STATE'S RESPONSE TO REFUGEE CRISIS: THE CASE OF KENYA'S REFUGEE LAW, 1991 – 2016

BY

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DECLARATION

This project is my original work and has not been presented for the award of a degree in this University or any other institution of higher learning for examination.

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This research project report has been submitted for examination with our approval as the University Supervisor.

Signature ………………………………… Date ………………

DR. HERBERT MISIGO AMATSIMBI

DEDICATION

To my family and friends for their continuous support and patience that helped me realize my dream of attainting a Master of Arts Degree from University of Nairobi.

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I thank the almighty God, for his abundant kindnesses and loveliness, which has enabled me to complete this Master's Program. I would like to thank my Supervisor, Dr. Herbert Misigo Amatsimbi for his guidance and patience in carrying out this research project. My gratitude also goes to my spouse, children and friends for the support and encouragement they accorded to me.

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ABSTRACT

The focus of this dissertation was the articulation, implementation and impact of Kenya refugee law in the period between 1991 and 2016. Kenya has hosted refugees since independence mainly from neighbouring countries. It was due to this reason that the study set out to find how Kenya's legal system was crafted to deal with the refugees issues in the country and the impact of these law. The project relied on broad and definite objectives and adopted a conceptual framework that brought in a number of theories. Written secondary and primary written materials provided most of the study data. Gaps identified in the written literature were filled through oral interviews with people who were knowledgeable on refugee law in Kenya.

The study found out that Kenya refugee law has gone through three major trajectories. First period between 1963 and 1991 encompassed the government being in charge of refugee management in the country and adopting a *Laissez-faire* attitude towards the refugees. Second phase was in the period, 1991 to 2006 where refugee camps were set up following the influx of refugees fleeing violence from various countries in Africa. Consequently, the Government of Kenya abandoned direct involvement with refugees and shifted the management of refugees to UNHCR. The third trajectory was in the period, 2007 to 2016 where the refugee law was enacted in 2006. The act came with a framework on the handling and management of refugees in the country. Significantly there was a rise of insecurity that was blamed on refugees. This prompted the Kenya Government to come up with a raft of measures, pronouncements and amendments to tame rising insecurity though most of them were challenged in court and found to be unconstitutional. There was also a significant negative shift in Kenyans attitudes towards refugees. They began to see them as competitors rather than people who needed assistance.

The study has shown that the implementation of the Kenya refugee law to some extent was an affront to the constitution of Kenya and the International laws that Kenya is a signatory. The security inspired pronouncement and amendments culminated in the violation of refugee rights in Kenya. Kenyans similarly developed hatred and xenophobia towards refugees leading to what has been termed as securitization of the Kenyan asylum space.

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LIST OF ABBREVIATIONS AND ACRONYMS

AU - African Unity
BP - Bureau for Refugees
DRA - Department of Refugee Affairs
DRC - Democratic Republic of Congo
ECOSOC - Economic and Social Council
ECOWAS - Economic Community of West African States
EU - European Union
HRW - Human Rights Watch
ICARA - International Conference of Assistance to Refugees in Africa
ICCAR - International conference on Central American Refugees
ICCPR - International Convention on Civil and Political Rights
ICESCR - International Convention on Economic, Social and Cultural Rights
ICRC - International Committee of the Red Cross
IDPs - Internally Displaced Persons
IGAD - Intergovernmental Authority on Development
IOM - International Organization of Migration
IRC - International Red Cross
IRC - International Rescue Committee
IRIN - Integrated Regional Information Networks
IRO - International Refugee Organization
JRS - Jesuit Refugee Services
KNCHR - Kenya National Commission on Human Rights xi
LWF - Lutheran World Federation
MIRP - Minister of State in charge of Immigration and Registration of Persons
NCCK - National Council of Churches of Kenya
NEP - North Eastern Province
NFD - Northern Frontier District
NGO - Non-Governmental Organization
OAU - Organization of African Unity

RCK - Refugee Consortium of Kenya

RSD - Refugee Status Determination

UDHR - Universal Declaration of Human Rights

UN - United Nations

UNHCR - United Nations high Commission for Refugees

UNRRA - United Nations Relief and Rehabilitation Administration

USA - United States of America

WFP- World Food Program

UNGA- United Nations General Assembly

UNSC- United Nations Security Council

DEFINITION OF TERMS

Asylum

This is the protection which a state grants on its territory or in some other place under the control of certain of its organs, to a person who comes to seek it.

Illegal Migrant

Illegal immigrant refers to person living in a country without government permission or going to settle in another country without the permission of the government of that country.

The Alien Restriction Act

This means the Act by Kenyan Parliament that restrict aliens.

Encampment Policy

A policy by Kenyan government to restrict refugees who have gone through status determination into camps while awaiting a durable solution.

Kenya refugee Act

This Act recognizes two classes of refugees: statutory and *prima facie* refugees. The former category applies to a person who has "a well-founded fear of being persecuted for reasons of race, religion, sex, nationality, membership of a particular social group or political opinion." The latter relates to a person who, "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in any part or whole of his country of origin or nationality is compelled to leave his place of habitual residence.

Refugee Law

In this study, refugee law refers to the principles and regulations established in Kenya by legislation, International Conventions, customs, government directives and policies that deals with the rights and protection of refugees recognized and enforced by judicial decision.

Refoulement

In this study this terms is defined as eviction of people who otherwise have the right to be treated as refugees

Refugee

In this study a refugee refers to a person who has been forced to leave their country in order to escape war, persecution, or natural disaster.

Refugeehood

In this study refugeehood refers to the state of being a refugee, It is everything a refugee experiences being a minority within a state whether that refugee is privileged or not.

CHAPTER ONE
BACKGROUND TO THE STUDY

1.1 Introduction

There are various definitions of the term refugee within various jurisdictions. Most states have their own definitions, the majority of which follow the construction of the United Nations (UN) Convention. The germane passage of that instrument defines a refugee as a person who, "owing to a well- founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such a fear, is unwilling to avail himself of the protection of that country".[1] Such concrete definitions are predicated on an implicit argument (or conception) that: a) a bond of trust, loyalty, protection, and assistance between the citizen and the state constitutes the normal basis of society; b) in the case of the refugee, this bond has been severed; c) persecution and alienage are always the physical manifestations of this severed bond; and d) these manifestations are the necessary and sufficient conditions for determining refugee hood.[2]

The definition of "refugee" adopted by the African Union (AU), formally the Organization of African Unity (OAU) is the only salient challenge to the proposition that persecution is an essential criterion of refugeehood. That definition, after incorporating the United Nations' persecution-based phraseology, proceeds to state that: "The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of nationality."[3]

It should be pointed out from the onset that over the past two decades, the global population of refugees and other forcibly displaced people has grown substantially from 33.9 million in 1997

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[1] UNHCR. Statute of the office of the United Nations High Commissioner for Refugees.
[2] Andrew E. Shacknove. Who Is a Refugee? Chicago Journal, Ethics, Vol. 95, No. 2 (Jan., 1985), pp. 274-284.
[3] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted September 10, 1969 (UNTS no. 14691), Art. 1(2).

to 65.6 million in 2016. It remains at a record high where most of this increase was concentrated between 2012 and 2015, driven mainly by the Syrian conflict. Similarly, conflicts in the region such as in Iraq and Yemen, as well as in sub-Saharan Africa including, Somalia, Burundi, the Central African Republic, the Democratic Republic of Congo, South Sudan, and Sudan led to refugees. This has led to a major increase in displacement, from about 1 in 160 people a decade ago to 1 in 113 in 2016. Although still at a record high at the end of 2016, the growth in the number of people who have been forcibly displaced has slowed for the first time in recent years. However, large numbers of people were on the move in 2016 and affected by forced displacement, with many people newly displaced as well as large numbers of returning refugees and Internally Displaced Persons (IDPs). During the year, 10.3 million people were newly displaced, including 3.4 million who sought protection abroad and 6.9 million people who were forced to flee but remained in their own countries. These 10.3 million new displacements equated to an average of 20 people being newly displaced every minute of every day in 2016. Still, many others returned to their countries or areas of origin to try to rebuild their lives, including 6.5 million internally displaced people (IDPs) and over 550,000 refugees. These included 22.5 million refugees. [4]

Some countries were especially affected by forced displacement in 2016. Syrians continued to be the largest forcibly displaced population, with 12 million people at the end of 2016; that included 5.5 million refugees, 6.3 million IDPs, and nearly 185,000 asylum-seekers (Figure 3). Colombians were the second-largest group, with 7.7 million forcibly displaced, mostly inside their country.A total of 4.7 million Afghans were also forcibly displaced, of whom 1.8 million were IDPs and 2.9 million were refugees or asylum-seekers. Other large displaced populations at the end of 2016 – those with over 2 million people displaced, either internally or as refugees or asylum-seekers – were from Iraq (4.2 million), South Sudan (3.3 million), Sudan (2.9 million), the Democratic Republic of Congo (2.9 million), Somalia (2.6 million), Nigeria (2.5 million), Ukraine (2.1 million) and Yemen (2.1 million).[5]

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[4] UNHCR, Global Trends: Displacements in 2016, p. 2.
[5] *Ibid.*

The refugee population from Burundi also increased by 39 per cent during 2016 while the IDP population in that country quadrupled to 141,200 people. Conflict and violence also continued in Afghanistan, the Central African Republic, the Democratic Republic of Congo, Eritrea, Iraq, Libya, Sudan, Ukraine, and Yemen, leading to new displacements and inhibiting returns. In 2016, the large number of infants, children, and pregnant women among the South Sudanese refugees made the humanitarian response particularly challenging. These countries are among the poorest and least developed countries in the world, with limited resources to deal with the needs and challenges associated with hosting displaced people.[6]

In 2016, more refugees and IDPs returned to their countries or areas of origin than in 2015. Some half a million refugees returned to their countries of origin in 2016, the majority to Afghanistan, Somalia and Sudan, compared with 201,400 in 2015, but these numbers remained low at only 3 per cent of the overall refugee population. About 6.5 million IDPs returned to their areas of origin, representing 18 per cent of the population. However, the context in which many displaced people returned was complex, leading to concerns that many returns may not be sustainable. Resettlement provided a solution for 189,300 refugees. [7]

In March 2016, the United Nations Statistical Commission, at its 47th session, decided to establish an Expert Group on Refugee and IDP Statistics (EGRIS).[8] The group consists of participants from national authorities, international statistical organizations, and other technical experts, led by Statistics Norway, Eurostat, and UNHCR, and aims to address the challenges related to refugee and IDP statistics. The EGRIS was mandated to develop: International Recommendations on Refugee Statistics, which will be a reference guide for national and international work concerning statistics on refugee and asylum seekers; Refugee Statistics Compilers' Manual with operational instructions on how to implement the international recommendations; and Technical Report outlining a way forward for similar work for IDP statistics.[9]

[6] UNHCR, Global Trends: Displacements in 2016, p. 7.
[7] *Ibid.*
[8] For more information, see http://ec.europa.eu/eurostat/web/ expert-group-on-refugee-statistics/home.
[9] UNHCR, Global Trends: Displacements in 2016, p. 9.

Developing regions continued to share a disproportionately large responsibility for hosting refugees. Nine of the top 10 refugee-hosting countries were in developing regions, according to the United Nations Statistics Division classification. Three of these (the Democratic Republic of Congo, Ethiopia, and Uganda) were classified as least developed countries, facing severe structural impediments to sustainable development in addition to the challenges of large refugee flows. As in 2015, Turkey was the country hosting the largest refugee population, with 2.9 million refugees at the end of 2016, up from 2.5 million in December 2015. The vast majority of refugees in Turkey were from Syria: More than 2.8 million Syrian refugees represented more than 98 per cent of the entire refugee population in Turkey, with about 330,000 newly registered Syrian refugees. In addition, 30,400 refugees from Iraq were registered in Turkey, as well as smaller numbers from the Islamic Republic of Iran (7,000), Afghanistan (3,400), and Somalia (2,200). Pakistan had the second-largest refugee population, despite declining numbers mainly through refugee returns. At the end of 2015, Pakistan hosted 1.6 million refugees; by the end of 2016, this number had decreased to 1.4 million, driven largely by some 380,000 departures. The refugee population in Pakistan continued to be almost exclusively from Afghanistan.[10]

The refugee population in Lebanon also reduced slightly, mainly due to data reconciliation, deregistration, and departures for resettlement. However, Lebanon still hosted just over 1.0 million refugees at the end of 2016, compared with just under 1.1 million in 2015 and 1.2 million refugees in 2014. The majority of refugees in Lebanon are from Syria (1.0 million), with 6,500 from Iraq. The registered refugee population in the Islamic Republic of Iran, the fourth-largest refugee-hosting country, remained unchanged at 979,400 people at the end of 2016.Uganda experienced a dramatic increase in the refugee population, mostly in the second half of 2016. At the end of 2015, there were 477,200 refugees in the country, a number that had nearly doubled to 940,800 a year later. Most new arrivals came from South Sudan, with refugees from that country accounting for 639,000 people or 68 per cent of the total refugee population. Significant numbers of refugees in Uganda also originated in the Democratic Republic of Congo (205,400), Burundi (41,000), Somalia (30,700), and Rwanda (15,200). The refugee population in Ethiopia also increased during 2016, reaching 791,600 people. The majority of arrivals came from South Sudan, bringing the total number of South Sudanese refugees in the country to 338,800 people,

[10] UNHCR, Global Trends: Displacements in 2016, p. 14.

up from 281,500 the previous year. There were 242,000 refugees from Somalia, a slight decrease from 2015, while significant numbers of refugees from Eritrea (165,600) and Sudan (39,900) remained in Ethiopia by the end of 2016. Jordan experienced a small increase in its refugee population, providing protection to 685,200 people by the end of 2016, up from 664,100 in 2015 and making it the seventh-largest refugee-hosting country in the world.[11]

Continuing conflicts in Burundi and South Sudan resulted in growing numbers of refugees in the Democratic Republic of Congo. That country hosted 452,000 refugees at the end of 2016, compared with 383,100 at the beginning of the year. The number of refugees from South Sudan jumped more than tenfold from 5,600 to 66,700 over the year, while the number from Burundi rose from 23,200 to 36,300. The largest refugee populations in the Democratic Republic of Congo continued to be from Rwanda (245,100) and the Central African Republic (102,500). The refugee population in Kenya declined during 2016 from 553,900 to 451,100, a decrease of nearly 20 per cent. Still, Kenya hosted the 10th-largest refugee population globally. The number of Somali refugees in the country decreased from 417,900 to 324,400 during the year, mainly due to revivification exercises, returning refugees and, to a lesser extent, resettlement. In addition to Somalis, significant numbers of refugees from South Sudan (87,100), Ethiopia (19,100), and the Democratic Republic of Congo (13,300) remained in Kenya at the end of 2016.[12]

1.2 Historical Background

As shown above, Refugees are defined as such by 1951 UN Convention relating to the Status of Refugees. The Convention was negotiated in the aftermath of World War II, due to the mass displacement that preceded, accompanied, and followed it; and perhaps above all the Holocaust. Flight makes one a refugee: the moment a person with a well-founded fear of persecution crosses a border, they become a refugee.[13] The 1967 amendment to the protocol, however, removed both the limitations of 1951.[14] By 2016, over 145 states had signed the 1951 Convention, 146 states had signed the 1967 Protocol, and 142 had signed both.[15] Failing to sign the refugee convention or the protocol does not, of course, insulate a country from flows of refugees. India,

[11]UNHCR, Global Trends: Displacements in 2016, p. 14.
[12] *Ibid.,* p. 15.
[13]J C. Hathaway, *Who should Watch Over Refugee Law?,* Forced Migration Review, Vol 14, [2002], p 23-26.
[14]Convention and Protocol 2011, 2.
[15]Randall Hansen, op.cit, p. 4.

for instance, has not signed the Convention but has been confronted with the challenges of mass influx and accepted large numbers of refugees.[16]

The global governance of refugee flows is a matter of international law, international norms, and international politics. Asylum and refugees are thus deeply embedded in the international system. Indeed, the 1951 Convention and 1967 Protocol constitute one of the greatest constraints on nation-state sovereignty in international law. The core of the international refugee system is one right—the right of all individuals to apply for asylum - and one obligation - that countries respect the principle of *non-refoulement*: no state should return an asylum seeker to a country where he or she faces a well-founded fear of persecution.

Behind the staggering numbers of displaced peoples are endless tales of human misery, fleeing violence, abandoning homes and families, and too often becoming beholden to traffickers who extort funds, torture migrants, pack huge numbers of human beings onto dangerous ships, and remove and sell their victims' organs. For most of these refugees, there is no simple solution to their plight. They are in what the legal community calls "protracted situations" in that they spend years, sometimes decades, as refugees with little chance for building anything approaching a decent life. It is a humanitarian disaster of immense proportions.

1.2.1 History of Refugee law in Kenya

Kenya is signatory to a number of international treaties applicable to individuals seeking asylum and protection. For instance, it acceded to the 1951 United Nations Convention Relating to the Status of Refugees on May 16, 1966, and its 1967 Protocol in 1981.[17] Kenya is also a state party to the 1969 African Union (AU) (formerly known as the Organization of African Unity, OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, which it signed in September 1969 and ratified in June 1992.[18] In addition, Kenya acceded to the 1984 Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment in February

[16] Randall Hansen, *op.cit*, p. 4.
[17] *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, UNHCR, http://www.unhcr.org/3b73b0d63.html (last visited, Dec. 28, 2015), *archived at* https://perma.cc/2NMZ-C8M3.
[18] *Ratification Table: AU Convention Governing Specific Aspects of Refugee Problems in Africa*, African Commission on Human and Peoples' Rights, http://www.achpr.org/instruments/refugee-convention/ratification/ (last visited Dec. 28, 2015), *archived at* https://perma.cc/35NK-ZPFG.

1997.[19] Of particular relevance to refugee issues is a provision in the Convention on *non-refoulement*, which states that, "no State Party shall expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[20]

There was no refugee law to speak of until 1967. Although Kenya ratified the United Nations Convention Relating to the Status of Refugees on May 16, 1966, the independence constitution required a domestic law to make it applicable in Kenyan courts. This was done through the inclusion of Class M entry permits under the Immigration Act of 1967.

Despite the inclusion of the legal definition of a refugee, there was no information regarding rights. It appeared as though the law was only meant to regulate the entry and settlement of refugees, without providing the terms of their residence. There were also no legal provisions on the principle of *non-refoulement*, right to work, or freedom of movement. The law did not provide any durable solutions for dealing with refugees. This situation continued until the enactment of the Refugees Act of 2006.

Nevertheless, refugees in Kenya at the time had de facto freedom of movement as well as access to work. A good example is that of the Ugandans that fled the autocratic and kleptocratic regime of Idi Amin. They were received well and most of them eventually integrated into Kenyan society. Most Kenyans that went to school in the 1970s and 80s have memories of Ugandan teachers, further evidence that these refugees were allowed to work in formal sectors.

As civil wars erupted in Ethiopia, Sudan, and Somalia, the number of refugees coming to Kenya increased tenfold, from 20,000 to about 200,000. This massive influx had debilitating consequences that still haunt Kenya's asylum system. The government of Kenya abandoned direct involvement with refugees and left this role to the UNHCR. It also set up the Dadaab and

[19] *Status: Kenya*, United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-9&chapter=4&lang=en (last visited Dec. 28, 2015), *archived at* perma.cc/6XUT-YGU4.

[20] Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85, available on the Office of the United Nations High Commissioner for Human Rights (OHCHR) website, *at*http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx, *archived at*https://perma.cc/LSG2-DZQT.

Kakuma camps, primarily for refugees from Somalia and Uganda, respectively. From the location of these camps–close to the borders of the countries from which the refugees were arriving–one can deduce that the government of Kenya thought the asylum situation was temporary. However, 27 years down the line, the camps as well as the refugees are still there.

There was also a significant shift in Kenyans' attitudes toward refugees. Rather than being seen as people that needed assistance, refugees were now viewed as burdens to the economy. Kenya was going through the Structural Adjustment Programs (SAPs) under the aegis of the Britton Woods institutions. These were tough economic times as unemployment soared and inflation was high. A majority of Kenyans viewed refugees with suspicion, as they saw them as competitors for the few jobs available in the market. In the 1990s, there was a steep rise in small arms and light weapons circulating in the country, which was blamed on the increase of refugees and asylum-seekers accessing the country. This assumption, unsubstantiated by evidence, also contributed to the shift in Kenyans' attitudes toward refugees and was the harbinger for the rise of xenophobia in the country.

Until 2006, Kenya had no law exclusively addressing the status and rights of refugees. The Refugees Act of 2006, which became operational in 2007, defined refugee status, replete with exclusion and cessation clauses. It also outlined the rights and duties of refugees and asylum-seekers. Perhaps more importantly, it established institutions that would manage refugee affairs in the country. These include the Department of Refugee Affairs, the Refugee Affairs Committee, and the Refugee Affairs Board.

The act also provided refugees with the right to move and earn a living. It incorporated the provisions of relevant international conventions into the domestic legislative framework. Refugees could by right access work permits, seek and gain employment, or start a business. However, the implementation of the act presented a problem for refugee access to this right. Whereas the law provided the right to work and access work permits, the same law restricted the movement of refugees. Refugees were required to reside in refugee camps unless they had authorization to live elsewhere. Seeking a work permit was not a basis for applying for this authorization. Refugees had limited access to Work permits because they only granted in

Nairobi, and not in the camp. Those who decided to live and work in urban areas without authorization often did so under a constant threat of harassment and intimidation.

At the same time, *Al-Shabaab* attacks in Kenya increased which led government to close the border between Kenya and Somalia in 2007. This didn't mean that Somali asylum-seekers could not access the country, as a large number of them did at the height of the drought in 2011, but it did mean that government officers at the border were withdrawn. These attacks continued unabated, leading the government to enact stricter encampment measures. Hitherto, there had been no legal instrument that defined where refugees ought to reside. In 2014, the Dadaab and Kakuma refugee camps were legally recognized as refugee camps. Refugees were thus formally required to reside in the camps. The government also passed a law that capped the number of refugees allowed to be in the country at 150,000. This provision was finally declared unconstitutional by the High Court of Kenya. Further the government in 2016, gave a directed that refugee camps in should be closed and refugees repatriated. This study thus looks the formulation of Kenya refugee law so as to find out the dynamism of the Kenya refugee law and its impact from 1991 to 2016.

1.3 Statement of Research Problem

Kenya has been providing protection and lifesaving assistance to refugees since the 1960s. During the 1990s major influxes were witnessed from Sudan, Somalia and Ethiopia. While returns took place as the situation improved in places of origin for Sudanese to South Sudan and Ethiopians to Ethiopia, a significant number of refugees remained and continue to be hosted in Kenya. Additionally 2011 saw an unprecedented influx of Somalis as a result of drought and insecurity in their homeland. Since the 2011 influx, humanitarian actors in Kenya have collectively spent close to $1 billion in the provision of protection and assistance to refugees and asylum seekers. The bulk of the resources was spent in Dadaab refugee camp where the number of refugees approached the half a million mark. More recently as a result of the growing influx from South Sudan and Sudan, the Kakuma programme in Turkana has been expanding, and is receiving greater donor support.

In April 2013, 555,980 refugees and asylum-seekers were being hosted in Kenya, including 357,392 in the Dadaab Complex, 147,773 in Kakuma and 50,815 in urban areas. The Government of Kenya, UN Agencies, and international and local NGOs provide protection and basic needs for this population. It was anticipated that by 2014, the population of South Sudanese refugees will grow by another 20,000. It is also expected that the number of Somali refugees, which was more than 486,000 in 2012, will continue to decline as a result of spontaneous returns. The two main countries of origin for refugees in Kenya are Somalia (77%) and South Sudan (11%). The remaining refugees originate from Ethiopia (5%), the Democratic Republic of Congo (3%), Sudan (1%), and Burundi (1%), with Rwandan, Eritrean and Ugandan nationals constituting the remaining 2%. Consequently, the refugee problem is one that Kenya cannot afford to ignore.

The refugee debate focuses on migration and forced migration. It is a discourse on human rights. It concerns duties that countries owe foreigners under international law and the rights of such persons who include refugees. The law disallows countries from excluding aliens who are seeking asylum (*non - refoulement* principle). Several International Conventions shed light on how such aliens should be treated once they are in the country that is supposed to give them surrogate protection.

As noted above, Kenya is a signatory to a host of Conventions and treaties dealing with the issue of refugee and their protection. The conventions and treaties have now been fully domesticated vide section 16 of the Refugees Act which is to the effect that every recognised refugee and every member of his family living in Kenya shall be entitled to the rights and be subject to the obligations contained in the international conventions to which Kenya is party. Further, by dint of Article 2(5) and 2(6) of the Constitution of Kenya 2010, all International Conventions that have been ratified by Kenya now form part of Kenyan law. The Constitution of Kenya 2010 also offers a number of protections to refugees vide Chapter IV which guarantees the fundamental rights and freedoms of the individual.

Refugees have thus been part of Kenya from as long as Kenya has been an independent State, that is from as far back as 1963.The reason for this is pegged on the fact that Kenya plays an

important role as a refugee receiving country, due to its relative political stability and geostrategic position of being surrounded by countries with unstable and repressive regimes. The fact that refugees have been within the Republic of Kenya has resulted in the government moving a step forward and creating a law for governing refugees' activities.

In addition to this, the law provides a guide on how refugees should be handled by the Kenyan government while they continue to be hosted within its borders. This project paper therefore sets out to examine the dynamism of Kenya refugee law in the face of refugee crisis in the period 1991 to 2016. To do this, this project paper had to answer several related questions. These questions were anchored on the refugee crisis, genesis and formulation of Kenya's refugee law, the implementation of the law, the challenges facing the implementation of the law and the impact of the law. These questions were only answered through a thorough analysis of Kenya's refugee's law.

1.4 Research Questions

This study was guided by the following research questions.

1. What is the link between refugee crisis and formulation of refugee law in Kenya?
2. How has the Kenya's refugee law been implemented?
3. What are some of the challenges associated with the implementation of Kenya refugee law?
4. What has been the impact of Kenya refugee law?

1.5 Research Objectives

The overall objective of this study is to examine the refugee crisis, the formulation and impact of Kenya refugee law.

Specific objectives for this study are:

1. To examine the linkage between refugee crisis and the genesis of Kenya refugee law.
2. To examine the implementation of Kenya refuge law.
3. To examine the impact of Kenya refugee law.

1.6 Justification of the Study

This study is crucial as it will identify the reasons behind the formulation, implementation and impact of Kenya refuge law. Today, refugee law issues are conflated more extensively than ever before with issues of migration. In addition, security issues have a greater impact upon States' policies as to whom to admit and under what conditions, thereby affecting national refugee legislation and the actual protection provided to refugees. In exploring the theme of the interplay between UNHCR's autonomy and the authority granted to UNHCR by States, the project paper may assist in providing insights into how UNHCR can further strengthen and expand its role within the political context in which UNHCR currently operates.

Indeed, there have been a number of writings on the refugee situation in Kenya, but very few have tackled the thinking behind the Kenya refugee law. This makes this study important in that it examines at the refugee situation in Kenya from the perspective of law. This project paper will also analyze the application of 1951 principle in Kenya and whether Kenyan Law and jurisprudence contributes to academia and allow for research on new concepts that may have not been addressed. Therefore, the project paper will introduce new concepts that will be beneficial to scholars and allow for further development refugee law based on the current application of the principle international community.

1.7 Scope and Limitations

The scope of this study was limited to refugee crisis, Kenya refugee law, and its application and impact. The scope of the study spans the period from 1991 to 2016. The year 1991 witnessed political instability as a result of civil wars in Ethiopia, Sudan, and Somalia, leading to massive influx of refugees into Kenya. The escalation of refugee influx led to the establishment of Kakuma and Dadaab refugee camps that year. The year 2016, is significant, it was during this year that the Government of Kenya threatened to close Dadaab refugee camp. This threat was issued despite Kenya's commitments as a signatory to conventions protecting refugees.

1.8 Literature Review

The literature in this study considers two levels, namely the broad and specific approaches to the subject matter. At the broad level, a review will be done on literature dealing with international

refugee protection generally, addressing the historical evolution, development and the relevant debates. This will facilitate the laying of a framework of understanding the linkage between previous historical practices that were largely based on humanitarian grounds, and the modern Kenya refugee law that involves use of legal instruments to manage refugee affairs. This literature is useful for this study because it provides a historical conceptualization of the Kenya refugee law, its implementation, implementation challenges and impact.

1.8.1 Literature on Global Refugees Issues

Laura Barnett argues that since the Treaty of Westphalia in 1648 the refugee regime has evolved with our modern state system, reflecting changes in international law, politics, economics and ideology.[21] Responding to a history of religious and political persecutions, a comprehensive refugee regime finally emerged under the League of Nations after World War I. The article further says that this regime underwent dramatic change during World War II to create a permanent framework to cope with the refugee problem through the United Nations High Commissioner for Refugees and the UN Convention Relating to the Status of Refugees. The Cold War had an overwhelming influence on the norms and rules of this regime, and in the post-Cold War era the regime has struggled to reflect and adapt to emerging global concerns — from internally displaced persons to gender and race distributional issues. As UNHCR is forced to reconsider its definitions, laws, and policies, the larger evolving regime must give way to a form of global governance in which the international authority of the UN body has more meaningful influence on the implementation of national law and policy. This article is an important background study on the formulation of refugee law in Kenya.

B S. Chimni provides a historical review of the legislative framework influencing refugee law, both at the international and regional level. He contends that the initiative to define the concept of refugees in a manner consistent with the ideology of the more powerful states set the stage for the development of contemporary international refugee law.[22] Chimni's observations are deemed instrumental to this study as they provide a basis for analyzing the refugee definition as

[21] Laura Barnett, "Global Governance and the Evolution of the International Refugee Regime", *International Journal of Refugee Law*, Volume 14, Issue 3, 1 April 2002, pp. 238–262.
[22] B.S Chimni, *International Refugee Law, A Reader,* London: Sage Publications, 2000].

enshrined in the Kenya refugee law. It helps determine whether the law gives clear guidance on its interpretation and whether provision has been made to ensure consistent application alongside definitions in other statutes, including the Constitution of Kenya.

Ivor C. Jackson, while looking at different refugee definitions highlights the fact that individual determination differs from group determination.[23] Each guarantees different rights to persons concerned, thus the need for stakeholders to differentiate. This literature adds to the evaluation of the refugee definition under the Kenya refugee law, and supports the study analysis as to whether the law sets out the requisite elements necessary for the consideration of either criterion.

Guy S. Goodwin-Gill reviews the principle of *non-refoulement,* highlighting its historical evolution, its scope and legislative relevance.[24] He relates the principle to specific issues, like admission and non-rejection of asylum seekers at the frontier. His debate concludes with the debates emanating from state views and state practice as regards *non-refoulement.* In his perception, states remain divided over the acceptance of the principle of *non-refoulement* as a rule of *jus cogens* despite their concurrence to international instruments prohibiting such acts. Two views dominate, on the one hand are states that opine that there should be no excuse whatsoever for refusing asylum, while others express that *refoulement* could be the only way out in the current international environment, where the concept of burden-sharing seems illusive. To the latter, such states should not be deemed at fault, 'since the responsibility for ensuring the conditions necessary for observance of the *non-refoulement* rested with the international community as a whole.' In conclusion, Goodwin observes that it is the State that retains the choice of means as to the methods of implementation of its international obligations, and that application of different procedures and standards will not necessarily result in the breach of international obligations. This material also provides important background information for this study.

In another article, Goodwin-Gill, argues that despite nearly 100 years of international organization and practice, international refugee law is confronted today with the critical

[23]Ivor C. Jackson, *The Refugee Concept in Group Situations,* The Hague: Martinus Nijhoff Publishers, 1999.
[24] Guy S. Goodwin-Gill, *The Refugee in International Law,* Oxford: Oxford University Press, 1998.

challenges of globalization, securitization and an increasingly mobile world.[25] Large-scale movements have exposed serious cracks in the European project; the EU's stated policy goal seems simply to keep refugees away. Elsewhere, numerous refugee situations are protracted while persistent underdevelopment continues to drive the movement of people between States, in a context in which States appear unable to manage irregular migration. If a generous asylum policy is in practice, contingent on well-controlled external borders, can the basic rules of protection survive? Or are asylum and the principle of non-return to persecution (*non-refoulement*) at risk in a new international legal order? These issues as raised by the author are important contribution to the understanding of Kenya refugee law.

James C. Hathaway asks the question, Who Should Watch over Refugee Law? He answers this question by looking at the theoretical basis for refugee protection.[26] He critiques the assumption that an enhanced oversight of the Refugee Convention is what is needed to ensure international commitment to refugee law. He calls attention to the successes and failures of the six major UN treaty bodies as a reference both for and against particular modes of oversight. Hathaway proposes the adoption of a process to oversee the Refugee Convention through an independent supervisory body. This discussion introduces a global perspective in this area and helps in the understanding of Kenya refugee law.

Olker Turk and Madeline Garlick, in their article, argue that with today's movements of asylum seekers, refugees, and migrants presenting significant challenges in many countries and regions, reinforced international cooperation and responsibility-sharing is urgently needed among States.[27] This article examines the principles underlying cooperation among States in international law and in international refugee law in particular. It describes key historical situations in which States have worked together, including with UNHCR's support and facilitation, to develop and implement cooperative responses to refugee movements, including large-scale arrivals. It argues for a new framework, as proposed by the UN Secretary-General, in

[25] Guy S. Goodwin-Gill, International Refugee Law: Where it comes from, and where it's going..., *International Journal of Legal Information* 45.1, 2017, pp. 24–27.
[26] James C. Hathaway, "Who should Watch Over Refugee Law*"?, Forced Migration Review*, Vol 14, 2002.
[27] Volker Turk and Madeline Garlick, "From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees", *International Journal of Refugee Law*, Volume 28, Issue 4, 1 December 2016, pp. 656–678.

the form of a Global Compact on Refugees, to ensure more effective responsibility-sharing in response to significant refugee movements, including a commitment to implement comprehensive responses from the outset of a displacement situation. Elaborating on the key elements that this framework would comprise, the article maintains that recent dynamics create not only strong imperatives, but also potentially important opportunities, to take forward action in this area.

In another article Turk, considers the different approaches undertaken by states in defining their refugee obligations. He contends that, "while some regions have applied a refined treaty-based refugee definition to include all victims of conflict and upheaval, others have not. Instead, they rely on national laws or discretionary ad hoc arrangements, such as temporary protection in situations of large refugee influx". Additionally, Turk, touches on the issue of disparities between the responsibilities of UNHCR and the often limited, legally formalized obligations of states that inhibit effective intervention by UNHCR. In conclusion, the author recommends a multilateral framework and dialogue, based on consensus, which he sees as a predictable and foreseeable system that can allow responsibility-sharing. Based on the two articles, this study looks at instances for formulating such a law that would ensure standard setting in the application of refugee law and consider monitoring and enforcing compliance under the international refugee regime.

Thomas Gammeltoft – Hansen argues that international refugee law is seen by many as constitutive for national refugee policy.[28] Yet, as asylum has become politicized, many countries have adopted procedural and physical deterrence mechanisms to prevent refugees from accessing protection. The article examines these policies, as well as the legal responses to them, as a critical case study for understanding the relationship between international law and refugee policy. Based on a theoretical triangulation of the dominant accounts of the interplay between international law and politics within liberal, realist and critical legal studies scholarship, the article argues that the two should rather be seen in a dialectic process of co-evolution. This speaks both to the continued power of international refugee law, but also to the instrumentalist approach of certain states trying to contest or circumvent their international legal commitments.

[28] Thomas Gammeltoft – Hansen, "International Refugee Law and Refugee Policy: The Case of Deterrence Policies", *Journal of Refugee Studies*, Volume 27, Issue 4, 1 December 2014, pp. 574–595.

This article helps in understanding the genesis of Kenya refugees hence it forms important background information.

Corinne Lewis, argues that *UNHCR and international refugee law* should be of particular interest to refugee lawyers as well as academics and students of refugee law and international law, and anyone concerned with the important role that UNHCR plays in the protection of refugees today.[29]This book charts the significant evolution that has occurred in the organization's role throughout the last sixty years, looking at both the formal means by which UNHCR's mandate may be modified, and the techniques UNHCR has used to facilitate the changes in its role, thereby revealing a significant evolution in the organisation's role since the onset of the crisis in refugee protection in the 1980's. This book is yet important background information for this study.

In his study on refugees in Africa, Jeff Crisp provides a detailed research on the trends and challenges affecting refugee protection in Africa. Some of the challenges highlighted by the author in the year 2000 still hold true today.[30] One such challenge is the issue of local integration that still lacks tangible steps to address the same. A common characteristic of many protracted refugee situations in Africa is the inability of exiled populations to access basic human rights- including rights under the 1951 Convention. Africa's long-term refugees have been provided with a very conditional form of asylum. They are generally (but not always) spared the threat of refoulement. But the right to life has been bought at the cost of almost every other right. In a study on the living conditions of refugees in Kampala and Nairobi, Human Rights Watch14 observes that tens of thousands of refugees from Ethiopia, the Democratic Republic of Congo, Rwanda, Somalia, Sudan and elsewhere live in dire conditions. They struggle for survival without the legal status or networks of friends and family that citizens have. Some are forced to sleep on the streets, leaving them vulnerable to incidents of insecurity, with neither food nor access to medical attention. The refugees are subjected to harassment, extortion and arbitrary arrest and detention ranging from ordinary criminals, law enforcers or agents from refugees'

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[29]Corinne Lewis, *UNHCR and International Refugee law: From Treaties to Innovation,* London: Routledge, 2012.
[30]Jeff Crisp, *Africa's refugees: Patterns, problems and policy challenges,* Evaluation and Policy Analysis Unit, UNHCR Working Paper no. 28, August 2000.

home countries. The procedures for registration and status determination are fraught with delay and occasional bias. The researchers lament that there is little incentive to address their needs because the governments have policies requiring refugees to reside in designated locations, resulting in neglect of refugees in urban center. This study gives important material on this present investigation.

Gil Loescher and James Milner while addressing the correlation between the assumption that refugees are indeed a cause of insecurity, hence the need to deter their movements, observe that protracted refugee populations not only constitute over 70 per cent of the world's refugees, but are also a principal source of many of the irregular movements of people around the world today.[31] In response, host governments have enacted policies of containing refugees in isolated and insecure camps, have prevented the arrival of additional refugees and, in extreme cases, have engaged in forcible repatriation. Although, this study does not discuss the case of Kenya, it is still a valuable for it provides important background and historical information.

1.8.2 Literature on Refugees in Kenya

Fred Nyongesa Ikanda's Deteriorating Conditions of Hosting Refugees: a Case Study of the Dadaab Complex in Kenya describes the deteriorating conditions of hosting refugees at Dadaab refugee camp. He shows that this camp has been hosting refugees in the semi-arid northeastern part of Kenya since 1991.[32] The study has established that the institution of asylum has seriously deteriorated in Kenya due to various factors. Socially, the insecurity associated with the refugees, the general poverty of the locals that makes them perceive refugees as leading better social lives, and the protracted refugee situation that has resulted in hosting fatigue have all contributed to the locals' negative perception of the refugees. Competition for the meager natural resources at Dadaab has also played a key role in influencing the negative local perception of the refugees. The perception that refugees are better off economically than their hosts also appears to have contributed to the deteriorating attitudes of locals toward refugees. Most sentiments expressed by locals pertaining to the "better" economic status of refugees are actually inaccurate. The reality

[31]Gil Loescher and James Milner, *Protracted Refugee Situations: Domestic and International Security Implication,* New York , Routledge, 2005.
[32]Fred Nyongesa Ikanda, "Deteriorating Conditions of Hosting Refugees: a Case Study of the Dadaab Complex in Kenya", *African Study Monographs*, 29(1) March 2008, pp. 29-49.

at Dadaab is that the majority of the refugees are generally poor since only a tiny percentage of refugees are entrepreneurs. This is illustrated by the sentiments of a Somali refugee leader who argued that it is actually the refugees' deprivation that has made their children malnourished and has often forced them to put their lives at risk by venturing into the *shifta*-occupied forests to look for firewood and construction poles. In addition, the fact that some refugees at Dadaab have fraudulently acquired Kenyan identity cards and others are still striving to obtain them clearly demonstrates the fact that the refugees at Dadaab are not satisfied with their status. Competition in business, although important, appears to be insignificant in shaping local attitudes toward refugees at Dadaab, as most locals were not opposed to refugee engagement in trade. Although this study discusses refugee crisis in Kenya, it does not examine Kenya refugee law.

Vincent O. Akuka's study asserts that the disintegration of the Soviet Union and the subsequent end of the Cold War introduced a new world order with its own problems and complexities.[33] He asserts that many approaches of solving global problems that had been modeled along the Cold War framework have faced new challenges some of which they cannot address adequately. Their tenability is now under question and scrutiny. The author argues that in the new millennium, there is need to re-think some of these traditional approaches with a view to making them relevant for solving modern problems. One of these areas that need to be revisited and reviewed is the international humanitarian assistance to refugees. The traditional approach of relying on the UNHCR and other donor agencies has not only become expensive over the years but has also tired the international community which has continuously shouldered the burden of states of origin that failed in their duty of protecting their citizens. There is a need to revise the humanitarian assistance to refugees with an aim of making it more proactive and also making it more inclined to integrating the community where the refugees are settled.

Importantly, the study investigates the challenges facing the humanitarian assistance to refugees in the Horn of Africa in the post-Cold War era. The Horn of Africa has over the years been synonymous with refugees. In the 1990s, it exhibited various complexities of refugeehood. These included continued population displacement both within states and across international borders,

[33] Vincent O. Akuka, "African Refugee Problem: A case study of UNHCR'S Assistance to Refugees in the Horn of Africa", Master of Arts Thesis, University of Nairobi, 2002.

life in exile for hundred thousands of refugees, and, prospects of repatriation. The study also examines how the humanitarian assistance to refugees deals with all these phenomena. An attempt is made to identify and highlight the loopholes and weaknesses facing the humanitarian assistance programs. Finally, the study makes a case for the need to make humanitarian assistance programs to be more holistic and inclusive. Thus, the agencies providing humanitarian assistance programs ought to work closely with the UNHCR in its duty of assisting refugees. This study though important, does not tackle the Kenya refugee law.

Jackline Nganga in her thesis titled National Security and Legal Protection of Refugees in Horn of Africa: A Case Study of Kenya's Dadaab Refugee Camp, analyses the refugee protection in Kenya and the efforts the government and the international community have made to protect and repatriate refugees.[34] The work examined the domestic and international legal framework on refugee law and protection vis-a-vis what happens in Kenya. It discussed the extent of implementation and the existing protection gaps in regards to the legal protection and where Kenya is in terms of its international obligation to protect. The work asserts that the government of Kenya policy to restrict refugees in camps has violated rights of refugees guaranteed under the Geneva and Human Right Conventions. It has placed an "encampment policy" whereby refugees are obliged to reside in camps to qualify for assistance, and those found outside are classified as illegal aliens and subject to punishment including deportation. Most importantly the treatment offered contradicts the human right obligations of the government. In light of these restrictions, the rights of refugees in camps are grossly violated and this section is dedicated to the general description of refugee policy in Kenya in connection with the standard of treatment offered in Dadaab camp.

The work further claims that the legalization of encampment policy has grossly restrained list of rights including the conventional ones. The policy has created a situation where there is limited physical security, limited freedom of movement, limited or no ability to work, limited legal rights and lack of status, and so on. Practically the extension of rights to refugees in Kenya is not in the first instance intended to promote a permanent solution. The government seems to have

[34] Jackline Nganga, "National Security and Legal Protection of Refugees in Horn of Africa: A Case Study of Kenya's Dadaab Refugee Camp", Master of Arts Research Paper, University of Nairobi, 2016.

provided certain rights as an interim and with the hope that refugees would return to their country of origin after a certain period of time. According to the work, most of fundamental rights have been suspended or denied. It has been argued that refugees' right to life has been bought at the expense of almost every other right, in which states have only accepted the obligation of providing. This has been the case in Kenya since 1991 and there is no indication for improvement. This work though important makes sweeping statement with enough evidence and it does not deal directly with the question of Kenya refugee law. Elizabeth H. Campbell, work on Urban Refugees in Nairobi: Problems of Protection, Mechanisms of Survival, and Possibilities for Integration, examines the legal status and economic livelihoods of refugees in Nairobi, focusing on Somalis, the largest urban population residing in the city.[35] The author claims that the results of the study challenge the Government of Kenya's (GOK) official position and the popular local perception that refugees are an economic burden, and show instead that these urban refugees are economically self-sufficient. Despite this economic independence, conditions for most refugees in Nairobi are extremely difficult. Urban refugees live largely without material assistance or legal protection from the GOK or UNHCR, are vulnerable to police arrest at any time and face high levels of xenophobia from the local population.

This work though important to this study unnecessarily blames the GOK without giving evidence. Further the work does not tackle the Kenya refugee law. Sharon Chepkirui Kitur, in her study on Refugees a Threat to National Security: Case Study Kenya, argues that the principle of *non-refoulement* which entails a state's duty and responsibility not to return a person to place of persecution was found to be violated when the state claims that its national security was under threat.[36] The study further looks into the issue of refugees and national security strategy in Kenya by examining Kenya's domestic laws governing admission of asylum seekers. The study argues that such laws require Kenya to protect asylum seekers and exclude individuals that have committed crimes against peace, war crimes or crimes against humanity.

[35] Elizabeth H. Campbell, "Urban Refugees in Nairobi: Problems of Protection, Mechanisms of Survival, and Possibilities for Integration", *Journal of Refugee Studies*, Volume 19, Issue 3, 1 September 2006, pp. 396–413.
[36] Sharon Chepkirui Kitur, Refugees a Threat to National Security: Case Study Kenya, BA Dissertation, Strathmore University, 2016.

In accessing Kenya's national security strategy, the study examines the government's national security strategy in relation to refugee influx and if such a strategy violated the principle of *non-refoulement* or whether the asylum seekers are a threat to Kenya's national security while pretending to be in need of international protection. The study argues that some asylum seekers were economic migrants and were a threat to Kenya's human security. Although this study tackles various aspect of Kenya law it does not specifically address the present question. Dolu Nyaoro's, Policing with Prejudice: How policing exacerbates poverty among urban refugees, examines how policing of vulnerable social groups such as refugees impacts on their livelihood strategies in their host countries. The research argues that inadequate legal frameworks, hostile host communities and unfriendly policing exacerbate the plight of poor urban refugees in a number of ways. First, poor urban refugees' rights of movement and association can be highly circumscribed by police thereby preventing them from accessing basic needs.

Secondly, refugees are an easy target of extortion from corrupt police officers who either collect money themselves or fail to stop individuals who run such rackets. Thirdly, use of excessive violence during police raids not only causes physical harm necessitating medical attention, but also reinforces the fear urban refugees have in venturing into the streets of their livelihoods. Finally, the destruction or confiscation of identity documents causes great inconvenience to poor urban migrants and their families by preventing them from accessing remittances and services that require identification. Again this work does not tackle the question on Kenya refugee law. Guglielmo Verdirame's, Human Rights and Refugees: The Case of Kenya deals with some human rights aspects related to the treatment of refugees in Kenya.[37] After giving a brief background on refugee policy developments in Kenya, the paper presents some observations on the situation of refugees living in camps, particularly in Kakuma refugee camp in the northwest of the country. It highlights some of the human rights problems that refugees have to face in this camp, and stresses the fact that camps are legal anomalies, in which the administration of justice is virtually in the hands of the humanitarian agencies that exercise this function either directly, or by delegating it to community leaders. After looking at an example of a human rights violation carried out with at least the complicity of humanitarian organizations—the forcible relocation of

[37]Guglielmo Verdirame, Human Rights and Refugees: The Case of Kenya1.*Journal of Refugee Studies*, 12(1), 1999, pp. 54-77.

refugees from the camps in Mombasa—the paper finally sketches some of the more classic human rights issues that present themselves with respect to refugees living in Nairobi; police harassment, arbitrary arrest and detention without trial. This paper tackles one aspect that may have influenced Kenya refugee law, but it is not holistic in its approach.

Evelyn Martha Kiswii asserts that there are groups of criminals that take full advantage of refugee influxes to trade in small arms and hide amongst refugees to camouflage their activities.[38] To their advantage are the large numbers of the refugees that makes them difficult to be noticed. These groups are the ones that make refugees get mistaken for the rising insecurity. Refugees have been blamed for insecurity in Kenya because, the country of origin of most refugees, particularly Somali which has had civil war for decades. The protracted instability has caused internationalization of conflicts or spillover of effects into Kenya. This assumption has drawn reactions from the country's security team. They have severally attacked the refugee community due to the suspicion that, they are behind these activities. This way of making an issue a security issue is what the Copenhagen school describes as securitizing an issue. In the case of Kenya, refugee issues have been securitized, as the study agues.

The study has also established that small arms and light weapons are sold across the borders and not by the refugees as assumed. There are illegal markets in the neighbouring countries near the Kenyan borders where criminals or citizens can easily access them into the country, for the purpose of trading in them, committing crime or protecting themselves. The whole of the Northeastern Kenya province is plagued by insecurity that is attributed internally to; banditry, illicit firearms, cattle rustling and inter - clan conflict, poverty and poor governance and externally to; foreign militias and rebels. Refugees are just a group of vulnerable people who need protection. When the criminal groups hide amongst them, the refugees' lives are put at risk and cannot report them to the authorities. Many times we have had the criminal activities targeted at the camps, killing and injuring the helpless refugees. They too need to be protected by the government both inside and outside of the camps. This paper though essential for this study deals with refugee and security and not refugee law.

[38] Evelyn Martha Kiswii, "Refugee Influx and (In) Security: Kenya's Experiences, 1991 -2012", Master of Project Paper, University of Nairobi, 2013.

Titus Waweru Ranja, explores whether or not Kenya complies with the principle of non refoulement taking into consideration it is a signatory to various instruments that provide for it and further, the fact that it has established the principle through Section 18 of the Refugee Act.[39]The paper begins by discussing the principle of *non-refoulement* by looking at the various international instruments within which it is codified. It was established that the principle is primarily established in the Refugee Convention, commonly known as the Convention Relating to the Status of Refugees which was ratified in 1951 and the 1967 Protocol Relating to the Status of Refugees. The paper goes ahead to look at the scope of application of the principle and has shown that the principle is applicable to asylum seekers, refugees and other persons whose status is yet to be determined. The exceptions to the principle were highlighted and observed to fall within two categories the first is national security and the second, public order. In as much as there exist exceptions to the principle of *non - refoulement*, it has been established that Article 33(2) and Article 33(3) provide that the decision to expel shall only be arrived at by a duly competent body, in most instances it is the Court of law that makes an extradition order or the relevant department in charge of refugee affairs in a country. Further, in the event that an extradition order has been granted the refugee or asylum seeker as the case may be should be granted reasonable time to seek admission into a third state.

The paper also establishes that in the event that a state has failed to ratify or be a signatory to the conventions that establish the principle, the state under international law has obligations to respect and comply with the principle of *non - refoulement* by the mere fact that the principle has achieved the status of a customary international law and more to that, the principle is a peremptory norm of *jus cogens* application. To this end therefore, every state is obligated to comply with the principle. Finally, the project paper discusses the Kenyan law through the enactment of the Refugee Act. It shows that the act has assisted in the development of the principle of *non-Refoulement*. The Refugee Act provides that asylum seekers that wish to enter Kenya can claim *non - Refoulement* protection under the Kenyan law. The principle of *non – Refoulement*under Article 33 was prepared with its scope of application limited to those that

[39]Titus Waweru Ranja, “The Kenyan Law on Refugees and its Compliance with the Principle of Non Refoulement”, Master of Arts Project Paper, University of Nairobi, 2015.

were to be removed from a state not those that sought entry into it. Although, this project paper is similar to the present study, it concentrates on only one aspect of the Kenya refugee law.

1.9 Conceptual Framework

This research transcends a number of theories whose jurisprudence informs the essence of refugee law, including, the need to consider states' legitimate interests and security, the need to respect refugee rights as human rights, and the need to ensure that the different systems in refugee management operate in tandem for the greater good of the whole system. Conventional theories like realism theory assume the state is the primary unit of study and the defining concept of security in either external or outwardly directed terms. This involves a focus on the threats that originate from the outside rather than those generated inside the state. Mohammed Ayoob has developed a wider definition of security that goes on to encompass both internal and external dimensions.[40] Ayoob starts with the ordinary definition of national security that is derived from Walter Lipmann and other authors, which according to them a nation is secure when it is able to protect its vital national interests and core national values. A nation' national values do not have to be limited to traditional security concerns, for instance the maintenance of territorial integrity and independence, but can go on to encompass concerns regarding the safety and wellbeing of individual citizens in addition to the preservation of cultural values such as democracy and tolerance.

Ayoob highlights two overarching factors that to a great extent are also the drivers of his theory. He notes that third world countries are in their early stages in nation development and have are just beginning on the process of state and nation building. It is to be noted that this is a long and ferocious process requiring countries to do away with all internal plaintiffs to authority and to build a common sense of identity and dependability among their populations. This is a process that has taken centuries to complete in the West and third world nations find themselves under immense pressure to accomplish this same process in a few decades. Secondly third world countries have only in the recent past been acknowledged as full members of the international system of judicially sovereign nations with many of them having joined the system of states by

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[40] Mohammed Ayoob, "Inequality and Theorizing in International Relations: The Case for Subaltern Realism", International Studies Review, Vol. 4, No. 3, 2002, 27-48.

the mere fact of achieving independence in the post second world war period. The two factors as such define the central driving forces of the security quandary they face. Therefore as latecomers to the process of state building third world countries are ineffective, weak and vulnerable. Ayoob further highlights the norms and principles that emanate from the established order. Yet, since these principles have been defined by the developed countries, when applied to third world countries can be destabilizing and aggravate the security predicaments already prevalent.[41]

In modern-day terms both democracy and the human rights agenda and can be principally destructive and obscures their efforts at state building. They also contribute to internal dissatisfaction by augmenting internal groups' dissatisfaction by among others fashioning demands that these vulnerable and weak states cannot fulfill. Western concepts of a civilized state behavior, including those concerning human rights, often contradict Third world countries efforts when it comes to state making. This is because they are forced to sanction and frequently use violence against rowdy domestic groups and individual citizens. Because of these in -house weaknesses third world countries are highly vulnerable to external pressures, military, political, technological or economic and from transnational actors, including irredentist groups, multinational corporations, and supranational movements.[42]

From the theory of third world insecurity, it is clear that third world countries such as Kenya are faced with a huge predicament when it comes to securing its national interest and peace from both outside and inside forces. From the theory Kenya, a third world nation is a latecomer to the process of state building hence its security systems are weak, ineffective to some extent, and vulnerable considering how easy it has been for militants to smuggle in small arms and weapons. As Kenya slowly integrates in the international community, it has found itself between a rock and a hard place in maintaining its international obligations to host refugees and at the same time dealing with the security threats posed by the same. In this case, while the Kenya government is pre-occupied with issues of national security and control of migration flows into the country defined as Kenya's national interests, the handling of these interests impacts other obligations, including its international obligations towards refugee protection. Encapsulated in the research

[41]Mohammed Ayoob, *op.cit,* p. 31.
[42]*Ibid.*

problem statement is the dilemma faced by most states when considering the balance between legitimate state interests and the protection of rights and needs of refugees, without doing unnecessary harm to either. Despite States' recognition of the important role played by the 1951 Convention and its 1967 Protocol as landmark legal instruments in the setting of standards for the treatment of refugees globally, the degree of their implementation remains unsatisfactory. Consequently, this theory will therefore among others also guide the study in highlighting why Kenya refugee law was formulated and how it has been implemented so as to deal with external pressures and more from transnational actors such as refugees.

1.10 Research Hypotheses

This research was guided by the following hypotheses,

1. The formulation of refugee law was due to refugee crisis in Kenya.
2. Kenya has used the disciplined forces to implement refugee law.
3. The implementation of refugee law has led to the violation of refugee rights in Kenya.

1.11 Research Methodology

This project paper seeks to address the extent of the legislative framework for refugees in Kenya, that is, the Kenya Refugee Act 2006 and other instruments. The study seeks to elicit the opinions and views of different stakeholders as regards the impact of the enactment of the Kenya refugee law and the value added to refugee affairs in the country. In this regard, this project paper primarily relied on collection of data to assist in analysis of the of Kenya refugee law. Indeed, the primary focus of this study was Kenya and data was collected from various sources that have had an opportunity to deal with refugee affairs and the law relating to them.

First the project paper relied on secondary data collection. The secondary data was collected through reading of various journals, books, project papers and articles (both scholarly and newspapers) on refugee affairs. Secondly the study utilized primary written documents. These included United Nations Publications, Human Rights Reports, International Conventions and decided cases touching on the issues relating to the principle of *non-Refoulement*. Information obtained from these written documents provided directions for conceptualizing the refugee

concerns in Kenya's legislative framework and gave guidance on the way forward in the implementation and impact of refugee law in Kenya.

Gaps in the literature from written sources were filled by primary sources by way of oral interviews. Consequently, this research utilized primary data. Respondents were identified using purposive and snowballing sampling methods. By this method the study selected a sample from the participants or group of participants that are judged to be appropriate or especially informative for the purpose of the research. For the purposes of this study, could only be accurately evaluated if the sample was purposively selected. At each level of purposive sampling, the critical sample size was obtained by the snowball sampling method.

The basis for use of primary data was the need to obtain first-hand relevant information and perceptions regarding the Kenya refugee law, which is relatively new in Kenya. Interviews with both stakeholders in refugee management in Kenya, and refugees as persons affected by the legislative framework are carried out. In this regard face-to-face interviews were conducted on people in order to ensure representation of a cross-section of the key refugee stakeholders in the country. Notes were taken and were later transcribed to form memos for writing. Prior to the actual data collection process, a pilot study was conducted with the interviewer developing a set of questions that were shared with UNHCR Officers for their opinion in relation to the relevance and quality of the questions asked. The Officers guided the interviewer in reviewing the question structure and making it more open-ended in order to obtain more of the interviewees' opinions rather than being specifically restricted to only one issue. The types of questions ensued from the statement of the problem and the research objectives of this study. A total of twenty two face-to-face interviews were conducted. These included interviews with officials at the department of refugee affairs, UNHCR Officers, Judicial officers and law enforcers (the Kenya police) are directly responsible for interpreting the law as relates to one's presence in the country. Obtaining the opinions, experiences and suggestions of the judicial officers was therefore deemed invaluable in analyzing the application of the law and also helpful in shaping the way forward in terms of recommendations. A structured interview with both open and close-ended questions was therefore necessary for this purpose. The NGO representative and UNHCR officers were also

interviewed to obtain information about their experiences both at the time when there was no specific law on refugees and the status after the enactment of the Refugee Act 2006.

Content analysis was the method used to analyse the information collected through open- ended questions. In this regard, the key elements in the information given by the persons interviewed were transformed into units that facilitated their description and analysis. The answers were codified according to the most common responses provided and later classified accordingly into answer categories. This method was very useful to infer objectives and reliable statements based on the data provided by the interviews and based on the context in which they were made. Information obtained therefore provided directions for conceptualizing the refugee law in Kenya.

CHAPTER TWO
HISTORY OF REFUGEE LAW IN KENYA

2. 1 Introduction

Since its establishment in January 1951, the United Nations High Commissioner for Refugees (UNHCR) has played a unique and pivotal role related to international refugee law. The chapter examines those roles and the approaches adopted by UNHCR to strengthen its role since the onset of the crisis in refugee protection in the 1980's. UNHCR's creation of doctrinal positions, that is, the organisation's written views of what refugee law should be, are featured as a crucial means employed by UNHCR to further the elaboration of the refugee law framework. UNHCR's innovative approaches related to States' accession, implementation, and application of international standards for the protection of refugees, such as capacity-building, are highlighted as means to enhance the effectiveness of international refugee law.

Consequently, this chapter provides a historical background of the refugee regime, tracing it through the temporary juridical and social phases that emerged towards the end of the First World War, followed by signs of a more permanent, individualistic approach introduced between 1939 and 1951. The chapter examines the salient features of the 1951 Convention and its 1967 Protocol that were introduced during the latter phase of the refugee evolution. The geographical and time limitations imposed by the 1951 Convention and failure by the 1967 Protocol to amend the definition of a “refugee”, compelled states in Africa, Latin America, Europe and Asia to adopt specific frameworks relevant to the causes of refugee movements in their respective regions. The chapter reviews the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and highlights the value-added by this Treaty. The chapter concludes by looking at the formulation of refugee law in Kenya up to 1991.

2.2 Historical Approaches to the Refugee Definition

The United Nations High Commissioner for Refugees was not the first international organization with responsibilities for refugees. Beginning with the time of the League of Nations, there was a succession of refugee organizations created to deal with groups of refugees. These organizations are presented as the precursors to UNHCR in refugee law texts, treatises on refugee law, and

UNHCR's training manual on international protection. Such organisation's and refugee law did not just coexist; refugee law was the centerpiece for the work of nearly all of UNHCR's predecessors.

2.2.1 Historical Foundations

The plight of persons fleeing their homelands to seek protection in other lands is as old as persecution itself. Originally, when a person left his/her country and sought asylum in another country, it was up to the authorities in the country of asylum to decide whether the individual would receive protection and not be expelled. Since the sovereign was generally the source of law, s/he was the ultimate arbiter of how the individual would be treated and what rights would be accorded. Collective action by States to confront the problem of forced migration did not occur until the formation of the League of Nations in 1919 following the end of the First World War. The League served as an international forum in which States could pursue cooperation not only in the political sphere to prevent wars and ensure peace, but also in the areas of social and economic matters.[43]

The displacement of about 1.5 million Russians, as a consequence of the 1917 Bolshevik revolution, civil war, and the 1921 Russian famine, served as the catalyst for collective State interest in the creation of the first international office for refugees. The lack of clarity as to which state was responsible for these persons, many of whom required material assistance and lacked a recognized identity document, and their movement among countries, in some cases as a result of their expulsion by a country, created tensions among European States.

Therefore, in 1921, the League of Nations created the office of the High Commissioner for Russian Refugees and appointed Dr. Fridtjof Nansen as the first High Commissioner. Initially, his responsibilities concerning the Russian refugees included defining their legal status, organizing their repatriation or allocation to various countries which might be able to receive them, assisting them with finding work, and with the assistance of aid groups, providing relief to them. In 1924 his mandate was extended to include Armenian refugees who had fled from

[43] Corinne Lewis, "UNHCR and International Refugee Law: From Treaties to Innovation", A Dissertation Submitted in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy in Law of the London School of Economics and Political Science, 2010, p. 34.

Turkey and then in 1928 to include Assyrian and Assyro-Chaldean and Turkish refugees. He then carried out the same responsibilities for these two groups and the term "Russian" was deleted from his title.[44]

To help curb potential abuse to the largely philanthropic system, the League of Nations developed the 1926 Arrangement for purposes of defining the persons who would qualify for the Nansen Passport. Thus under the 1926 Arrangement, a Russian refugee was defined as;

> Any person of Russian origin who does not enjoy, or ...no longer enjoys, the protection of the Government of the Union of Soviet Socialist Republics...' An Armenian refugee, on the other hand was defined as 'any person of Armenian origin, formerly a subject of the Ottoman Empire, who does not enjoy, or ... no longer enjoys, the protection of the Government of the Turkish Republic.'[45]

Following the death of the High Commissioner in 1930, the League of Nations created the Nansen International Office for Refugees to carry out the humanitarian assistance work for refugees previously handled by Nansen. The secretariat of the League of Nations assumed responsibility for the legal and protection work handled by Nansen, but in practice, it was the Nansen Office that would carry out both the humanitarian and legal protection aspects.[46]

In response to the exodus of persons from Germany, in 1933, the League of Nations created a special organization, the Office of the High Commissioner for Refugees coming from Germany, which initially was not part of the League of Nations system due to the membership of Germany in the League at the time. The office was to assist refugees from Germany in the same manner as the High Commissioner for Refugees and the Nansen Office, with the secretariat of the League, had supported other groups of refugees. In 1938, the Office of the High Commissioner for Refugees coming from Germany also became responsible for refugees fleeing Austria, but this office was liquidated, along with the Nansen Office, at the end of 1938, and replaced by a High Commissioner of the League of Nations for Refugees. Consequently, this new High

[44]Corinne Lewis, *op. cit.,* p. 35.
[45]Pirkko Kourula, *Broadening the edges: refugee definition and international protection revisited*, (The Hague: Kluwer Law International, 1997) pp.49-51.
[46] See for example, Work of the Inter-Governmental Advisory Commission for Refugees during its Eighth Session, 17 O.J.L.N. 140 (1936). The Statutes of the Nansen International Office for Refugees can be found at 12 O.J.L.N. 309-10 (1931).

Commissioner assumed responsibility for the refugees aided by the Nansen Office and the High Commissioner for Refugees coming from Germany.[47]

The organizations created by States through the League of Nations were the first international attempts by States to coordinate efforts related to refugees. However, each of the organizations mentioned above, like other entities created by the League to deal with specific refugee situations, was only given responsibility for certain nationalities of refugees. States were not yet ready to deal with refugees as an international phenomenon, but instead considered them to be discrete localized problems. The refugees' nationality and the fact that they had crossed an international border were the defining characteristics of the groups of refugees.[48]

2.2.1.1 League of Nations and Responsibilities Related to International Refugee Law

When the League of Nations appointed Nansen as the first High Commissioner in 1921, international refugee law was non-existent.[49] However, Nansen's mandate included refugee law related responsibilities. Specifically, he was to define the legal status of refugees, although his mandate did not establish how he was to do this. The problems encountered by the refugees would serve as the catalyst for Nansen's significant role in the development of international refugee law. The practical difficulties faced by the de-nationalized Russian refugees, who lacked identity or travel documents, spurred the Council to call a conference of representatives of interested governments, which met in August 1921.

A second conference was convened in September 1921, over which Dr. Nansen presided, to further discuss the problem. Dr. Nansen then consulted with the International Labour Office, legal authorities among the refugees, and a conference of private organizations and prepared specific proposals on identity papers for the refugees to be considered by governments. At an inter-governmental conference in 1922, called by Dr. Nansen, the arrangement with regard to the Issue of Certificates of Identity to Russian Refugees was adopted, which provides a common form for the identity certificate as well as conditions related to its issuance and use by a refugee. Similar concerns about the situation of Armenian refugees led the High Commissioner to

[47] Corinne Lewis, *op. cit.,* p. 37.
[48] *Ibid.*
[49] *Ibid,* p. 38.

consider, at the request of the Council of the League of Nations, the issue of identity certificates for Armenians; Dr. Nansen studied the problem and then drafted an agreement concerning identity certificates for this group of refugees. He subsequently initiated an agreement that consolidated and amended the arrangements concerning identity certificates for Russian and Armenian refugees. Other practical problems faced by the refugees resulted in the High Commissioner preparing two instruments that concerned the rights of refugees, which were adopted at an inter-governmental conference in 1928.

These arrangements concerned the personal status, legal assistance, expulsion, taxation, and identity certificates of certain groups of refugees. Despite the fact that the Nansen Office was responsible for the humanitarian rather than the legal and protection work, as noted above, it, nevertheless, was mandated to undertake a function related to the practical application by States of the arrangements instituted by the first High Commissioner. Specifically, the Nansen Office was to "facilitate within the limits of its competence, the application, in particular cases, of the arrangements that have been made for the benefit of the refugees." This included "certifying the identity and the position of the refugees", "testifying to the regularity, validity, and conformity with the previous law of their country of origin, of documents issued in such country" among other services.[50]

In addition, although not specified in its mandate, the Nansen office prepared an agreement, the first one to be legally binding on States, relating to the protection of refugees, the 1933 Convention relating to the International Status of Refugees. As for the High Commissioner's Office for Refugees coming from Germany, it was specifically instructed to convoke an intergovernmental conference in order to provide "a system of legal protection for refugees coming from Germany", which it did in the form of the 1936 Provisional Arrangement Concerning the Status of Refugees Coming from Germany, which concerned certificates of identity, and the personal status and freedom of movement of refugees, among other matters. After the drafting of the 1936 Provisional Arrangement, the Office was instructed by the Assembly of the League of Nations to obtain the accession of States to the Arrangement and "to prepare an intergovernmental conference for the adoption of an international convention on the

[50]Corinne Lewis, *op. cit.,* p. 39.

status of these refugees."[51] The result was the 1938 Convention Concerning the Status of Refugees coming from Germany that replaced the 1936 Arrangement. The 1938 Convention reiterated most of the provisions contained in the 1936 Arrangement, but also covered topics such as labour conditions, welfare and relief, and the education of refugees.[52]

As a result of the creation of a number of agreements for the protection of refugees, when the High Commissioner of the League of Nations for Refugees was appointed in 1938, following the liquidation of the office of the High Commissioner's Office for Refugees coming from Germany and the Nansen Office, the League of Nations Assembly provided it with a specific supervisory responsibility related to international refugee law agreements. The High Commissioner was to "superintend the entry into force and the application of the legal status of refugees, as defined more particularly in the Conventions of 28 October 1933 and 10 February 1938".[53] Specifically, the High Commissioner was to ensure that the 1933 Convention relating to the International Status of Refugees concerning Russian, Armenian, Assyrian, Assyro-Chaldean, Turkish and other refugees, and the 1938 Convention concerning the Status of Refugees Coming from Germany were ratified by States and applied by them within their national systems.[54]

Thus, while the first High Commissioner, Nansen, was given a general mandate for defining the legal status of refugees, the realities of the refugees' situation, in particular, the obstacles they faced, served as the catalyst for the creation of international arrangements concerning identity documents and refugees' legal status. Similarly, while nothing in its mandate provided that it should further develop legal standards for the protection of refugees; the Nansen Office prepared the first convention to be legally binding on States. In creating the High Commissioner for Refugees coming from Germany, States recognized that the protection afforded to certain groups of refugees, such as Russians, Armenians, Turkish, Assyrian, and Assyro-Chaldean refugees needed to be provided to German refugees. Therefore, the High Commissioner for Refugees coming from Germany facilitated the creation of two agreements to provide similar rights to refugees from Germany. As a result, the first High Commissioner, the Nansen Office, and the

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[51]Corinne Lewis, *op. cit.,* p. 39.

[52]Truphosa Atero Njichi, Protecting Refugees: A Critical Analysis of the Kenya Refugee Act, 2006, Master of Arts Project Paper, University of Nairobi, 2010, p. 27.

[53]*Ibid.*

[54]*Ibid,* p. 28.

High Commissioner for Refugees coming from Germany contributed to the further development of international standards for the protection of the categories of refugees who were of their concern. Their work in this area established an early precedent of involvement by refugee organizations in the development of international refugee law, which would be reflected in the mandate of the International Refugee Organization as well UNHCR's statutory mandate.[55]

Once international agreements for the protection of refugees had been created, there was a need to ensure that they were adopted and applied by States. The Nansen Office assisted in ensuring the application of such agreements in a practical manner, as most likely did the first High Commissioner. However, it was the High Commissioner of the League of Nations for Refugees that was first assigned specific responsibilities for the supervision of States' ratification and application of agreements for the protection of refugees. Therefore, the activities of this early refugee organizations as well as the mandate of the High Commissioner of the League of Nations, related to the effectiveness of agreements for the protection of refugees, helped establish a basis for the involvement of future organizations in this area, including eventually UNHCR.[56]

2.2.2 Subsequent Refugee Organisations

The forced mass emigration of Jews from Germany led the United States, which was not a member of the League of Nations, to organize a conference in 1938 of thirty-one States to discuss co-ordination of support for persons who wished to flee or already had fled Germany because of persecution. As a result, the Intergovernmental Committee on Refugees was created, in 1938, to assist Jewish persons to leave Germany and resettle in other countries, through negotiations with Germany as well as countries of resettlement, but this work was obstructed by the outbreak of the Second World War.

Renewed cooperation among States was spurred by the situation of millions of displaced persons in countries liberated by the Allies at the end of the Second World War. In 1943, forty four states established the United Nations Relief and Rehabilitation Administration to provide material

[55] Corinne Lewis, *op. cit.,* p. 42.
[56] *Ibid.*

assistance to displaced persons, who also included persons who had fled because of persecution, and to facilitate the return of displaced persons to their home countries.[57] However, UNRRA's work became increasingly difficult as a result of the political changes in Eastern Europe and the Soviet Union, which deterred many displaced persons from wanting to return. UNRRA then refused to return persons who did not wish to go back to their home countries. As a result, such persons were stuck in camps. UNRRA was faced with another significant problem. In 1945, new refugees had begun fleeing from Germany, Austria and Italy, but UNRRA's mandate provided only for support for repatriation, and therefore, the organisation could not facilitate their settlement in the country in which they had sought refuge or their resettlement in another country.[58]

States addressed the limitations in UNRRA's capacity by creating the International Refugee Organisation, as a specialized agency of the United Nations. The mandate of the IRO was "to bring about a rapid and positive solution of the problem of *bona fide* refugees and displaced persons". IRO had broad responsibilities for such persons; it was to carry out the "repatriation; the identification, registration and classification; the care and assistance; the legal and political protection; the transport; and the re-settlement as well as the re-establishment, in countries able and willing to receive them, of persons who are the concern of the Organization". The IRO even sub-let ships to transport refugees, and its annual budget was four times that of the United Nations. The IRO essentially assumed responsibility for refugees and displaced persons covered by the mandates of UNRRA and the IGCR as well as new refugees fleeing from Germany, Austria and Italy. The IRO's focus was the repatriation of persons to their home countries. Where such persons objected to their return because of persecution, reasons of a political nature, or compelling family reasons or infirmity or illness, they were to remain under the protection of the IRO and would be assisted with local settlement or resettlement in another country.[59]

2.2.3 The Need for a New Organisation

The IRO, however, was unable to arrange for the repatriation or settlement of all of the refugees and displaced persons from the Second World War due to the political changes taking place. The

[57] Gil Loescher, The *UNHCR and World Politics: A Perilous Path*,New York: Oxford University Press, 2001, p. 12.
[58]*Ibid.*
[59]Corinne Lewis, *op. cit.,* p. 45.

increasing restrictions on rights of persons in the former Soviet Union and many Eastern European countries meant that refugees from those countries were less inclined to return. Western countries also became less willing to return refugees to their home countries. The IRO estimated that upon its cessation, scheduled for 30 June 1950, there would remain approximately 292,000 persons in Europe who had not been repatriated to their home countries or resettled in third countries. These numbers were substantially augmented by the increasingly large numbers of persons who were fleeing to Western European countries from Eastern European ones as well as the refugee movements in other areas of the world, such as on the Indian subcontinent, the Korean peninsula, in China and in Palestine. Thus, given the temporary nature of the organisation and the changing political situation, it became clear that the refugee problem could not be solved entirely by the IRO.[60] As a result, there was a clear need for a new international organisation with a statutory mandate to deal with old and new refugees. In 1949, the UN Economic and Social Council adopted a resolution requesting the United Nations Secretary-General to prepare a plan for a new organisation and to propose "the nature and extent of the legal functions to be performed, taking into consideration the experience of the League of Nations, the Intergovernmental Committee on Refugees and the IRO".[61]

The UN Secretary-General, in his 1949 Report, duly took into account the experience and the mandates of the previous organisations in formulating proposals for the functions, form and financial arrangements of the future refugee organisation. Since the Secretary-General's report served as the basis for the discussions about the new organisation in the Economic and Social Council, the General Assembly and the third committee of the General Assembly, the report had a determinative influence on the role and responsibilities of the new organisation. In particular, the Secretary- General relied on the mandates and work of UNHCR's predecessors in formulating UNHCR's proposed responsibilities. The culmination of the discussions was the creation of a subsidiary organ of the United Nations General Assembly, the office of the United Nations High Commissioner for Refugees.[62]

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[60]Corinne Lewis, *op. cit.,* p. 49.
[61]*Ibid.*
[62]B S. Chimni, *International Refugee Law, A Reader*, New Delhi: Sage Publications, 2000, p. 234.

2.3 The United Nations High Commissioner for Refugees

The United Nations High Commissioner for Refugees (UNHCR) was created in December 1950 pursuant to the adoption of its Statute by the General Assembly. Adopted on 28 July 1951, the 1951 Convention Statute - which remains the defining document for the organisation's structure and powers - lays the foundation for the regulation of the legal status of refugees globally. The Convention was born out of the realization by States that the refugee issue was not the preserve of a few affected States and that its escalating nature called for international cooperation.

Structurally, as a subsidiary organ of the United Nations General Assembly, UNHCR not only reports to the General Assembly but also may have its mandate modified through General Assembly resolutions. UNHCR's Statute also provides for UNHCR to receive advice from the General Assembly, in the form of resolutions, and from the Executive Committee of the High Commissioner's Programme, an advisory body created by the United Nations Economic and Social Council and comprised of approximately 72 State representatives, in the form of conclusions.[63]

UNHCR's structure and responsibilities were significantly influenced by those of its predecessors, in particular by the IRO. The IRO had been an all-encompassing specialised agency with very broad responsibilities for refugees that required substantial funding. The drafters of UNHCR's Statute did not want UNHCR to be as operationally active nor to replace government services as the IRO had done. Therefore, UNHCR, unlike the IRO, was not authorised to provide material assistance without the approval of the General Assembly. Instead, UNHCR's role was to be one of "guidance, supervision, co-ordination and control", and it was envisioned that the High Commissioner would enjoy the same authority and prestige as had Dr. Nansen in order to ensure the effective protection of the refugees. UNHCR's two primary functions, the provision of international protection to refugees and the seeking of permanent solutions for the problem of refugees, built upon the work and responsibilities of UNHCR's predecessors.[64]

[63] B S. Chimni, *op. cit.*, p. 5I.
[64] *Ibid.*

The function of providing international protection to refugees was derived from the mandates of the High Commissioner for Refugees under the Protection of the League of Nations and the IRO that prescribed a "legal and political protection" responsibility. Even the wording of some of UNHCR's specific protection responsibilities, not only those that concerned international refugee law as elaborated below, but also others can be traced to the mandates of these two organisation's. For example, UNHCR's responsibility to "keep in close touch with the governments and inter-governmental organisation's concerned" and to "establish contact in such manner as he may think best with private organisations dealing with refugee questions" repeated obligations that the High Commissioner for Protection under the League of Nations had under his mandate and was similar to IRO's responsibility to "consult and cooperate with public and private organisations whenever it is deemed advisable". In addition, UNHCR's responsibility to enter into agreements with governments for "the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection" is similar to obligations that IRO had in its constitution.[65]

2.3.1 UNHCR Responsibilities Related to International Refugee Law

A significant contribution of the 1951 Refugee Convention was its embodiment of the most widely accepted legal definition of a refugee. In expounding the refugee definition, the Convention envisaged continued international protection for both persons previously deemed as refugees under any of the earlier international agreements on refugees and also introduced criteria for recognition of potential new influxes, beginning with the post-Second World War trans-European refugees.[66] The Convention also highlighted the applicable geographic and temporal limitations, whose challenges are discussed below when looking at the evolution of the 1967 Refugee Protocol. The Convention stated that a refugee shall include any person who;

> as a result of events occurring before 1 January 1951 and who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable to, owing to such fear, or is unwilling to avail himself of the protection of that country; or who, not having a nationality and

[65]Corinne Lewis, *op. cit.,* p. 53.

[66]Erika Feller, 'The Evolution of the Refugee Protection Regime', *Journal of Law and Policy,* Vol. 3 (2001) pp. 152-178:168.

> being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[67]

This represented a formal codification of all previous international instruments relating to refugees and the catalogue of circumstances developed by States during the two previous emergency phases. The 1951 Refugee Convention in essence marked the shift from refugee issues to refugee law by placing a definable obligation on signatory states. Beyond this, States were to ratify the 1951 Refugee Convention and incorporate this obligation into their own national laws. However, refugee definition was strategically designed to serve strategic political objectives.

UNHCR's specific responsibilities related to international refugee law are contained in sub-paragraph 8(a) of its Statute, which states that "the High Commissioner shall provide for the protection of refugees falling under the competence of his Office by: (a) promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto".[68] Four distinct responsibilities can be identified in the wording of this sub-paragraph: (i.) the promotion of the conclusion of international treaties concerning refugees; (ii.) the proposal of amendments to such treaties; (iii.) the promotion of ratifications to such treaties; and (iv.) the supervision of the application by States of such treaties. These four responsibilities permit UNHCR to work toward securing the existence of international refugee law standards and their effectiveness. The importance of these responsibilities can be ascertained from the fact that they are contained in the first sub-paragraph defining the responsibilities that UNHCR must carry out in order to fulfil its international protection function. They also were consistent with a consideration of international law as not only the basis for the United Nations and the international relations among States, but also as essential for the maintenance of international peace and security.[69]

Additional sub-paragraphs in paragraph 8 of the Statute facilitate and support UNHCR's responsibilities under sub-paragraph (a). Under subparagraph (f), UNHCR is to obtain

[67]UNHCR, Statute of the office of the United Nations High Commissioner for Refugees, Article 1.
[68]UNHCR, Statute of the office of the United Nations High Commissioner for Refugees, Article 8 (a).
[69]Corinne Lewis, *op. cit.,* p. 54.

information from governments concerning the number and situation of refugees and the laws and regulations concerning them. Thus, this paragraph provides a means that facilitates UNHCR's work of supervising States' application of refugee conventions, since it permits UNHCR to obtain the necessary information from States about their treatment of refugees. This provision also would serve as a basis for UNHCR's initially limited role related to States' implementation of their international refugee law obligations. Subparagraph (g) lends additional support to UNHCR's responsibilities under paragraph 8(a), since it provides for UNHCR to stay in close touch with governments and thereby foster a good working relationship with States to benefit the refugees UNHCR was mandated to protect.[70]

It must be pointed out that as formulated, refugee definition, sought to serve the Eurocentric goals of Western states that were desirous of a redistribution of the refugee burden from European shoulders who had for a long time borne the burden of resettling the remaining war refugees, in addition to responding to the influx from the Soviet bloc, without any binding obligation to reciprocate by way of the establishment of rights for, or the provision of assistance to, non-European refugees. It was such thinking that resulted in the amendment of the 1951 Refugee Convention to give it a broader scope. In addition, the liberation wars of the mid 1950s and late 1960s saw an upsurge in the flow of refugees, especially in Africa. As the dates suggest, these events occurred during the post-1951 period and the only existing global treaty for refugee protection covered situations that occurred prior to 1951, hence there was a legal loophole with regard to responding to the new wave of massive displacements. Due to the urgency of the matter, states, informed by previous experience, where it took more than four years to finally reach a consensus on the 1951 Convention, quickly suggested an amendment to the 1951 Convention in order to expand its definition beyond the previously prescribed time limitation of 1951. This ultimately led to the adoption of the 1967 Protocol relating to the Status of Refugees (1967 Protocol). [71]

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[70]Corinne Lewis, *op. cit.,* p. 54.

[71]UN General Assembly, *Protocol Relating to the Status of Refugees,(* 30 January 1967), United Nations, Treaty Series, vol. 606, p. 267, available at: http://www.unhcr.org/refworld/docid/3ae6b3ae4.html accessed 14th August 2017.

2.3.2 The 1967 Refugee Protocol Relating to the Status of Refugees

UNHCR's work to modify the definition of a refugee in the 1951 Refugee Convention, and thereby give it a truly international scope constituted an extremely significant contribution to the development of international refugee law. Under Felix Schnyder, the third High Commissioner, UNHCR began to view the disparity between the number of refugees who benefited from UNHCR's services, but who did not receive the protection of the 1951 Refugee Convention, as a significant problem. He wanted to ensure that the 1951 Refugee Convention would serve as a universal convention, particularly in light of the decision of the then Organisation of African Unity (now the African Union) to draft a regional by which the personal scope of the 1951 Refugee Convention might be liberalized and proposed a colloquium on this issue. UNHCR representatives attended the colloquium, along with thirteen legal experts from various countries and representatives from the Carnegie Endowment for International Peace and the Institut de Hauts Etudes in Geneva, where they discussed how to modify the 1951 Refugee Convention in order to ensure its applicability to new refugee situations.[72]

UNHCR also drafted a background note for the conference, which extensively considered prior refugee arrangements and conventions and the drafting history of the refugee definition in the 1951 Refugee Convention. UNHCR then assessed the content and the potential forms the document could take, specifically, whether it should be a recommendation or a binding legal instrument. Following the Colloquium's recommendation that the time limitation should be removed completely and that no geographic declarations should be made by States ratifying the Protocol, UNHCR prepared a draft instrument that incorporated States' views. After final modifications were made to the text following suggestions by members of the Executive Committee of the High Commissioner's Programme, UNHCR submitted the 1967 Protocol relating to the Status of Refugees to the General Assembly, via the Economic and Social Council, where it was adopted.[73]

The 1967 Refugee Protocol amended the 1951 Convention by removing the time and geographical limitation, thereby ensuring that claimants with a cause of flight beyond the 1951 events in Europe could lodge their claim for consideration as refugees. The Protocol made the

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[72]Corinne Lewis, *op. cit.,* p. 71.

[73] UNHCR, 1967 Refugee Protocol, Article l (2)-(3).

Convention applicable to refugees from other parts of the world, without limitation of date. As an independent legal instrument, state parties may accede to it without being party to the 1951 convention.[74]

Further provisions were made with regard to the grant of refugee status under the 1951 Refugee Convection. Article 1, Clauses C, D, E and F of the 1951 Convention, outline a category of people who are considered as not deserving or no longer deserving of continued international protection. The 1951 Convention ceases to apply to refugees who, after reasonable consideration, it is found that there is a substantial change in their personal circumstances, brought about by the refugees' own acts, such as re-availing oneself of the protection of the country of nationality, or the acquisition of a new nationality under which the refugee is now protected. A refugee for whom there is a fundamental change in the circumstances in connection with which they were granted refugee status, shall cease to be recognized as such. Cessation clauses, which are declaratory in nature, acknowledge that international refugee protection is no longer required and operate to withdraw refugee status and bring to an end related rights and benefits. Persons who are receiving protection or assistance from organs or agencies of the United Nations, other than the UNHCR, are equally not protected under the 1951 Convention. Certain persons are, however, excluded from the grant of refugee status. Contrary to the cessation clause which concerns itself with cases where the international protection is withdrawn after a fundamental change of circumstance, the Exclusion Clause has to do with cases where the refugee does not deserve the benefits of international protection. As provided under Article 1 (F);

> The provisions of this Convention shall not apply to any person with whom there are serious reasons for considering that: (a) he has committed crimes against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee or (c)he has been guilty of acts contrary to the purposes and principles of the United Nations.[75]

Refugees who commit serious crimes within the territory of the country of refuge are not subject to the exclusion clauses, but to that country's criminal law process and to Articles 32 and 33(2)

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[74]B S. Chimni., *op.cit.,* p. 4.
[75] UNHCR, 1967 Refugee Protocol, Article l.

of the 1951 Convention that permit return of a refugee if there are reasonable grounds for regarding them as a danger to the host country. The primary purpose of the exclusion clauses is to deprive the perpetrators of heinous acts and serious common crimes of international protection and to safeguard the receiving country from criminals who present a danger to that country's security. This is in line with maintaining the humanitarian and social nature of the concept of asylum. A person excluded from refugee status will not, however, be necessarily expelled from country of asylum and may be protected under relevant municipal and international law that contain provisions against *refoulement*.[76]

Further distinction should be made between cessation and cancellation, with the latter referring to a situation where it comes to the knowledge of the authorities that the refugee status was obtained through fraudulent means, hence a misrepresentation of material facts. This clearly indicates that had these been known at the time of status determination, the individual would not have been granted refugee status. All the above provisions should be applied in a restrictive manner since a premature or insufficiently grounded application of the cessation, exclusion or cancellation of refugee status could have extremely serious consequences for refugees who may have to stay in host countries illegally and face the threat of being *refouled.*[77]

Other categories exempted from refugee protection are those categorized as economic migrants. As opposed to refugee claimants who flee for reasons of civil and political rights, economic migrants constitute those whose socio-economic rights are at risk. UNHCR views a migrant as 'a person who, for reasons other than those contained in the refugee definition, voluntarily leaves his country in order to take up residence elsewhere. He may be moved by the desire for change or adventure, or by family or other reasons of a personal nature. If moved exclusively by economic consideration, he is an economic migrant, not a refugee. However, as experience has proved, it is sometimes very difficult to draw a sharp distinction between what is political and economic, especially when the causes of flight are so inextricably intertwined as to resist any simplistic classification as one or the other. Practical examples are situations such as the one in

[76]For instance Article 3(1) of the 1984 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, contains the provision for non-Refoulement and states thus... 'No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. ' Such a person need not be a refugee.
[77]Truphosa Atero Njichi, *op.cit.,* p. 40.

Somalia, where the economic conditions are the direct result of a political failure to guarantee peace, hence, challenging people's ability to earn a decent living and have access to food, clothing, shelter, jobs or education. In such a case, UNHCR clarifies that,

> The distinction between an economic migrant and a refugee is, however, sometimes blurred in the same way as the distinction between economic and political measures in an applicant's country of origin is not always clear. Behind economic measures affecting a person's livelihood there may be racial, religious or political aims or intentions directed against a particular group. Where economic measures destroy the economic existence of a particular section of the population (e.g. withdrawal of trading rights from, or discriminatory or excessive taxation of, a specific ethnic or religious group), the victims may, according to the circumstances, become refugees on leaving the country.[78]

It is on this basis that states insist on an individual refugee status determination interview for every applicant for purposes of evaluating the motive and circumstances behind their flight.[79]
In addition to defining a refugee, the 1951 Refugee Convention lays down basic minimum standards for the treatment of refugees. The Convention also outlines an analogous list of obligations for host states and responsibilities for refugees. As persons whose fundamental rights have been violated in their country of origin, refugees seek asylum abroad in the hope of continuing to enjoy their basic human rights. Article 3 of the 1951 Refugee Convention requires that the provisions of the Convention be applied without discrimination as to race, religion or country of origin. Refugee rights recognized under the 1951 Convention include freedom to practice one's religion and religious education of their children consistent with that accorded to nationals; respect for all rights that are dependent on one's personal status, such as the right to marriage, provided the right in question is one which would have been recognizable by the law of the host state had the person not become a refugee.[80]

A refugee will have the right to acquire or lease movable and immovable property, in line with the treatment accorded to aliens generally. Other rights include protection of artistic rights and industrial property similar to that accorded to the nationals of that country; right of association

[78]UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the1951 Convention and 1967 Protocol, Paragraph 63.
[79]Corinne Lewis, *op. cit.,* p. 73.
[80]UNHCR, 1967 Refugee Protocol, Articles 4 - 25.

similar to the most favourable treatment accorded to foreign nationals; access to courts and right to legal assistance similar to the nationals; right to engage in wage-earning employment and self-employment similar to that accorded to other foreigners generally; favourable treatment similar to aliens with regard to practicing a liberal profession; favourable treatment with regard to access to housing, public education, public relief and welfare; same treatment as nationals with regard to rights under the labour laws and social security, facilitate administrative assistance, for instance, issuance of certifications, with authorities of a foreign country for whom the refugee cannot have recourse; freedom of movement subject to regulations applicable to aliens generally in the same circumstances, and right to identification papers and travel documents.[81]

Any taxes imposed on refugees will not be higher than those levied on nationals in similar situations by the host state shall, in conformity with its laws and regulations, permit refugees to transfer assets that they brought into the host territory, to another country where they have been admitted for resettlement. Under Article 31, the host state shall not impose penalties, on account of a refugee's illegal entry or presence, if the refugee is coming directly from a territory where his life or freedom was threatened, provided they present themselves without delay to the authorities and show good cause for the illegal entry or presence. The host state is further prohibited from expelling a refugee who is lawfully in their territory, save on grounds of national security or public order. Any such expulsion must be in pursuance of a decision reached in accordance with the due process of the law. The principle of *non-Refoulement* is contained in Article 33, and prohibits contracting states from expelling or returning ("*refouled*") a refugee to the frontiers of territories where their life or freedom would be threatened on account of religion, race, nationality, membership to particular social group or political opinion. This provision is so fundamental that no reservations may be made to it. The only exception to the principle of *non-recoupment* occurs where there are reasonable grounds for regarding the refugee as a danger to the security of the country or who, having been convicted by a final judgment of a particular serious crime, constitutes a danger to the community of that country. The contracting state shall,

[81]UNHCR, 1967 Refugee Protocol, Articles 4 - 25.

as far as possible, facilitate the assimilation and naturalization of refugees at reduced charges and costs.[82]

On the other hand, under the 1951 Convention, every refugee has duties to the country in which he finds himself, and is required under Article 2 of the Convention, to conform to its laws and regulations as well as to measures taken for maintenance of public order. It is a universally recognised principle that the grant of asylum and the recognition of refugee status have a peaceful, non-political and humanitarian character. It follows, therefore, that refugees, at least for purposes of protection under international instruments, are civilians. Persons actively engaged as combatants in military and armed conflicts benefit from the special protection afforded under applicable international humanitarian law. The Preamble to the 1951 Convention, expresses the 'wish that all states will recognize the social and humanitarian nature of the problems of refugees and will do everything in their power to prevent this problem from becoming a cause of tension between states.' The promotion and defense of refugee rights is no easy task today with the attitude of states and host communities towards refugees being hardened and hostile. In the majority of cases, refugees are stereotyped as persons devoid of will and resources to rebuild their lives, as opposed to being considered as active participants in remaking their lives. Human rights instruments are particularly useful in this regard as they can be invoked to guarantee the basic rights of refugees in situations where states are not parties to the 1951 Refugee Convention or have entered reservations as permitted by Article 42 of the 1951 Refugee Convention.[83]

2.4 The 1969 OAU Convention on Refugee Problems in Africa

Shortly after independence, many states in Africa were faced with the challenge of nation building along with the need to protect, assist and find durable solutions for refugees displaced by the wars of liberation and the struggle against apartheid in South Africa. The Organization of African Unity (OAU) was established in 1963 and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (the OAU Refugee Convention) was enacted in 1969. The 1969 Convention is the regional legal instrument governing refugee protection in Africa. It was adopted on 10 September 1969 at the sixth ordinary session of the OAU's Assembly of

[82]UNHCR, 1967 Refugee Protocol, Articles 26 – 34.
[83] UNHCR, Statute of the office of the United Nations High Commissioner for Refugees, Article 2.

Heads of State and Government, when it was signed by forty-one heads of state or government. It entered into force on 20 June 1974, after ratification by one-third of OAU member states. It has since been ratified by forty-five of the fifty-four member states of the African Union (AU), the successor organization to the OAU.[84]

The 1969 Convention was a relatively short instrument, containing a preamble and fifteen articles. The first article provided two refugee definitions, and included paragraphs on cessation and exclusion. These two paragraphs closely followed the 1951 Convention provisions, with three additions. Two additional cessation clauses provided that the 1969 Convention ceased to apply to any refugee who "committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee" or "seriously infringed" the 1969 Convention's purposes and objectives. A further point of distinction was that the 1969 Convention did not include the clause presented in the 1951 Convention preventing cessation in respect of a refugee who can "invoke compelling reasons arising out of previous persecution for refusing to avail him of the protection of the country of nationality." Finally, an additional exclusion clause "acts contrary to the purposes and principles of the OAU as a further ground for exclusion".[85]

Article II of the 1969 Convention relates to asylum. The third article articulates refugees' duty to respect the laws and regulations of the host state, echoing article 2 of the 1951 Convention, and prohibits them from engaging in subversive activities against any OAU member state. States party to the convention undertake to support this duty by prohibiting refugees "residing in their respective territories from attacking any State Member of the OAU, by any activity likely to cause tension between Member States." The prohibition on subversive activities is operationalized by the cessation clauses described above, which terminate the refugee status of an individual who commits a serious non-political crime after the acquisition of such status or who has seriously infringed the 1969 Convention's purposes and objectives.[86]

Article VI, like article 28 of the 1951 Convention, mandates that contracting states provide refugees with travel documents. In view of article II(5), on temporary protection, article VI(2)

[84] OAU Refugee Convention 1969.
[85] *Ibid.*
[86] *Ibid.*

provides, “Where an African country of second asylum accepts a refugee from a country of first asylum, the country of first asylum may be dispensed from issuing a document with a return clause.” Articles VII and VIII relate to state co-operation with the OAU and the office of the United Nations High Commissioner for Refugees (UNHCR), respectively. Article VIII (2) provides that the 1969 Convention “shall be the effective regional complement in Africa” of the 1951 Convention.[87]

The above reflects the 1969 Convention’s objective, as announced by its title: to address aspects of the refugee problem singular to Africa. Indeed, the final text of the 1969 Convention “settled for only the specific aspects of the African -refugee problem- which were not adequately catered for under the 1951 Convention.”[88] Accordingly, many of the 1969 Convention’s provisions are considered major innovations in the field of refugee law.

The negative omission of not considering the specific circumstances of refugee movements in Africa, made it impossible for the Convention to accurately capture the specific circumstances surrounding the early liberation wars, hence the clamour for a more African-friendly treaty. In appreciating this lacuna, the Assembly of African Heads of State and Government resolved to finding ways and means of alleviating the misery and suffering of the increasing numbers of refugees in Africa, as well as recognizing the need for a humanitarian approach towards resolving the specific circumstances pertaining to the refugee problem in Africa. The 1969 OAU Convention is the only legally binding regional refugee treaty that adopted the first broader definition of a refugee, more closely reflecting the realities of Africa during a period of violent struggle for self-determination and national development.[89]

Article 1(1) of the 1969 OAU Convention reproduces the refugee definition contained in the 1951 Convention, in recognition of the fact that the latter, as modified by the 1967 Protocol, constitutes the basic and universal instrument relating to the status of refugees. The 1969 OAU Convention, however, goes further and embodies the unique aspects of refugee problems in

[87]OAU Refugee Convention 1969.
[88]*Ibid.*
[89]M B. Rankinh., “Extending the Limits or Narrowing the Scope” in UNHCR Evaluation and Policy Analysis Unit, *New Issues in Refugee Research,* UNHCR Geneva, Paper No 113, 2005, pp.5-10.

Africa by expanding the universal refugee definition to deliberately include victims of external aggression, occupation, foreign domination or events seriously disrupting public order in either part or whole of the country, whether or not they have been individually affected. For the first time, the application of the refugee definition, albeit at a regional level, was extended to individuals forced to leave their countries owing to aggression by another state. The 1969 OAU Convention, therefore, marked the beginning of a refugee protection system which directly addressed the causes of mass refugee influxes, by emphasizing objective conditions in the country of origin.[90]

In addition, the language of the 1969 Convention, and the interpretation which has been placed on it in practice, are much more accommodating of large-scale refugee situations than similar interpretations that have taken root around the 1951 Convention. The 1969 Convention allowed millions of people in need of protection to be covered and helped with greater legal and operational flexibility. A typical example applied in Kenya is in reference to the Somali and Sudanese asylum seekers, who, for a long time have been victims of protracted civil strife. On the face of it, they present a compelling reason for flight, hence the *prima-facie* consideration. Such refugees would only undergo individual determination if they are considered for other durable solutions, such as resettlement to a third country, hence the need to distinguish them from the group determination and establish their individual profile. A once *prima-facie* refugee can be rejected or excluded from refugee status if there are good reasons to believe that they are not genuine refugees or they could have been involved in acts contrary to the purposes and principles of the United Nations. Article 11(2) of the 1969 OAU Convention provides that the grant of asylum to refugees should be deemed as a peaceful and humanitarian act and should not be regarded as an unfriendly act by any member state.[91]

In paragraph 5 of Article II, a refugee who has not received the right to reside in any country of asylum may be granted temporary residence in any country of asylum, within the OAU. Other provisions of the 1969 Convention provide guidance on dual nationality, cessation, exclusion, right to asylum, and prohibition on subversive activities.83 Refugees have an obligation to avoid

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[90]M B. Rankinh*, op.cit.,*p. 7.
[91]OAU Refugee Convention 1969.

any activities which might affect the strictly civilian and humanitarian nature of camps and settlements, as well as any activity that is incompatible with regional peace and security. This is especially relevant in the African context in view of the internationalization of conflict in the region that has resulted in the increased militarization and politicisation of refugee camps. The provisions of the 1969 Convention are also to be applied without discrimination on account of race, religion or political affiliations. Member states are under obligation to respect the essential voluntary character of repatriation. Refugees lawfully staying in a host country shall be issued with travel documents. Article VII-VIII of the 1969 OAU Convention call for the cooperation of national states with the African Union and UNHCR in a spirit of African solidarity and international cooperation. Generally, the 1969 OAU Convention sets down a basis for refugee jurisprudence and practice in Africa to develop in a predictable and asylum friendly manner.[92]

A key distinction between the 1951 Convention and the 1969 OAU Convention is as regards the principle of *non-refoulement.* While Article 32 of the 1951 Convention stipulates the exceptions to admission of refugees on grounds of national security, the 1969 OAU Convention clearly prohibits such measures as rejection at the frontier, return or expulsion, which would compel one to return or remain in a territory where his life, physical integrity or liberty would be threatened. The 1969 OAU Convention further provides that refugees should be settled at a reasonable distance from the frontier of their country of origin, thus strengthening the protection requirement.,0 The 1969 Convention is also celebrated as the first international instrument that elaborated the principles relating to voluntary repatriation and also defines features of international solidarity and burden-sharing that were not fleshed out in the 1951 Convention.[93]

2.5 Kenya Refugee Policy and Practice before 1991

Before 1991, the Kenyan government used an *ad hoc* administrative refugee status determination (RSD) system to recognize refugees, despite the fact that it lacked domestic laws providing for their rights and status. Asylum seekers were interviewed by an Eligibility Committee, made up of representatives from the Ministry of Home Affairs, the Immigration Department, and UNHCR observers. The Committee usually heard individual cases and applied the Refugee Convention

[92]OAU Refugee Convention 1969.
[93]*Ibid.*

definition, as provided for in the Class M Entry Permit category, but the Committee did not apply the OAU definition.[94]

Most newly arriving refugees were processed through a reception center established in October 1981 at Thika, a town near Nairobi. Conflict in Uganda, Somalia and Sudan brought large numbers of refugees to Kenya in the early 1990s. Kenya hosted 14,400 refugees in 1990, but as a result of the increase in regional conflicts, the number had risen to 120,000 by 1991. Just one year later, in 1992, 401,000 refugees were living in Kenya.[95]

The large numbers overburdened the Eligibility Committee, causing Kenya to ask UNHCR to set up refugee camps. UNHCR and international NGOs were needed at the time since the large numbers of arrivals far outstripped the government's ability to ensure their well-being. While there was an obvious need for an emergency response from the international community, the agencies involved usurped Kenya's refugee administration almost completely. This all-or-nothing approach scrapped the positive aspects of Kenya's pre -1991 refugee policy, including, for example, the *laissez-faire* approach by which refugees were allowed to locally integrate, and enjoy rights to work, education and freedom of movement. Most fundamentally, the Kenyan government's pre-1991 role in refugee status determination was surrendered to UNHCR and quickly forgotten.[96]

2.5. 1 The 1967 Kenya's Immigration Act

Kenya has for a long time pursued asylum policies and practices which reflected the most essential obligations mandated in the refugee Conventions despite the absence of specific legislations on the management of the refugee situation. The human rights provisions in Chapter V of the Constitution of Kenya allowed some recognition of the rights of refugees residing in Kenya. In chapter V, section 70 it states that;

> every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin or residence

[94] See for example, UNHCR, The State of the World's Refugees 2000: Fifty Years of Humanitarian Action, Oxford: Oxford University Press, 2000, pp. 311-313.
[95]UNHCR, The State of the World's Refugees 2000, *op.cit.*
[96]*Ibid.*

> or other local connection, political opinions, colour, creed or sex, subject to the respect for the rights and freedoms of others and for the public interest to the right to life, liberty, security and protection of the law amongst others.[97]

It should be pointed out that, the Constitution of the Republic of Kenya of 1969 did not provide for the direct application of international treaties, conventions, or general rules of international law. This position was buttressed by the Judicature Act, which recognised the Constitution, written laws, common law, doctrines of equity, statutes of general application and customary law as the applicable law in Kenya. As a result, international law would be applied if it was ratified or domesticated by an Act of Parliament. This lack of a constitutional provision changed with the adoption of the Constitution of 2010.

Additionally, related national legislation continued to have a bearing on refugee management in Kenya, and made reference to the control of refugee movements into Kenya. The Immigration Act of 1967 was passed ideally to govern orderly immigration into Kenya. In its preamble, the Immigration Act intended to 'amend and consolidate the law relating to immigration in Kenya....'[98] Section 4 of the Immigration Act prohibits non-citizens from entering Kenya unless they are in possession of valid entry permits. One was required first to apply for and obtain an entry permit before being allowed entry into the country. Violation of this requirement renders the person's presence in Kenya unlawful.[99]

In the Schedule to the Immigration Act, there was specified a list of the various classes of entry permits to be issued to people who wish to enter Kenya.[100] Of relevance to refugees is the Class M Permit, which incorporated the refugee definition as provided under the 1951 Refugee Convention, without the time and geographical limitation.[101] In essence, the section adopted the definition as amended by the 1967 Refugee Protocol. The Immigration Act was, however, silent on the 1969 OAU definition and this was perhaps because it was not meant to regulate refugee situations *per se*. It can be therefore be concluded that the omission of the 1969 OAU definition

[97] This Constitution was in existence until the 27th of August 2010, when Kenya promulgated a new Constitution.
[98] The Immigration Act, Chapter 172 Laws of Kenya, (No. 25 of 1967).
[99] *Ibid.*
[100] Section 5(1) makes reference to the 13 different Classes of entry Permits (Class A-M) expounded in the Schedule to the Immigration Act.
[101] Article 1 (A) (2) of the 1951 Refugee Convention.

was because the Immigration Act was adopted before the enactment of the 1969 OAU Convention. In this respect, the Kenya Immigration Act was deemed unsuitable as a legal reference for handling refugee issues, especially when it contains no definition of the circumstances that inform the majority of the refugee caseload in Kenya.

The Immigration Act lacked information on how to handle situations of massive refugee influx and did not provide room for *prima facie* recognition on a group basis. With time it further extended to the 'wife or child over the age of thirteen years of such a refugee'.[102] It has been observed that such a description was indeed gender insensitive as it assumes that it is only men who will flee persecution, thus rendering the situation of women who flee from similar circumstances difficult to adjudicate. The Act therefore fell short of appreciating present day realities in which mass movements cut across age and sex.[103] Being legislation applicable in Africa, the Act also failed to appreciate the situation of polygamous marriages that is typical in this region, and by interpretation, an asylum seeker was required to choose one of the wives and child for purposes of recognition under Class M, leaving out the other family members.[104]

No guidelines were provided for the status of children below the age of thirteen and this may result in a lot of uncertainty in the application of this provision. In addition, the Act did not contain any provision on the rights and obligations of refugees or the state towards refugees, hence its inadequacy in dealing with refugee specific issues. The Act further vested lots of discretionary powers in the Minister in charge of immigration affairs, to hear the applicant's case and make a decision on whether to issue the permit or not. The minister's decision was final and could not be questioned in any court of law.

In majority of the cases, the provisions of the Immigration Act were applied alongside those of the Aliens Restriction Act of 1973.[105] The Aliens Restriction Act served two purposes. First, the Act enabled certain restrictions to be imposed on aliens, and second, it made provisions that were necessary or expedient to carry such restrictions into effect. In contrast to the Immigration Act,

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[102]Edwin O. Abuya., *Legislating to Protect Refugees and Asylum Seekers in Kenya: A note to the Legislator,* Moi University Press, Research Paper Series, ISSN: 1811-3265, Vol. 1, 2004, p. 12.
[103]*Ibid.*
[104] Edwin O. Abuya, *op.cit*., p.13.
[105] The Aliens Restriction Act, Chapter 173 Laws of Kenya, No. 5 of 1973.

the Aliens Restrictions Act did not make any direct mention of the term "refugee" but by interpretation it can be deduced that the use of the term 'alien' to mean 'any person who is not a citizen of Kenya, would cover asylum seekers and refugees.[106] Refugees were thus caught in a dilemma as to whether they were to follow provisions provided under the Immigration Act that required an entry permit or the Aliens Restrictions Act that pushed them to the camps. Further reference to refugees in the Aliens Restrictions Act can be deduced from the registration process entailed in section 3 of the Act. All aliens are to report to a Registration Officer within 90 days of their arrival into Kenya, where they will be required to complete Form Al -"Form for Registration as Alien." There are however no guidelines on the procedure for the grant of refugee status under the Aliens Restrictions Act, thus making it, like Immigration Act, inadequate to serve as a reference for refugee law in the Kenya.[107]

[106] The Aliens Restriction Act, Chapter 173 Laws of Kenya, No. 5 of 1973.
[107] Truphosa Atero Anjichi, *op. cit.,* p. 61.

2.6 Conclusion

The foregoing discussion highlights the fact that earlier refugee definitions were largely informed by the regional circumstances prevalent at a given place and time. During the pre-1951 Convention, reference to the status of a refugee was based on the geographical, social and political problems and the individual's mindset with regard to the situation in their country of origin. This notion seems to have been transferred wholly to the 1951 Convention, which might have been directed to the world war victims and not any other person due to the limitations embedded therein. The promulgation of the 1967 Protocol extended consideration of mass influx of refugees experienced elsewhere outside Europe, but failed to make any amendments to the refugee definition, hence failed to accommodate new causes of flight beyond those in the 1951 Convention and failure by the 1967 Protocol to amend the definition of a "refugee", compelled states in Africa, Latin America, Europe and Asia to adopt specific frameworks relevant to the causes of refugee movements in their respective regions. The chapter reviews the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and highlights the value-added by this Treaty. The Chapter concludes by looking at various regimes of Kenya refugee law before 1991, and notes that this regime was inadequate in addressing refugees' issues in Kenya.

CHAPTER THREE
KENYA REFUGEE LAW 1991 – 2016

3.1 Introduction

Before 1991, the Kenyan government used an ad hoc administrative Refugee Status Determination (RSD) system to recognize refugees, despite the fact that it lacked domestic laws providing for their rights and status. During this period, an ad hoc committee was established to deal with the issue of asylum seekers and refugees. The UNHCR together with the government provided for the welfare of the refugees and in protection activities. The identity and definition of a refugee was provided for under international conventions and their protection is governed under international instruments and overseen by UNHCR. One thus became a refugee by virtue of crossing international borders in fear of persecution on religious, racial or political grounds. National system that defines and bestowed legal status of a refugee is crucial to his or her protection. Countries have a common procedure of determination of a refugee status. Although states are not obliged to admit refugees in their countries they cannot return a refugee to a country where he/she is at risk of torture, persecution or death. A signatory to the refugee conventions of 1967 and 1951 binds them to examine their status and admit them.

In the Kenyan case the legislation applied prior to the enactment of the Act in December 2006, fell far short of defining a comprehensive refugee framework, and even the provisions that were potentially applicable to refugees, were not consistently implemented. For example, while the Aliens Restriction Act required foreigners to register at designated locations within 90 days of arrival in Kenya, refugees who attempted to do so in the past were turned away by immigration officials and/or officials from the National Refugee Secretariat for lack of infrastructure to handle refugee registration and refugees were being referred to UNHCR for this purpose. This dilemma made the management of refugees in Kenya unpredictable and inconsistent particularly with the influx of refugees in starting from 1991.

It should be noted that since 1963, Kenya has been hosting refugees from her neighbouring countries: Ethiopia, Somalia and Rwanda which experience civil war and political unrest for example in 1970’s it hosted fleeing Ugandans. Until 1980s, there were no refugee camps and

refugees could settle in any part in Kenya. In the 1990s the camps were set due to an influx of refugees. Today refugees are settled in two camps, Daadab and Kakuma. The UN and other specialized UN organs have assumed the responsibility of providing basic needs for refugees in the camps while as the government of Kenya provides administrative and security back-up maintaining law and order in the afore mentioned refugee camps. This chapter looks at the formulation of Kenya's refugee law from 1991 to 2013, the implementation of the law, how it relates to the international refugee standards, and why Kenya threatened to close Daadab refugee camp, despite its commitment to conventions protecting refugees.

3.2 Refugee Influx in the 1990s

Refugees in Kenya up until the late 1980s and early 1990s, enjoyed 'full status' rights, which included "the right to live in urban areas and freely move around the country, the right to acquire a work permit as well as access to opportunities in the educational sector, and also the right to apply for legal local incorporation. The open hospitality can be attributed to the relatively small number of refugees in the country then, roughly 12,000 at the end of the 1980s.[108] However, the early 1990s saw a remarkable shift in the country both refugee and asylum policies to a more restrictive approach that majored on the restraint and segregation of refugees dwelling in its territory.

3.2.1 Refugee Crisis in the 1991 - 2006

As civil wars erupted in Ethiopia, Sudan, and Somalia, the number of refugees coming to Kenya increased so that by 1992, the new arrivals in Kenya were estimated to be about 400,000. In the formative years of the 1990s, prior to the setting up of the refugee camps, the small numbers of asylum seekers and refugees that Kenya received were scattered throughout the country, including in transit towns such as Mombasa and Thika. The number of registered refugees was very small compared to today's figure of over 474,000. By the year 2014, Dadaab was hosting 388,627 refugees, Kakuma hosted 53,518 and Nairobi hosted 32,679. The Dadaab refugee camp was established to host and provide protection to Somali refugees who had fled persecution after the fall of President Siad Barre triggered a civil war and displaced thousands of Somalis.

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[108]Elizabeth *Campbell,* "Urban Refugees in Nairobi: Problems of Protection, Mechanisms of Survival, and Possibilities for Integration', *Journal of Refugee Studies Vol*. 19(3), 2006, pp. 396-413.

Kakuma refugee camp, on the other hand, was established in the early 1990s mainly to host and assist refugees fleeing civil war in Sudan.[109]

3.2.2 The Implementation of Encampment Policy

Encampment policy may be termed as the second stage in the evolution of the refugee regime. Kenya's encampment policy started around 1991 following the influx of refugees from Somalia and Sudan. Kenya, grudgingly accepted the refugees from neighbouring countries on condition that they were settled in the distant refugee camps. This indicates that the encampment system took root in Kenya following the influx of refugees in 1991.[110] In the early 1990s, following large-scale refugee arrivals from Ethiopia, Somalia and Sudan, refugee camps were set up in the border areas of Kenya. While many of the Somalis initially made their way to Mombasa and coastal areas of the country, they were subsequently relocated to three large camps in Dadaab, in north-east Kenya. Refugees from Ethiopia and Sudan, meanwhile, were accommodated primarily at Kakuma camp, in the north-west of the country.

At the Government's request, in the early 1990s UNHCR rapidly went from assisting a relatively small number of urban-based refugees to managing large camp operations. Initially large amounts of donor funding flooded in to deal with the high-profile humanitarian emergency. By 1993, this had helped to stabilise morbidity and mortality rates among the refugees, and there was a dramatic fall in new displacement, so that UNHCR declared that the emergency was over. The situation shifted into a phase of "care and maintenance" and as time went on acquired the character of a protracted refugee situation: large numbers of refugees in long-term exile with no access to durable solutions to their loss of citizenship. As donor fatigue set in, from the late 1990s there were dramatic and recurring shortfalls in refugee funding, with UNHCR still struggling to maintain minimum humanitarian standards a decade after it declared that the emergency was over. [111]

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[109]Nicholus Nduati Mwangi, "Refugees Influx and National Security: A Case Study of Kenya", Mater of Arts Project Paper, University of Nairobi, 2016, p. 20.
[110] Guy S. Goodwin-Gill and J. McAdam *The refugee in international law,* Oxford: Oxford University Press 2007 pp. 47 and 453.
[111] J. Milner, *Refugees, the State and the Politics of Asylum in Africa*, London: Macmillan, 2009, p. 32.

The Government policy was to try to contain the refugees in Dadaab camps (Ifo, Hagadera, and Dhagahaley) of the former North Eastern Province (NEP), now known as North Eastern Region (NER), close to Somalia, and to a lesser extent in Kakuma camp in the north west. During the 1990s many refugees were relocated to these camps from other locations where they had initially settled. The decision to locate the major camps in Dadaab is significant: the NER has a substantial indigenous Somali Kenyan population and a troubled history of marginalisation, repression, and violence under both colonial and independent rule. The region benefited from little development intervention and there is still a considerable economic gulf between the NER and the rest of Kenya.[112] In this context, many refugees voted with their feet, gravitating towards urban areas, in order to avoid the harsh camp conditions (heat, scarce rations, recurrent sickness among children and insecurity among others), to access better educational opportunities and health facilities; to find work and build a different future for oneself and one's family; to get in contact with relatives abroad with a view to arranging onward migration to other countries; or simply because they preferred city life.[113] However, the government's encampment policy required the settlement of refugees in camps where their movements were controlled. A refugee was not at liberty to leave a camp unless there was a valid reason to do so.

3.3 The Refugee Act of 2006

The Refugees Act 2006, was assented to on 30th December 2006, as an Act of Parliament which provided for the recognition, protection and management of refugees and connected purposes. The Act laid down the institutional and legal framework for the recognition, protection and management of refugees.[114] The Act established various offices and institutions which include a Department of Refugee Affairs and the office of Commissioner for Refugee Affairs, the Refugee Appeal Board and the Refugees Affairs Committee. The Act laid down provisions relating to recognition of refugees, asserting the principle of *non- refoulement* and codified the rights and duties of refugees in Kenya. The welfare of women and children is emphasised and the Commissioner is required to ensure that specific measures are taken to ensure the safety of refugee women and children in designated areas.[115]

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[112] J. Milner, *op.cit.,* p. 33.
[113] *Ibid.*
[114] The Kenya Refugee Act, 2006.
[115] *Ibid.*

Importantly, the Kenya Refugee Act has been characterized as the most comprehensive framework for refugee management in Kenya. The Act represents the commitment by the government of Kenya to abide by the established international norms and good practices for refugee management. Kenya is a signatory to the 1951 Convention and the 1969 OAU Convention, and the Act is therefore a domestication of Kenya's international law obligations towards refugees and asylum seekers. The promulgation of the Act arose out of the appreciation that the refugee regime was a distinct subset of forced migrants, with its own attendant rights and obligations, and cannot be categorized within other laws applicable to aliens or migrants generally. The Kenya Refugee Act has a total of 26 sections covering a variety of issues relating to refugees in the country. The Schedule to the Act provides further guidelines on the implementation of specific matters such as the composition and functions of the Refugee Appeals Board.[116]

Unlike the Aliens Restriction Act and the Immigration Act, the Refugee Act provides an elaborate definition of who a refugee is, how refugee status can be acquired and lost, and who is excluded from refugee status under the Kenyan law. The Act, in its definition of a refugee, combines the provisions of Article 1(A) (2) of the 1951 Convention, as modified by the 1967 Protocol and Article 1 of the 1969 OAU Convention, thus ensuring a broader consideration when granting refugee status. A person is recognised as a statutory refugee for the purposes of the Refugees Act if such a person;

a) owing to a well-founded fear of being persecuted for reasons of race, religion, sex, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself to the protection of that country;
b) not having a nationality and being outside the country of his former habitual residence, is unable or, owing to a well-founded fear of being persecuted for any of the aforesaid reasons is unwilling, to return to it.[117]

[116]Robert Doya Nanima, "An evaluation of Kenya's parallel legal regime on refugees, and the courts' guarantee of their rights", *Journal of Law democracy and Development*, vol.21 Cape Town 2017, p.1.
[117] The Kenya Refugee Act, 2006.

The Kenya Refugee Act does not include a time or geographical limitation, thus making the grant of asylum more flexible and practical to the situations causing refugee flows in Africa. Similar to the 1969 OAU Convention, the Act specifies, in Section 3(2), the circumstances under which one may be considered a *prima facie* refugee. The decision to declare one a *prima facie* refugee is vested in the Minister in charge of refugee affairs. It is clear, therefore, that the Act still envisages group acquisition of refugee status through declaration posted in the national gazzette. A typical case is that of Somali refugees who continue to flee civil war in Somalia, whose influx into Kenya has exceeded the camps capacity to bear the caseload, hence a call for the extension of the current Dadaab camp setting.[118]

Furthermore, and in line with the 1951 Convention, the Kenya Refugee Act 2006 lays own the conditions for disqualification from grant of refugee status. The exclusion and cessation clauses borrow heavily from the international standards to include such persons as those involved in crimes against peace, war crimes, serious non-political crimes outside Kenya or in Kenya after admission as a refugee, persons with dual nationality and are able to seek refuge in their second country of nationality, or people from places where there is a fundamental [positive-sic] change of the circumstances that forced them to flee in the first place, hence ability to re-avail self of the protection of the country of origin.[119]

Most of the powers under the Act were then vested in the Minister of State in charge of Immigration and Registration of Persons. Under section 3(3), the Minister could, by publishing an order in the official Government Gazette, declare any class of persons to be *prima facie* refugees, and could at any time amend or revoke such declaration. This provision took care of situations of mass movement that was typical of refugee movements in Africa. The same Minister could designate certain places and areas in Kenya to be transit centers for purposes of temporarily accommodating asylum seekers, or a refugee camp for residence by refugees. This, to some extent, restricted the refugees' freedom of movement since violation of this order was punishable under the Act. Only under very specific defined circumstances could a refugee leave the camps legally to seek assistance in urban centers. It must, however, be proved that the

[118]The Kenya Refugee Act, 2006.
[119] *Ibid.*

services sought, for instance, higher education or specialized treatment, could not be obtained at camp level for one to be issued with a travel document out of the camp. The declaration of designated areas of residence for refugees under the Act was no longer at the discretion of the Minister, since the Act provides that the "Minister shall consult with the host community to seek their support in accommodating the refugees".[120]

In the past few years, Kenya experienced serious opposition by the host community in Dadaab area, North Eastern Kenya, where the government proposed to expand the hosting capacity of the refugee camps. The host communities were fearful that further expansion of the camp will result in heightened insecurity in the area and further fear competition for scarce resources with refugees, in the already marginalised areas.[121] The Act required the Minister to ensure that the designated areas were maintained and managed in an environmentally sound manner, in response to accusations that camp settings and refugee lifestyles, which include such activities as use of firewood for fuel, have resulted in environmental degradation in the areas around the refugee camps.

Under section 21, the Minister in charge could, , in consultation with the Minister responsible for matters relating to immigration and internal security, order the expulsion from Kenya of any refugee or member of his family if found to be in breach of national security or public order. This provision remained discretionary and, in most cases, did not require proof or due process, with some genuine asylum seekers and refugees suffering deportation based on the conviction of the government officer. Further the Minister had powers to appoint officers to implement the provisions of this Act. [122]

The Act establishes a Department for Refugee Affairs (DRA) as a public office within the Ministry of State for Immigration and Registration of Persons (MIRP). The DRA had the responsibility for the administration, coordination and management of issues related to refugees, including developing policies, promoting durable solutions, coordinating international assistance,

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[120] The Kenya Refugee Act, 2006.
[121]Robert Doya Nanima, "An evaluation of Kenya's parallel legal regime on refugees, and the courts' guarantee of their rights", *Journal of Law democracy and Development*, vol.21 Cape Town 2017, p.3.
[122] The Kenya Refugee Act, 2006.

receiving and processing asylum applications, issuing identity cards and travel documents, and managing refugee camps.[123]

Section 7 of the Act established the office of the Commissioner of Refugees, an office in the public service, to be headed by the Commissioner of Refugee Affairs. The Commissioner was to be the Secretary to the Refugee Affairs Committee. S/he was to coordinate all measures necessary for promoting the welfare and protection of refugees, including formulating policy on refugee matters in accordance with international standards; liaison with United Nations Agencies and any other institutions on the provision of adequate facilities and services for the protection, reception and care of refugees within Kenya; promoting durable solutions for refugees granted asylum in Kenya; receiving and processing applications for refugee status; managing refugee camps and related facilities, and advising the Minister on how to solicit funds for refugee.[124] By incorporating refugee issues specifically within a designated Ministry in contrast to previous practice where this was not clear, one can clearly see the seriousness which the government of Kenya attached to refugee protection through this important recognition of its unique parameters.

Section 8 of the Act, established a Refugee Affairs Committee, responsible for advising the Commissioner for Refugees. The main function of the Committee was to 'assist the Commissioner in matters concerning the recognition of persons as refugees', which included receiving application for asylum and advising on recognition and denial of refugee status and asylum. The Committee had a wide membership drawn from various line ministries, departments and interested stakeholders, including civil society. Section 8 (3) provides that the Committee shall consist of:[125]

a) The chairperson who shall be appointed by the Minister;
b) One representative from the ministry responsible for provincial administration and internal security;
c) One representative from the ministry responsible for refugee affairs;
d) One representative from the Ministry of Foreign Affairs;

[123]The Kenya Refugee Act, 2006.
[124]*Ibid.*
[125]*Ibid.*

e) One representative from the ministry responsible for local government;
f) A representative of the Attorney General;
g) One representative for the Ministry of Health;
h) One representative of the Ministry responsible for finance and planning;
i) One representative from the Department of Immigration;
j) One representative from the Department of Police;
k) One representative from the National Security Intelligence Service; and
l) One representative from the Department of National Registration Bureau.

In allowing such an elaborate representation, the Act was to guarantee that refugee rights would not be violated through the possible exercise of excessive or abuse of power by one individual, but through the involvement of the various groups, the requisite checks and balances would be instituted to ensure fair and impartial decision making in the interest of both refugees and the host government. For the first time in Kenya's history, the Refugee Committee included a representative from the host community. The inclusion of various line ministries and a wide range of stakeholders was to ensure a comprehensive, all-inclusive approach that will take into account a diverse range of opinions before any decision was taken.[126]

Indeed, the Act established the Refugee Appeals Board to consider and decide appeals under the Refugee Act. The procedure for appeal is as established in section 10 of the Act and allows rejected asylum seekers sufficient time (30 days) to lodge their appeal against the Commissioner's decision. Further grievances were to be brought before the High Court for consideration.[127]

3.3.1 Rights and Obligations under the Act

Upon entry into the country, asylum seekers were required to make their intentions known, by appearing before the Commissioner immediately upon entry or, in any case, within thirty days after their entry into Kenya. On its part the government was to establish official reception centers for such services. Section 11(3) of the Act prohibited detention or penalization of asylum

[126]Truphosa Atero Njichi, *op cit,.* p.69.
[127] The Kenya Refugee Act, 2006.

seekers on account of illegal entry. The Act upheld the same freedom from arbitrary arrest and non-penalisation for illegal entry as enshrined in the 1951 Convention, Article 31.[128] The Act further provided that asylum seekers who have applied for recognition of their status as refugees and every member of their family was to remain in Kenya pending the determination of status. The Act did not, however, provide guidance on where such persons who have fled with no material possessions were to be accommodated. [129]

Specific reference to the rights and duties of refugees in Kenya was provided for under section 16 of the Act, which provided that 'every recognised refugee in Kenya and every member of his family in Kenya, 'shall be entitled to the rights and be subject to the obligations contained in the international conventions to which Kenya is party and shall be subject to all laws in force in Kenya.' [130] This provision removes the lacuna that previously existed with the lack of a description on the manner of enjoyment of the rights by refugees. Under the Act, refugees were entitled to and were to be subjected to the obligations contained in the 1951 Refugee Convention and 1969 OAU Conventions.

The obligations under these conventions included not sending a person back to a country where he or she may be persecuted - *non-refoulement* - and, in the case of the OAU Convention where his or her life is threatened because of the threats to public order which form the basis for refugee status. Section 18 of the Act captures well these requirements of *non-refoulement* as read together with the definition under section 3 of the same Act, and impliedly stayed the provisions of the Aliens Restrictions Act and the Immigration Act as regards asylum seekers and the refugees.[131] This was perhaps a good starting point for the harmonisation of the three pieces of legislation that had a bearing on refugees in Kenya to ensure consistency.

Other refugee rights spelt out in the 1951 Refugee Convention, to which refugees in Kenya could lay claim to under the Act, include, right to receive the same treatment as nationals with regard to the freedom to exercise of religion and religious education; free access to the courts,

[128] The Kenya Refugee Act, 2006.
[129] Truphosa Atero Njichi, *op. cit,*. p.71.
[130] The Kenya Refugee Act, 2006.
[131] *Ibid.*

including legal assistance; access to elementary education; access to public relief and assistance; protection provided by public security; protection of intellectual property, such as inventions and trade names; protection of literary, artistic, and scientific work; and equal treatment by taxing authorities.[132]

Refugees were to receive the most favourable treatment provided to nationals with regard to the right to belong to trade unions as well as the right to belong to other non-political non-profit organisations, and the right to engage in wage earning employment. Refugees were also to receive the most favourable treatment possible, similar to that accorded to aliens generally in the same circumstances with regard to the right to own property; the right to practice a profession; the right to self-employment; access to housing and access to higher education.[133] However, there are limitations to the actual enjoyment of some of these rights. For instance, regarding freedom of movement and residence, the Act required refugees to reside in designated camps, which infringes their freedom of movement and residence. This act therefore embraced the encampment policy.

3.3.2 Duties of Refugees in Kenya

Refugees have a general obligation, both under the international conventions and the Act, to conform to the laws and regulations, as well as measures laid down for maintenance of public law and order in the host country. Refugees and asylum seekers were to abstain from activities that would cause tension amongst member states, and in particular, refugees had a duty to keep the peace and not be a threat to national security or to the host community, otherwise, the Minister was empowered, under section 21 of the Act, to order the expulsion of such a refugee and members of their family.[134] The 1969 OAU Convention explicitly prohibited engagement in subversive acts that would jeopardize or cause tension among member states.[135]

[132] The Kenya Refugee Act, 2006.
[133] *Ibid.*
[134] *Ibid.*
[135] UNHCR, Statute of the office of the United Nations High Commissioner for Refugees, Article III.

3.4 Refugee Law in the Kenya's Constitution

Under Articles 2(5) and (6) of the Constitution, general rules of international law, treaties and conventions ratified by Kenya, form part of the law of Kenya.[136]Kenya is a signatory to a number of conventions and treaties dealing with refugees and their protection, including the 1951 Convention, the 1967 Protocol, the OAU Convention and the African Charter. Kenya is also a signatory to a number of other international legal instruments covering international human rights, including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the ICCPR.[137]

Article 10 of the Constitution sets out the national values and principles of governance, which include "human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised". Such national values and principles bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law; or makes or implements public policy decisions.[138]

Chapter 4 of the Constitution contains Kenya's Bill of Rights. The Bill of Rights is an integral part of Kenya's democratic state and is the framework for its social, economic and cultural policies. The Bill of Rights sets out the rights and fundamental freedoms to which every person in Kenya is entitled. Importantly, these rights and fundamental freedoms are not limited to Kenyan citizens, but apply to all persons within Kenya's borders irrespective of how they came into the country. Thus, Kenya places itself under an obligation to ensure that the basic human rights of every person in its territory, including refugees, are respected.[139]

3.5 Government Directive since 2010

Since the promulgation of the constitution in 2010, the Government of Kenya has issued various directives and pronouncements touching on the refugee affairs in Kenya.

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[136] The Constitution of the Republic of Kenya Article 2(5).
[137] Norwegian Refugee Council, A Review of the Legal Framework Relating to the Proposed Closure of Dadaab Refugee Camp and Repatriation of Somali Refugee, 2017, p.34.
[138] *Ibid.*
[139]*Ibid.* p.35.

3.5.1 Government Directive of 2012

On 18 December 2012, the Government of Kenya issued a directive to stop the reception and registration of asylum seekers and refugees. The directive stated:

> The Government of Kenya has decided to stop reception, registration and close down all registration centers in urban areas with immediate effect. All asylum seekers/refugees will be hosted at the refugee camps. All asylum seekers and refugees from Somalia should report to Dadaab refugee camps while asylum seekers from other countries should report to Kakuma refugee camp. UNHCR and other partners serving refugees are asked to stop providing direct services to asylum seekers and refugees in urban areas and transfer the same services to the refugee camps.[140]

According to the Government, urban refugees were evading registration, and that their relocation was in their best interest. This followed the application of the Refugee Act and the Refugees (Reception, Registration, and Adjudication) Regulations of 2009. [141]These regulations provided forthe reception of asylum seekers at the reception center nearest to where s/he makes the application. The asylum seeker was to present him/herself to a registration officer (defined as 'an officer designated to register asylum seeker(s). More detail about the registration procedure was provided in section 2, suffice it here to note that there were relevant powers for the Commissioner to designate registration procedures and clarify the duties of registration officers. Registered asylum seekers were e issued with a pass which was the key for the procedure. There was a duty of confidentiality in the Regulations which, like that in the Act, only permitted disclosure of information in accordance with duties or the consent of the Commissioner. Provision was made for vulnerable categories of asylum seekers. The adjudication process was specified in the Regulations with a reinforcement of the time limits set out in the Act. The Regulations provided substantial detail about how the RSD procedure was to be conducted consistent by and large with UNHCR recommendations. The regulations also covered documentation for refugees and procedures for withdrawal of status. Regulation 47 repeated the power in the Act to expel a refugee on grounds of national security or public order.[142]

[140] See for example, Robert Doya Nanima, *op.cit.,* p. 4.
[141] Refugees Regulations 2009.
[142] *Ibid.*

While this directive targeted Somalis in Nairobi, it affected all other refugees who were residing in all urban centers other than Nairobi. Consequently, on 13 December 2012, the DRA announced the implementation of a structural encampment policy that required all refugees and asylum seekers in urban areas to relocate to refugee camps or return to their country of origin. The designation of refugee areas appears to be dictated by several factors, including the administrative challenge of processing refugees, difficulties regarding local integration and political and security concerns. Additionally, registration of new arrivals in urban areas was suspended, and refugees with expired documents were not permitted to renew their status. Kenyan police adopted a practice of stopping refugees and asking for their papers, and if refugees did not have the required documents they were at risk of arrest and, in some cases, deportation. It is worth noting, however, between 2012 to 2013 and 2014 to 2015, there were periods of urban registration that contributed to the ongoing urban verification programme. Small-scale and one-off urban registrations continue to occur occasionally, but this process has been largely scaled back since December 2012, when the DRA announced that the registration of asylum-seekers and refugees in urban areas would be suspended.[143]

3.5.2 The Tripartite Agreement of 2013

The Tripartite Agreement between the Government of Republic of Kenya, the Government of the Federal Republic of Somalia, and the United Nations High Commissioner for Refugees Governing the Voluntary Repatriation of Somali Refugees Living in Kenya, 2013 was signed in 10 November 2013 and was welcomed by NGOs, UNHCR, and various stakeholders as representing an important step in the development of durable solutions for Somali refugees.[144]

The Tripartite Agreement was carefully drafted so that the option of returning refugees to Somalia was not treated as an alternative to asylum. Return could only be carried out in specific circumstances, as it did not entail the cessation of refugee status and therefore there still existed insufficient protection from persecution in the country of origin. Thus the principle of voluntary

[143] Norwegian Refugee Council, A Review of the Legal Framework Relating to the Proposed Closure of Dadaab Refugee Camp and Repatriation of Somali Refugee, 2017, p.41.
[144]Art 2 Tripartite Agreement between the Government of the Republic of Kenya, the Government of the Federal Republic of Somalia, and the United Nations High Commissioner for Refugees Governing the Voluntary Repatriation of Somali refugees living in Kenya, 2013 (hereafter Tripartite Agreement).

return and the right to return in safety and dignity formed the backbone of the Tripartite Agreement. [145]

The Preamble of the Agreement also reaffirmed the prohibition of *refoulement*, which protects refugees from being sent to places where their lives or freedoms are in danger. Kenya and Somalia were bound by this principle as States Parties to the 1951 Convention Relating to Status of Refugees and Kenya was a State Party to the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, which also prohibits *refoulement*.[146]

The agreement's overarching objective was to provide for a legal framework for the voluntary return and reintegration of the Somali refugees in Somalia. All parties were obliged to ensure that the refugees' decision to repatriate was based on their freely expressed wishes and relevant knowledge of the conditions within Somalia. Crucially, the parties undertook to assist the refugees return in safety and dignity in accordance with international and national law.[147]

Kenya assumed this responsibility as long as the refugees were within Kenyan territory, and Somalia took over when they crossed into Somali territory. The agreement also sets out distinct duties for the three parties. Kenya's centered on the facilitation of the repatriation process - evidenced in its duties to provide security escorts for the repatriation convoys and to exempt all refugee goods from custom duties and taxes that would otherwise apply. Importantly, and connected to the principle of *non-Refoulement*, the Kenyan Government accepted its obligation to continue providing protection and assistance to refugees who decide not to be repatriated.[148]

Conversely, Somalia's obligations revolved around the reintegration of the refugees into Somali society. One example of this was its duty to establish administrative, judicial and security measures to ensure that the return and reintegration takes place in dignity and safety. UNHCR's obligations were of a monitoring and coordinating nature, evidenced by its duty to verify the

[145]Tripartite Agreement, 2013.
[146]*Ibid.*
[147] Article 10 Tripartite Agreement.
[148] Article 24(vi) and (viii) Tripartite Agreement.

legitimacy of the decisions made by refugees to repatriate in order to ensure that they were truly free and voluntary.[149]

All parties shared an obligation to provide the refugees with information on the current conditions that will inform their decisions to return. Moreover, the parties agreed to assist the Somali refugees to return to their final destination in safety and dignity.[150] The primary responsibility for the mobilization of the considerable resources needed for the operation was to be shared among the three parties.[151]

The agreement also established a Tripartite Commission whose membership is made up of the representatives of the three parties.[152] If all parties agreed, representatives of the refugee community could be invited to participate in the Commission's deliberations in an observer or advisory capacity.[153] Although the agreement provided that the Commission would determine overall policies, establish the modalities, and provide guidance to the parties, its principal objective was to advance the voluntary and organized repatriation of refugees, and their subsequent reintegration as returnees in Somalia.[154] It was unclear whether or not the Commission's advancement of voluntary repatriation would be limited to a facilitative role of assisting those who have already decided to return or would extend to include activities promoting or encouraging them to leave.[155]

Interestingly, there was no explicit provision indicating that the returnees will lose their refugee status on voluntarily returning. But a close look at the text suggests that they would. The text of the agreement, Kenya's Refugees Act, and past State practice indicated that once the decision to return was made with the requisite intent, the refugee in question was no longer in need of international protection - leading to the loss of his/her status. This was so notwithstanding

[149] Article 25 Tripartite Agreement.
[150] Article 12 Tripartite Agreement.
[151] Article 8 Tripartite Agreement.
[152] Article 4 Tripartite Agreement. Representatives of the refugee community may be invited subject to the agreement of all parties and their participation is to be advisory in nature.
[153] Article 4(5) Tripartite Agreement.
[154] *Ibid.*
[155] *Ibid.*

UNHCR's policy that the loss of refugee status was not always the case following a repatriation operation.[156]

Another matter not explicitly addressed was the possibility of the returnees returning to Kenya again as asylum-seekers. If this happened it was not clear whether they will be given *prima facie* refugee status, or, required to undergo individual status determination. Moreover, it was not immediately obvious whether or not the parties had accepted a suggestion floated by some NGOs that would create a 'grace period' allowing the returnees to retain their refugee status for a period following their return to Somalia.[157]

The agreement was to remain in force for three years and it could be renewed for a further period if the parties so agree. In line with the principle of *non-refoulement*, it did not set a deadline for the return of Somali refugees to Somali[158]

3.5.2 Government Directive of 2014

By Gazette Notice No. 1927 the Government, acting through the Cabinet Secretary designated areas as refugee camps. The Gazette Notice provided that "in exercise of the powers conferred by section 16(2) of the Refugees Act, 2006, the Cabinet Secretary for Interior and Coordination of National Government designates the areas specified in the schedule as Refugee Camps". These camps were put in the schedule as: The Ifo 1 and Ifo 2 and Dagahaley in Dadaab Ward of the Dadaab Sub-County in Garissa County; Hagardera and Kambioos in Jarajilla Ward of the Fafi Sub-County in Garissa County; and Kakuma of Kakuma Ward in the Turkana West Sub-County in Turkana County.[159]

Subsequently, on 26 March 2014, the Government issued a directive on refugee and national security issues.[160] It was premised on the position that refugees were residing in urban centers, other than Daadab and Kakuma refugee camps. It directed that the urban refugee registration

[156] Norwegian Refugee Council, A Review of the Legal Framework Relating to the Proposed Closure of Dadaab Refugee Camp and Repatriation of Somali Refugee, 2017, p.41.
[157] *Ibid.*
[158] Article 29(1) Tripartite Agreement.
[159] Robert Doya Nanima, *op.cit.,* p. 4.
[160] Press Statement by Cabinet Secretary For Interior & Coordination of National Government on Refugees and National Security issues on 26th March 2014.

centers be closed, and refugees moved back to the camps. This was followed by a deployment of the police to ensure the observance of this directive. The refugees were expected to relocate to the camps for registration, or renewal of their documents. Their relocation from urban centers to the refugee camps subjected the refugees to the discretion of the Refugee Camp Officer (RCO). The only exception to movements outside the camps was limited to a 40 kilometer radius around the camp.[161] This directive was another attempt by the Government to enforce the strict application of the encampment policy.

One of the most prominent incidents cited to justify the encampment approach towards Somali refugees was the Westgate Shopping Centre attack on September 2013. At least 67 people died when suspected *Al-Shabaab* militants stormed the shopping center, leading to a four-day siege. In this context, the Kenyan Government began a concerted effort to neutralise Al-Shabaab, beginning with *Operation Usalama* Watch, which commenced on 5 April 2014. Thousands of Somali refugees in Nairobi were apprehended and detained in the Kasarani Sport Stadium Complex in Nairobi. Some Somali detainees were charged with unlawful presence and were either made to relocate to refugee camps, deported or released after payment and on the condition that they would return to Somalia as soon as possible.[162]

3.5.3 Enactment of the Security Laws (Amendment) Act, 2014

In December 2014, significant legislative changes to the Refugees Act were adopted as part of efforts to strengthen security and provide for tougher anti-terrorism measures. The Security Laws (Amendment) Act 2014 amended a number of Kenyan statutes, including several new provisions which led to significant negative consequences for asylum-seekers and refugees. These included section 45, which required refugees to present themselves immediately to the Commissioner upon their entry into Kenya, without the previous period of 30 days in which they were permitted to do so. Under section 46,129 a strict requirement required asylum seekers and their families to remain in designated refugee camps until their applications were determined, effectively providing for a rigid application of the encampment policy in all cases. Section 47, provided that

[161] Press Statement by Cabinet Secretary For Interior & Coordination of National Government on Refugees and National Security issues on 26th March 2014.
[162] Norwegian Refugee Council, A Review of the Legal Framework Relating to the Proposed Closure of Dadaab Refugee Camp and Repatriation of Somali Refugee, 2017, p .25.

no refugee or asylum seeker would be allowed to a camp without the permission of the Refugee Camp Officer. This amendment enshrined in legislation a more rigid practice than the one in force. In a further change, section 48 came into force.[163]

The specific Section that Section 48 amended was Section 16 of The Refugee Act, 2006. The Section was amended to read as follows, that;

> The Refugee Act is amended by inserting the following new section immediately. 16A; (1) The number of refugees and asylum seekers permitted to stay in Kenya shall not exceed one hundred and fifty thousand persons; (2) The National Assembly may vary the number of refugees or asylum seekers permitted to be in Kenya; (3) Where the National Assembly varies the number of refugees or asylum seekers in Kenya, such variation shall be applicable for a period not exceeding six months only: and (4) The National Assembly may review the period of variation for a further six months.[164]

This section required Kenya to reduce the number of refugees to 150,000. The implementation of this section required the country to get rid of 338,415 refugees.

[163] Security Laws (Amendment) Act 2014.
[164] *Ibid.*

2016 – Statistical Summary of Refugees and Asylum Seekers in Kenya by Country of Origin and Location

Search:

Somalia	229.064,00	35.549,00	19.733,00	284.346,00
South Sudan	990,00	105.168,00	5.454,00	111.612,00
DR Congo	114,00	11.533,00	24.063,00	35.710,00
Ethiopia	7.759,00	10.470,00	9.651,00	27.880,00
Sudan	53,00	9.789,00	166,00	10.008,00
Burundi	83,00	10.134,00	2.611,00	12.828,00
Uganda	57,00	1.705,00	720,00	2.482,00
Rwanda	16,00	611,00	1.015,00	1.642,00
Eritrea	8,00	60,00	1.273,00	1.341,00
Other	8,00	135,00	423,00	566,00
Total	238.152,00	185.154,00	65.109,00	488.415,00

Source: Refugee Consortium of Kenya, 2016.

3.5.4 Closure of Refugee Camps

Following the April 2, 2015, deadly attacks at Garissa University by the Somalia-based terrorist group *Al-Shabaab*, which claimed close to 150 lives, Kenya announced that it would close the Dadaab refugee complex immediately and repatriate its residents, all of whom are Somali, back to Somalia. Kenya reportedly retracted its plans following pressure from the international community, including the United States of America. Subsequently, on 11th April, 2015 Kenya’s Deputy President William Ruto stated that the UNHCR had three months within which to close Dadaab and make alternative arrangements for its residents otherwise, Kenya would relocate the refugees themselves. Following this statement, the Ministry of the Interior issued a directive of 6 May 2016. The directive “disbanded the DRA and declared that two refugee camps – Daadab and Kakuma – would be closed within the shortest time possible”.[165] The Kenyan Government

[165]Norwegian Refugee Council, A Review of the Legal Framework Relating to the Proposed Closure of Dadaab Refugee Camp and Repatriation of Somali Refugee, 2017, p .25.

subsequently extended the deadline for the closure of Dadaab from 30 November 2016 to May 2017. Since May 2017, the camp has continued to operate despite the deadline having expired.

3.6 Conclusion

This chapter has outlined the development of Kenya refugee law since 1991, following the massive influx of refugees in Kenya. It is manifest that Kenya has made some remarkable steps towards the formulation and implementation of refugee law by enacting the Refugee Act, 2006. The Act introduced innovative ideas, such as the establishment of the Department of Refugee Affairs, the Officer of the Commissioner for Refugees, the Refugee Appeal Board and gave recourse to the High Court for appeals against the Refugee Board, all of which were aimed at enhancement of the way in which refugee issues were managed in Kenya. Subsequent, regulations and directions were meant to enhance the effectiveness of this act. The impact of this law and regulations is discussed in the next chapter.

CHAPTER FOUR
IMPACT OF KENYA REFUGEE LAW SINCE 1991

4. 1 Introduction

Kenya has hosted refugees from the neighbouring countries for a long time and now there have also been legislation on refugees. Kenya is a signatory to various international legal instruments that covers both International Human Rights Law and International Refugee Law. This is inclusive of Geneva Convention's protocol in 1967 and the OAU convention. Until 2006, there existed no refugee national legislation, but over the years, Kenya has registered hundreds of thousands of refugees from Somali and gave them temporary protection in various camps. Since it was passed in 200, there has been a regulation of the Kenyan refugees by the Refugees Act of 2006. The Acts provisions are related closely on the Regional and International instruments, containing necessary exceptions as necessitated by specific Kenya's circumstances. This chapter looks at the implementation impact of the Kenya refugee law on Kenyans, refugees and on other refugee legal instruments.

4.2 Encampment Policy

Prior to 1991, Kenya primarily pursued an open asylum policy where individual refugee status was granted by the government, and the refugees enjoyed their rights enshrined in the 1951 Convention such as the freedom of movement, access to employment markets and benefitted from social rights.[166] This was attributed to the fact that majority of the refugees were from Uganda and they contributed to Kenya's development and prosperity through the skills they brought in as doctors and teachers. [167] At this time, there was no formal refugee policy or national legislation on refugees and Kenya's priority was to socially and economically integrate refugees as quickly as possible.

[166]Gil Loescher, James Milner, Edward Newman and Gary Troeller, "The Long Road Home: Protracted Refugees Situation in Africa" *Online Publication*, 2005, p.4.

[167] Peter Kagwanja and Monica Juma 'Somali Refugees, "Protracted Exile and Shifting Security Frontiers", in Gil Loescher, James Milner, Edward Newman and Gary Troeller (eds), *Protracted Refugee Situations: Political, Human Rights and Security Implications*, Tokyo: United Nations University Press, 2008 pp. 214–247.

However, this approach dramatically changed in 1991 when the number of Somali refugees increased dramatically to around 400,000 by the end of 1992. This influx forced the government to shift refugee responsibility to UNHCR to manage the seven camps it had opened to accommodate the refugees.[168]

Encampment was thus the second stage in the evolution of the refugee regime in Kenya. Kenya's encampment policy started around 1991 following the influx of refugees from Somalia and Sudan. Kenya grudgingly accepted refugees from neighboring countries on condition that they were settled in the distant refugee camps. This indicated that the encampment system took root in Kenya following the influx of refugees starting from 1991.

With the implementation, the UNHCR was left to cater for the refugees in the camps that were set up at Dadaab in Garissa County and Kakuma in Turkana County. The Government's change of its position ended the integration and started the encampment policy. This new policy perceived refugees as transitory and as a result the lasting solution was repatriation. The policy required the settlement of refugees in camps where their movements were controlled. A refugee was not at liberty to leave a camp unless there was a valid reason to do so.

The enactment of the Refugee Act of 2006 embraced the encampment policy. In its definition of refugee status, it provides for both statutory and *prima facie* refugees and established institutions to manage refugee affairs in the country. Although the Refugee Act provided for the rights to movement and work, the application of the encampment policy changed the perception that Kenyans have about refugees. Kenyans stared to view refugees as a security threat and as persons who would compete for their jobs. Although the Refugee Act had various rights that refugees enjoy, it was a daunting task to enjoy them, due to the policy.[169]

4.2.1 Human Rights Violation in Refugee Camps

The current encampment policy has a number of disturbing features, which affect the enjoyment of rights by refugees. First, it represents a determination to resist the integration of refugees into

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[168]Gil Loescher, James Milner, Edward Newman and Gary Troeller, "The Long Road Home: Protracted Refugees Situation in Africa" *Online Publication*, 2005, p.4.

[169] The Kenya Refugee Act, 2006.

the economic and social life of the country. Section 16 of the 2006 Refugee Act, provided that every recognized refugee in Kenya and every member of his family in Kenya shall, 'be entitled to the rights and be subject to the obligations contained in the international conventions to which Kenya is party and shall be subject to all laws in force in Kenya'.

4.2.1.1 Freedom of Movement and Residence

Although the Act grants the same package of rights and duties as provided in the 1951 and 1969 OAU Conventions, there still exists some concerns with regard to the actual enjoyment of these rights. For instance, regarding freedom of movement and residence, the Act still required refugees to reside in designated camps. Under this policy, all refugees registered in the camps were not permitted to move outside the camps unless they received special permission. Asylum seekers entering Kenya were required to by law, register at the nearest office of the Refugees Commissioner, which in practice meant the DRA in Nairobi or UNHCR and the DRA in the Dadaab and Kakuma camps. A refugee's ability to move freely in Kenya - a right under the 1951 Refugee Convention - was therefore dependent on whether s/he entered Kenya through a border crossing near the Dadaab or Kakuma camps or through other points of entry closer to Nairobi. In the case of the camps, the refugee was required to register there and remain confined there unless receiving special permission to leave.[170]

Under the Refugees Act, the Refugees Commissioner "may, by notice in the Gazette designate places in Kenya to be refugee camps".[171]Refugees apprehended outside such areas could be charged with "residing without authority outside the designated areas," an offense which on conviction led to a fine of up to KES 20,000 (about $300) or imprisonment of up to six months. This requirement prohibited all refugees living there from moving outside of them unless they had a temporarily movement pass. This regulation was unlawful under international law. The DRA could issue a pass if a refugee has "a valid reason to travel" outside the camp. The DRA could also issue a special "pupil's pass" for students registered in the camps. If the DRA refused an application for a movement or pupil's pass, it must give "reasons in writing." However, Neither the Act nor the Regulations say what "valid reasons to travel" are. UNHCR and the DRA

[170]Human Rights Watch, Welcome to Kenya: Police Abuse of Somali Refugees, 2010, p. 73.
[171] The Kenya Refugee Act, 2006.

have created an ad hoc list of reasons which remain unpublished and which are not available in writing. The informal list included the following: health, education, resettlement interviews in Nairobi, and a catch - all category called "humanitarian requests" or "humanitarian reasons," which includes family - related reasons (for example, visiting sick relatives, funerals, weddings) and purchasing goods for trading purposes. As UNHCR noted, "It's an open list because there is no list."[172] Indeed, Al-Shabaab's threats against Kenya and the hardening political discourse against Somalis in general have led to an increase in reported cases of police turning back or arresting refugees traveling from the camps toward Nairobi with valid movement passes.

Police also have always said that because refugees produce fake movement passes that are hard to distinguish from valid passes—a fact which the DRA and UNHCR confirmed—they are forced to turn back or arrest refugees traveling with what may turn out to be valid passes. At times refugees with passes were allowed to continue and at other times they were arrested or turned back to the camps. As one agency official working in Dadaab put it in March 2010, "now we don't know from one day to the next how restrictive the policy will be".[173]

At the end of February 2010, police at the Modikare check point just before Garissa arrested four refugees traveling to Garissa for medical care. All four had valid movement passes, and their medical documents. Officers at the check point reportedly looked at the four refugees and said, "You don't really look sick." All were returned to the camps. Staff working in the Provincial Commissioner's office later disputed that they had valid passes, saying that the Provincial Administration had not approved the movement passes. An eight-month pregnant woman traveling with a valid movement pass was stopped at Modikare checkpoint on December 4, 2009 and the police tore up the pass. She was taken to Garissa police station where she was detained without charges for four days and released without explanation. In early 2010, police on the road between Dadaab and Garissa stopped an ambulance belonging to one of the medical NGOs working in the camp which was transporting a number of sick refugees to hospital. The police held the ambulance up while ignoring staff's requests to let them proceed to the hospital, forcing all the patients to get out of the vehicle for body search. Human Rights Watch also spoke with a

[172] Human Rights Watch, Welcome to Kenya: Police Abuse of Somali Refugees, 2010, p. 73.
[173] *Ibid.*

refugee who said he had obtained a movement pass for December 2009 -December 2010 for educational reasons and had traveled towards Nairobi but was arrested at the Kasarani checkpoint just before Nairobi. He was held for three days in a cell and released without explanation and allowed to continue to Nairobi.[174]

Refugees that were found moving outside the camps without movement passes were charged with traveling outside a designated area without permission, contrary to the Refugees Act and Regulations. Some were fined and others, including women with their babies, were sentenced to between one and 12 months in Garissa prison—in a separate building from the police station—where they were held in overcrowded cells and faced prison guard violence. Further, on January 18, 2010, the Garissa Magistrate's Court found four registered refugees guilty of moving outside of the camps without a movement pass, despite hearing evidence that all four had travelled to Liboi to pick up sick, elderly, or pregnant relatives about whom they were worried, given the prevalence of police abuses between the border and the camps. The magistrate fined one of them Kshs. 10,000/= ($133) and sentenced the other three to one month in prison.[175]Refugees found guilty by the Garissa magistrate's court of moving outside the camps without a movement pass are sentenced to between one and three months imprisonment, with women usually receiving lower sentences than men.[176] However, because the magistrate's court does not follow their files, some refugees paid police at the Garissa police station around Kshs. 40,000 ($533) to secure their immediate release.[177]In some cases, rather than arresting them, the police doing patrols between Dadaab and Garissa would take women and children off buses and tell them to walk back to the camps.[178]

Any restriction on freedom of movement must be clearly and precisely set out in domestic law. The principle reasons for this requirement was to prevent officials from taking arbitrary and abusively discretionary decisions and to ensure that people whose right to free movement was restricted. Restriction on freedom of movement was to be justified by one or more of the

[174] Human Rights Watch, Welcome to Kenya: Police Abuse of Somali Refugees, 2010, p. 76.
[175] Oral Interview, Mohamed Galgalo- Police officer, Garissa on 17/07/2018.
[176] Human Rights Watch, *op.cit.,* 79.
[177] Oral Interview, Ali Korane –UNHCR Dadaab on 20/07/2018.
[178] Human Rights Watch, *op.cit.,* p. 79.

following legitimate aims under the ICCPR: National Security, Public Order, Public Health or morals, or the rights and freedoms of others.[179]

David Mwangi laments that when the government invokes some of this measures as a justification for limiting free movement rights must be specific about how, for example, national security is threatened if the people who are prohibited from moving were allowed to move. Consequently, the measures were to be taken were to be proportionate to the legitimate aim pursued, but this was not always the case with measures taken against refugees living in Daddab refugee camp.[180]

Kenya's de facto encampment policy, including the movement pass system, fails to meet any of the criteria described above. The policy as such is discriminatory between Kenyan citizens and refugees because the policy allows the former to move and denies that right to the latter.

Ali Osman while reacting on the harsh treatment by Kenyan authorities towards refugees complained that there is no Kenyan law setting out the precise criteria on which the authorities may justify restricting a person's free movement.[181] The authorities have failed to say why they are restricting the movement of refugees in Dadaab, and why doing so is necessary to achieve any of their aims. Finally, they have failed to show how restricting all of Dadaab's refugees to the camps was a proportionate measure to achieve their unstated aim.[182] Under international law, the movement pass system was also in itself unlawful.[183] The law explicitly prohibited states from making freedom of movement "dependent on any particular purpose or reason for the person wanting to move". [184]

4.2.1.2 Legal Principles

Kenya's international obligations require it to guarantee refugees the right to choose their own residence and to move freely throughout Kenya. Kenya may only limit the movement of people in Kenya—nationals or non-nationals alike - if it was "provided by law and the necessity to

[179] Human Rights Watch, Welcome to Kenya: Police Abuse of Somali Refugees, 2010, p. 80.
[180]Oral Interview, David Mwangi-UNHCR Dadaab on 17/07/2018.
[181] Oral Interview, Ali Osman, refugee, Dadaab on 18/07/2018.
[182] Human Rights Watch, Welcome to Kenya: Police Abuse of Somali Refugees, 2010, p. 82.
[183] Oral Interview, Ali Osman ,refugee–Dadaab on 18/07/2018.
[184] *Ibid.*

protect national security, public order, public health or morals, or the rights and freedoms of others. In addition, these restrictions must be non-discriminatory, in accordance with national law, and be "necessary" to achieve one or more legitimate aims. Any such restrictions on a person's free movement must be proportionate in relation to the aim sought to be achieved by the restriction that is, carefully balanced against the specific reason for the restriction being put in place.[185]

Kenyan refugee law provides that "every recognized refugee shall be entitled to the rights in the International Conventions to which Kenya is party," thereby recognizing refugees' right to freedom of movement. However, as set out above, Kenyan refugee law and related regulations allowed the authorities to designate certain areas as camps, to confine refugees to those camps, and to exceptionally allow some refugees to travel if they have a movement pass. The Act does not specify the purpose of "designating areas" as camps and does not say under what circumstances the Commissioner "may designate areas." Kenya's Constitution says that a person's freedom of movement in Kenya may be restricted if it is "reasonably required in the interests of defense, public safety or public order". These "interests" are the same as those identified by international law, as set out above, and can therefore only be lawfully invoked if they meet the following criteria.[186]

Any restriction on freedom of movement must not have a discriminatory effect, which has been described by the Human Rights Committee as,

> any distinction, exclusion, restriction or preference which is based on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[187]

Lewis Ndemo points out that any differential treatment between non-citizens and citizens on the grounds of their citizenship must be strictly justified and was normally limited to political rights (such as the right to vote). Unfortunately, this has not been the case for refugees in Kenya.[188]

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[185] Human Rights Watch, Welcome to Kenya: Police Abuse of Somali Refugees, 2010, p. 79.
[186] *Ibid.*
[187] *Ibid,* p. 80.
[188] Oral Interview, Lewis Ndemo Osero Advocate –Nairobi 0n 25/07/2018.

4.2.1.3 The Location of Kenya's Refugee Camps

According to one UNHCR official in Kenya, "you cannot create island of security in a sea of insecurity."[189] It is a statement that neatly encapsulates the difficulties experienced by UNHCR and other humanitarian organizations working in the country's refugee camps. Kakuma and Daadab are both located in remote and semi-arid areas, sparsely populated by desperately poor nomadic pastoralists. They are almost totally devoid of any investment or development activity, whether by the Kenyan authorities, private enterprise or international agencies. In both areas, refugees easily outnumber the indigenous population. In the Kakuma area, for example, Kenyan citizens represent well under half of the total population. And contrary to the situation in Dadaab, the Turkana have no ethnic or cultural links with the residents of the camp.[190]

There is a general recognition in Kakuma and Daadab that the refugees enjoy a standard of living which is equal to if not better than many local people. In the words of Faith Okitoyi, the level of malnutrition amongst the Turkana was higher than it is amongst the refugees in Kakuma.[191] Some of the Turkana people were even employed as domestic and manual labour by the more prosperous refugees.[192] While local people have been given access to many of the camp's facilities, and although UNHCR has established its 'refugee-affected area' programme, the Turkana do not receive the food ration which is given to the refugees - an important consideration in a subsistence economy.[193] Not surprisingly, in the words of one NGO staff member, "the locals feel that the refugees are getting all the goodies."[194]

Additional resentment comes from Kenyan traders, who find it difficult to compete with their Somali and Ethiopian competitors, as the latter are not subject to taxation by the Kenyan authorities.[195] The potential for conflict between refugees and locals since 1991 years was exacerbated by the fact that the refugee population grew at an alarming rate, obliging UNHCR to

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[189]Jeff Crisp, *Africa's refugees: Patterns, problems and policy challenges,* Evaluation and Policy Analysis Unit, UNHCR Working Paper no. 28, August 2000, p. 19.
[190] *Ibid.*
[191]Oral interview Faith Okitoyi, UNHCR Dadaab on 17/07/2018.
[192] *Ibid.*
[193]*Ibid.*
[194]Oral Interview, Nathan Mwachinga UNHCR Dadaab on 18/07/2018.
[195]Jeff Crisp, *Africa's refugees: Patterns, problems and policy challenges,* Evaluation and Policy Analysis Unit, UNHCR Working Paper no. 28, August 2000, p. 19.

seek additional land in an area which provided prime grazing land for the Turkana. The poverty of Kakuma and Daadab was closely related to their instability.[196] The border areas of north-west and north-east Kenya have always been insecure and weakly governed, characterized by banditry, cattle rustling and insurgency, as well as violent clashes between the Kenyan army and local armed groups. As a result of conflicts in neighbouring countries - Ethiopia, Somalia, Southern Sudan and northern Uganda - the area has been flooded with small arms and automatic weapons. Some militia groups from Somalia are also known to have taken up residence in north-east Kenya. Indeed, some of the first attacks on refugee camps in the area took place in the early 1990s, when the multinational forces of Operation Restore Hope drove a number of militiamen and bandits across the border into Kenya.[197]

While the areas of Kakuma and Daadab have traditionally experienced high levels of insecurity, the establishment of the two refugee camps appears to have led to a geographical concentration of the violence. There are simply more items to steal, more people to rob and more women to rape in and around the camps than in other parts of the two provinces. The presence of the refugee camps has also been destabilizing in political terms. The resentment of local people towards refugees in Kakuma, for example, has been mobilized and exploited by local politicians, seeking to strengthen their popular support. The fact that UNHCR and other agencies provide almost the only source of employment and business in the area leads to intense competition for jobs, contracts and access to the various resources of the refugee assistance programme. Although 85 per cent of jobs in the camp are supposedly reserved for local people, few of the Turkana are sufficiently qualified for the better paid posts. Those who do have the necessary qualifications also tend to be highly politicized, something which has contributed to regular disputes over issues such as recruitment, dismissals and promotions. As a result of these factors, Kakuma has become a hotbed of intrigue, where discontented individuals and groups of people have an interest in fomenting unrest.[198]

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[196] Oral interview. Ali Osman Dadaab, on 18/07/2018.

[197] Jeff Crisp, *Africa's refugees: Patterns, problems and policy challenges,* Evaluation and Policy Analysis Unit, UNHCR Working Paper no. 28, August 2000, p. 20.

[198] *Ibid.*

4.2.1.4 Dependency and Deprivations in Refugee Camps

As already noted refugee camps in Kenya have been established in peripheral regions, which have led to segregation and marginalization of refugees. The international humanitarian organizations administering these camps have different cultural norms, linguistic backgrounds, and political concerns than the people under their care. Refugees in the crisis phase welcome the assistance strangers bestow upon them and remain acquiescent to camp regimentation. However, once the emergency period passes, with camps entering a maintenance phase, refugees experience few changes in the routines of scheduled ration distributions, head counts, and visits of international dignitaries. Resentment and conflict with the aid apparatus follows. Aggravating these inadequacies further was the prohibition of freedom of movement to which refugees in Kenya camps are subjected, a constraint that greatly hampered the ability to seek alternative livelihood strategies outside the camps.[199]

Coupled with the difficulties international humanitarian organizations experience in raising sufficient funds to administer the camps with adequate provisions beyond the emergency phase, this rendered the camps domains of high material scarcity. Refuges have argued against this type of encampment. Opposition to encampment included that camps engender passivity, breaking down all initiative and sense of self-worth of refugees. The hand-to-mouth arrangement of waiting for others to provide for one's needs eventually translated to complete dependency on donations.[200]

Data collected from Somalis in Dadaab confirms the deprivations refugees experience in protracted situations. Interviewees detailed the precariousness of their day-to-day existence, which is, unfortunately, substantiated by camp administration reports. For example, WFP often raises alarm bells about the impending starvation of refugees in Dadaab or in Kenya. The food WFP is able to secure always falls short of the daily caloric requirement, with both the quantity and quality of rations falling short. Refugees expressed frustration with the situation.[201] Foodstuffs distributed are actually often scorned. Refugees in the camps argued that the quality

[199]Oral interview, David Makori, Interior Ministry, Nairobi on 19/07/2018.
[200] Oral Interview Ali Noor ,Interior Ministry, Garissa on 23/07/2018.
[201]Awa M. Abdi, "In Limbo: Dependency, Insecurity, and Identity amongst Somali Refugees in Dadaab Camps", Canada's *Journal of Refugees*, Vol. 22 No. 2. 2005, p, 21.

of the grains distributed is not fit for humans, even though the food distributed was rarely enough both in quality and quantity.[202]

4.2.1.5 Insecurity in Refugee Camps

The majority of refugees living in Kenya are to be found at Kakuma refugee camp (in the north-west of Kenya), and Dadaab refugee camps (in the north-east). Refugees in camps face a number of insecurities including, domestic and community violence, sexual abuse and violence, armed robbery, violence within national refugee groups, violence between national refugee groups, violence between refugees and local populations and police brutality. Given the level of insecurity which prevails in and around Kenya's refugee camps, one might legitimately ask what steps the refugee law taken to curtail the level of violence. It has been argued that UNHCR, other humanitarian agencies and the police are an intrinsic part of the security problem in Kenya, "administering the camps in ways which often appear to be in blatant disregard of international human rights standards." These officials have been taken to task for failing to take adequate action in support of refugees rights in the camps.[203] Police stationed inside the camps have been accused of committing serious violence against refugees living there.[204] Kenya police have been accused of torture, rape, beatings, and extortion. Equally, the police have been accused of arbitrary detention and criminal charges without evidence on the pretext of administering law and order in the refugee camps.[205]

It should be noted that under the Kenyan Constitution, which reflects key provisions of international human rights treaties to which Kenya is party including the International Covenant on Civil and Political Rights, all people in Kenya, including refugees and asylum seekers, are entitled to protection of their physical integrity, freedom from all forms of inhuman and degrading treatment or punishment, freedom from arbitrary arrest and detention, and protection from arbitrary interference with their property and privacy without discrimination on the grounds of national origin or any other status. The above abuses thus point to the weakness of Kenya refugee law.

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[202] Oral Interview, Fatuma Zaida, Refugee. Dadaab on 20/07/2018.
[203] Oral Interview, Mary Mukami ,Lawyer -Nairobi on 28/07/2018.
[204] *Ibid.*
[205] *Ibid.*

4.2.1.6 Police Failure to Protect Victims of Violence

Although the police in the Dadaab camps are themselves the perpetrators of a range of serious abuses against refugees, it is also the police to whom refugee women and girls must turn for access to justice and protection in the face of sexual violence, whether by other refugees or Kenyans. Indeed, sexual violence survivors were reluctant to report to the police on their ordeal, including because of past abuse by police in Kenya or elsewhere, lack of confidence in the justice system or the police, threats of retaliation from the perpetrator, community pressure to solve conflicts internally, and fear of stigma. But, in spite of all this, some women and girls do come forward.[206]

Ali Salim a refugee who lives in East Leigh does not support views that refugees constitute a threat to security. He points out that this are people who have run away from violence or other forms of persecution, the suffering that they have had will in most cases want order to prevail. Moreover most of them usually flee with their children and all that they are looking for is shelter and security. [207]

In some cases, survivors reported their rape to the police, but said that after the initial police interview there was no further action. Others said the police told them that the investigation could not go ahead unless they, as the survivor, produced witnesses or called the police if they saw the perpetrator again. In cases where an attack took place at night time and the survivor could not identify her attacker, such instructions effectively meant the end of the case. In cases where the police arrested a suspect, the prospect of justice was often short-lived, women narrated that suspects were released within hours or a matter of days and that the police discontinued their investigation without explanation. Many women said they thought that suspects bribed the police to discontinue investigations or to release them.[208]

Under the Kenya, Regional and International Law, the Government of Kenya has an obligation to prevent, investigate, prosecute, and punish violence against women. The obligation is grounded in the rights of non-discrimination, security of person, and freedom from torture provided in treaties ratified by Kenya and includes ensuring that State actors, such as the police,

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[206] Human Rights Watch, Welcome to Kenya: Police Abuse of Somali Refugees, 2010, p. 52.
[207] Ali Salim. Refugee , Dadaab, on 18/07/2018.
[208] Human Rights Watch, Welcome to Kenya: Police Abuse of Somali Refugees, 2010, p. 53.

do not commit such violence and taking all reasonable steps to provide everyone within its territory with effective protection against such violence by private parties. Included in this obligation is the State's duty to effectively investigate whenever such violence occurs, which international human rights tribunal case law says involves an investigation capable of leading to the identification and punishment of those responsible.[209] The failure to adhere to these international standards suggests a weakness in Kenya's refugee law.

4.2.1.7 UNHCR's Role in Monitoring Violations of the Rights of Asylum Seekers and Refugees

At least two factors have made UNHCR unable to carry out effective protection monitoring in the camps. First, UNHCR says that, due to security concerns, it has limited access to areas outside of its own compounds in the camps. Any time a UNHCR staff member wished to access any location where refugees lived and work her/him was to be accompanied by police escorts, but on most occasions there was a shortage of police escorts.[210] Second, UNHCR staff in Dadaab has always been overwhelmed by the many challenges posed by the refugees living in chronically underfunded camps designed for a third of the current population, challenges exacerbated by the long-term underfunding of UNHCR's operations in Dadaab in particular. UNHCR has always stated that their limited numbers of staff work overtime, always juggling different priorities and that it was over-stretched. During the period of this study, UNHCR had a limited number of protection staff dedicated to monitoring serious rights abuses faced by asylum seekers on their way to the camps, refugees in the camps, and refugees moving outside the camps.

4.3 Effect of Government Directive of 2012

In 2012, Kenyan government officials and the media often asserted that violence in the refugee camps and in East Leigh, a Somali -dominated neighborhood of Nairobi, can be attributed to the high populations of Somali refugees living in camps and urban settings in Kenya. After a series of grenade attacks in East Leigh, the Government of Kenya attributed the attacks to *Al - Shabaab* and used the attacks to justify the December 2012 forced encampment policy for refugees.

[209]Human Rights Watch, Welcome to Kenya: Police Abuse of Somali Refugees, 2010, p. 53.
[210] Oral Interview, Ali Osman, refugee -Dadaab, 18/07/2018.

According to the DRA's press statement, the policy directly resulted from the 'rampant insecurity in the refugee camps and urban areas'.[211] As a result of a series of grenade attacks in urban areas the government decided with immediate effect stopped all registration of asylum seekers in urban areas. Further, all asylum seekers were directed to Daadab and Kakuma for registration and The Refugee Status Determination (RSD), and Somali refugees living in urban areas were ordered to report to the camps. Until then, refugees who could support themselves or were in need of specialised education or medical care had been allowed to live in urban areas.[212]

On 18 December 2012, the Kenyan authorities issued a press release stating that they had decided to cease reception, registration and to close all registrations centers for refugees in urban areas with immediate effect. From that time forward, asylum seekers and refugees were to be hosted exclusively in refugee camps. Almost a month later, on 16 January 2013 the instructions were issued to give effect to the decision. A first phase was announced to commence on 21 January 2013, targeting 18,000 refugees who were to be taken at first instance to Kasarani stadium in Nairobi. From there, they were to be taken to Daadab and Kakuma camps and ultimately to their home countries. At that time there were approximately 56,000 refugees residing in urban areas in Kenya.[213]

An objective of the order was to oblige all asylum seekers and refugees to register in one of the two main camps. This was the central objective of DRA. Once a refugee was registered in a camp, she /he was required to obtain from the camp director a pass to travel in Kenya outside the camp. These passes were time limited and issued only on a limited number of grounds. Thus any asylum seeker who did not wish to live in a camp could not register in a camp but found a way to register in an urban center. For refugees, the issue was not dissimilar as it appeared that when documents expired, at least in theory, they were required to go to the camps to register to obtain extensions. For a short period in March 2013, and in November 2014, however, such registration was taking place in Nairobi on an exceptional basis for vulnerable asylum seekers.[214]

[211] Ministry of Interior, Department of Refugee Affairs 2012.
[212] Oral Interview, Peter Wambua-Interior Ministry, Dadaab on 19/07/2018.
[213] UNHCR-KENYA, UNHCR country operations profile –Kenya', 2013.
[214] Oral interview, Mary Mukami Lawyer -Nairobi 28/07/2018.

This government directive and proposed implementation plan, was however, seen as being in breach of Kenya's international human rights obligations because it is overtly discriminatory; violate Article 3 and 26 of the 1951 Convention Relating to the Status of Refugees and Article 11(1) of the 1966 International Covenant on Economic, Social and Cultural Rights; and potentially violates Kenya's *non-refoulement* obligations. Most basically, the Government of Kenya's directive was overtly discriminatory.

According to the International Convention on the Elimination of All Forms of Racial Discrimination (1966), discrimination is defined as:

> ...Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[215]

The directive was discriminatory on two levels: first, it targeted refugees (specifically urban refugees), and secondly, it differentiated between refugees from Somalia and refugees from other countries. The forced eviction component of the policy explicitly discriminated against refugees, specifically urban refugees. In contrast to some forced eviction policies that are applied to all inhabitants of a certain area regardless of their immigration status, the Government of Kenya's policy targeted urban refugees. While forced evictions may be legal in certain circumstances, commentary on Article 11 of CESCR states, 'where evictions do occur, appropriate measures are taken to ensure that no form of discrimination is involved'.[216]

Since the Government's forced eviction policy would only be applied to refugees rather than to all inhabitants of a certain neighbourhood or district, the policy involved a form of discrimination. Furthermore, the Government of Kenya's forced encampment policy was potentially in violation of Article 3 of the Refugee Convention, which states that 'The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin'.[217] By differentiating between Somali

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[215]International Convention on the Elimination of All Forms of Racial Discrimination, 1966.
[216] Office of the High Commissioner for Human Rights, 'The Right to Adequate Housing, Art. 11.1: Forced Evictions', 1997.
[217] UNHCR, Statute of the office of the United Nations High Commissioner for Refugees, Article 3.

refugees and refugees from other countries, the Government of Kenya was effectively discriminating against refugees on the basis of their country of origin.[218] Further, legal arguments against the guidelines on relocation of urban refugees to the camps were based on the Kenyan Constitution. Article 28 protects the right to dignity, Article 29 prohibits arbitrary and discriminatory acts, and Article 39 safeguards the right of free movement.[219] Additionally, and in a second line of argument, the petitioners argued a violation of Kenya's international obligations

After the passing of the directive, *Kituo Cha Sheria*, a Non-Government Organisation that runs programmes designed to address the rights and welfare of refugees within the Republic of Kenya petitioned the High Court. It sought a declaration that the directive violated the rights of refugees living in Kenya. The petitioners stated that the directive violated Article 28 with regard to human dignity and Article 47 with regard to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. They also added that the directive violated Article 39 with regard to the right to movement and Article 27 against arbitrary and discriminatory actions.

The court stated that the application of this policy would lead to a violation of refugee rights. The court based its reasoning on five grounds:

> First, the policy is unreasonable and contrary to Article 47(1). Second, it violates the freedom of movement of refugees. Third, it exposes refugees to a level of vulnerability that is inconsistent with the States duty to take care of persons in vulnerable circumstances. Fourth, the right to dignity of refugees is violated. Fifth, the implementation of the Government directive threatens to violate the fundamental principle of *non-refoulement*.[220]

The court's use of a human rights perspective was a departure from the Government's stand on security. While security was a cardinal issue in the protection of human rights, this administrative decision had to pass the constitutional standard of protection of human rights. The court used the right to a fair administrative action to establish if the relocation of the refugees to the camps without due process was constitutional.[221]

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[218] Oral Interview, Lewis Ndemo Osero, Lawyer –Nairobi on 25/07/2018.
[219] The Constitution of Kenya.
[220] Robert Doya Nanima, *op.cit.,* p. 57.
[221] *Ibid.*

The court recognised the right to freedom of movement as an issue that affects refugees in urban centers and stated:

> As far as refugees are concerned, two conclusions may be drawn from Article 39 of the Constitution. First, although the right under Article 39(3) is limited to citizens, it does not expressly limit the right of refugees to move within Kenya guaranteed under Article 39(1). Second, it does not expressly recognise the right of refugees to reside anywhere in Kenya but more important the Constitution does not prohibit refugees from residing anywhere in Kenya.[222]

This stand by the court showed a parallel perspective to the Government's enforcement of the encampment policy. By its nature this decision evaluated the effect of the directive on the rights of refugees. The court sought to avert the constitutional violations posed by the directive. The reparations by the court required the Government to restitute the rights of refugees.[223]

Prior to this court ruling, Kenyan police had unleashed a wave of abuses, including torture, against Somali and Ethiopian refugees and asylum seekers as well Somali Kenyans in East Leigh, a predominantly Somali suburb of Nairobi. Refugees claimed that the police committed the abuses, which included rape, beatings and kicking, theft, extortion, and arbitrary detention in inhuman and degrading conditions. Many women and children were among the victims.[224] Police officers also arrested and charged hundreds of East Leigh residents with public order offenses without any evidence, before the courts ordered their release. The police repeatedly accused them of being "terrorists," indicating one motivation for the abuses appeared to be retaliation for some 30 attacks on law enforcement officials and civilians by unknown perpetrators in Kenya since October 2011.[225]

The police were also accused of using threats of transfer to the camps or deportation to Somalia as a further excuse for their abuses and extortion. It was claimed that the police "demanded victims pay them large sums of money so as to buy freedom". [226] To most refugees personal gain on the part of the police and not national security concerns was the main reason police targeted

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[222] *Ibid.* Robert Doya Nanima, *op.cit.,* p. 57.
[223] *Ibid.*
[224] Oral Interview, Abdul Maalim. Nairobi, 01/08/2018.
[225] Oral Interview, Yasim Hussein, Resident Nairobi, 01/08/2018.
[226] Oral Interview, Mariam Omar, Resident, Nairobi, 02/08/2018.

and abused their victims.[227] The abuses ended in late January 2014, a few days after the Kenyan High Court ordered the authorities to halt a proposed plan to relocate all urban refugees to refugee camps.[228] But In spite of the High Court decision, in March 2014 the government issued a similar directive and launched an internal security operation -'Operation Usalama Watch'. The Kenya Police began to enforce the directive harassing, arresting and detaining persons mainly from the Somali ethnic community and sending them to refugee camps. There were reports that hundreds of families were separated - including children from their parents.

4.4 Effect of the Tripartite Agreement of 2013

A major milestone in the two-decade long story of Somali refugee in Kenya was crossed when high-level representatives from Kenya, Somalia, and UNHCR convened to adopt an agreement governing the voluntary return of Somali refugees. During the ceremony, the signatories emphasized the voluntariness of the return process – stressing that the returns are to be grounded on the voluntary and informed decisions of the refugees. In doing so, they signaled that force will not be used to compel the Somali refugees to leave; reaffirming that the operation is to be a refugee-led process supported by the two governments and UNHCR.[229]

In adopting the agreement the parties chose one of the three durable solutions that have developed over time to address the problem of external displacement; the other two are the integration of refugees in to the country of asylum and resettlement in a third country. Although not mentioned directly in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, the three solutions have developed through UNHCR practice as the institution's policy response to external displacement.

The prominence placed on each of the three solutions has changed throughout history; in fact following the Second World War resettlement in third states was considered the most feasible solution. Today, however, voluntary repatriation is regarded as the most desirable solution. One possible explanation for its present attractiveness is that it resonates with the prevailing political and socio-economic interests of host States and the wider international community. A voluntary

[227] Oral Interview, Yasim Husein, Resident, Nairobi, 01/08/2018.
[228] Oral Interview, Ipsha Abdi, Resident East Leigh, 02//08/2018.
[229]Kenya Refugee Tripartite Agreement 2013.

return 'home' is seen as the neatest solution – a position strengthened by the perception that the presence of large refugee populations involves significant economic, cultural, environmental and security costs. Findings that challenge these perceptions and highlight the positive impacts of hosting a refugee population hardly change sentiments or encourage the integration and resettlement of large numbers of refugees in their societies.[230] After more than two decades of acting as a host, Kenya appears no different. The proposition of integrating the Somali refugee population as citizens or permanent residents continues to be politically unviable.

This agreement for the "voluntary" repatriation of Somali refugees that outlined that both countries and UNHCR was to make sure Somalis return voluntarily in safety and dignity. But the experiences of many Somali refugees in Dadaab stood in sharp contrast to those commitments.[231] Testimonies from the refugees indicated that conditions in south-central Somalia were not conducive to mass refugee returns in safety and dignity. In this regions in Somalia civilians continue to be severely affected by the conflict, with reports of civilians being killed and injured in conflict-related violence, widespread sexual and gender-based violence against women and children, forced recruitment of children, and large-scale displacement.[232] Indeed, the information that UNHCR provided to refugees in Dadaab seeking to make an informed choice about returning, however, was mostly superficial and out of date, and sometimes misleading.[233]

Secondly, the concept of voluntary returns may have been clear enough in principle; its implementation was more complex. For instance, voluntary repatriation was not, however, the practice of Kenya in the aftermath of the conclusion of the Tripartite Agreement. In April 2014, Kenya launched a massive security crackdown on Somali refugees following terrorist attacks in several areas, culminating in the forced deportation of 359 refugees. At that time the situation in Somalia was not conducive to the mass return of refugees and only a few parts of Somalia were safe for return. Unsurprisingly, therefore, both Amnesty International and the UNHCR condemned these acts as a breach of international law.[234] The Somali government responded by

[230] The UNHCR Handbook on Repatriation, 1997.
[231] Oral Interview, Noor Abdiba UNHCR, Dadaab, 18/07/2018.
[232] Oral Interview, Abdul Maalim. Refugee, Nairobi, 21/08/2018.
[233] Oral Interview, Noor Abdiba UNHCR, Dadaab, 18/07/2018.
[234] *Ibid.*

refusing to attend a meeting concerning the Tripartite Agreement, which was due to take place on 27 May, 2014. According to the Somali government,

> as we are concerned about the plight of Somali refugees and the unlawful activities committed by the Kenyan security forces against the refugees of Somalia in Kenya, we cannot attend such meeting.[235]

The launch of a 12-member Tripartite Commission to oversee the gradual and voluntary repatriation process was shortly suspended. On 22nd December, 2014, the Kenya government enacted the Security Laws (Amendment) through Section 48 of the Refugee Act of Kenya 2006 was amended.[236]

A number of questions about the voluntariness and timeliness of the process arose. For instance, how voluntary can a returns operation be when it is implemented in an economic and socio-political context that overwhelmingly favors return? How real is the risk of eroding the protection accorded to refugees by international and national law when increasing, and perhaps undue, importance is placed on the interests of state actors? Can it ever be legally or ethically appropriate to advance repatriation when the security situation in the country of origin is precarious and the receiving government's capacity to absorb and integrate returnees is limited? While answers to these and other questions may not be clear, what appears certain is that the implementation of the agreement will be both contested and complicated.

On the 10th of November 2013, Kenya, Somalia and the United Nations High Commissioner for Refugees (UNHCR) signed a Tripartite Agreement governing the voluntary return of Somali refugees living in Kenya. According to the parties the agreement does not amount to, nor signal a push towards, the forcible return of the 477,491 registered Somali refugees residing in Kenya. During the ceremony, the signatories emphasized the voluntariness of the return process. Reaffirming that the operation is to be a refugee-led process supported by the two governments and UNHCR.[237]

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[235]UNHCR-KENYA, UNHCR country operations profile –Kenya, 2013.
[236] Peter Aling'o, "Kenya's current probe on terror: why Operation Usalama Watch won't cut it", *Institute for Security Studies*, 02 May 2014, p. 1.
[237]UNHCR-KENYA, Country Operations Profile –Kenya, 2013.

4.5 Effect of Operation *Usalama* Watch

At the beginning of April 2014, the Kenyan government launched a massive crackdown on terror. Known as Operation *Usalama* (peace) Watch, the security forces describe it as an operation to detect illegal immigrants, arrest and prosecute people suspected of engaging in terrorist activities, identify places harbouring criminals and prevent acts of crime and lawlessness in general. However, the operation is essentially aimed at eliminating terrorism. Operation *Usalama* Watch – focused mainly on Nairobi's Eastleigh area and Mombasa and resulted in many as 4,000 people being arrested and detained. The operation had a striking similarity to the one mounted against the terrorists during the Westgate Mall attack on Saturday, 21 September 2013. In both cases the operations were bullish, brutal, impulse driven and reactionary. Moreover, both types of operations involved different security arms and departments of government. A further similarity is that both operations are aimed at an enemy described vaguely as 'terrorism' – but which is difficult to identify in reality, despite being present throughout the country and the region.[238]

There is no doubt that terrorism is a global threat and should therefore not be countenanced. Kenya is no exception, and has since 1998 suffered numerous terrorist attacks in which many lives and property have been lost. In 2014, at least five such attacks occurred in Nairobi's Eastleigh area, in Mombasa and in north-eastern Kenya. This showed that the threat of terrorism in Kenya had become a real menace. The Kenyan government's reaction to this threat has been largely oblivious of the root factors – as demonstrated during the Westgate Mall attack and Operation *Usalama* Watch. The Westgate Mall attack saw the use of uncoordinated force by the government's military and security, which nevertheless did not prevent the loss of lives and left behind massive destruction of property, and extreme bitterness among the people of Kenya. Even with a demonstration of such might, terrorism was not defeated. Under Operation *Usalama* Watch, large numbers of security personnel were deployed in Nairobi's Eastleigh area and parts of Mombasa, which were believed to host operational bases for terrorists.[239]

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[238] Oral Interview, Bonny Munzala, Police officer, Kasarani on 03/08/2018.
[239] Peter Aling'o, "Kenya's Current Probe on Terror: Why Operation Usalama Watch Won't Cut it", *Institute for Security Studies*, 02 May 2014, p. 1.

During the operation, large numbers of people were arrested and detained, particularly those perceived to be non-Kenyans or suspected to be criminals. The arrested were held in degrading conditions, in a way that showed little regard for basic human rights and the fundamental liberties enshrined under the Kenyan Constitution, as well as international and regional human rights law and standards, which Kenya is obligated to observe. This only deepened a sense of resentment, isolation, and discrimination, which are recipes for radicalisation, extremism and ultimately further terrorist activities.[240]

For example, out of those arrested and detained, some 82 were deported to Somalia in the first week of the operation – and over 225 were deported in the second week of the operation. Yet the basis under which the deportations were being conducted was not clear, since human rights organisations, including UNHRC, were denied access to the detention and screening centers. In any event, any deportations to Somalia contravened refugee principles of non-*Refoulement,* which is protected under Article 2 (3) of the 1969, Organisation of African Unity Convention Governing Specific Aspects of Refugee Problems in Africa, to which Kenya is a signatory.[241] Indeed, this act was against the spirit and letter of the Tripartite Agreement of 2013, which had been imitated by Kenya.

Furthermore, the concentration of the security forces' raids in Nairobi's Eastleigh and parts of Mombasa also added credit to the perception that the operation was discriminatory and targeted towards particular communities and a particular religion. This increased perceptions that the operation was being driven by little more than ethnic and religious profiling. Security is indeed a sensitive matter, and governments have the right to ensure the safety and security of its citizens within its borders. However, the best way to do this was to ensure that large-scale security operations were based on clear intelligence, and are well-thought-out and planned to ensure that they are conducted in a humane and balanced manner.[242] This would have helped reduce the risk that security operations contributed to further radicalisation, extremism and terrorist activities, as

[240] Peter Aling'o, "Kenya's Current Probe on Terror: Why Operation Usalama Watch Won't Cut it", *Institute for Security Studies*, 02 May 2014, p. 1.
[241] *Ibid.*
[242]Oral Interview, Mariam Omar, Refugee, Nairobi, 02/08/2018.

it was not possible – merely based on security operations – to identify all those involved across Kenya and the region.

4.6 Effect of the Security Laws (Amendment) Act 2014

Adopted amid controversy by the Kenyan National Assembly on 19 December 2014, these amendments appear to reflect a security-oriented focus. As already noted this amendment of the refugee law came up after the government of Kenya had blamed the refugees for the high insecurity in Kenya. However, observers have noted that this was part of a dangerous tendency to conflate refugees and terrorists. Ever since Kenyan troops' incursion into Somalia in 2011 brought increased *Al-Shabaab* attacks to Kenyan soil, refugees have been at the forefront of an often heavy-handed response by the Kenyan state. In December 2012, after a series of grenade attacks by dissidents, it was announced that no further refugee registrations would happen in Kenya's cities, and that refugees should be moved to the camps. The Commissioner for Refugee Affairs indicated that this was because "refugees, particularly those living in urban centers, were contributing to insecurity in the country." [243] At this time, abuse and extortion by police of Somali refugees in Kenya's capital was widely reported, in which victims were routinely described as "terrorists" and seen as " walking bank ATMs" by police, who demanded payments to free them.[244]

This was notwithstanding the lack of established systematic connections between specific terrorist incidents and asylum seekers or refugees in recent years. While Kenya's legitimate desire to ensure the security of its territory and its citizens could justify measures to strengthen its oversight of the non-citizen population, it could be questioned whether the changes brought about by the new Act represent the most effective and proportionate means to achieve that goal.[245] In addition, there was a negative impact upon the rights of individuals who were in need of international protection, as well as on overall confidence levels in the prospects for a fair objective and effective asylum process which fully respected due process and the rule-of-law in the longer-term future.

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[243] Oral Interview, David Muli, UNHCR, Nairobi, 05/08/2018.
[244] Oral Interview, Amina Jibir, Resident, Nairobi, 04/08/2018.
[245]Oral Interview, Lewis Ndemo Osero Lawyer–Nairobi, on 25/07/2018.

The most concerning aspect of the new Kenyan law as regards persons of concern to UNHCR was the purported establishment of an upper cap on the number of persons who could receive international protection in the country. Any such cap was contrary to the wording and spirit of the Refugee Convention which does not permit the *refoulement* of any person who fulfiled the conditions of Article 1. Further, although the OAU Convention was beyond the scope of UNHCR's immediate mandate, there were contradictions there as well. Exactly how the cap might work was extremely worrying in addition to its appearance at all. As already indicated this section required Kenya to get rid of 480,000 refugees, and house only 150,000 refugees. This was clearly less than a quarter of the total number of persons who were receiving international protection in Kenya, yet there was a substantial influx of South Sudanese refugees who are being given *prima facie* protection.[246]

A look at the drafting history of the amendment reveals that the drafters did not debate a plan of reducing the number of refugees to the required legal minimum. While they argued that the reduction of the number was in line with international standards, they did not refer to them to justify this figure. A retrospective application of the law amounted to a violation of the principle of *non- refoulement* as discussed in the next section.

Sections 16A, 11, 12 and 14 had the effect of keeping the refugees in camps and limiting their movements until their applications were decided. While is it true that the freedom of movement may be a justifiable limitation under the Constitution, a look at the geographical location of these camps may lead to a different conclusion. First, Dadaab Camp in Garissa County is 474 km from Nairobi, 569 km from Mombasa, and 454 km from Malindi, yet it is just 80 km from Somali border. With regard to Kakuma, it is 723 km from Nairobi, 566 km from Nakuru, and 477 km from Kitale, yet it is just 130 km from the border of Southern Sudan and about 95 km to the Ugandan border. Other than the distant location of the camps, there was security threats involved if one was travelling to Dadaab. The requirement to move refugees to camps, where they were

[246] Oral Interview, Ali Osman, Refugee, Dadaab, on 18/07/2018.

susceptible to violence in the course of the journey and in the camps, reflected the Government's lack of appreciation of their vulnerability and dignity.[247]

After the enactment of the amendments, the Coalition for Reform and Democracy (CORD) and others petitioned the High Court challenging the constitutionality of the bill. The petitioners sought orders that sections 14 and 16A of the Refugee Act were unconstitutional because they negatively affected the rights of refugees and contravened Articles 2(5) and (6), 24(1) and 59(2)(g) of the Constitution, and Articles 3, 4(d), 32, 33 and 34 of the Refugee Conventions.[248] The preceding Articles from the Constitution deal with the obligation to apply international law in Kenya while ensuring that any human rights violations are justified under the Constitution. The Court noted that the general rules of international law, ratified treaties and conventions form part of the law of Kenya. The Court declared that section 16A187 of the Refugee Act was unconstitutional because, first, a refugee was a special person who had to be protected. Secondly, that as a signatory to regional and international covenants; Kenya had to abide by them. The Court stated that for the Government to reach the proposed statutory ceiling of 150,000, it had to stop the admission of refugees and to expel the extra 430,000 refugees.[249]
With regard to section 47 of the SLAA that required that refugees stay in camps unless they had permission from a Refugee Camp Officer (RCO), the Court stated,

> The government has a duty to protect and offer security to refugees and it is, therefore, important that the Refugee Camp officer knows the whereabouts of each refugee. This can only be checked by the refugee seeking permission and a movement pass issued to her/him. This is also important for accountability purposes in light of the security concerns raised by the Attorney General.[250]

This position resonated with the discretionary powers of the RCO who performed the administrative and facilitative role in the refugees' enjoyment of their right to movement stated in Samow Mumin Mohamed and *Kituo Cha Sheria* case of 2012. The Court's silence on the role of the RCO was based on the parties' non-contestation of the officer's duties. This showed that in the exercise of its protective role, the Government monitors the refugees' movements as a security concern. While an application of the principles in *Kituo Cha Sheria* and Samow Mumin

[247]Robert Doya Nanima, *op.cit.,* p. 65.
[248]*Ibid.*
[249]*Ibid.*
[250]*Ibid.*

Mohamed indicated that the RCO's discretion should not be unduly limited so as to affect the refugee's enjoyment of the right to freedom of movement, CORD highlights the need to address security concerns. It was therefore argued that the three cases illustrate the need for the RCO to balance his role in the monitoring of security concerns raised by Government in a manner that does not violate the rights of a refugee. Therefore, it was argued that in CORD, the Court enhanced the position of international law as an approach to the protection of human rights in Kenya. Against this backdrop, the principles handed down in *Kituo Cha Sheria* and *Samow Mumin Mohamed* with regard to the use of the Constitution as the yardstick for questioning government policies were corroborated.[251]

The amended law also affected the principle of principle of *non - Refoulement*. The principle of *non – Refoulement* threatened limiting the number of refugees that may continue to be present within Kenya at any given time has the consequent effect of limiting the entry of new refugees into the Kenya and further, those that are present in Kenya that exceed the set number of one fifty thousand would have to be forced out of the country in order to comply with the law. By forcing out the excess refugees Kenya would have been in breach of *refouling* people as they could guarantee that where they were to go would be a safe third state, which is contrary to the principle as espoused in the Refugee Act and also in the Refugee Convention of 1951.[252]

4.7 Threats to the Principle of *Refoulement*

The principle of *non - refoulement* is captured by section 18 of the Refugee Act 2006. The section provide that,

> no person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or to subjected any similar measure if, as a result of such refusing, expulsion, return or other measure, such person is compelled to return to or remain in a country where - (a) the person may be subject to persecution on account of race, religion, nationality membership of a particular social group or political opinion; or (b) the person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of that country. [253]

[251]Robert Doya Nanima, *op.cit.,* p. 65.
[252] Oral Interview, Mary Mukami, Advocate, Nairobi, 28/07/2018.
[253] Kenya Refugee Act 2006.

As already, mentioned the prohibition of forced return of a refugee is called *non - refoulement* and is one of the most fundamental principles in international law. This principle is laid out in Article 33 of the Convention relating to the Status of Refugees (Refugee Convention).

There have been several threats this principle. For instance, in April 2016, Kenya announced that it would no longer grant Somali refugees' *prima facie* refugees' status and in May, disbanded the Department of Refugee Affairs (DRA), a statutory government body responsible for registration of asylum seekers, issuing of travel permits and movement passes. At the same time, Kenyan officials announced plans to close Dadaab refugee camp. As a consequence of the April 2, 2015, deadly attacks at Kenya's Garissa University carried out by members of the Somalia-based terrorist organization known as *Al-Shabaab*, which resulted in the killing of 147 students, the Government of Kenya announced that it wanted the Dadaab refugee complex closed immediately and its residents, who are all Somalis, moved to Somalia. Indeed, Kenya's Deputy President William Ruto declared that the United Nations High Commissioner for Refugees (UNHCR) must close the Dadaab refugee complex within three months.[254] The Kenyan Government subsequently extended the deadline for the closure of Dadaab from 30 November 2016 to May 2017.

The government argued that the decision to close the camp was arrived at in November 2013, when Kenya, Somalia and UNHCR signed tripartite Agreement setting grounds for repatriation of Somali refugees. The government through the Cabinet Secretary of Interior and Coordination, Joseph Nkaisserry indicated that this action was due to the very slow progress on the implementation of the agreement and lack of commitment by the international community to the repatriation bid. The government has argued that the camps have become hosting grounds for *Al-Shabaab* as well as centers of smuggling and contraband trade besides being enablers of illicit weapons proliferation.

In response to this announcement, UNHCR released a statement expressing its concern that "abruptly closing the Dadaab camps and forcing refugees back to Somalia would have extreme humanitarian and practical consequences, and would be a breach of Kenya's international

[254]Oral Interview, Richard Oyasi, Police Officer, HQ, Nairobi, 07/08/2018.

obligations."[255] Other agencies that also expressed concern included Amnesty International which called threats for imminent closure of refugee camps reckless, while the United Nations termed it unfortunate. The Kenya National Commission on Human Rights and Doctors without Borders (MSF) said the move was a violation of international law.[256]

It is worth noting that Kenya is a signatory to both the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees. Article 32 of the Convention is informative on 'expulsion' of refugees. It states that Contracting States shall not expel a refugee lawfully in their territories save on grounds of national security or public order. It further states that the expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority. In addition, Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary. Article 33 which essentially focuses on prohibition of expulsion or return *(refoulement)*. It states that no Contracting State shall expel or return *(refouler)* a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. It further states that the benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.[257]

In addition, Kenya is obligated under Article 2(5) which states that, "the general rules of international law shall form part of the law of Kenya". Article 2 (6), states that "any treaty or convention ratified by Kenya shall form part of the law of". These two articles are very important given the public pronounce of intention to forcibly repatriate refugees because it was a

[255] Oral Interview, Mary Mukami, Lawyer-Nairobi on 28/07/2018.
[256] UNHCR, 1967 Refugee Protocol.
[257] *Ibid.*

violation of the Convention/Protocol on the Status of Refugees and the Constitution of Kenya.[258] Further, the Convention is indeed part of Kenya's laws. In addition, Refugee issues in Kenya are governed by the 2006 Refugees Act, which incorporates international instruments that the country has signed. The Act prohibits *refoulement* of refugees and asylum seekers, stating: no person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or be subjected to any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country where (a) the person may be subject to persecution on account of race, religion, nationality, membership of a particular social group or political opinion; or (b) the person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of that country.[259]

In a petition, filed by the Kenya National Commission on Human Rights and Kituo Cha Sheria, and supported by Amnesty International, the organizations sought to have the government's decision to close the camp declared unconstitutional.[260] On 9 February 2017, in the Dadaab Decision, the High Court of Kenya ruled that the directive issued on 6 May 2016 disbanding the DRA was an *ultra vires* act, and the directive issued on 10 May 2016 regarding the closing of Dadaab and repatriation of Somali refugees was unconstitutional. Therefore, both directives were null and void. In its decision, the High Court considered representations by the KNCHR and *Kituo Cha Sheria* Legal Advice Centre (as petitioners) and Amnesty International (as an interested party). The issues before the Court were,

> the revocation of the *prima facie* refugee status of refugees of Somali origin; the closing of Dadaab and Kakuma refugee camps within the shortest time possible; the appointment of a task force to implement repatriation of refugees to Somalia; and the disbanding of the DRA.[261]

Before addressing the above issues, the court explained the current state of modern refugee law and listed international and regional instruments relating to refugees upon which its decision relies. The Court also looked to regional and domestic court opinions interpreting the right to life

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[258] The Constitution of Kenya.
[259] Kenya Refugee Act 2006.
[260] Oral Interview, Lewis Ndemo Osero, Lawyer, Nairobi, 25/07/2018.
[261] Kenya National Commission on Human Rights & another v Attorney General & 3 others, Pet. No. 227 of 2016 (2017) Kenya Law Reform, 9 February 2017.

and freedom from torture when opining on the prohibition against refoulement, noting that the principle of *non-refoulement* prohibits not only the removal of individuals but also the mass expulsion of refugees.[262]

The Court considered: (a) whether or not the Kenyan Government's decision violated the principle of *non-refoulement*, the refugees' rights to a fair administrative action and the constitutional rights of the refugees; (b) whether the circumstances in Somalia have fundamentally changed to warrant repatriation of the refugees; and (c) whether the decision to disband the DRA was valid. The Court ruled in favour of the petitioners. The Court concluded by ordering the Kenyan Government, with immediate effect, to restore the status *quo ante predating* the invalidated Kenyan Government directive with regard to administration of refugee affairs in Kenya and to reinstate and operationalize the DRA. In details the Court held that,

> the Kenyan Government's decision violated the principle of *non-refoulement;* the Court held the Kenyan Government's decisions/directives violated the refugees' right to fair administrative action*;* the Court held the Kenyan Government's decision violated the human rights of the refugees guaranteed by the Constitution; the Court held circumstances in Somalia have not fundamentally changed so as to warrant repatriation of the refugees; and the decision by the Attorney General to disband the DRA was invalid.[263]

In short, the court held that the amendment was unconstitutional because it violates the principle of *non-refoulement* - which is part of Kenyan law.

The *non-refoulement* principle does not protect any refugees who are a danger to the security of the host country. But, in all these cases above, the State failed to provide any evidence to show that the refugee camps were used as breeding grounds of criminal activities, or that refugees were involved in serious crimes or they were a threat to public security that would necessitate the closure of the camps.

These decisions show that the courts recognise that Kenya has a positive obligation to protect persons in vulnerable situations, which includes refugees. Upholding this principle ensures that

[262]Kenya National Commission on Human Rights & another v Attorney General & 3 others, Pet. No. 227 of 2016 (2017) Kenya Law Reform, 9 February 2017.
[263] *Ibid.*

refugees are protected from violation of the right to life, freedom from torture or cruel, inhuman or degrading treatment or punishment, dignity and to liberty and security of the person. These rights are provided for under the Constitution, 1951 Refugee Convention, African Charter on Human and People's Rights, Convention Against Torture and the International Covenant on Civil and Political Rights. Any refugee law thus needs to be consistent with these international obligations.

4.8 Conclusion

This chapter has shown that a wide variety of 'constitutionalising' acts have been undertaken by the Kenyan authorities in respect to refugees and more generally the reception, management and treatment of refugees and asylum seekers. This action began with the passing of the Refugees Act 2006 and has picked up pace ever since. However, it does not appear to be a continuous process but rather one which gains momentum at certain times. This is perhaps not surprising in any constitutional democracy where the demands on political and administrative authorities are diverse and must be balanced. Nonetheless, a number of key steps have been taken such as the publication of various acts in the Gazette in an effort to enhance refugee law.

The chapter has shown that the legalization of encampment policy has grossly restrained list of rights including the conventional ones for refugee in Kenya. The policy has created a situation that has led to limited physical security, limited freedom of movement, limited or no ability to work, limited legal rights and lack of status and forced return to home country. Most of the refugee fundamental rights have been suspended or denied at time due to security challenges in Kenya. This has been the case in Kenya since 1991 and there is no indication for improvement.

The chapter has also shown that security challenges have been at the heart of the development of Kenya refugee law since 1991. These security challenges have been used to justify the enactment of various refugee legislations in Kenya. The chapter has noted that some of these legislations violate international human rights and refugee law guarantees of refugees' right to freely move in their country of refuge unless certain specific conditions are met. Further, some of these legislations also contradict the Kenya Refugee Act which came into force of Kenya's 2006. Consequently, some of the laws have been overturned by the courts in Kenya. The legislations

and directives have also been blamed for massive abuse of refugee human rights. The security agencies in Kenya have used the refugee laws to abuse and extort money from asylum seekers and refugees in Kenya.

CHAPTER FIVE

CONCLUSION

This chapter provides a condensed summary of the issues and debates emerging from the discussions developed in the preceding chapters. Chapter one discusses the background to the study and contains the framework for analyzing the subject under review both at the international, regional and at domestic level. In so doing, the chapter provides details on the statement of the research problem, research questions, the objectives, justification of the study, scope and limitation, the theoretical framework, study hypotheses and discusses the research methodology. The literature review introduces the various views and discussions developed by various scholars into understanding of subject matter and the research gap therein.

Chapter two has shown that the situation of refugees is one of the most pressing and urgent problem facing the international community today in general and Kenya in particular. The legal instruments, on which refugees can rely to secure international protection globally, are the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. At a regional level, the 1969 OAU Convention embodies the unique circumstances of refugee movements in Africa.

The 1951 Convention dealt with refugee victims of the Second World War. The promulgation of the 1967 Protocol extended consideration of mass influx of refugees experienced elsewhere outside Europe but failed to accommodate new causes of refugeehood beyond those in the 1951 Convention. The upsurge of contemporary refugeehood was therefore, informed by the urgent need for States to protect the large number of people affected by the global challenges of asylum, which included liberation wars in Africa starting in the 1960s and movements caused due to natural disasters. In discussing the historical evolution of international refuge protection in the world, the chapter has observed that the codification of the 1951 Convention and the development of the principles of refugee law, such as the principle of *non-refoulement,* were informed by the unique circumstances that prevailed at a given place and time during both World Wars I and II. Under International law states are obligated to enact national legislation to reflect their commitments at the international level.

The chapter has also shown that the Convention of the Organization of African Unity Governing the Specific Aspects of Refugee Problems in Africa of September 10, 1969, is

the regional supplement to the 1951 Convention relating to the Status of Refugees. It contains a broader definition of the concept of "refugee" than the 1951 Convention, covering persons outside their country of origin due to external aggression, military occupation, foreign domination, or other events seriously disturbing public order in either part or the whole of the country of origin. The OAU Convention also addresses matters not regulated in the 1951 Convention, such as asylum, subversive activities of refugees, and voluntary repatriation.

Finally, the chapter has shown that Kenya has hosted refugee from the independence period of the early 1960s. At that time, Kenya hosted a total population of about 5,000 refugees mainly from Uganda, Ethiopia, and Somalia. At that time the government was fully in charge of refugee management in the country. Refugees could access work and move freely in the country. For example many Ugandans, who fled the autocratic and *kleptocratic* regime of Idi Amin, were received well and most of them eventually integrated into Kenyan society. Most Kenyans that went to school in the 1970s and 80s have memories of Ugandan teachers, further evidence that these refugees were allowed to work in formal sector refugees became teachers in Kenya and they together. At the same time some of the Somali refugees were also integrated and became Kenya citizens. This was what has been referred to as the golden age for refugee management. Golden age because the government observed many of the international conventions on refugees.

Although Kenya ratified the United Nations Convention Relating to the Status of Refugees on May 16, 1966, the independence constitution required a domestic law to make it applicable in Kenyan courts. This was done through the inclusion of Class M entry permits under the Immigration Act of 1967. Indeed, despite the inclusion of the legal definition of a refugee, there was no information regarding rights. It appeared as though the law was only meant to regulate the entry and settlement of refugees, without providing the terms of their residence. There were also no legal provisions on the principle of *non-refoulement*, right to work, or freedom of movement. The law did not provide any durable solutions for dealing with refugees. This situation continued until the enactment of the Refugees Act of 2006.
Chapter three discusses the riseof encampment law in Kenya in the 1990s**.** As civil wars erupted in Kenya's neigbouring countries of Ethiopia, Sudan, and Somalia, the number of refugees

coming to Kenya increased dramatically. This massive influx had debilitating consequences that haunted Kenya's asylum system. With this new dispensation, the government abandoned direct involvement with refugees and left this role to the UNHCR. With the help of UNHCR, the government set up refugee camps at the Daadab and Kakuma, primarily for refugees from Somalia and Uganda, respectively. From the location of these camps–close to the borders of the countries from which the refugees were arriving–one can deduce that the government of Kenya thought the asylum situation was temporary. However, almost 28 years later, the camps as well as the refugees are still there.

The chapter has also shown that, there was also a significant shift in Kenyans' attitudes toward refugees starting in the 1990s. Rather than being seen as people that needed assistance, refugees were henceforth viewed as burdens to the economy. It should be remembered that at the same time, Kenya was going through the Structural Adjustment Programs (SAPs) under the aegis of the Bretton Woods institutions. These were tough economic times as unemployment soared and inflation was high. A majority of Kenyans viewed refugees with suspicion, as they saw them as competitors for the few jobs available in the market.

At the same time, refugees were blamed for the rise in criminal activity. In the 1990s, there was a steep rise in small arms and light weapons circulating in the country, which was blamed on the increase of refugees and asylum-seekers accessing the country. These assumptions, though unsubstantiated by evidence, contributed to the shift in Kenyans' attitudes toward refugees and were the harbinger for the rise of xenophobia in the country and enactment of subsequent of refugee law starting with the refugee act of 2006.

The Refugees Act of 2006, which became operational in 2007, defined refugee status, replete with exclusion and cessation clauses. It also outlined the rights and duties of refugees and asylum-seekers. Perhaps more importantly, it established institutions that would manage refugee affairs in the country. These include the Department of Refugee Affairs, the Refugee Affairs Committee, and the Refugee Affairs Board. The act also provided refugees with the right to move and earn a living. It incorporated the provisions of relevant international conventions into the domestic legislative framework. Refugees could by right access work permits, seek and gain

employment, or start a business. However, the implementation of the act presented a problem for refugee access to this right. Whereas the law provided the right to work and access work permits, the same law restricted the movement of refugees. Refugees were required to reside in refugee camps unless they had authorization to live elsewhere. Seeking a work permit was not a basis for applying for this authorization. Work permits were only granted in Nairobi, not in the camp, and thus refugees had limited access to this document. Those who decided to live and work in urban areas without authorization often did so under a constant threat of harassment and intimidation.

At the same time, *Al-Shabaab* attacks in Kenya increased. This led the Kenyan government to close the border between Kenya and Somalia in 2007. This didn't mean that Somali asylum-seekers could not access the country, as a large number of them did at the height of the drought in 2011, but it did mean that government officers at the border were withdrawn. These attacks continued unabated, leading the government to enact stricter encampment measures. Hitherto, there had been no legal instrument that defined where refugees ought to reside.

Chapter three has also shows that the development of Kenya's refugee law starting from 2012 was marked more by security concerns than protection considerations. Refugees have been and still are seen as a transient issue as well as a threat to national security. Terrorist attacks prompted Kenya to make drastic changes to its policy on asylum seekers and refugees. One of the key changes came in the form of an announcement of an encampment policy. Until then, Kenya allowed refugees and asylum seekers to live in urban areas, a policy that received official endorsement when, in 2011, the government began registering refugees in urban centers) and issuing them refugee certificates. In December 2012, Kenya's Department of Refugee Affairs (DRA), however, announced a forced encampment policy for urban refugees. At that time there were approximately over 450,000 refugees in Dadaab Refugee Camp, over 101,000 refugees in Kakuma Refugee Camp, and over 56,000 refugees residing in urban areas in Kenya. The Government of Kenya's forced encampment policy targeted urban refugees, citing security concerns as a motive for the policy.

It was observed that, although the Government of Kenya has had a *de facto* encampment policy for refugees since the early 1990s, the encampment of refugees was never fully enshrined in law

and the movement of refugees in the camps in Daadab and Kakuma was never restricted. However, the December 2012 forced encampment policy articulated by the DRA stated that all Somali asylum seekers and refugees in urban areas were to move to Dadaab Refugee Camp and that all other asylum seekers and refugees in urban areas were to be relocated to Kakuma Refugee Camp. Additionally, the forced encampment policy ordered that the registration of asylum seekers and refugees in urban areas to be halted and that all urban registration centers be closed. Regarding service provision for urban refugees, the policy stated that UNHCR and other agencies serving asylum seekers and refugees stop providing all direct services to refugees with immediate effect. The directive and proposed implementation of this policy had three main components; the forced eviction of refugees from urban areas; forced encampment of refugees in Kenya; and the eventual return of refugees to their home countries.

The chapter also discusses the 2013 a Tripartite Agreement. The government of Kenya, the Somali government and UNHCR signed a Tripartite Agreement paving the way for the "voluntary" repatriation of Somali refugees in "safety and dignity". The Agreement established a Commission that meets regularly. The agreement provided a three year time-frame for voluntary returns. It came to an end on 10 November 2016. Despite the commitments made under the Tripartite Agreement, Kenya forcibly returned refugees to Somalia. Indeed in early April 2014, during Operation *Usalama* Watch, a counter-terrorism operation in Nairobi and hundreds of Somalis were deported back to Somalia.

Further, on 16 December 2014, the Executive with the aid of the Kenya National Assembly enacted the Security Laws (Amendment) Act 19 of 2014. This law amended 22 provisions of other Acts of Parliament. The Refugees Act was amended in sections 11, 12, 14 and an introduction of section 16A. This section required Kenya to reduce the number of refugees to 150,000. Finally the chapter has shown that as a consequence of the April 2, 2015, deadly attacks at Kenya's Garissa University carried out by members of the *Al-Shabaab*, which resulted in the killing of 147 students, the Government of Kenya announced that it wanted the Dadaab refugee complex closed immediately and its residents, who are all Somalis, moved to Somalia. These laws and directives had a major effect on the refugees in Kenya.

Chapter four discusses the impact of refugee law in Kenya. The chapter shows that the formulation and implementation of Kenya refugee law has to refugee rights violation in Kenya. These rights violations include; border and refugee transit center closure: police abuses against asylum seekers near the Dadaab refugee camps; abuse of asylum seekers by criminals in the border areas; police violence against refugees in the Dadaab refugee camps; police failures to respond to sexual violence in the Dadaab refugee camps; unlawful restriction on refugees' free movement; and abusive imprisonment of refugees. In particular, the forced encampment policy, has been discriminatory, illegal, and has displaced tens of thousands of urban refugees, jeopardising their human rights, livelihoods, and access to critical services in the process. Indeed, the chapter has argued that the directives are in breach of Kenya's international human rights obligations. The policies have led to d forcible eviction urban refugees in a discriminatory manner; curbed the freedom of movement rights of refugees; and resulted in the illegal return of refugees to their country of origin. Indeed the courts on two occasions ruled that some of the refugee laws violated the principle of *non refoulement*, which is a part of the law of Kenya as is underpinned in the Constitution. In conclusion therefore, the refugee crisis in Kenya in the period between 1991 and 2016, led to confusion and knee jack formulation and implementation of laws that were unconstitutional and an affront to the rights of refugees in Kenya.

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