only because foreigners do not have legal status, but mainly because they do not have a common shared understanding of the culture and mores that are present in the members of the society. Gibney therefore explains that when the modern state is viewed through the partialist lens, it is seen as an “intimate association, the maintenance of which is often of fundamental moral significance because of its indispensability for human fulfilment”.<sup>117</sup> This human fulfilment is characterized by the “distinct way of life and bonds of attachment that citizens currently share and which make the political community the object of their allegiance.”<sup>118</sup> Therefore, the threat from admitting foreigners arises from when there are large influxes of foreigners which may lead to racial violence, tension within the community, pressure on the state infrastructure and a general disruption of law and order. While some of these concerns may remain valid, it is worth noting that they are on the extreme side. It is possible that a state could accept large influxes of foreigners without in any way jeopardizing their national mores.

When refugee protection is undertaken from the communitarian and security approach, as opposed from the cosmopolitan and humanitarian concern, it can then be argued that refugee protection comes under the scope of national and international security and not from the perspective of the security of the human being. Taken from the communitarian and security approach, the state is the “legitimate basis for sovereign authority” meaning that in an

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<sup>116</sup> *ibid* 26.

<sup>117</sup> *ibid* 23.

<sup>118</sup> *ibid* 27.

international system, the state is the entity that is responsible for in ensuring that there is good governance, peace and law and order. However, even at this level, the state is still required to conduct itself in accordance with the set down international standards and this ensures that there is preservation of international order within the international system.<sup>119</sup> In this perception, the refuge is more of a threat to the homogenous nation-state and is a big threat to the stability of the internal order of the state as well as to relations between states.<sup>120</sup>

### 1.4.3 The Principle of Humanitarianism

A more holistic argument is the humanitarian principle set forth by Matthew J. Gibney<sup>121</sup> which states that all countries have an obligation to assist refugees only when the costs of protection are low. Flowing from a position that takes both the interests of the refugees and those of the citizens of a country into consideration, a balance should be struck in order to ensure that reduces any unintentional consequences of hosting refugees and is additionally “politically feasible over time.”<sup>122</sup> This argument reinforces both the cosmopolitan and communitarian account argument by affirming the notion that states, as well as individuals, owe people outside their borders because they all belong to a single community.<sup>123</sup> First, humanitarianism asserts that states have the responsibility to take steps that work toward giving assistance to refugees and asylum seekers when the need arises. Secondly, humanitarianism makes fewer demands on the state in the sense that the host state is not required to assist refugees until it finds its independent institutions under attack. Finally, humanitarianism allows states to take into account the manner in which they themselves can assist or integrate refugees.<sup>124</sup> The benefit of this approach is that calls for a compromise in the needs of citizens

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<sup>119</sup> Emma Haddad, ‘Refugee Protection: A Clash of Values’ (2003) 7 *The International Journal of Human Rights* 1, 12.

<sup>120</sup> *ibid.*

<sup>121</sup> Matthew J Gibney, ‘Liberal Democratic States and Responsibilities to Refugees’ (1999) 93 *The American Political Science Review* 169.

<sup>122</sup> *ibid* 177.

<sup>123</sup> *ibid* 178.

<sup>124</sup> *ibid.*

of a country as well as for refugees because it does not require that states place the rights of refugees over those of their own citizens.<sup>125</sup>

### 1.5 The Legal and Policy Framework for Refugee Protection in Kenya and Ethiopia

Ethiopia is a party to the 1951 Convention and its optional protocol, having acceded to the convention and the protocol on 10th November 1969, as well as the AU Convention, having ratified the Convention on 15 October 1973. The country therefore has obligations under these international human rights treaties under the principle of *pacta sunt servanda*.<sup>126</sup> The international obligations that Ethiopia has under the treaties that it has signed include ensuring that any treaties that it has subscribed to are implemented in good faith. The Constitution of the Federal Democratic Republic of Ethiopia provides that “all international agreements ratified by Ethiopia are an integral part of the law of the land”.<sup>127</sup> Article 13 (2) of the Constitution requires that the fundamental rights and freedoms contained therein be interpreted in a manner that conforms to the UDHR and other international covenants on human rights and other international instruments that have been ratified by Ethiopia. Article 9 also provides that “all international instruments ratified by Ethiopia are an integral part of the law of the land”.

Ethiopia is a party to the various regional human rights instruments such as the ICCPR, the ICESCR, the CAT and the Banjul Charter which all reinforce the protection of refugees.<sup>128</sup> The fact that Ethiopia is party to all these instruments is an indication that the country intends to assume the responsibility of the protection of refugees.<sup>129</sup> As such, the

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<sup>125</sup> *ibid* 180.

<sup>126</sup> Lelisa Jemal, ‘The Compatibility of Ethiopian Refugee Law with International Refugee Laws’ 35 <[https://www.academia.edu/16512212/The\\_Compatibility\\_of\\_Ethiopian\\_refugee\\_law\\_with\\_international\\_refugee\\_Laws](https://www.academia.edu/16512212/The_Compatibility_of_Ethiopian_refugee_law_with_international_refugee_Laws)> accessed 22 May 2017.

<sup>127</sup> Article 9 of the Constitution of the Federal Democratic Republic of Ethiopia

<sup>128</sup> Gizachew Admassu, ‘Refugee Law Teaching Material’ (Justice and Legal System Research Institute 2009) 279 <<https://chilot.files.wordpress.com/2011/06/refugee-law.pdf>> accessed 25 May 2017.

<sup>129</sup> Hofmann (n 41) 279.

country has taken measures towards the domesticating the international and regional human rights instruments, thus making them enforceable in Ethiopia, adopting legislation that promotes refugee protection as well as establishing the necessary institutions to handle refugees refugee issues.<sup>130</sup>

The Refugee Proclamation (Proclamation No 409 of 2004)<sup>131</sup> is the main proclamation that deals with refugee law in Ethiopia. The object of the proclamation is to provide a legal framework, through “national legislation for the effective implementation of the foresaid international legal instruments, establish a legislative and management frame work for the reception of refugees, ensure their protection and promote durable solutions where the condition permit.”<sup>132</sup> The definition of the term refugee is found in Article 4 of the proclamation. Article 4(1) provides that a person would be considered a refugee if “owing to a well-founded fear of being persecuted ... he is outside his country of nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”<sup>133</sup> Article 4(2) expands the definition of refugee to include stateless people as follows: “... not having a nationality and being outside of his former habitual residence, he is unable, or owing to a well-founded fear of being persecuted ... he is unwilling to return to it”. Article 4(3) provides that a refugee is also a person who, “owing to external aggression, occupation, foreign domination or events seriously disturbing public order, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality, in case of refugees coming from Africa.”<sup>134</sup>

Ethiopia has not escaped the impact of the instability that has been witnessed within the horn of Africa. As a result of the war in Somalia, a significant number of refugees, mainly

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<sup>130</sup> *ibid* 279–280.

<sup>131</sup> Proclamation No. 409/2004 of 2004, Refugee Proclamation.

<sup>132</sup> *ibid* Preamble.

<sup>133</sup> *ibid* Article 4(1).

<sup>134</sup> *ibid* 4(3).

from Somalia, were driven into Ethiopia.<sup>135</sup> The UNHCR has noted that Ethiopia “respects the right of asylum seekers to be protected from non-refoulement,” and that as such, the “countries refugee population is likely to grow as much as 25 percent due to new arrivals”.<sup>136</sup>

Ethiopia is lauded as one of the most stable countries in the region, and as one that plays a leadership role in the region as well as throughout the continent.<sup>137</sup>

Non-refoulement is provided for under Article 9 of the Proclamation, which provides that:

“no person shall be refused entry in Ethiopia or returned from Ethiopia to any other country or be subject to any similar measure if as a result of such refusal, expulsion or turn or any other measure, such person is compelled to return or remain in a country where he would either be subject to persecution, or his life or integrity or liberty would be threatened on account of external aggression.”<sup>138</sup>

The proclamation is clear that any refugee who is lawfully resident in Ethiopia shall not be expelled except on the ground of national security and public order.<sup>139</sup> Even in light of this provision, an order for expulsion under Article 10 (1) may be made by the Head of the Security, Immigration and Refugee Affairs Authority and the refugee concerned is allowed to present a case as to why he should not be expelled.<sup>140</sup> After the Head of the Authority makes an expulsion order, then it is communicated to the refugee, alongside with the reasons for the order, and the carrying out of the order may be delayed if the concerned refugee requests for a

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<sup>135</sup> UNHCR, ‘UNHCR Global Appeal 2010-2011: AFRICA’ 68 <<http://www.unhcr.org/ga10/#/africa>> accessed 25 May 2017.

<sup>136</sup> *ibid.*

<sup>137</sup> UNHCR, ‘Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights’ Compilation Report – Universal Periodic Review: ETHIOPIA’ (2014) 1 <<http://www.refworld.org/pdfid/5283488c4.pdf>> accessed 26 May 2017.

<sup>138</sup> Proclamation No. 409/2004 of 2004, Refugee Proclamation (n 131).

<sup>139</sup> *ibid* Article 10(1).

<sup>140</sup> *ibid* Article 10 (2).

reasonable period to enable the refugee seek admission to a country other than the country to which he is to be expelled.<sup>141</sup>

The rights of refugees are provided for in Part Four of the Proclamation. Even as asylum seekers, persons approaching Ethiopia for protection are allowed to remain in Ethiopia either until the Authority makes a decision on the application, or if, should the application be unsuccessful, he exhausts his right of appeal.<sup>142</sup> As recognized refugees, they are granted to remain within Ethiopia, to be issued with identity cards that attest to the status and be issued with a travel document for the purpose of travelling outside Ethiopia in accordance with international agreements. Refugees are also extended the rights contained in the 1951 Convention and the African Convention.<sup>143</sup>

The provision for camp situations are made under Article 21 (2) of the proclamation in which the Head of the Authority is given power to designate places and areas within Ethiopia where refugees, asylum seekers as well as their families shall live.<sup>144</sup> These areas are supposed to be located within a reasonable distance from the border of their countries of origin or former habitual residence. Female refugees, children, the elderly and the handicaps are given special protection, and the Authority is required to take measures to ensure their protection.<sup>145</sup>

In September 2016, Ethiopia joined the New York Declaration for Refugees and Migrants<sup>146</sup> during which the United Nations General Assembly made various declarations and pledges with a view to addressing large movements of refugees and migrants.<sup>147</sup> Following this declaration, Ethiopia made pledges to improve and expand the protection that it provides to

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<sup>141</sup> *ibid* Article 10 (3-4).

<sup>142</sup> *ibid* Article 20.

<sup>143</sup> *ibid* 21.

<sup>144</sup> *ibid* Article 21(2).

<sup>145</sup> *ibid* Article 21(2).

<sup>146</sup> UNGA, 'New York Declaration for Refugees and Migrants' <<http://www.unhcr.org/57e39d987.pdf#zoom=95>> accessed 27 November 2017.

<sup>147</sup> United Nations High Commissioner for Refugees, 'New York Declaration for Refugees and Migrants' (UNHCR) <<http://www.unhcr.org/new-york-declaration-for-refugees-and-migrants.html>> accessed 13 November 2017.

refugees.<sup>148</sup> Under this declaration, Ethiopia has committed to expand its out of camp policy so that it can cover at least 10 percent of the refugee population in Ethiopia.<sup>149</sup> In addition, it has made pledges to provide work permits to refugees and to increase the enrollment of school children by at least 50%.<sup>150</sup>

Moreover, Ethiopia pledged to create employment opportunities for refugees by providing irrigable land to allow at least 20,000 refugee households to engage in crop production and to work with other development partners to build industrial parks where a third of the work force would be from the refugee community.<sup>151</sup> Ethiopia has also moved toward local integration by pledging to allow also to ensure that refugees who have lived in Ethiopia for more than 20 years to integrated locally. In addition to this, Ethiopia has pledged to strengthen and expand social services for all refugees and provide facilities and benefits that other people with legal residency are entitled.<sup>152</sup> These pledges have presented an opportunity for the implementation of initiatives for the improvement of refugee protection. These initiatives will be undertaken by the ARRA as well as the UNCHR, and include expanding of alternatives to refugee camps, local integration and an increase in the number of work permits issued to refugees.<sup>153</sup> As at November 2017, the establishment of a legal framework to underpin the implementation of the pledges was still ongoing.<sup>154</sup>

The supreme law in Kenya is the Constitution of Kenya.<sup>155</sup> While the Constitution does not make specific provision with regards to refugees, it requires that the general rules of international law as well as all treaties and conventions ratified form part of Kenyan law.<sup>156</sup>

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<sup>148</sup> United Nations High Commissioner for Refugees, ‘Overview Leaders’ Summit on Refugees’ (*UNHCR*) 1 <<http://www.unhcr.org/events/conferences/58526bb24/overview-leaders-summit-on-refugees.html>> accessed 13 November 2017.

<sup>149</sup> *ibid* 4.

<sup>150</sup> *ibid*.

<sup>151</sup> *ibid*.

<sup>152</sup> *ibid*.

<sup>153</sup> ‘Ethiopia | Global Focus’ <<http://reporting.unhcr.org/node/5738>> accessed 30 November 2017.

<sup>154</sup> *ibid*.

<sup>155</sup> Constitution of Kenya 2010.

<sup>156</sup> *ibid* 2(5) and (6).

The protection of human rights of refugees can fall under Chapter Four of the Constitution which offers various protections to all persons.

Having acceded to the 1951 Convention as well as the 1967 Protocol relating to the Status of Refugee on 16<sup>th</sup> May 1966 and 13<sup>th</sup> November 1981 respectively, Kenya is party to these treaties. It is also a party to the Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (the African Convention) of 1969. In addition to these core refugee protection instruments, Kenya is a party to additional international human rights instruments which have a bearing on refugee protection such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child as well as the International Covenant on Civil and Political Rights (ICCPR).

In theory, the country adheres to its basic obligations under these instruments. Kenya has had a long history of granting admission asylum for refugees but up until 2006, did not have any codified legislation governing the protection of refugees. The first ever refugee legislation was enacted in December 2006, and it came into force on 15<sup>th</sup> May 2007.<sup>157</sup> It makes provision for the “recognition, protection and management of refugees”<sup>158</sup>. Under the section 3 of the Act, a refugee is defined either as a statutory refugee or a prima facie refugee.

A statutory refugee is one who fits the definition of Article 33 of the Convention or, who being stateless, is unable to, or unwilling to return to his former habitual residence due to a well- founded fear of being persecuted.<sup>159</sup> On the other hand, a prima facie refugee is a person, who fits the expanded definition that is contained in the African Convention, and in particular, who “owing to external aggression, occupation, foreign domination or events seriously

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<sup>157</sup> The Refugees Act No 13 of 2006 2007.

<sup>158</sup> *ibid* preamble.

<sup>159</sup> *ibid* 3(1)(a).

disturbing public order in any part or whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".<sup>160</sup> The Minister responsible for Refugee Affairs is given power to declare a class of people as prima facie refugees<sup>161</sup>.

Refugees are allowed to remain in Kenya, as are asylum seekers if the conditions under section 12 of the Act are fulfilled. Under this section, a person may remain in Kenya pending official recognition as a refugee, pending an appeal on a decision refusing his application for recognition as a refugee, and for a period of ninety days after during which he is to seek admission to a different country of his choice.

The Refugees Act sets out the framework and the organs that are responsible for refugee protection. There is established a Department of Refugee Affairs that is responsible for all administrative matters concerning refugees.<sup>162</sup> The Department of Refugee Affairs is headed by a Commissioner of Refugee Affairs who is appointed under section 7 of the Act. His duties include to co-ordinate all measures to be taken by the country on the promotion of the welfare and protection of refugees, to advise the Minister responsible of such measure, to formulate policies on refugee matters and ensure that such policies are in accordance with international standards, to work with relevant United Nations Agencies and other institution to ensure the provision of adequate facilities and services for the reception and protection of refugees within Kenya as well as to promote durable solutions for refugees in Kenya<sup>163</sup>. The Commissioner is assisted in his duties by the Refugee Affairs Committee established under section 8 of the Act. With the creation of the department of Refugee Affairs, it was considered that there was an upgrade within the framework and a measure to strengthen refugee protection.<sup>164</sup>

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<sup>160</sup> *ibid* 3(2).

<sup>161</sup> *ibid* 3(2).

<sup>162</sup> *ibid* 6.

<sup>163</sup> *ibid* 7(2).

<sup>164</sup> Oluoch (n 54) 34.

Upon designation, refugees can either remain in the camps or in transit areas. Initially, the registration of refugees was done solely in Dadaab and Kakuma refugee camps and Nairobi. In 2011, registration activities were expanded to include offices in Mombasa, Malindi, Nakuru, Eldoret and Isiolo. However, these activities ceased in the urban areas as a consequence of the relocation directive of December 2012<sup>165</sup>.

The main policy framework that Kenya operates under is the Kenya Vision 2030.<sup>166</sup> This policy aims to ensure that Kenya is turned into a middle-income country by the year 2030. With respect to refugees, the policy document reaffirms Kenya's commitment to secure all human rights contained in the Bill of rights and to extend the realisation of these rights to all people, and specifically mentions refugees.<sup>167</sup>

Despite this affirmation, the government continues to maintain that Kenya has an "excessive refugee burden".<sup>168</sup> Further, the government that refugees in the country are susceptible to environmental, health and security risks, but are also unable to clothe or feed themselves and are a major source of risk to the local population.<sup>169</sup>

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<sup>165</sup> IOM, 'Migration in Kenya: A Country Profile, 2015' (International Organization for Migration 2015) 35 <[http://publications.iom.int/system/files/pdf/migration\\_profile\\_kenya.pdf](http://publications.iom.int/system/files/pdf/migration_profile_kenya.pdf)> accessed 1 November 2017.

<sup>166</sup> Kenya Vision2030, 'About Vision 2030' (*Kenya Vision2030*) <<http://www.vision2030.go.ke/about-vision-2030/>> accessed 2 November 2017.

<sup>167</sup> 'Sessional Paper No. 10 of 2012 On Kenya Vision 2030' 158.

<sup>168</sup> *ibid* 137.

<sup>169</sup> *ibid*.

## CHAPTER TWO: ENCAMPMENT AS A MEANS OF REFUGEE PROTECTION: THE KENYAN VS ETHIOPIAN EXPERIENCE

This chapter considers the way refugee camps in Kenya have been created and administered, how these situations have over time evolved to protracted refugee situations and the way these situations contribute to human rights violations. National security concerns seem to be largely informing the refugee protection approach taken in Kenya. This chapter also describes how the Kenyan government has justified the encampment policies adopted on the national security challenges that have presented themselves in the Kenya context. To show a comparison, there will be a discussion on the policy on encampment that has been undertaken in Ethiopia and the manner in which this has aided in refugee protection.

### 2.1 Encampment Policies in Kenya: A means of containment of refugees

There are two refugee camps in Kenya, Kakuma and Dadaab, both located in the northern part of Kenya. The Dadaab refugee camp, the largest of its kind in eastern Africa, comprises three camps and was opened in 1991 to house refugees fleeing from Somalia. It was originally intended to house approximately 90,000 people, but as at September 2016 was hosting up to 326,000 refugees.<sup>170</sup> Kakuma Refugee Camp mainly hosts refugees from South Sudan and hosts approximately 200,000 refugees, a number that continues to grow with the escalating situation in South Sudan.<sup>171</sup>

The rise of the refugee camps begun around 1993 when the country began to receive large numbers of refugees from neighbouring countries.<sup>172</sup> Housing refugees in camps was to be a temporary measure with government thinking being that the lasting solution to the mass influx would be repatriation of refugees to their homes. Due to the sensitivity of the land

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<sup>170</sup> AfricaNews, 'Kenya to Slash Dadaab Population by Half by End of 2016' (*Africanews*, 26 June 2016) <<http://www.africanews.com/2016/06/26/kenya-to-slash-dadaab-population-by-half-by-end-of-2016/>> accessed 27 October 2017.

<sup>171</sup> *ibid.*

<sup>172</sup> Robert Doya Nanima, 'An Evaluation of Kenya's Parallel Legal Regime on Refugees, and the Courts' Guarantee of Their Rights' (2017) 21 *Law, Democracy & Development* 42, 49.

question in Kenya, as well as the notion that the refugee question was to be more transient, the government decided that refugees could not be settled in the interior, more fertile areas of Kenya, and they were therefore located in regions that were closer to their countries of origin.<sup>173</sup> Refugee camps in Kenya have ended up entrenching a policy of non-integration which “tethers human beings within specific territorial spaces”.<sup>174</sup>

The government of Kenya has operated a de facto encampment policy since the mass influx of refugees from Ethiopia, Somalia and Sudan in the early 1990s. The approach of the government at this time was basically “government-led, open and laissez faire.”<sup>175</sup> Despite the fact that refugees were put in camps, the policy was never strictly enforced.<sup>176</sup> This was informed in part due to the fact that Kenya had had a long history of hosting refugees and it was anticipated that refugees would not be residing in Kenya for a prolonged period of time, and that they would be returning to their countries of origin.<sup>177</sup> As a result, the most logical solution at the time was one that would facilitate the repatriation of refugees and would for the time being, make the provision of humanitarian assistance easier. It was therefore decided that refugees should be placed in temporary refugee camps towards the north of the country.<sup>178</sup>

Since the encampment policy was not strictly enforced, refugees would routinely make their way to Nairobi, and some government agencies viewed the presence of urban refugees as a “legitimate and inevitable” presence.<sup>179</sup> Even still, those who chose to reside in urban areas did so at their own risk. Organisations working with refugee assistance, such as the UNHCR

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<sup>173</sup> MAPD Montclos and PM Kagwanja, ‘Refugee Camps or Cities? The Socio-Economic Dynamics of the Dadaab and Kakuma Camps in Northern Kenya’ (2000) 13 *Journal of Refugee Studies* 205, 207.

<sup>174</sup> R Jaji, ‘Social Technology and Refugee Encampment in Kenya’ (2012) 25 *Journal of Refugee Studies* 221, 221.

<sup>175</sup> A Lindley, ‘Between a Protracted and a Crisis Situation: Policy Responses to Somali Refugees in Kenya’ (2011) 30 *Refugee Survey Quarterly* 14, 7.

<sup>176</sup> Martha Marrazza, ‘A Critical Analysis of Kenya’s Forced Encampment Policy for Urban Refugees’ 3 *Oxford Monitor of Forced Migration* 46, 46.

<sup>177</sup> Elizabeth Campbell, Jeff Crisp and Esther Kiragu, ‘Navigating Nairobi: A Review of the Implementation of UNHCR’s Urban Refugee Policy in Kenya’s Capital City’ 5 <<http://www.unhcr.org/4d5511209.pdf>> accessed 9 October 2017.

<sup>178</sup> *ibid.*

<sup>179</sup> *ibid.* 7.

acceded to the unofficial encampment policy. It was not until 2006 that the UNCHR, working together with other agencies, such as the RCK (Refugee Consortium of Kenya) and the government of Kenya adopted a more proactive approach to the issue of urban refugees and started to educate this subset of refugees with regards to their right to access basic amenities such as educational opportunities and health care, and also started to provide refugee rights training to police officers and to refugee self-help groups.<sup>180</sup>

In 2009, a policy by the UNHCR was adopted to expressly recognise the right of refugees to live in urban areas, to have government protection and also to have the UNHCR engage with refugee populations.<sup>181</sup> This policy was primarily to guide UNHCR in its refugee protection activities. As at 2011, this policy had evolved, and the objective was to include “expanding the protection space, services and opportunities available to urban refugees.”<sup>182</sup> In this case, protection was inclusive, and encompassed a wide range of activities, from the moment which the refugee was admitted to the point which a durable solution was found for him.<sup>183</sup>

The UNCHR policy was based on various basic principles, among them state responsibility. The idea was that “in urban as in other contexts, national and local authorities have a primary role to play in providing refugees with protection, solutions and assistance.”<sup>184</sup> Despite this policy, urban refugees still faced problems. One of the persistent problems was arbitrary arrest and detention by the police who would extract bribes from them.<sup>185</sup> By 2011, it was thought that this problem would be eradicated due to the strengthening of governmental institutions as well as a check on police powers following the promulgation of the Constitution

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<sup>180</sup> *ibid* 9.

<sup>181</sup> *ibid*.

<sup>182</sup> *ibid* 10.

<sup>183</sup> *ibid* 13.

<sup>184</sup> *ibid* 16.

<sup>185</sup> *ibid* 17. At some point, urban refugees were referred to as ATMS because it was very easy to extract money from them.

of Kenya, 2010. However, attacks threatening the physical security of refugees continued. For instance, in November 2010, 350 refugees of Somali and Ethiopian origin were rounded up and detained in Eastleigh, a neighbourhood primarily occupied by people of Somali origin ostensibly as retaliation for the murder of three policemen within the neighborhood.<sup>186</sup>

The Kenyan government has all along viewed urban refugees as an economic burden who “should be collectively forbidden from living and working in Nairobi.”<sup>187</sup> As a result, government officials regularly made public addresses in which they warn refugees living in urban areas that they were doing so illegally and threatening to treat them as illegal aliens.<sup>188</sup> Moreover, every time there was a security incident in the country, arrests of urban refugees would follow. Between 1997 and 2004, there were arrests of refugees following different attacks in Nairobi; in all these arrests, the government claimed that it was conducting “major crackdowns on crime.”<sup>189</sup> This government attitude towards refugees has resulted in increased police harassment to urban refugees as well as an increase on xenophobic attacks by the local population who view refugees as economic and security threats.<sup>190</sup>

The urban refugee policy came under direct threat when, in December 2012, the government of Kenya directed that all urban registration centres be closed, and all refugees living in urban areas relocate to either of the two refugee camps,<sup>191</sup> thus attempting to move the country towards a formal encampment policy. On 10<sup>th</sup> December 2012, the Department of Refugee Affairs wrote a letter to its officers in charge of Refugee Offices in Dadaab, Kakuma, Mombasa, Malindi, Nakuru and Isiolo stating that the government had decided to stop

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<sup>186</sup> *ibid* 10.

<sup>187</sup> Elizabeth H Campbell, ‘Urban Refugees in Nairobi: Problems of Protection, Mechanisms of Survival, and Possibilities for Integration’ (2006) 19 *Journal of Refugee Studies* 396, 396.

<sup>188</sup> *ibid* 400.

<sup>189</sup> *ibid* 401.

<sup>190</sup> *ibid*.

<sup>191</sup> Lucy Kiama and Rufus Karanja, ‘Asylum Space in Kenya: Evolution of Refugee Protection over 20 Years |’ *Forced Migration Review* <<http://www.fmreview.org/25th-anniversary/kiama-karanja.html>> accessed 15 October 2017.

registration of all asylum seekers in urban areas with immediate effect<sup>192</sup>. All refugees and asylum seekers were to be directed to the Daadab and Kakuma camps for reception and other procedures. In particular, the circular indicated that plans had been put in place to repatriate all Somali refugees living in urban areas. This move was as said to be as a result of a “series of grenade attacks in urban areas where many people were killed and many more injured.”<sup>193</sup>

On the same day, the Commissioner of Refugee Affairs wrote to the Country Representative of UNHCR Branch Office – Kenya, giving guidelines on the relocation of urban refugee to the refugee camp. In this letter, the CRA indicated that the process of relocation was to be a “quick impact project’ which would be carried out through a Rapid Results Initiative” (RRI) within 100 days. This letter was followed by another statement, on 18<sup>th</sup> December 2012, in which the closure of all the registration centres in urban area was announced, with refugees given directions on how to register at the refugee camps.<sup>194</sup> The government further directed the 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 the refugee camps.<sup>195</sup>

The justification for this directive was a number of security incidents in the capital city, Nairobi, whose culprits were found to be refugees resident in Eastleigh who had been offered money to kill security officers.<sup>196</sup> Thereafter, the Permanent Secretary in charge of the Provincial Administration and Internal Security wrote to his counterpart in the Ministry of Special Programmes a letter dated 16<sup>th</sup> January 2013 in which he reiterated the government’s intention to relocate refugees residing in urban areas to refugee camps, and “ultimately to their home countries after the necessary arrangements are put in place.”<sup>197</sup> Under this plan, the

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<sup>192</sup> Cyrus Ombati, ‘Government Orders Refugees Back to Camps’ *The Standard* (18 December 2012) <<https://www.standardmedia.co.ke/article/2000073190/government-orders-refugees-back-to-camps>> accessed 27 September 2017.

<sup>193</sup> *ibid.*

<sup>194</sup> *ibid.*

<sup>195</sup> *ibid.*

<sup>196</sup> *ibid.*

<sup>197</sup> Marrazza (n 176) 48.

refugees were to be rounded up and taken to the Thika Municipal Stadium pending government arrangements to move the refugees back to the refugee camps.<sup>198</sup>

In the course of the implementation of this relocation programme, Kituo Cha Sheria a non-governmental organization that works with refugees, alongside other civil society organisations filed suit in court in which it demonstrated the manner in which this policy, if implemented, would affect refugees and their protection.<sup>199</sup> Relying on supporting statements from affected refugees, it was shown that the directive would violate various rights and freedoms contained in the Constitution as well as the guarantees contained in various international instruments to which Kenya was a party. In rejecting the government position on national security concerns, the court stated that

“where national security is cited as a reason for imposing any restrictive measures on the enjoyment of fundamental rights, it is incumbent upon the State to demonstrate that in the circumstances such as the present case, a specific person’s presence or activity in the urban areas is causing danger to the country and that his or her encampment would alleviate the menace. It is not enough to say that the operation is inevitable due to recent grenade attacks in the urban areas and tarring a group of persons known as refugees with a broad brush of criminality as a basis of a policy....”<sup>200</sup>

Under this new policy, refugees are required to stay within refugee camps; with controlled movements, refugees are not allowed to leave the camps unless they have valid reason to do so.<sup>201</sup> This policy, alongside government rhetoric that refugees create a national security concern have reinforced the encampment policy. Since January 2007, refugees have been considered as “agents of insecurity”.<sup>202</sup> At this time, there had been a de facto encampment

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<sup>198</sup> *ibid* 48.

<sup>199</sup> Anna Wirth, ‘Reflections from the Encampment Decision in the High Court of Kenya | Forced Migration Review’ (2014) FMR 48 *Forced Migration Review* 80, 81.

<sup>200</sup> *Kituo Cha Sheria & 8 others v Attorney General [2013] eKLR [2013] Kenya Law Rep (High Court of Kenya at Nairobi)* 87.

<sup>201</sup> *Nanima* (n 172) 50.

<sup>202</sup> *Jaji* (n 174) 224.

policy, and until 2011, the encampment policy was not applied, with even the UNHCR finding that refugees residing in urban areas were not at risk of relocation to refugee camps.<sup>203</sup> After the enactment of the Refugees Act, 2006, the minister responsible for refugee affairs was, and is, allowed to establish refugee camps by publishing a notice in the Kenya Gazette.<sup>204</sup>

## 2.2 Encampment policies in Ethiopia: The Mix between Encampment and Out of Camp Policies

Relatively speaking, the Government of Ethiopia provides a favourable environment for refugees.<sup>205</sup> The UN reports that the government of Ethiopia generally has a policy of open borders for the reception of refugees.<sup>206</sup> On various occasions, the Government of Ethiopia has been lauded for its open border and asylum policy and even called a “pillar of refugee protection” and “an indication that refugee protection is the right thing to do”.<sup>207</sup>

It is estimated that Ethiopia provides asylum to almost 20 countries, with refugees coming from South Sudan, Somalia, Eritrea and Sudan. One of the ways through which refugees are held in Ethiopia is through refugee camps, which are administered on three distinct levels.<sup>208</sup> The first level is the ARRA, the main administrative body that deals with refugees in Ethiopia, which was initially created as the Security, Intelligence and Refugee Affairs Authority by the Refugee Proclamation of 2004. The second level is the UNHCR which should have an observer role during the refugee status determination process. It however takes on a significant role in all refugee matters and also finances the ARRA. The two organisations work

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<sup>203</sup> Marrazza (n 176) 46.

<sup>204</sup> The Refugees Act No 13 of 2006 (n 157).

<sup>205</sup> Samuel Hall Consulting, ‘Living out of Camp: Alternatives to Camp-Based Assistance for Eritrean Refugees in Ethiopia’ (2014) 9 <<https://samuelhall.org/wp-content/uploads/2014/05/Living-Out-of-Camp-Alternative-to-Camp-based-Assistance-in-Ethiopia.pdf>> accessed 23 August 2017.

<sup>206</sup> ‘UNHCR Ethiopia Fact Sheet June 2016’ <<http://et.one.un.org/content/unct/ethiopia/en/home/resources/un-agencies-newsletters1/unhcr-ethiopia-fact-sheet-june-2016.html>> accessed 23 August 2017.

<sup>207</sup> Melissa Fleming, ‘UNHCR Chief Praises Ethiopia for Open Borders, Refugee Protection’ <<http://www.unhcr.org/news/latest/2013/7/51dff086/unhcr-chief-praises-ethiopia-open-borders-refugee-protection.html>>.

<sup>208</sup> Mewded Mengesha, ‘Human Rights Violations in Refugee Camps: Whose Responsibility to Protect? A Case of Ethiopia’ 1 <<http://lup.lub.lu.se/student-papers/record/8772433/file/8772437.pdf>> accessed 26 August 2017.

interdependently, with the ARRA providing political support to the UNHCR and the latter providing financial support.<sup>209</sup> The third level manifests itself through the UNCHR implementing partners and other non-governmental organizations to whom the UNHCR delegates camp projects and other assistance activities. Each of these organs has various levels of responsibility.<sup>210</sup>

Ethiopia has several refugee camps located primarily in five states: The Somali Regional State, Tigray Regional State, Gambella Regional state, Benishangul-Gumuz Regional State and Oromia Regional State. Including the refugees who reside in urban areas and those who are under the out of camp programme, the total number of refugees in Ethiopia as at April 2017 was 866,050.<sup>211</sup> The refugee camps in Ethiopia, face challenges similar to those in Kenya. Reports of insufficient water and delays in delivery of food affect many camps that are located in remote areas. In the camps located in Gambella Regional State, concerns about insecurity are rife, with organizations delivering humanitarian assistance requiring a military escort to get there. In Shimelba refugee camp, there was overcrowding as the capacity of the refugee camps was exceeded.<sup>212</sup>

To its credit, the Ethiopian government has been taking steps to try and ameliorate the situation in refugee camps. To deal with the challenge on overcrowding and increased influxes of refugees coming from neighbouring South Sudan and Eritrea, the government has provided land for the establishment of new camps.<sup>213</sup> In all its camps, the government works with the UNHCR and other non-governmental organisations to provide medical facilities as

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<sup>209</sup> *ibid* 45.

<sup>210</sup> *ibid* 1.

<sup>211</sup> ARRA, 'Where We Work - ARRA' Statistics Report for April 2017 <<http://ethioarra.org/statistics/>> accessed 18 November 2017.

<sup>212</sup> UNHCR, 'UNHCR Global Report 2005' 182 <<http://www.unhcr.org/449267600.pdf>> accessed 18 November 2017.

<sup>213</sup> 'South Sudanese Refugees Relocated to Camps since September 2016 Top 100,000' (*International Organization for Migration*, 22 September 2017) <<https://www.iom.int/news/south-sudanese-refugees-relocated-camps-september-2016-top-100000>> accessed 18 November 2017.

well as refugee reception facilities.<sup>214</sup> Refugees are also routinely given information about possible relocation to refugee camps that provide alternative, less crowded accommodations.<sup>215</sup>

Although many refugees reside in camps, there is provision for urban refugees who live in Addis Ababa. As at April 2017, urban refugees numbered only 5,000.<sup>216</sup> They can seek residence in urban areas for various reasons such as humanitarian reasons, medical reasons or security reasons and are provided with identity cards recognized by the Ethiopian government which they can use to freely move around and secure employment.<sup>217</sup>

A significant number of the refugee population in Ethiopia comes from Eritrea. Eritrean refugees fall into two main profiles: young men and women, mainly literate, who are escaping military conscription and vulnerable groups, including children who are left behind after the men they travel with leave Ethiopia to pursue further migration in Europe.<sup>218</sup> For these refugees, returning to Eritrea would result in harsh punishment, or even death as penalty for having left Eritrea in the first place.<sup>219</sup> Refugees who opt to engage in further migration do so despite the immense risks involved, while those who are left behind end up being left in situations of protracted displacement which result in further dependence on humanitarian aid and an increased violation of human rights.<sup>220</sup>

One way to address the plight of Eritrean refugees is through the out of camp scheme adopted in 2010 and implemented by the Ethiopian government as well as the UNHCR.<sup>221</sup> This

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<sup>214</sup> United Nations High Commissioner for Refugees, 'Eritrean Refugees in Ethiopia Get New Camp in North of Country' (*UNHCR*) <<http://www.unhcr.org/news/latest/2013/6/51b9b66b9/eritrean-refugees-ethiopia-new-camp-north-country.html>> accessed 18 November 2017.

<sup>215</sup> 'ARRA & UNHCR Open a New Refugee Camp for South Sudanese Refugees – ARRA' <<http://ethioarra.org/arra-unhcr-open-a-new-refugee-camp-for-south-sudanese-refugees/>> accessed 18 November 2017.

<sup>216</sup> ARRA (n 211) Statistics report for April 2017.

<sup>217</sup> 'UNHCR Ethiopia Fact Sheet June 2016' (n 206).

<sup>218</sup> Samuel Hall Consulting (n 205) 6.

<sup>219</sup> *ibid.*

<sup>220</sup> *ibid.*

<sup>221</sup> 'The Out of Camp (OCP) Scheme in Ethiopia' <<https://africamonitors.org/2017/05/12/the-out-of-camp-ocp-scheme-in-ethiopia-2/>> accessed 30 August 2017.

scheme is widely lauded as a commitment to the cause of refugee protection.<sup>222</sup> Under the scheme, refugees from Eritrea can live and study outside refugee camps and in any part of the country if they can sustain themselves. Through this, they are able to obtain tertiary education and pursue a productive life outside the refugee camps.<sup>223</sup>

The result of the program is that thousands of refugees have moved away from refugee camps and live among the host community. To benefit from the scheme, the refugee must undergo several steps. The first step is residing in the refugee camp environment so that an assessment can be undertaken. This assessment is done by the government representatives and UNHCR officials. In order to qualify for this program, the refugee must have Ethiopian relatives that live outside the camp. These relatives sponsor refugees when they leave the refugee camp.<sup>224</sup> Once the refugee is out of the camp, they are monitored jointly by the UNHCR and the Administration for Returnees and Refugees. Even with this monitoring, the refugees do not have extensive obligations and are only required to report at various intervals, ranging from within one year to three years.<sup>225</sup>

This policy has seen an improvement in self reliance among the beneficiaries. This has been an important alternative to camp based protection of refugees. Eritrean refugees do not have to remain in limbo; the Norwegian Refugee Council has stated that there is a danger of “Eritrean refugees being stuck ‘in limbo’, as unable to return home, because they face severe punishment, even the death penalty, for leaving Eritrea, and they also face great difficulties and enormous risks to migrate further.”<sup>226</sup> Living out of camps enables refugees to pursue their education, engage in gainful employment and ultimately lead a much more productive life.

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<sup>222</sup> ‘Ethiopia Praised for Its Out-of-Camp Policy on Eritrean Refugees’ <<http://www.tigraionline.com/articles/article110504.html>> accessed 23 August 2017.

<sup>223</sup> Samuel Hall Consulting (n 205).

<sup>224</sup> ‘The Out of Camp (OCP) Scheme in Ethiopia’ (n 221).

<sup>225</sup> *ibid.*

<sup>226</sup> Samuel Hall Consulting (n 205) 10.

As at August 2017, Ethiopia had begun to fulfill its pledges under the New York Declaration. Registration of refugees had begun, and refugees were given proof of registration that can enable them to access the enhanced social services. The Proclamation was also amended in July 2017 to allow the ARRA issue civil documents to refugees to enable them to integrate and acquire work permits.<sup>227</sup>

### 2.3 Entrenching Encampment Policies: The question of national security

Securing national security as well as the rights of refugees are often considered as conflicting goals. Security is considered as “an expression of the legitimate interests for the state” and it therefore influences the policies which it may undertake.<sup>228</sup> As matters now stand, many countries, Kenya included have invoked national security interests to reduce protection of refugees and increase control on irregular migration.<sup>229</sup> Murillo states that the approach to national security has impacted refugee protection in three ways. The first is with regard to access to national territory, the second is with regard to the process of determining the status of refugees, and the third is with regard to refugees exercising their rights and finding durable solutions for refugees.<sup>230</sup>

In Kenya, national security issues have influenced these three areas as well. Over time, a narrative has been created to portray refugees, and Somali refugees in particular as being responsible for the proliferation of arms, for gang violence and crime and for outbreak of diseases such as tuberculosis and measles.<sup>231</sup>

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<sup>227</sup> UNHCR, ‘Global Update on the Comprehensive Refugee Response Framework’ 2 <<http://www.unhcr.org/59bb8f357.pdf>> accessed 13 November 2017.

<sup>228</sup> Juan Carlos Murillo, ‘The Legitimate Security Interests of the State and International Refugee Protection’ (2009) 6 *International Journal on Human Rights* 120, 119.

<sup>229</sup> *ibid.*

<sup>230</sup> *ibid.*

<sup>231</sup> Jaji (n 174) 226.

In Kenya, security concerns include militancy of refugees, the proliferation of arms and terrorism.<sup>232</sup> Because of human movement, proliferation of arms becomes a great concern. While some people may argue that refugees are the ones who are directly responsible for arms proliferation, it can be argued that criminal elements, such as arms dealers join groups of asylum seekers and refugees, mingle with them and undertake their criminal activities.<sup>233</sup> Proliferation does also happen at the instance of refugees themselves. While the host government is responsible for ensuring that there is security within refugee camps, security is not always guaranteed. In Kenya, there is a large refugee population that has been difficult to police. As such, refugees resorted to arming themselves in order to secure their protection.<sup>234</sup> This has contributed to the proliferation of arms, and has in turn contributed to urban crime, cattle rustling and ethnic conflict.<sup>235</sup>

Refugee camps are also used as a breeding ground for terrorist activity. First, they provide spaces within which terrorists can hide and where recruitment or radicalization can happen without being detected. In addition, the conditions within refugee camps make it easier to spread propaganda to refugees who have been confined to the camps and have not been afforded an opportunity to continue with productive lives.<sup>236</sup> In Kenya, there have been at least 130 terror attacks since 2011 and it has been evident that recruitment of terrorists takes place in both Kakuma and Dadaab refugee camps<sup>237</sup>.

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<sup>232</sup> Oluoch (n 54) 32.

<sup>233</sup> *ibid.*

<sup>234</sup> *ibid.*

<sup>235</sup> 'Kenya National Focal Point on Illicit Small Arms and Light Weapons' <<http://www.gsdr.org/document-library/kenya-national-focal-point-on-illicit-small-arms-and-light-weapons/>> accessed 27 October 2017.

<sup>236</sup> Suman Momin, 'A Human Rights Based Approach to Refugees: A Look at the Syrian Refugee Crisis and the Responses from Germany and the United States', *Duke Forum for Law & Social Change* (Duke University School of Law 2017) 64.

<sup>237</sup> Helisten Sirkku and The Nordic Africa Institute, *Radicalisation and Terrorist Recruitment among Kenya's Youth* (The Nordic Africa Institute 2016) 3.

Various terrorist attacks in Kenya have been blamed on refugees, particular those residing in refugee camps. After the attack that killed 148 students at the Garissa University College in April 2015, the Kenyan government launched a sustained campaign to close down the Dadaab Refugee camp. The Kenyan government stated that it would close down the camp as a means to “deny terrorists a place to hide”.<sup>238</sup> Hon. Aden Duale, area MP for Garissa Township, stated that “the camps have been... centres where the training, coordination, the assembly of terror networks is [taking place],”<sup>239</sup> while the Deputy President William Ruto supported the move arguing that “the way America changed after 9/11 is the way Kenya will change after Garissa”.<sup>240</sup> As at May 2016, the government maintained that it would be shutting down the Dadaab refugee complex within the year, and that all activities undertaken by the Department of Refugee Affairs would cease. Support for closure of the camps has since mounted. For instance, in September 2016, the government stated that an attempted attack on the Mombasa Central Police stations had been perpetrated by attackers who had been resident at the Dadaab refugee camps. The Foreign Affairs minister stated that the Dadaab camp would be closed for the good of Kenyan security.<sup>241</sup>

In the interests of national security, Kenya has taken steps to restrict access to its territory by making sure that refugees who leave refugee camps are rounded up and arrested<sup>242</sup>, and by taking steps to limit access to incoming asylum seekers. In addition, security considerations also affect the local integration of refugees and the quotas established by States that regulate the number of resettled refugees they will accept. Reacting to the restrictions of

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<sup>238</sup> Tony Karumba, ‘In Wake of Garissa Attack, Kenya Frustrated by Dadaab Issue’ *Daily Nation* (April 2015) <<http://www.nation.co.ke/news/Dadaab-Refugee-Camp-Terrorism-Somalia-Repatriation/1056-2686320-crh6po/index.html>> accessed 19 November 2017.

<sup>239</sup> *ibid.*

<sup>240</sup> ‘Kenya’s Proposed Closing of Daadab Refugee Camps’ <<http://www.urban-refugees.org/debate/kenyas-proposed-closing-daadab-refugee-camps/>> accessed 19 November 2017.

<sup>241</sup> Jeremy Lind, Patrick Mutahi and Marjoke Oosterom, “‘Killing a Mosquito with a Hammer’: Al-Shabaab Violence and State Security Responses in Kenya’ (2017) 5 *Peacebuilding* 118, 132.

<sup>242</sup> Campbell (n 187) 401.

movements, some refugees take up criminal activity within the refugee camps. For example, in 2006 a group of Somali refugees begun to undertake military training at the Dadaab Refugee Camp. The Kenyan government reacted by further restricting the movements of refugees, and banning all but essential travel to and from the camps. In taking this action, the then Permanent Secretary for Internal Security made statements to the effect that “a refugee camp is not a place where people arrive and depart on their own accord”.<sup>243</sup>

In December 2014, the Kenyan parliament passed the Security Laws Amendment Act (SLAA)<sup>244</sup> which amended the provisions of several acts of parliament concerned with matters of security in Kenya. Section 47 of the SLAA inserted a new paragraph under section 14 of the Refugees Act requiring that refugees not leave designated refugee camps without the permission of the refugee camp officer. Section 48 of the SLAA amended the Refugee by introducing Section 16A, which capped the number of refugees and asylum seekers in Kenya to 150,000. In response to this, a group of civil society organizations filed suit seeking orders inter alia, that the amendment with regard to the Refugees Act was unconstitutional.<sup>245</sup> In this petition, the court was required to consider the constitutionality of the provisions of the SLAA *vis a vis* the Bill of Rights contained in Chapter Four of the Constitution of Kenya. These amendments were eventually declared unconstitutional and in violation of the principle of non-refoulement in a judgment dated 23<sup>rd</sup> February 2015.<sup>246</sup>

In Ethiopia as well, security concerns are a factor in the kind of policies that would be applicable to refugees from different countries of origin. For example, the ARRA has consistently stated that refugees from Somalia and Southern Sudan cannot be a part of the out

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<sup>243</sup> Jaji (n 174) 226.

<sup>244</sup> Act No. 19 of 2014.

<sup>245</sup> *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10; others* [2015] eKLR [2013] eKLR (High Court of Kenya at Nairobi).

<sup>246</sup> *ibid.*

of camp scheme due to the security risk posed as well as the geopolitical contexts that these refugees come from.<sup>247</sup>

#### 2.4 The Dangers of Prolonged Encampment and Prioritisation of National Security: Protracted Refugee Situations and violations to Human Rights

A protracted refugee situation is one where refugees have been away from their countries of origin for a period of at least five years after the initial displacement, and for who there are no immediate prospects for a solution to the situation.<sup>248</sup> According to the UNHCR, a protracted refugee situation is one that “involves more than 25,000 refugees who have been in exile for a period of at least five years.”<sup>249</sup> However, this definition is considered too narrow since it ignores the smaller residual populations that are left behind after repatriation, as well as the effects of repeat migration.”<sup>250</sup>

The number of refugees in protracted situations is not static; often there are changes within the population that occur as new refugees arrive, or others move on. Protracted refugee situations often occur due to political reasons where refugee influxes are perceived as temporary situations that warrant temporary solutions.<sup>251</sup> Inaction in the country of origin, where the circumstances that led to flight continue to occur result in increased inflows into the host countries, as well as policies of non-integration in the host country result in creation of refugee camps as a means to deal with the large numbers of people.<sup>252</sup> These refugee camps

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<sup>247</sup> Samuel Hall Consulting (n 205) 17.

<sup>248</sup> UNHCR, ‘Conclusion on Protracted Refugee Situations’ Preamble <<http://www.unhcr.org/excom/exconc/4b332bca9/conclusion-protracted-refugee-situations.html>> accessed 6 February 2017.

<sup>249</sup> Rema-Therese Beydoun, ‘The Adversarial Impacts of Protracted Refugee Situations on Refugee Protection and Camp Security: A Case for Local Integration in Lebanon’ (Arizona State University 2010) 23 <[https://repository.asu.edu/attachments/56295/content/Beydoun\\_asu\\_0010N\\_10243.pdf](https://repository.asu.edu/attachments/56295/content/Beydoun_asu_0010N_10243.pdf)> accessed 1 June 2017.

<sup>250</sup> Alexander Betts, ‘The Politics, Human Rights and Security Implications of Protracted Refugee Situations, 19–20 September, St Antony’s College, University of Oxford’ (2006) 19 *Journal of Refugee Studies* 509, 510.

<sup>251</sup> James Milner and Gil Loescher, ‘Responding to Protracted Refugee Situations’ (2011) 6 *Lessons from a decade of Discussion. Forced Migration Policy Briefing Series* 3 <<http://www.regionaldss.org/sites/default/files/Forced%20Migration%20Policy%20Brief-Responding%20to%20protracted%20refugee%20situations.pdf>> accessed 6 February 2017.

<sup>252</sup> *ibid.*

are created to respond to the immediate needs of people fleeing persecution. However, as restrictive policies force refugees to reside in camp situations, they face restrictions on their freedom of movement among other violations of their fundamental rights and freedoms.<sup>253</sup> Thus the refugee camps evolve into protracted situations due to the continued state of affairs in the country of origin, which causes the camps to remain stagnant and even become exacerbated as has been the case in Kenya.<sup>254</sup>

The refugee camps in Kenya have been described as a “forgotten humanitarian drama” where refugees continually depend on humanitarian aid and have no realistic prospects for a durable solution.<sup>255</sup> While some refugees resident at the camps do leave, it is estimated that new influxes go up to 5,000 new people per month. Both of the refugee camps are located in semi-arid areas with little development activity that are insecure and are weakly governed.<sup>256</sup> Dadaab refugee camp, in particular, is considered amongst the most acute emergencies in the world; it is faced with overcrowding and congestion in the extreme, little space to establish sanitation, education or health facilities. This dire situation is compounded by the environment within which the camp is located, as well as the lack of resources and poverty that the local host population is faced with.<sup>257</sup> The complex is now 25 years old, and has seen at least three generations of refugees.<sup>258</sup> The situations of the refugee camps in Ethiopia are not as dire, but

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<sup>253</sup> Svetlana Sytnik, ‘Rights Displaced: The Effects of Long-Term Encampment on the Human Rights of Refugees’ [2012] Refugee Law Initiative 13.

<sup>254</sup> Leonellha Barreto Dillon, ‘Prolonged Encampments’ (*SSWM*) <<https://www.sswm.info/print/9108?tid=3502>>.

<sup>255</sup> Katherine Marshall, ‘Kenya: Faith in a Protracted Refugee Crises’ <<https://berkeleycenter.georgetown.edu/posts/kenya-faith-in-a-protracted-refugee-crisis>> accessed 2 November 2017.

<sup>256</sup> United Nations High Commissioner for Refugees, ‘Update on the Somali Refugee Emergency and Protracted Refugee Situation in Dadaab, Kenya, Side Event to the 60th Session of the Executive Committee, Tuesday, 29 September’ (*UNHCR*) <<http://www.unhcr.org/excom/announce/4ac073de9/update-somali-refugee-emergency-protracted-refugee-situation-dadaab-kenya.html>> accessed 2 November 2017.

<sup>257</sup> *ibid.*

<sup>258</sup> Marshall (n 255).

some of them such as the camps housing Somali and Eritrean refugees are considered protracted ones.<sup>259</sup>

Adopting strict encampment policies as a means of refugee protection leads to direct threats for the rights of refugees. Increasingly, this mode of encampment, also described as ‘refugee warehousing’<sup>260</sup> results in violations of human rights. Warehousing of refugees results in human beings being placed in camps for protracted periods of time. During this time, they rely on humanitarian aid even though they do not pose problems for the host state and are able to seek asylum on other states.<sup>261</sup> The situations obtaining in protracted refugee situations not only compromise state security, but they also contribute to the insecurity of the individuals who live around those situations. Warehousing refugees keeps them in a state of restricted mobility, it enforces dependency, and is in violation of the rights that are contained in the 1951 Convention.<sup>262</sup>

Protracted refugee situations often occur in dangerous settings, mainly located at peripheral or insecure border areas.<sup>263</sup> This results in the key feature of these situations being the denial of rights, as opposed to the passage of time.<sup>264</sup> By placing refugees in camps, it restricts their economic activity which promotes earlier or involuntary repatriation, thus amounting to constructive violation of the principle of non-refoulement.<sup>265</sup> There is evidence that refugees who reside in refugee camps are often the victims of violence, exploitation and criminal activity. Warehousing that occurs as a result of encampment policies is a violation of several articles of the 1951 Convention. It is a violation of on the right to earn a livelihood as

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<sup>259</sup> ‘Outline for the Oral Update on Protracted Situations Which Would Benefit from International Support’ <<http://www.refworld.org/pdfid/47d6a6762.pdf>> accessed 20 November 2017.

<sup>260</sup> Beydoun (n 249) 5.

<sup>261</sup> Serena Parekh, *Refugees and the Ethics of Forced Displacement* (Routledge, Taylor & Francis Group 2017) 4.

<sup>262</sup> Beydoun (n 249) 9.

<sup>263</sup> Merrill Smith, ‘Warehousing Refugees: A Denial of Rights, a Waste of Humanity’ (2004) 38 *World Refugee Survey* 38, 38.

<sup>264</sup> *ibid.*

<sup>265</sup> *ibid* 39.

found in Articles 17, 18, 19 and to some extent, article 13 which provides for the right to acquire movable and immovable property.<sup>266</sup>

The forced encampment policy has been criticized for being discriminatory on two grounds. First, because it targets only urban refugees. This is in contrast to other eviction policies that apply to other inhabitants within urban areas. The policy is also specifically targeted at refugees of Somali origin, who comprise 80% of the Kenyan refugee population, which amounts to discrimination on the basis of country of origin. This policy is therefore in violation of the 1951 Convention as well as the ICESCR and the ICERD.<sup>267</sup>

By forcibly removing urban refugees from their homes and requiring them to live in the refugee camps, the government directive further violates Article 11 of the ICESCR on the right to housing. Although refugees in urban areas live in conditions of squalor, the conditions within refugee camps are no better: they are extremely overcrowded and insecure. Requiring refugees to live in the camps also violates their right to adequate housing as outlined in the United Nations Guidelines on the Basic principles and Guidelines on Development Based Evictions and Displacement which requires that evicted persons ought to be resettled to land of better or equal quality.<sup>268</sup>

In the refugee camps, the freedom of movement of refugees is severely curtailed. Refugees cannot travel to urban areas unless they have the requisite permission to travel, and they must provide valid reasons, such as seeking medical treatment, in order to receive the permission. While Kenya does have the right to limit refugees' rights to movement, under international law, the country cannot curtail fundamental freedoms unless there is reasonable

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<sup>266</sup> *ibid* 40.

<sup>267</sup> Martha Marrazza, 'A Critical Analysis of Kenya's Forced Encampment Policy for Urban Refugees' 49 <<http://oxmofm.com/wp-content/uploads/2014/01/MARTHA-MARRAZZA-A-Critical-Analysis-of-Kenya%E2%80%99s-Forced-Encampment-Policy-for-Urban-Refugees.pdf>> accessed 15 October 2017.

<sup>268</sup> *ibid*.

justification to do so.<sup>269</sup> Under Article 26 of the 1951 Convention, refugees should be allowed by the host state to choose their place of residence as well as to move freely within the host country. The Refugees Act of Kenya, does not provide for any justification for the country to follow an encampment policy and as such, it can be argued that Kenya has no basis for a forced encampment policy under the law.<sup>270</sup> Similarly, the Ethiopian Refugee Proclamation of 2004 provides for refugees to have certain rights with respect to movement and residence. However, this right is proscribed when the ARRA is given the power to designate the areas where refugees must live since the directives it makes sometimes amount to a violation of the right to freedom of movement as guaranteed in the Constitution and the international human rights framework.<sup>271</sup>

Urban refugees may choose to ignore directives from the government to go back to the refugee camps because they have integrated themselves into the fabric of the city. This is a popular choice in Nairobi, and is often preferred in lieu of settling in the overcrowded refugee camps. When this happens, these refugees are unable to access basic services provided by the state or by the UNCHR because from the government perspective, urban refugees should not exist<sup>272</sup> In addition, these refugees can only engage in informal trade because they cannot legally access formal work opportunities. Where they participate in informal trade and become independent, they are still vulnerable to police abuse and arrest due to xenophobic attitudes of the Kenyan public and the police.<sup>273</sup>

The conditions in Kenyan refugee camps were discussed in the *Case of Sufi and Elmi V. The United Kingdom* 8319/07 11449/07<sup>274</sup> where the Court noted that “there is insecurity in

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<sup>269</sup> Simon Konzolo, ‘An Overview of Refugee Status Determination and the Rights of Refugees in Kenya: The Protection Envisaged under the 2006 Refugees Act’ 14 <<https://www.rsc.ox.ac.uk/files/files-1/dp-rsd-kenya-2010.pdf>> accessed 15 October 2017.

<sup>270</sup> Marrazza (n 267) 50.

<sup>271</sup> Mengesha (n 208) 43.

<sup>272</sup> ‘Can African States Offer New Approaches to Refugee Asylum?’ <<http://africasacountry.com/2016/12/can-african-states-offer-new-approaches-to-refugee-asylum/>> accessed 1 November 2017.

<sup>273</sup> Campbell (n 187) 399.

<sup>274</sup> *Sufi and Elmi v The United Kingdom* (European Court of Human Rights).

the camps due to the presence of members of or sympathizers with Al-Shabaab.”<sup>275</sup> In addition, Somali refugees had been found to have been harassed by Kenyan police who routinely fail to respond to their complaints of criminal behaviour, who routinely extorted money from them and threatened them with return to Somali should they not pay bribes as demanded.<sup>276</sup> In this case, the court held that returning a person to the Dadaab refugee camp would amount to a violation of Article 3 of the European Convention on Human Rights because of the conditions that exist in that camp.<sup>277</sup>

The principle of non-refoulement in Article 33 requires that a refugee should not be returned to a country where he or she would face a serious threat to his life. The protection afforded by this Article is considered the cornerstone of refugee protection. However, the right to non-refoulement cannot be claimed by persons who “are a danger to the security of the country, or who have been convicted of a particularly serious crime”.<sup>278</sup> States are however called upon to exercise the principle of proportionality in determining whether the “menace to public security” outweighs the danger returning the person to a place where they are likely to face persecution.<sup>279</sup> Similarly, the UNHCR has taken the view that the security exception contained in Article 33 of the 1951 Convention is not a routine ground for exclusion, and should only be invoked by State in very exceptional circumstances.<sup>280</sup> The failure to take a proportional approach and overemphasizing on security concerns ends up negatively affecting the rights of refugees, and ultimately hampers the search to a final and lasting solutions.<sup>281</sup>

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<sup>275</sup> *ibid* 157.

<sup>276</sup> *ibid* 286.

<sup>277</sup> *ibid* 296.

<sup>278</sup> The 1951 Convention relating to the Status of Refugees and its 1967 Protocol (n 65).

<sup>279</sup> Paul Weis, ‘The Refugee Convention, 1951 The Travaux Préparatoires Analysed with a Commentary by Dr Paul Weis’ (UNCHR 1983) 245 <<http://www.unhcr.org/4ca34be29.pdf>> accessed 8 December 2016.

<sup>280</sup> Murillo (n 228) 121.

<sup>281</sup> Oluoch (n 54) 35.

A combination of skewed public opinions results in xenophobia and discrimination against refugees from certain regions is perpetuated by the fact that warehoused refugees do not engage in gainful employment which in turn means that there is a continued dependency on humanitarian assistance. By pursuing a strict encampment policy, as has been the case in Kenya, and to some extent in Ethiopia, the only possible solutions are repatriation and resettlement, as opposed to local integration which may mean that refugees can regain their agency as soon as they become settled.<sup>282</sup>

While there is a comprehensive legal framework within which refugee protection is to be undertaken, security concerns remain the main driving force behind refugee policy in Kenya. One way in which this is evident was by the very location of the camps in remote areas as well as the continued resistance of the government to provide more land for expansion of the camps. This was further seen when on 10<sup>th</sup> November 2013, the governments of Kenya, the Federal Government of Somalia and the UNHCR entered into a tripartite agreement which upon execution, would see Somali refugees repatriated to areas within southern Somalia that are considered safe. This move is being pushed by the latest terrorist attack in Nairobi, which occurred on 21<sup>st</sup> September 2013. This attack has been found to have been spearheaded by terrorists who were resident at the Dadaab Refugee Camp. Kenya also maintains that it has for too long shouldered the burden of refugee support with limited support from the international community.<sup>283</sup>

It is unclear if the security environment in Somalia is appropriate for voluntary repatriation and whether the government of Somalia is able to absorb and reintegrate

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<sup>282</sup> *ibid.*

<sup>283</sup> Hawa Noor, 'Repatriation of Somali Refugees from Kenya and the Principle of Non-Refoulement | Pambazuka News' *Pambazuka News* <<https://www.pambazuka.org/human-security/repatriation-somali-refugees-kenya-and-principle-non-refoulement>> accessed 5 October 2017.

returnees<sup>284</sup>. Moreover, concerns have been raised as to whether the Kenyan government intends to observe human rights obligations as contained in the various international treaties to which it is a party. Aid organizations working in refugee protection at the refugee camps have urged the government to engage in continued consultation with affected refugees as well as with the government of Somalia to determine ensure that any failures in human rights are minimal, and adequately addressed.<sup>285</sup>

The restriction of freedom of movement lead to other restrictions such as the right to work. In Ethiopia, refugees who reside in camps are generally not allowed to work; they do not qualify for work permits although the government will normally turn a blind eye to any informal work that they engage in.<sup>286</sup> Ethiopia is marginally better due to the fact that some Eritrean refugees qualify for the out of camp policy. In Kenya, the situation is significantly different. Urban refugees are essentially considered illegal immigrants, and the government does not issue work permits to any refuge despite the fact that the Refugees Act provides for an avenue through which refugees and their spouses may apply for certain classes of work permits free of charge.<sup>287</sup>

These restrictions on the right to work and freedom of movement violate both international refugee law and international human rights law. Thus, refugee camps, which are created in order to create a safe haven to which refugees can derive protection from, have become

“over time, the prime vehicle for denying that same refugee the rights to liberty, security of person and other rights enshrined

<sup>284</sup> Noni Munge, ‘The Tripartite Agreement: Contested and Complicated’ <<http://regionalmms.org/index.php/research-publications/feature-articles/item/21-the-tripartite-agreement-contested-and-complicated>> accessed 2 November 2017.

<sup>285</sup> Noor (n 283).

<sup>286</sup> ‘Country Reports on Human Rights Practices for 2013’ (United States Department of State) 19 <<https://www.state.gov/documents/organization/220323.pdf>> accessed 20 November 2017.

<sup>287</sup> Hanibal Goitom, ‘Refugee Law and Policy: Kenya’ (March 2016) <<https://www.loc.gov/law/help/refugee-law/kenya.php>> accessed 20 November 2017.

both in the Universal Declaration of Human Rights and in the refugee instruments.... These same camps have come to embody the refugee experience, to represent the content of international protection for refugees, is grimly ironic, and demonstrates how desperately new approaches to responding to refugee situations are needed.”<sup>288</sup>

Moreover, restricting the right to move out of the camp means that refugees living in protracted situations cannot pursue normal lives or contribute to their new societies. This means that refugees become a burden to their new societies and increases their vulnerability, particularly for women and young children, to further exploitation.<sup>289</sup>

It is clear that the prioritization of security considerations have shaped the policy that Kenya has taken towards refugee protection, and in some cases, this has contributed to the violation of the principle of non-refoulement. One such instance was when the Kenyan government returned refugees from Ethiopia who were suspected of being members of the Oromo Liberation Front.<sup>290</sup> In addition, in 2014, under the guise of security concerns, the government rounded up thousands of refugees of Somali origin from various urban areas and detained them at the Moi International Sports centre in Kasarani; this operation, denounced by many as ethnic profiling, was carried out by the government with a view to moving them to the refugee camps.<sup>291</sup>

The fact that Kenya has erected a wall at the Kenya-Somali border also violates the principle of non-refoulement, as does the imminent closure of the two refugee camps. The UN has warned that these actions violate international law by putting refugees at immediate risk.

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<sup>288</sup> Arafat Jamal, ‘A Realistic, Segmented and Reinvigorated UNHCR Approach to Resolving Protracted Refugee Situations’, *Protracted Refugee Situations: Political, Human Rights and Security Implications* (United Nations University Press) 146.

<sup>289</sup> Elizabeth Ferris, ‘Protracted Refugee Situations, Human Rights and Civil Society’ in Gil Loescher (ed), *Protracted refugee situations: political, human rights and security implications* (United Nations University Press 2008) 88.

<sup>290</sup> Oluoch (n 54) 34.

<sup>291</sup> *ibid.*

Refugees returning home may be subject to further persecution and those looking to flee may not have a place to escape to.<sup>292</sup>

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<sup>292</sup> Marilena Hatoupis and Sonia Ben Ali, 'Refugee Camps Are Not the Answer to a Complex Crisis' *The Guardian* (10 June 2016) <<http://www.theguardian.com/global-development-professionals-network/2016/jun/10/refugee-camps-urban-dadaab-kakuma-jordan>> accessed 7 November 2017.

## CHAPTER THREE: RECOMMENDATIONS AND CONCLUSION

In the previous chapter, it is demonstrated that most of the violations of human rights of refugees occur when countries do not honour their obligations under the international refugee law framework as well as other human rights instruments. In this chapter, recommendations on the approaches to refugee protection that strike a balance between the protection of human rights, protection of local communities and the upholding of national security will be suggested.

### 3.1 A human rights based approach to refugee protection

The beginning of a human rights approach identifies that refugees are responsible actors and they ought to be involved in decisions that affect their lives.<sup>293</sup> This approach identifies the rights holders and what is entitled from them, as well as the duty bearers and the obligations that they ought to meet.<sup>294</sup> In addition, adopting a human rights approach to refugee protection starts from the rights to be met. All the practices that should be undertaken should contribute to the realisation of human rights of refugees.<sup>295</sup> However, government policy and practice can, as has been the case, restrict the enjoyment of human rights by refugees.<sup>296</sup>

A human rights approach also involves taking up two approaches: an intrinsic and instrumental approach.<sup>297</sup> Using the intrinsic rationale, it is acknowledged that the human rights approach should be undertaken because there is a legal and moral obligation on the state to protect refugees. This approach adopts the legal arguments for assistance which are founded on international human rights law as well as international refugee law. The thrust of this

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<sup>293</sup> Michael Posner and Deirdre Clancy, 'A Human Rights-Based Approach to Refugee Assistance' (2005) 25 Human Rights First < [http://www.humanrightsfirst.org/intl\\_refugees/regions/approach\\_refugess.pdf](http://www.humanrightsfirst.org/intl_refugees/regions/approach_refugess.pdf)>. Protracted Displacement 4.

<sup>294</sup> UNHCR, 'Operational Protection in Camps and Settlements: A Reference Guide of Good Practices in the Protection of Refugees and Other Persons of Concern' 17 <<http://www.refworld.org/pdfid/44b381994.pdf>> accessed 6 November 2017.

<sup>295</sup> *ibid* 18.

<sup>296</sup> *ibid*.

<sup>297</sup> Momin (n 236) 57.

approach is that states must protect refugees because they have signed international treaties and enacted laws which oblige them to do so.<sup>298</sup> On the other hand, an instrumental rationale posits that taking a human-rights based approach to refugee protection benefits the host state. It leads to better development outcomes due to improved economic performance, increased national security and a better reputation for the host state.<sup>299</sup>

In order to ensure that refugee protection is optimised, the Kenyan government should go beyond the step of recognising refugee rights in its constitution and national legislation. The government must also respect the rights of refugees to reside in urban areas as well as to obtain documentation that would enable them acquire basic services without having to depend on humanitarian assistance provided by non-governmental organisations.<sup>300</sup>

### 3.2 Adopting an open border policy

One of the ways in which we can protect refugees is by allowing them entry to other countries as they flee persecution. This policy has been widely praised in Ethiopia, making it one of the foremost countries in refugee protection.<sup>301</sup> Open borders are a direct expression of the principle of non-refoulement, which requires that when a refugee arrives at the border of a country, then they have the right to seek entry and seek asylum either in the host country or in a third country.<sup>302</sup> However, in other countries such as Kenya, refugees are no longer guaranteed protection due to concerns on national security and threats of terrorism. Projects such as the Somali Border Control Project, which have been undertaken under the guise of

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<sup>298</sup> *ibid* 60.

<sup>299</sup> *ibid* 57.

<sup>300</sup> ‘Jesuit Refugee Service | North America | Urban Refugees | Accompanying Urban Refugees in Ethiopia’ <[http://jrsusa.org/campaign\\_detail?PTN=promo-20110408040157&TN=PROJECT-20110714023915](http://jrsusa.org/campaign_detail?PTN=promo-20110408040157&TN=PROJECT-20110714023915)> accessed 18 November 2017.

<sup>301</sup> ‘Ethiopia’s Refugee Protection and Open Borders Praised by UNHCR Chief’ <<http://www.tigraionline.com/articles/unhcr-praised-ethiopia.html>> accessed 14 November 2017.

<sup>302</sup> UNHCR, ‘Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol’ para 7 <<http://www.unhcr.org/4d9486929.pdf>> accessed 14 November 2017.

protection of the towns bordering Somalia such as Mandera and Garissa directly threaten protection that is afforded to refugees.<sup>303</sup> One Kenyan Member of Parliament did express concern in 2016 that erecting a border wall in the wake of the heated Somali elections that year would lead to a scenario where if Somalis decided to flee to Kenya, they would be faced with a wall.<sup>304</sup> Moreover, completing the border wall project in the face of closure of the refugee camps as well as the repatriation programme creates a situation of uncertainty for Somali refugees who have resided in the camps for prolonged periods of time because it would mean that they cannot come back should they every wish to.<sup>305</sup>

It is important to consider the extent to which countries should be allowed to protect themselves or respond to their security needs while still adhering to basic international human rights and refugee law principles.<sup>306</sup> Having open borders does not mean allowing each and every person access into the host country without screening. It would be the first step to allowing refugees access to much needed humanitarian assistance immediately they leave the countries where they face persecution. To achieve this, it is important to pursue a policy that balances the national security concerns of a state with non-violable human rights.<sup>307</sup>

### 3.3 Reviewing and Relaxing the Encampment Policy and Adoption of an Out of Camp Policy

Kenya needs to take appropriate steps to address the human rights violations that have arisen out of the encampment policy. There are possible gains for state actors to address the human rights violations meted out on refugees. First, refugees can be productive and can

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<sup>303</sup> ‘Why the Wall Kenya Is Building on Its Border with Somalia Is a Terrible Idea’ <<http://africasacountry.com/2015/04/why-the-wall-kenya-is-building-on-its-border-with-somalia-is-a-terrible-idea/>> accessed 14 November 2017.

<sup>304</sup> *ibid.*

<sup>305</sup> *ibid.*

<sup>306</sup> Judy Wakahiu, ‘Refugee Protection: The Challenges from Interventionist and Terrorism Concerns’ (A presentation during a Seminar organized Kenya Human Rights Institute on the Somali situation 26th February, 2007 at Panafric Hotel) 7 <<http://www.rckkenya.org/downloads/docs/Refugee%20Protection%20-%20The%20challenges%20from%20Interventioni.pdf>> accessed 11 April 2017.

<sup>307</sup> *ibid* 8.

contribute to the economy of the host state by providing human capital and labour. Refugees have skills that can be used in industries in the host states in the host state as well as in trade.<sup>308</sup> Moreover, refugees can create demand for certain markets, such as housing, food, health and education, which can mean that the host state may increase production so as to meet the increased demand. The presence of relief agencies that attend to refugee needs can also mean that there are increased employment opportunities for locals in the host state.<sup>309</sup>

When refugees are readily accepted, certain social and infrastructural benefits accrue to the host state. For instance, NGOs and other humanitarian international organisations take part in aiding refugees settle down in the host state. Although the primary beneficiaries of the assistance are not the local population, the benefits that may be given to refugees often directly find their way to them. In many cases, aid organisations deliberately provide assistance to the host communities in order to increase their receptiveness to refugees.<sup>310</sup> The UNCHR has taken this approach as one of the ways in which tensions between the local population and refugees can be eased. When the local communities get improvements in infrastructure, through provision of water or health services, then they do not resent these services being offered to refugees.<sup>311</sup>

The instrumental rationale also shows that accepting refugees can be used to improve the national security of a state.<sup>312</sup> Every stakeholder in refugee protection would want to ward off terrorism and other national security threats, and are aware of the levels of fear and xenophobia that arise out of these threats towards refugees. As governments accept refugees, they can negotiate security arrangements with aid agencies. For example, they could ask aid

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<sup>308</sup> Momin (n 236) 63.

<sup>309</sup> *ibid* 62.

<sup>310</sup> *ibid* 63.

<sup>311</sup> *ibid*.

<sup>312</sup> *ibid*.

organisations to conduct background checks, put in place arrangements for efficient ways to screen refugees and fund security services.<sup>313</sup> Where it is evident that security threats are being used as a means to expel refugees, the UNHCR can provide training for the security officers and the police officers.<sup>314</sup>

#### 3.4 Alternatives to Refugee Camps: Pursuing integration

Moving away from encampment policies, whether they be formal or not is one way in which host countries can significantly improve refugee protection. As shown, refugee camps may contribute to insecurity because they are sometimes used as a breeding ground for radicalization and other terrorist activity. As such, other options such making allowances for urban refugees and out of camp residences should be explored. As demonstrated many urban refugees contribute to the development of the country by engaging in various economic and social activities<sup>315</sup>. In Nairobi, Isiolo and Kakuma, refugees in Kenya have contributed to businesses, and it may be unlikely that they may return to their countries. These kinds of refugees are those that are prime for integration.<sup>316</sup> However, for refugees to take part in the social and economic activities and for them to become self-reliant, there is an urgent need for the Kenyan government to put in place a legal framework within which urban refugees can reside in urban areas without harassment. A failure to have this framework has in the past worked to the favour of the Kenyan government who have resorted to using refugees as scapegoats for every wrong thing that happens in the country.<sup>317</sup>

The county governments where the refugee camps are situated could play an important role in advocating for rights and privileges of refugees, and aid agencies in both the development and humanitarian sectors have an opportunity to play a role as partners in local

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<sup>313</sup> *ibid* 64.

<sup>314</sup> *ibid*.

<sup>315</sup> *ibid* 62.

<sup>316</sup> Campbell (n 187) 409.

<sup>317</sup> *ibid* 401.

development and service delivery. Governors have the potential to influence public opinion around the issue of refugees, and in the process could prove to be effective partners in shaping the ongoing national debate, particularly with regard to Somali refugees.<sup>318</sup>

The issue of adopting long term encampment as a means of refugee protection must be rethought. When refugees are not permitted to integrate with the local communities, they are excluded from the “common realm” which reduces their agency by diminishing their ability to speak and act for themselves.<sup>319</sup> This is further exacerbated when they spend prolonged periods of time in the camps, and are not resettled, thus continue to live outside any social or political construct.<sup>320</sup> The Kenyan response, to close the refugee camps altogether, points to a more fundamental issue. One of these is that refugee camps are now adopted the only strategy for refugee protection, and this only contributes to aggravating the refugee crisis.<sup>321</sup>

The situation that Kenya finds itself in with respect to closing the refugee camps is an indication that a more fundamental issue is at play: that refugee camps have become a primary avenue for containment and dealing with refugees. Internationally, refugee camps have become the main response strategy and a target for humanitarian aid to every crisis that results in mass movement of refugees.<sup>322</sup> However, refugee camps are intended to be temporary solutions. Both refugee camps in Kenya are 25 years old, having been established as temporary measures to accommodate a fraction of the people who currently inhabit them. This situation demonstrates the urgency with which the international community needs to pursue alternative durable solutions for refugees.<sup>323</sup>

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<sup>318</sup> Christine Kamau and John Fox, ‘The Dadaab Dilemma: A Study on Livelihood Activities and Opportunities for Dadaab Refugees’ (Danish Refugee Council 2013) 10 <[https://drc.ngo/media/1654297/dadaab\\_livelihood\\_study\\_-final\\_report.pdf](https://drc.ngo/media/1654297/dadaab_livelihood_study_-final_report.pdf)>.

<sup>319</sup> Serena Parekh, ‘Beyond the Ethics of Admission: Stateless People, Refugee Camps and Moral Obligations’ (2014) 40 *Philosophy & Social Criticism* 645, 659.

<sup>320</sup> *ibid* 653.

<sup>321</sup> Hatoupi and Ali (n 292).

<sup>322</sup> *ibid*.

<sup>323</sup> *ibid*.

Adopting an out of camp policy, as has been done in Ethiopia in the case of Eritrean refugees would be a start. Research has shown that this policy has presented interesting opportunities for refugees and has contributed to some level of social and economic inclusion. This policy has meant that refugees move away from being entirely dependent on organisations which provide humanitarian assistance and become reliant on themselves.<sup>324</sup> This policy would also mean that the refugees right to work and right to movement would be respected, and having them become self-reliant results in development for both the refugees as well as for the areas that they reside in is an advantage to the host country. As observed above, refugee camps are located in peripheral and marginal areas. This approach has been recommended for the refugees who are resident in Kakuma refugee camp. Allowing the refugees to work towards the development of Turkana county as well as implementing long-term plans for development will increase the county's potential for refugee protection.<sup>325</sup>

Local integration can be a viable durable solution for some urban refugees who have become self-sufficient which can address some of the concerns raised by the host state such as contribution of refugees to the economy and record keeping for security purposes. This process could be initiated by the creation of a written urban refugee policy, which clearly outlines the specific requirements for lawful refugee residence and employment in the city.<sup>326</sup> Moreover, when refugees are integrated and settled in the host state, as opposed to being warehoused in refugee camps, they take up productive work and this can inhibit the growth of extremist attitudes.<sup>327</sup>

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<sup>324</sup> 'ReDSS-SH-Report-Final.Pdf' 20 <<http://samuelhall.org/wp-content/uploads/2016/07/ReDSS-SH-Report-Final.pdf>> accessed 13 November 2017.

<sup>325</sup> Apurva Sanghi, Harun Onder and Varalakshemi Vemuru, 'Yes In My Backyard: The Economics of REfugees and Their Social Dynamics in Kakuma, Kenya' 55 <<http://documents.worldbank.org/curated/en/308011482417763778/pdf/111303-WP-Kakuma-Report-Yes-in-my-backyard-December-2016-PUBLIC.pdf>> accessed 2 October 2017.

<sup>326</sup> Campbell (n 187) 396.

<sup>327</sup> Momin (n 236) 64.

Kenya made a commitment under the New York Declaration for Refugees and Migrants.<sup>328</sup> This is a declaration made and adopted by the United Nations General Assembly in 2016 to set out a Comprehensive Refugee Response Framework to be applied to “large scale movements of refugees and protracted refugee situations.”<sup>329</sup> Under this declaration, Kenya undertook to put in place several measures to increase the self-reliance and inclusion of refugees residing at Kakuma. These measures include the development of integrated settlement that would benefit both the residents and refugees. In addition, the government undertook to facilitate legal status for refugees who may have claims to residency in Kenya as well as to increase the enrollment of refugees in Kenyan schools.<sup>330</sup> However, as at the global status update undertaken in August 2017, no progress on these pledges had been made.<sup>331</sup> Kenya needs to move towards fulfilling these pledges in order to enhance its refugee protection

### 3.5 A human rights based approach to the voluntary repatriation programme

The Kenyan government, the Somali government and the UNCHR entered into a tripartite agreement on 10<sup>th</sup> November 2013 under which each party affirmed their commitment to return refugees to Somalia in a coordinated and humane manner and in conditions of safety and dignity.<sup>332</sup> Following government threats to close down the refugee camps, the then UN High Commissioner for Refugees, Antonio Guterres held discussions with the Kenyan government with a view to find an amicable resolve to Kenya’s concerns.<sup>333</sup> The Kenyan government has promised to abide by its international commitments and only repatriate those

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<sup>328</sup> Refugees, ‘Overview Leaders’ Summit on Refugees’ (n 148).

<sup>329</sup> Refugees, ‘New York Declaration for Refugees and Migrants’ (n 147).

<sup>330</sup> Refugees, ‘Overview Leaders’ Summit on Refugees’ (n 148).

<sup>331</sup> UNHCR, ‘Global Update on the Comprehensive Refugee Response Framework’ (n 227).

<sup>332</sup> UNHCR, ‘Voluntary Repatriation of Somali Refugees from Kenya Operations Strategy 2015-2019’ 7 <<http://www.unhcr.org/5616280b9.pdf>> accessed 13 November 2017.

<sup>333</sup> Danish Refugee Council, ‘Kenya Country Profile Update April 2016’ 6 <<https://reliefweb.int/sites/reliefweb.int/files/resources/Kenyaupdate.pdf>> accessed 14 November 2017.

who want to return to their countries of origin.<sup>334</sup> Closing the refugee camps is not a viable solution but the current situation of the refugee camps being the main avenue of refugee protection is untenable.<sup>335</sup> The Kenyan government has repeatedly called for support from the international community to enable it adequately provide services to undertake voluntary repatriation, to facilitate reintegration of some refugees in the host country as well as to enable the resettlement of refugees to other countries.<sup>336</sup>

To ensure that the repatriation programme does not fall foul of the principle of non-refoulment it is imperative that certain minimum standards are met. The UNCHR has proposed three approaches for the programme: the first is to ensure that the voluntary aspect of the tripartite agreement is fully respected. One way of doing this is by making sure that the decision of a refugee to return is made freely and voluntarily, and after receiving all relevant information. To this end, UNCHR has put in place a system where refugees are provided with information on assistance and available services in the designated return areas. Refugees are also required to complete and sign a voluntary repatriation form which is used by the UNHCR to verify that return has been voluntary.<sup>337</sup>

The second includes partnering with donor agencies to ensure that there is adequate security to avoid a situation where returnees could be faced with violations of human rights. As part of this, the UNHCR has undertaken to ensure that refugees make a safe and dignified journey to their countries of origin. Returnees are given some money and a package of relief items containing food and hygiene items for use during the journey as well as upon arrival

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<sup>334</sup> Ionel Zamfir, 'Refugee Policies in Africa: Open Borders but Limited Integration' 8 <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608698/EPRS\\_BRI\(2017\)608698\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608698/EPRS_BRI(2017)608698_EN.pdf)> accessed 13 November 2017.

<sup>335</sup> 'Kenyan Court Blocks Plan to Close Dadaab Refugee Camp - The New York Times' <<https://www.nytimes.com/2017/02/09/world/africa/kenyan-court-blocks-plan-to-close-dadaab-refugee-camp.html?mcubz=0>> accessed 13 November 2017.

<sup>336</sup> Ionel Zamfir (n 334) 8.

<sup>337</sup> UNHCR, 'Voluntary Repatriation of Somali Refugees from Kenya Operations Strategy 2015-2019' (n 332) 13.

which ensures that basic standards of humanity are met. In view of the security concerns prevailing in the areas around the refugee camps, particularly in Dadaab, the money can be used to access safe and secure transportation. However, there have been concerns that the cash grant given to refugees is not sufficient to cover the transportation until the final destination, and proposals made for the increase of the allocations ought to be seriously considered. The Kenya Police Service should continue to provide security along the transport routes within Kenya to ensure that the safety of returnees is guaranteed.<sup>338</sup> The third approach is to implement further durable solutions geared towards assisting both refugees and the host communities where they reside.<sup>339</sup> To this end, the parties to the tripartite agreement agreed to enhance the return stations from the initial three set out in the agreement to a total of nine areas considered safe within Somalia.<sup>340</sup>

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<sup>338</sup> *ibid* 14.

<sup>339</sup> *ibid* 8.

<sup>340</sup> Danish Refugee Council (n 333) 6.

## CONCLUSION

Kenya and Ethiopia combined host a majority of refugees in Africa, most of whom are Somali refugees. With similar international and legal frameworks for refugee protection, Ethiopia has repeatedly been lauded as a pillar of refugee protection, particularly for having an open border policy, for allowing local integration as well as for ensuring the respect for the principle of non refoulement.<sup>341</sup> The most comprehensive argument for refugee protection is one that combines the communitarian theory and the cosmopolitan theory. Under this approach, refugees are granted a certain set of rights, which at first sets them apart from the rest of the society, while according them certain fundamental rights and freedoms.<sup>342</sup>

Both Kenya and Ethiopia have a comprehensive international and legal framework for refugee protection. Both countries are signatories to the core international refugee law and human rights treaties which set out a number of core rights for refugees. Despite having good laws on paper that if implemented would further the cause of refugee protection, Kenya has adopted policies that undermine it. For instance, Kenya's main economic policy views refugees as an excessive burden on the country.<sup>343</sup> Furthermore, there is also lack of political will in the country which has seen it pursue an encampment policy which has led to majority of refugees being warehoused in Kakuma and Dadaab Refugee Camps. Numerous human rights violations have arisen from this. The camps themselves are overcrowded and lack various amenities because they were created to hold far fewer refugees than they currently do. Moreover, the protracted nature of the refugee camps has made them difficult for the Kenya government to police leading to an increase in crime within the camp and in the areas surrounding it. In addition, the camps have led to instances of training of terrorists within the camps. Citing

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<sup>341</sup> UNHCR, 'Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: ETHIOPIA' (n 137).

<sup>342</sup> Haddad (n 119) 10.

<sup>343</sup> 'Sessional Paper No. 10 of 2012 On Kenya Vision 2030' (n 167) 158.

national security concerns, the Kenyan government has cracked down on the freedom of movement within the camps and taking action to reduce refugee numbers within the camps.<sup>344</sup>

The Kenyan government has also violated the principle of non-refoulement in various ways. First, the conditions of the camps has been described as so abhorrent that to require a person to stay there would be to act in violation of Article 3 of European Convention on Human Rights which prohibits inhuman or degrading treatment. Secondly, citing security concerns, Kenya has threatened to close down the Dadaab refugee camp and return its inhabitants to Somalia; and third, has already built several kilometers of a border wall at the Somalia border to prevent “irregular migrants” from accessing the country.<sup>345</sup>

By pursuing a strict encampment policy, urban refugees have faced eviction from their homes, in violation of the right to housing as well as the right to non-discrimination as provided in refugee law as well as the core international human rights instruments. Moreover, this policy has led to the entrenchment of protracted refugee situations with refugees who have lived in these camps for a period of over twenty years. These protracted situations invariably lead to restrictions on human rights as well as opportunities that would otherwise be available to other refugees.<sup>346</sup>

While Ethiopia also has refugee camps, they operate a much more flexible approach to where refugees reside. Ethiopia provides space for urban refugees by allowing Eritrean refugees to live outside the camps if they can sustain themselves. This policy has seen refugees

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<sup>344</sup> Jaji (n 174) 227.

<sup>345</sup> ‘Why the Wall Kenya Is Building on Its Border with Somalia Is a Terrible Idea’ (n 303).

<sup>346</sup> James Milner and Gil Loescher, ‘Responding to Protracted Refugee Situations’ (2011) 6 Lessons from a decade of Discussion. Forced Migration Policy Briefing Series 6  
<<http://www.regionaldss.org/sites/default/files/Forced%20Migration%20Policy%20Brief-Responding%20to%20protracted%20refugee%20situations.pdf>> accessed 6 February 2017.

move away from the camps, obtain higher education, pursue employment opportunities and integrate in the community.<sup>347</sup>

Ethiopia has also started processes to enhance local integration of refugees in line with its obligations under the New York Declaration. The measures taken as at August 2017 include providing refugees with civil documents through which they can access enhanced social services, such as health care services and acquire work permits.<sup>348</sup> The approach that Ethiopia has taken has contributed to the protection of refugees, and Kenya would do well to borrow some of these lessons and adopt a human rights based approach to refugee protection that recognizes refugees are responsible actors who have rights, including the right to be involved in decisions affecting them.<sup>349</sup> In addition to guaranteeing refugees their rights, a human rights based approach has been shown to lead to improved outcomes for the host state in terms of national security and economic performance.<sup>350</sup>

Another approach that Kenya can take to better refugee protection is to work with development and aid organizations to improve the conditions in the refugee camps in order to ensure that basic human rights in terms of sanitation, food and security are met. This can be complemented by adopting an out of camp policy through which refugees would be allowed to freely move out of camps and into urban areas. To reduce the likelihood of non-refoulement, the terms of the voluntary repatriation programme being taken by the governments of Kenya and Somalia and UNHCR should be respected. Repatriations should be conducted only after obtaining informed consent from the concerned refugees, and adequate provisions to ensure a journey in safety and dignity should be put in place.

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<sup>347</sup> 'The Out of Camp (OCP) Scheme in Ethiopia' (n 221).

<sup>348</sup> UNHCR, 'Global Update on the Comprehensive Refugee Response Framework' (n 227) 2.

<sup>349</sup> Posner and Clancy (n 293) 25.

<sup>350</sup> *ibid* 60.

This thesis has considered encampment policies that have routinely become the mainstay in the manner in which refugees are protected, and shown how in some cases, encampment situations, especially when they become protracted, lead to violations of human rights. Various approaches, each of which would lead to increased human rights protection of the refugee. However, each of these approaches cannot be undertaken on its own. To ensure the greatest degree of refugee protection, it would be prudent to apply each of them in varying degrees so as to reap the benefits that come with each approach. These approaches are not exhaustive, and further research on the role that the international community can play in ameliorating the situation of refugees in Kenya as well as on durable solutions such as resettlement in third countries should be pursued.

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