

ASYLUM AND NATIONAL SECURITY IN KENYA

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**A research Project Submitted in Partial Fulfilment for the award of Master of Arts Degree
in International Studies of the Institute of Diplomacy and International Studies, University
of Nairobi**

June 2014

DECLARATION

I declare that, this project is my own original work and has not been presented for award of any degree in any University.

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DEDICATION

I dedicate this study to my dear wife purity and sons Mulatyajnr and Ngumbau for bearing with my absence in the course of the entire study. Further I will be greatly indebted if I forget the victims of terrorism in Kenya and beyond who moved me to take on the topic.

ACKNOWLEDGEMENT

I owe my great acknowledgement to the support I received from such thinkers as the late Prof. Nyunya, my supervisor Dr.Maluki, and previous experiences at coursework level from Prof.MariaNzomo all from IDIS, University of Nairobi.

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LIST OF ABBREVIATIONS

AU	African Union
DRA	Department of Refugee Affairs
ECOSOC	Economic
GA	General Assembly
GDDP	Garissa District Development Plan
NSC	National Security Council
OAU	Organization of African Union
RSD	Refugee Status Determination
SALW	Small Arms and Light Weapons
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
UNCHR	United Nations Commissioner for Human Rights
US	United States

CHAPTER ONE

INTRODUCTION TO THE STUDY

1.0 Background to the study

The linkage between asylum and security has become the norm in post-September 11th 2001 terrorist bombing in US in the corridors of national security policy making.

The puzzle has not escaped Kenya, a country touted as an Island of peace in a region rocked by both interstate and intrastate conflicts since the end of cold war era period characterized by more interstate conflicts. In this regard the country has experienced influx of asylum seekers from such countries as Sudan, Ethiopia, Somalia, Uganda, Burundi, Rwanda and Eritrea among others.

To compound the situation of a possible breach of security in admitting fraudulent asylum claims over legitimate claims, the reception and registration of all asylum seekers has been a reserve of United Nations Humanitarian Commission of Refugees (UNHCR) until March 1st 2011 when the Department of Refugee Affairs took over¹ and the fact that the country is signatory to the 1951 United Nations Conventions, the 1967 protocol and the 1969 Organization of African Union Convention obligates the country to offer protection to refugee and asylum seekers².

A survey by Danny Turton titled *Analysis of Refugee Protection capacity Kenya*, observed the following about the admission policy and practice in Kenya; that the majority of asylum-seekers enter Kenya undetected, crossing the border by land, that refugees who enter Kenya by air generally arrive at Lokichogio airport where they are informally admitted by immigration officers and referred to UNHCR's transit centre in Lokichogio, the number of refugees who enter

¹Menya Walter, "Developing Countries Continue To Carry The Lion's Share of Responsibility For Hosting Refugees" *Daily Nation* 28th March 2011

²Ibid

Kenya through the Jomo Kenyatta International Airport in Nairobi is believed to be small. UNHCR is only notified of these arrivals if the person comes to the UNHCR office in if the person comes to the UNHCR offices in Nairobi to make an asylum claim or alternatively. That other border crossing where refugees are seen by government officials include Malaba, where Sudanese asylum seekers enter from Uganda and Moyale from the border with Ethiopia. That refugee who enter Kenya by sea are often referred to UNHCR by shipping agents who wish to disembark the stowaways and finally that there are at present no standard operating procedures or instructions for officials who admit asylum seekers and there is no systematic monitoring or information gathering in regard to admissions at the border crossings³.

This was a major indictment of the mechanisms of ensuring strong screening procedures of asylum-seekers in Kenyan which mirrors on the long –held subjective observation that criminal elements have taken advantage by disguising as asylum seekers to perpetrate acts that threaten national security such as terrorism and proliferation of small arms. This contrasts countries like the USA that have further special concern to asylum seekers from countries such as Saudi Arabia, Syria, Iran, North Korea, China, Pakistani, Egypt, Lebanon, Jordan, Afghanistan, Yemen and Somalia as potential national security risks and that asylum is a discretionary form of immigration policy thus national security risk concerns outweigh humanitarian concerns⁴.

Several case studies in other countries around the world have demonstrated that asylum seekers can be a threat to national security if not well screened before granting of refugee status. The arrest in 2000 in Tanzania of two Burundian refugees found in possession of weapons and allegedly engaged in military activities in Burundi is a case in point⁵. Being a challenge to the

³Turton Danny, *Analysis of Refugee Protection capacity Kenya*, (UNHCR Strengthening refugee capacity project publication, 2005) P.14

⁴Wasem, Ruth *U.S Immigration policy on Asylum Seekers*, (congressional research service publication, 2005) p.18

⁵Bonaventure Rutinwa, "Refugee protection and Security in East Africa," *Forced Migration Review*, October 2012

government of Tanzania, UNHCR and other stakeholders, divergent views emerged over what action to be taken. On one hand there was those who argued that combatants cannot be refugees, that an individual who actively and willingly engages in armed conflicts does not merit entitlement to qualifications under which refugees are protected, while on the other hand it was argued that the action of a refugee returning to fight in the country of origin does not make them lose refugee status.

Other cases illustrate how stringent measures taken by a government to separate criminal elements from refugees can have devastating impact on genuine asylum seekers. This was illustrated by the decision of Central African Republic government in 1997 to deny asylum to all Rwandese asylum seekers in order to prevent entry of suspected perpetrators of genocide. Thus the situation was saved after the UNHCR officials committed to come to the aid of the government in form of experts and equipments for screening the genuine refugees from the criminal elements.

Another complex challenge is when a country has to separate and exclude elements disguising as genuine asylum seekers who can threaten its security from an already settled refugee population. This was exemplified in 1994 when an attempt to exclude armed elements from the large Rwandese refugee population in Eastern Zaire⁶. To separate them the only possible option was to use force, thus the UN secretary general proposed several military options to UN Security Council which it rejected. This forced the secretary general to request the UNHCR through its Zairian Camp Security Contingent established in 1995 to provide security to refugees without separating them from the criminal elements that do not merit international protection.

⁶ Ibid

In other cases soldiers not willing to denounce their combatant status and are not willing to ask for asylum status since they also express interest to go back and fight don't merit custody of such agencies as International Committee of the Red Cross as stipulated in international humanitarian law of armed conflict and UNHCR. In this case the burden naturally falls on the host country to take care of them. This is the dilemma Pakistan faced with Taliban and al-Qaida militants fleeing from operation endure freedom in Afghanistan and in Tanzania over maimai fighters from Zaire in 1997⁷. Developed nations' situations are not different. In Britain after the failed suicide bombing of July 21st 2005 it was established that one in four terrorists suspects arrested in Britain is an asylum seeker⁸. Sunday times of July 15th 2007 confirms that A Home Office analysis of those arrested under antiterrorism laws from 2001 to 2005 found that almost a quarter – 24%, or 232 out of 963 had previously applied for asylum⁹.

1.1 Statement of the Problem

The accusation leveled against the government of Kenya of violating non-refoulement rule of international customary law by Amnesty International report of 8th December 2010 and Human Rights Watch report of March 17, 2011 contrasted by reports not only from within Kenya but also international that asylum is a national security threat informs the research problem of the study. In 'From life without peace to peace without life', an Amnesty International report of 8th December 2010 describes how thousands fleeing violence in Somalia are unable to find refuge, protection and lasting solutions in Kenya, due to the closure of the border between the two countries since 2006 amid security concerns. Since the border was closed, Kenyan security forces have forcibly returned asylum-seekers and refugees to Somalia; demanded bribes

⁷Bonaventure Rutinwa, "Refugee protection and Security in East Africa," Op.cit

⁸Leppard David and Thomas jonUngoed, "Asylum seekers form quarter of terror suspects", *Sunday Times* July 15th 2007

⁹ Ibid

and arbitrarily arrested and detained them. Somalis have been regularly harassed by Kenyan police at the border areas, in the Dadaab refugee camps in north-eastern Kenya and in urban areas, including Nairobi. This is complemented by the March 17, 2011 Human Rights Watch report accused Kenyan authorities of forcing the Kenya Red Cross to stop providing services at a temporary refugee camp in Mandera, in northeast Kenya.

While institutions like Human Rights Watch have defended refugee and asylum seekers rights, pretensions of asylum seeking have been associated with threats to national security. A number of Post-Cold war conflicts have seen refugee populations specifically in camps become parties to conflict. For example the arrest in 2000 in Tanzania of two Burundian refugees found in possession of weapons and allegedly engaged in military activities in Burundi is a case in point. Liberian refugees in Ghana are widely cited by Ghanaians as the cause of armed robberies and wife stealing. In addition, the Ghanaian population argues that, Liberians engage in illegal activities such as prostitution, drugs, robbery and gambling. After the failed suicide bombing of July 21st 2005 in Britain, it was established that one in four terrorists suspects arrested in Britain was an asylum seeker. The Home Office analysis of those arrested under antiterrorism laws from 2001 to 2005 found that almost a quarter – 24%, or 232 out of 963 – had previously applied for asylum.

Economic and political asylum seekers have also raised eyebrows on their impact on human security dimension issues especially use of people smugglers to cross national borders and organized criminal networks. For example the impact of asylum seekers in Kakuma refugee camp in Kenya, home to majority southern Sudanese asylum has generated a number of security and resource scarcities issues. For example, the Turkana accused the Dinka (a Sudanese ethnic group) in Kakuma refugee camp of raping their women and cutting down their trees.

It is against this background of a country caught between obligation to adhere to international law governing refugee and asylum seekers and its obligation to provide security as a basic human right that the research would establish whether granting asylum threatens national security in Kenya.

1.2 Objectives of the study

The general objective is to examine the relationship between asylum seekers and national security threats in Kenya. Specific objectives are:

1. To investigate whether asylum portends any security threats in Kenya
2. To investigate whether there has been any incident of an alien granted asylum and later involved in any activity that threatens national security
3. To establish for policy recommendation whether screening measures in place are able to separate criminals that do not deserve international protection at Kenyan borders, airports and sea entry points
4. To determine whether drastic government measures to deter hosting of criminal elements among asylum seekers has had any consequences on genuine asylum seekers

1.3 Hypotheses

1. Asylum seekers are conduit of terrorists and small arms proliferation agents
2. Weaker law governing granting of asylum in Kenya encourages penetration of criminal elements disguising as need of international protection
3. Weak screening measures at the points of entry are an exploit of criminals disguising as genuine asylum seekers

1.4 Justification of the study

There has never been any objective academic research on asylum seekers and national security in Kenya thus this qualifies the study. The study is also justified by the policy recommendation on asylum seekers and their implications on national security in Kenya.

1.5 Literature Review

This section reviews the literature about the subject in question. Specifically in this case it looks at what security threats and implications asylum seekers portend to Kenya. State security threats here are confined to terrorism and small arms proliferation as related to asylum seekers to Kenya.

Wainwright and Ward in *Asylum and Security*, a paper published by the Information centre about Asylum and Refugees explored the question of the links the media and politicians have made between asylum and terrorism¹⁰. Their three findings inform part of the provocations of this study. That newspaper concur in reports that inadequacies in the asylum system have heightened terrorists threat in the UK with an example of 2003 so-called ricin-plot and the murder of a policeman in greater Manchester in which case the individual who was convicted the these crimes had been refused asylum but had remained in the country.

That most of the individuals who attempted to detonate bombs on 21st July 2005 entered UK through the asylum system and were granted refugee status or indefinite leave to remain but in contrast three of the men who carried out the 7th July bombings were born in Britain. That finally the fact that asylum seekers are subjected to more stringent controls than other categories of migrants has led to Refugee Action to conclude that 'a would be terrorists is unlikely to choose a route of entry that immediately brings them to the attention of the authorities, requires

¹⁰Sophie Wain Wright and Kim Ward, *Asylum and security* (2006) ICAR 2006

fingerprinting and carries the risk of being detained’¹¹. This contrasting conclusion on the question of the link between asylum and security informs the journey to this research to come up with a concrete objective conclusion on the links between asylum and national security strategy in Kenya.

Mathew Gibney’s *Security and the Ethics of Asylum after 11th September* raises springboard issues for this research that calls for gap-filling study. He gives the reasons for the ascendancy of debates of insecurity emanating from asylum as the bombings of the world Trade Centre in 1993 in New York by Islamic extremists one of who had an asylum decision pending and the attacks of September 11th 2001 by foreigners on visitor and student visas demonstrated that security talk actually corresponded to an empirically verifiable. These attacks culminated a range of new restrictive laws and policies across western states and particularly in US according to Gibney. He further concludes that there is now an unprecedented consensus among states on the following: that refugees generally constitute more of a threat than an asset; that the dangers posed by asylum seekers are arguably more diverse than before and that there is need for international cooperation to deal with these new security risks¹². This research endeavors to dispute or concur with this subjective consensus among states on insecurity posed by asylum

Baylis *National Security and Political Asylum* explores the fact that since September 11, 2001, the United States has made significant changes in its political asylum policy restricting access to asylum for many applicants in the name of the war against terror.¹³ She concludes that by comparison with international norms, European practices and practical experience with

¹¹ Refugee Action (2005) *Asylum and terrorism: the facts in Asylum and security* (2006) by Sophie Wainwright and Kim Ward

¹² Mathew Gibney, *Security and the ethics of Asylum after 11 September* (Cambridge University press, 2002) as quoted in Jef Husmans “Migrant as security problem: dangers of as related to securitizing societal issues” (London, 1995) p.13

¹³ Baylis, *National Security and Political Asylum*, (Ford Institute for Human security, 2006) p.1

U.S.asylum system, the security strategy implemented in U.S. asylum policy since September 11th appears at best to fail to promote and at worst to risk undermining the human security goals for which the international political asylum system was founded¹⁴. Thus she disputes the fact that states such as the U.S. have adjusted their asylum policies in the wake of September 11th to deter terrorists exploitation of international asylum protection laws to gain entry is an exercise that aims to protect people human security they are dear need of. It is against this that the research will search for objective findings of which the scale should tilt the balance: national security at the expense of asylum protection or vice versa specifically Kenya’s national security strategy.

Morgenthau advances a strong case for realism theory that advocates for preservation of state security at all cost. He contends that ‘political realism refuses to identify the moral aspirations of a particular nation with the moral laws that govern the universe’¹⁵. Taken within the context of asylum seeking and national security in Kenya it means that interest of a country including security interest take precedence over international laws governing for example asylum seeking and refugees. This means that in preservation of her security Kenya should consider first the security implications of any asylum seeker over her national security before considering the provisions of the 1951 convention on refugee, the 1967 protocol and the 1969 Organization of African Union Convention and Article 14 of the 1948 universal declaration on human rights as moral laws that govern the universe.

Although overall Morgenthau made a strong case for national security over international morality he never discussed in detail such aspects like asylum seekers can portend security threat to a state. It is the interest of this research to fill this gap in concurrence with Morgenthau that realism should guide states in their security policies

¹⁴Ibid

¹⁵ Hans J.Morgenthau, *politics among nations ,the struggle for power and peace*(,Book mart press,1985) p.13

Salmon and Imberacknowledge that not international law, nor distance nor deterrence are capable of meeting the contemporary requirements of national security against non-state and state adversaries who employ mass killings, eschew risk-averse behavior and often advance ideological agendas beyond rational negotiation. In this case there is an admission by the writers that non-state actors such as terrorists elements who can disguise asin need of international protection can threaten the security of a state.

AhmetIcyduguy and E.FuatKeymanhas explored the effects of globalization in framing security relations and how nation-states tend to deal with migration flows as a security threat. They both concluded that treating asylum seekers as security threat accelerates the crisis of migration flows and peoples mobility which seem to be growing in a globalized world.

Theyfurther observe that there was increased refugees, asylum seekers and transit migrants into Turkey since early 1980s contracted by lack of established asylum policy except the 1951 Geneva international convention on refugees thus in 1994 it began to implement a new regulation on asylum seekers called regulation and procedures and principles related to mass influx and the foreigners arriving in turkey with the intention of seeking asylum from a third country, which was informed and framed by security concerns and led to codification of asylum seekers as security threats¹⁶. This research intends to fill the gap analyzing the actual security threats that asylum seekers portend to a country, the case of Kenya since these researches have merely implied that states face national security threats from asylum seekers without pointing out in which form.

In a press release to the Forty sixth General Assembly on 19/11/2001 titled:Refugees Victims of Terrorism, Not its Perpetrators, high commissioner for refugee observed that

¹⁶AhmetIcyduguy and E.FuatKeyman in *Globalization, security and migration: the case of Turkey*(Global Governance Journal, vol.6 ,issue 3,Lynne Rienner , 2000)

governments and politicians need to avoid falling into the trap of making unwarranted linkages between refugees and terrorism¹⁷. He raised concerns that in the wake of the 11 September terrorist attacks on the United States, it was understandable that governments were looking to enhance security safeguards against abuse of international asylum regimes, but it would be a terrible irony if those who had fled from terror were to become unwitting victims of the war against terrorism. He further defended refugees as victims of terrorism, not its perpetrators. Although the UNHCR commissioner raises an objective concern in a subjectively generalized issue nearly in all states of the world on the question of criminal elements disguising as asylum seekers to threaten national security of states, there has never been any objective study to ascertain whether indeed there are terrorists, and small arms proliferation criminals entering states territories through asylum channels.

Camilleri's *The challenges of sovereign borders in the post-cold war eras refugee and humanitarian crises in Hensel's' sovereignty and the global community ,the quest for order in the international system* has extensively explored the challenges of sovereignty in the face of refugee crises post-cold war era characterized by more internal strives than interstate strives .He demonstrates how states have reservations in admitting asylum seekers but on the contrary are stalwart supporters of UNHCR with regard to freedom of movement¹⁸. He captures this clearly when he quotes former UNHCR High commissioner for refugees Sadat Ogata who insisted that 'asylum is coming under pressure in countries which ironically have been among the most stalwart supporters of UNHCR in relation to freedom of movement which receives a lot of attention in Western states until the problem arrives at their borders'. What the writer missed to

¹⁷The forty sixth General Assembly press release titled *Refugees Victims of Terrorism, Not its Perpetrators*, by Mr. Ruud Lubbers then high commissioner for refugee, on 19/11/2001

¹⁸HorwardHansel,*sovereignty and the global community ,the quest for order in the international system* (2004) Ashgatepublishers,p. 88

include as reasons for the reservations expressed by the western states was the fact that they passive asylum seekers as national security threat. This research will fill that gap.

1.6 Theoretical framework

This research will be guided by the realist's theory of security. Realism as a theory of both national and international security traces its roots from such early ancient traditional thinkers as Thucydides, Machiavelli, and Rousseau. As a reaction to the failures of idealist thinking in interwar period it gained support and was advanced by such realists as E.H.Carr and Hans Morgenthau. Realists contrast sharply on interpretation of different approaches to control and management of national and global insecurity when compared with liberal and human security theorists.

Realist theory posits that human nature is brutish, greedy and selfish. Individuals only look after their personal interests¹⁹. This theory assumes that the international system is primarily anarchic as there is no central authority, nor an arbitrator²⁰. As a result, states must protect their national security and the needs of citizens by any means necessary.

For success of deterrence, in this research context avoiding hosting criminal elements disguising as genuine asylum, realists rely on such key assumptions about deterrence method of achieving state security as: Decision makers are rational and always want to avoid resorting to war through alternative methods. This is exemplified by the Security Council meetings both at national and international level where security technocrats explore the different options available concerning security threat to a state. Rational decision makers will not take aggression against nuclear states. Such states pose a far greater and devastating threat. Although this is contrasted by the Cuban missile crisis between U.S and Russia in 1962 case scenario where both sides were threatening to

¹⁹Salmon Trevor and Mark Imber, *Issues In International Relations* Op.cit.,p.22

²⁰Hans J.Morgenthau, *politics among nations ,the struggle for power and peace*Op.cit.,p.

use nuclear weapons against each other. A successful intervention by rational decision makers can be possible if the aggressor-threat is significant and large. In this study the threat asylum seekers have been subjectively reported to portend to national security of states cannot be overstated thus it is the intent of this study advocate for strict measures in deterring threats to national security posed by criminal elements exploiting international protection of asylum seekers.

Compared to realists approach liberalists theorists adopt a soft stance on national security issues which if taken within the context of this research would have no problem with UNHCR screening the asylum seekers and refugees in need of international protection in Kenya. Thus viewed from a liberal perspective the research deviates from allowing the interest of a non state actor operating in Kenya to dictate the terms of determining who to enter the territory of Kenya at the expense of state security interests

Viewed within the context of the research it is clear that human theorists on the other hand would fit well within the realm of the security needs of an asylum seeker whose political, social, and even environment freedoms are in jeopardy but realists would counter that it is at the expense of national security.

Clearly based on the other three theories of security, human and liberal theory have failed the test of the standpoint of the research and that the research takes realism as its core standpoint. National security interest cannot be sacrificed at the trade off with the international norms and cooperation.

1.7 Methodology

1.7.1 Introduction

This section in the research will deal with the actual field gathering, systematically ordering, and analyzing of the data to be used in the study. The section will capture how the research will be designed, how the researcher will collect the data, what data collection tools are to be used, and how the findings will be presented. Both secondary and primary data will be collected through qualitative and quantitative methods. Quantitative designs attempt to reduce social phenomena to quantifiable data which can then be statistically analyzed, focusing on the links and attributes across several cases.

Qualitative designs emphasize personal experiences, interpretation, and self-knowledge over quantification, are concerned with understanding the meaning of social phenomena, and focus on links and attributes across relatively few cases

1.7.2 Unit of analysis

In this case the research will be analyzing the relationship between asylum and national security strategy in Kenya.

1.7.3 Sampling procedure

For the case of asylum and national security strategy in Kenya the research will employ stratified random sampling of asylum seekers along the Kenya-Somali border. The following will form the study sampling frame: there will be 20 asylum seekers, five members of security forces along the Kenya Somali border, the Kenya Ethiopia border, at the Kenya Sudan border, Kenya Uganda border and five at the Jomo Kenyatta international airport, ten UNHCR officials and ten members of the department of refugees' affairs officials.

1.7.4 Methods of data collection

The methods of data collection to be adopted by the research are questionnaires, interviews, content analysis, and internet and library sources.

1.7.4.1 Questionnaires

The research will administer pre-tested questionnaires using trained interviewers to collect data from respondents. Some of the questionnaires will be distributed to target respondents.

1.7.4.2 Interviews

As opposed to surveys where you ask respondents to fill questionnaires here the research will ask questions orally and record respondents' answers. Compared with self-administered surveys, this type of survey generally decreases the number of 'do not know' and 'no answer' responses and also interviewers provide a guard against confusing items.

The research will interview community leaders and ordinary people to determine their feelings on the asylum seekers and national security in Kenya. It will also administer semi-structured questionnaires with open-ended questions on focus groups to be able to illicit in-depth information from the respondents. The research will also conduct telephone interviews for the respondents who cannot be reached through personal interviews.

1.7.4.3 Library and internet

The researcher will consult literature on the subject under study from books and internet sources as a secondary data. Analysis of the media reports on asylum and national security in Kenya will also be studied.

1.8 Data analysis

The research will use statistical package for social science to analyze statistical data collected in the field.

1.9 Definition of key concepts

1.9.1 Refugee

States Parties to the 1951 Convention and/or the 1967 Optional Protocol have incorporated the Convention's definition of a refugee into their domestic law. . States that are also party to the Cartagena Declaration or the 1969 OAU Convention have also incorporated those instruments' broader definition of a refugee, recognizing individuals fleeing generalized violence and other breakdowns of public order.

1.9.2 Asylum seeker

Person within a State Party who has applied for recognition as a refugee. If the asylum seeker is determined to meet the definition of a refugee they are granted asylum.

1.9.3 Well-founded fear

Individual States have interpreted the 1951 Convention's requirement of a well-founded fear of persecution to require asylum seekers to show that there is a reasonable possibility that they will suffer persecution if returned to their country of nationality or habitual residence. Although well-founded fear refers to a future threat of persecution, individuals who have faced persecution in the past are presumed to have a well-founded fear.

1.9.4 Persecution

Persecution is not defined in the 1951 Convention or the 1967 Optional Protocol. In an attempt to provide guidance on what constitutes persecution, such as: acts of physical or mental violence, including acts of sexual violence; legal, administrative, police, and/or judicial measures

which are in themselves discriminatory or which are implemented in a discriminatory manner; prosecution or punishment, which is disproportionate or discriminatory; denial of judicial redress resulting in a disproportionate or discriminatory punishment; prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2); acts of a gender-specific or child-specific nature.

1.9.5 National security–

It means freedom from threats to the core values of a state²¹. In cold war periods it was looked at within the context of military terms. Looked differently for the nation to be secure the territorial integrity of the state, its sovereignty, its population, its culture and its economic prosperity should be deemed safe from destruction or major damage²².

1.9.6 Asylum seeker-

These are People who are awaiting confirmation of their refugee status. It is a person seeking international protection but whose claim for refugee status has not yet been determined. This is different from a refugee who is someone who has been recognized under the 1951 convention relating to the status of refugee to be a refugee.

²¹Baylis John and Steve Smith *The Globalization of World Politics*, (2011) Oxford university press p.255

²²Salmon Trevor and Mark Imber, *Issues In International Relations*(2008) Routledgep.74

CHAPTER TWO

ASYLUM IN INTERNATIONAL LAW

2.0 Introduction

In this chapter the research will discuss the place of asylum in international law. The focus will be on the definition of asylum in international law, states obligations and an examination of the level of compliance of states in the face of emerging connection between asylum and security.

Under Kenya laws and numerous international treaties which it has signed, immigration officials are required to identify asylum seekers who are fleeing persecution or abuse in their homelands and allow them to remain in the country while they apply for the right to stay. Therefore, this research describes the laws that govern asylum in Kenya and how Kenya fits into the global picture.

2.1 International Legal Framework Relating To the Protection of Asylum Seekers

Traditionally, states were the main subject of international law. Increasingly, individuals and non-state international organizations have also become subject to international regulation. International law imposes upon the nations certain duties with respect to individuals. It is a violation of international law to treat an alien in a manner which does not satisfy the international standard of justice²³. However, in the absence of a specific agreement an individual cannot bring the complaint. Only the state of which he is a national can complain of such a violation before an international tribunal. The state of nationality usually is not obligated to exercise this right and can decide whether to enforce it.

²³ Goodwin-Gill, S. Guy *The refugee in international law*. (1996)New York: Oxford University Press Inc.

International organizations play increasingly important role in the relationships between nations. An international organization is one that is created by international agreement or which has membership consisting primary of nations. The United Nations, the most influential among international organizations, was created on June 26, 1945²⁴. The declared purposes of United Nations are to maintain peace and security, to develop friendly relations among nations, to achieve international cooperation in solving international problems, and to be a centre for harmonizing the actions of the nations and attaining their common ends. The Charter of the United Nations has been adhered to by virtually all states. Even the few remaining non-member states have acquiesced in the principles it is established.

International legal framework relating to the protection of refugees is divided into two parts: refugee law and asylum law. Of the two refugees law seems primarily, although not exclusively, a matter of public international law, and is considered a component of international human rights law or humanitarian law generally.²⁵ Refugee law is mostly initiated with a series of relatively ad hoc interwar procedures; modern refugee law came into its own after the Second World War with the establishment of the UNHCR,²⁶ and the 1951 convention relating to the status of refugees.

These documents define a refugee, provide for certain rights relating juridical status, non-expulsion, freedom of movement, employment, travel documents, participation in national welfare, education and rationing programmes and gives the UNHCR a role in administering and protecting these rights at the international level. In contrast those involved in refugee protection

²⁴See Charter of the United Nations, introductory note.

²⁵ Goodwin Gill, Guy S. "Forced Migration: Refugees' Rights and Security." In *Studies in International Law: Forced Migration, Human Rights and Security*, edited by JaneMcAdam. Oxford: Hart Publishing, 2008.

²⁶ G A. Res. 428, 5 U N GAOR sup (No. 20) at 46, U N Doc. A/1775 (1950), Statute of the UNHCR, supra note 8, at para 1.

have come to consider asylum law to be primarily, though not exclusively, a matter of national law and sovereign discretion.

Refugee law represents cooperation among sovereign states confronting a common problem, while asylum seems within the province of sovereign political discretion. Even when legalized, asylum law seems primarily municipal and beyond the cognitive control of international protection officers, especially in contrast to refugee law, with its international definitions of persons concerned and standards of treatment to be accorded.

Asylum law has not been codified in an international instrument and one must consequently search for it in a variety of locations. International asylum law seems less to bind states than to enable them. If refugee law seems to limit state discretion, asylum law seems to enlarge it. As a matter of public international law, it seems that asylum is what is left over after the law relating to refugees, statelessness, extradition, human rights and humanitarian issues has been spelled out.²⁷

Most critics of the law of asylum have taken a position between the extremes of this paradox, the unsatisfactory nature of such middle positions, saying that asylum can be excluded as a matter of national political discretion. They argue that asylum law can be equated to municipal law and discretionary, but add for one reason or another that asylum has, or is progressively acquiring, an international legal aspect.

It is not true that asylum is the irreducible other of refugee law, nor is it true that it can simply be treated as or transformed into a useful international legal partner to the refugee law standards spelled out in the statute and the convention. None the less all of the asylum materials

²⁷Albert, Matthew, *Prima facie determination of refugee status: An overview and its legal foundation*. Refugee (2010) Studies Centre, University of Oxford

attempt to define the boundary between asylum and refugee law strictly in doctrinal terms, without reference to the institutional framework within which these doctrinal categories have been given meaning. As a result, none of these middle positions seems particularly attuned to the work of a protection agent who must operate within the full range of discourse permitted by the paradoxical diversity of the asylum concept.

2.2 Legal Protections

Some of the international and regional instruments relating to refugees include: 1951 Convention relating to the Status of Refugees; 1967 Optional Protocol relating to the Status of Refugees; Universal Declaration of Human Rights (art. 14); American Declaration on the Rights and Duties of Man (art. 27); American Convention on Human Rights (art. 22); Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (Cartagena Declaration); African [Banjul] Charter on Human and Peoples' Rights (art. 12); OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa; Arab Charter on Human Rights (art. 28); Cairo Declaration on Human Rights in Islam (art. 12) and the European Convention on Human Rights (arts. 2, 3, and 5).

Despite differences across, and sometimes within states, there are a number of commonalities between the asylum procedures of States who have national frameworks for granting refugee status. The persecution at issue also does not need to have been committed by a State actor; persecutory acts committed by non-state actors may qualify under the 1951 Convention where the State is unwilling or unable to protect the individual claiming refugee status. But there must be a causal nexus between one of the five grounds and the persecutory act, namely race, religion, nationality political opinion or membership in a particular social group. In

practice, this means that applicants must show that one of the protected grounds was or will be at least one central reason for the persecution.²⁸

2.3 Elements of Asylum under international Law

The word “asylum” is the Latin counterpart of the Greek word “asylon” which means freedom from seizure.²⁹ Historically, asylum has been regarded as a place of refuge where one could be free from the reach of a pursuer. Sacred places first provided such a refuge and scholars are of the view that “the practice of asylum is as old as humanity itself”.³⁰ Asylum can be said to be the protection given to a person seeking it in a territory of another state. Asylum is the right of a sovereign state to grant shelter and protection to a foreigner and refuse his extradition. Persons genuinely seeking refuge from persecution are often referred as asylum seekers. The conception of asylum in international law involves two elements: a shelter which is more than a temporary refuge. People, who live in fear of being tortured or killed by their govt., often seek asylum as do people who are persecuted for their religious or political beliefs; and a degree of active protection: On the part of authorities which have control over the territory of asylum. Indeed, the right of asylum has been said to comprise certain specific manifestations of state conduct: to admit a person to its territory; to allow the person to sojourn there; to refrain from expelling the person; to refrain from extraditing the person; and to refrain from prosecuting, punishing, or otherwise restricting the person's liberty.

²⁸Goodwin-Gill, S. Guy *The refugee in international law* Op.cit., p.58

²⁹Betts, Alexander “The Refugee Regime Complex.” *Refugee Survey Quarterly* 29(1) (2010): 12-37

³⁰Ibid

According to Universal Declaration of Human Rights, “Everyone has a right to seek and enjoy in other countries asylum from protection.”³¹ Asylum is closely connected with extradition and both are interdependent, where asylum stops extradition begins. Asylum is generally motivated by human consideration and involves an adjustment between the legal claims of state sovereignty and the demands of humanity. The right of asylum sometimes called political asylum, is an ancient juridical concept, under which a person persecuted by his or her own country may be protected by another sovereign authority, a foreign country, or church sanctuaries (as in medieval times). This right has its roots in a longstanding Western tradition.

The Egyptians, Greeks, and Hebrews recognized a religious “right of asylum,” protecting criminals (or those accused of crime) from legal action to some extent. This principle was later adopted by the established Christian church, and various rules developed to qualify for protection and just how much protection it was. According to the Council of Orleans in 511, in the presence of Clovis I, asylum was granted to anyone who took refuge in a church, in its dependences or in the house of a bishop. This protection was given to murderers, thieves or people accused of adultery. It also concerned fugitive slaves, who would however be handed back to their owners when their owners swore on the Bible not to be evil.³² The General Assembly in the Declaration on Territorial Asylum in 1967 said that grant of asylum is a humanitarian act and such it cannot be regarded as unfriendly by any other state. But it adds in article 4 that “states granting asylum shall not permit persons who have received asylum to engage in activities contrary to the purposes and principles of the UN.” Respect for territorial integrity and political independence ranks among them.

³¹Universal Declaration of Human Rights, Art 14(1), G.A. Res. 217A(III), U.N. GAOR, 3d Sess.,at 71, U.N. Doc. A/810 (1948)

³²Herbermann, Charles, ed. (1913) Catholic Encyclopedia.

2.4 Kinds of Asylum

The General Assembly said in the Declaration of territorial asylum (1967) that the grant of asylum is a humanitarian act and it cannot be regarded as unfriendly by another state. But adds states granting asylum shall not permit persons engaged in activities contrary to the purpose and principles of the U.N.

1. **Territorial Asylum:** Territorial asylum is the one granted by a state in its territory. Territorial asylum is not usually granted to ordinary criminals. It is designed and employed primarily for the protection of persons accused of political offences such as treason, desertion, Sedition, religious refugees. Some of the well-known cases of such asylum are emperor Wilhelm-II of Germany in Holland, Dalai Lama of Tibet in India.
2. Extra-territorial asylum is granted by a state not on its physical territory, but on its notional territory, like in a legation and consular premises and on warships is called the extra-territorial asylum. International institutions like the UN and specialized agencies headquarters do not have that right.

According to the Havana convention, asylum should be denied to persons accused of common crimes and for deserters from army and navy and to be given only to political offenders. A decision to grant diplomatic asylum involves derogation from the territorial Sovereignty of State. Three common asylum statuses can be identified: diplomatic asylum, asylum in the premises of international institutions and asylum on Warships.³³

Diplomatic Asylum involves the granting of asylum in the legation (building in which diplomats work) premises is known as diplomatic asylum. It should be granted as a temporary measure to individuals physically in danger. It is an exceptional and controversial measure because it withdraws the offender from the jurisdiction of the territorial state. There is no general

³³Havana Conference, Cuba (1940)

right or practice regarding granting asylum in the premises of international institutions and of specialized agencies, even on humanitarian grounds. But temporary refuge in extreme cases cannot be ruled out. For example, Najibullah, former president of Afghanistan sought refuge in UN headquarters in Kabul, later he was killed by Taliban. On the other hand, warships and public vessels enjoy immunity under international law and there have been claims that there exists a right of asylum on ships. Asylum in merchant ships cannot be granted because merchant vessels do not have immunity.

2.5 The Three Faces of the Right Of Asylum

The right of Asylum has three faces which include: the right of a state to grant asylum; the right of an individual to seek asylum; and the right of an individual to be granted asylum

2.5.1. The Right of a State to Grant Asylum

The right of a state to grant asylum is well established in international law. It follows from the principle that every sovereign state is deemed to have exclusive control over its territory and hence over persons present in its territory.³⁴ One of the implications of this generally recognized rule is that every sovereign state has the right to grant or deny asylum to persons located within its boundaries. Traditionally in international law, the right of asylum has been viewed as the right of a state, rather than the right of an individual.

The Universal Declaration of Human Rights provides in Article 14(1) inter alia the right of each individual to enjoy in other countries asylum from persecution.³⁵ This therefore means that it is the right of every state to offer refuge and to resist all demands for extradition. Secondly, the Declaration on Territorial Asylum adopted by the General Assembly of the United

³⁴Tom Clark, Human Rights and Expulsion: Giving Content to the Concept of Asylum, 4 *International Journal of Refugee Law* 189, 190 (1992)

³⁵Universal Declaration of Human Rights, Art 14(1), G.A. Res. 217A (III), U.N. GAOR, 3d Sess., At71, U.N. Doc A/810 (1948)

Nations in 1967 provides in Article 1(1) states that, “asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke Article 14 of the Universal Declaration of Human Rights,... shall be respected by all other States.” Further, Article 1(3) of this Declaration vests the state of asylum with the authority "to evaluate the grounds for the grant of asylum.

Regional instruments evidence the right of a state to grant asylum. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa provides, in Article II(1), that member states of the Organization of African Unity “shall use their best endeavors consistent with their respective legislations to receive refugees.”

The Asian- African Legal Consultative Committee, in 1966, adopted Principles Concerning Treatment of Refugees, Article III(1) of which states that, “State has the sovereign right to grant or refuse asylum in its territory to a refugee.”³⁶

2.5.2. The Right of an Individual to Seek Asylum

The second aspect of the right of asylum is the right of an individual to seek asylum. This is an individual right that an asylum-seeker has vis-à-vis his state of origin. Essentially, it is the right of an individual to leave his country of residence in pursuit of asylum. The basis for this right is the principle that “a State may not claim to ‘own’ its nationals or residents.”

This right is enshrined in several international and regional instruments. Article 13(2) of the Universal Declaration of Human Rights proclaims that, “everyone has the right to leave any country, including his own.” While the Universal Declaration of Human Rights is not a legally binding instrument, it has been declared to set forth “the inalienable and inviolable rights of all members of the human race and to constitute an obligation for the members of the international community.” Moreover, the Declaration has been said to be “an authoritative expression of the

³⁶The Asian- African Legal Consultative Committee www.aalco.int/39thsession/strcairoIV.pdf

customary international law of today in regard to human rights.”With the adoption of the International Covenant on Civil and Political Rights, the right of an individual to leave his country became written law binding on the states parties to the Covenant and Article 12(2) of the Covenant, states that everyone shall be free to leave any country, including his own.

This right has also been justified through the United Nations Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities, two functional commissions created by the United Nations Economic and Social Council under Article 68 of the U.N. Charter.³⁷ The right to leave one’s own country in pursuit of asylum is thus a right of the individual asylum-seekers, enforceable in certain situations. At the continental level, the rights to seek asylum and freedom of movement can be found within the text of the same article.³⁸

2.5.3. The Right of an Individual to be granted Asylum

The third component right under the umbrella of the right of asylum is the right of an individual to be granted asylum. International and regional instruments dealing with human rights, asylum, and refugees, as well as the failure of the international community to agree on a convention on territorial asylum illustrate the general proposition that, in international law today, an individual has no right to asylum enforceable vis-à-vis the state of refuge.

Article 14(1) of the Universal Declaration of Human Rights proclaims the right of an individual "to seek and to enjoy in other countries asylum from persecution. This is argued that the provision merely affords the individual a right to seek asylum, not a right to receive it. This article has been criticized for giving the individual a right to seek asylum without specifying whose duty it is to give effect to that right. International instruments adopted subsequent to the

³⁷Pursuant to the procedure established under U.N. ECOSOC Resolution 1503 (1970),

³⁸See African [Banjul] Charter on Human and Peoples’ Rights, Art 12(1).

Declaration likewise do not provide for an individual's right to be granted asylum. In preparing the International Covenant on Civil and Political Rights, states had an opportunity to provide for the right to asylum. The principal international instruments relating to the protection of refugees, the 1951 Convention relating to the Status of Refugees' and the 1967 Protocol relating to the Status of Refugees, also do not provide a right to be granted asylum.

During the drafting of the Refugee Convention, France and the United Nations Secretariat submitted a proposed article providing for, “favorable consideration to the position of refugees seeking asylum from persecution. The United Nations High Commissioner for Refugees explains in the Handbook on Procedures and Criteria for Determining Refugee Status that, “the granting of asylum is not dealt with in the 1951 Convention or the 1967 Protocol”.³⁹ Thus, as with other international instruments, these refugee instruments do not vest an individual with a right to asylum.

The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa provides in Article II(1): “[member states] shall use their best endeavors consistent with their respective legislations to receive refugees.”⁴⁰

2.6 The Principle of Non-Refoulement

It is understood in international law as the duty of a state not to return a person to a place of persecution. Non-refoulement was first imposed in Article 3(2) of the Convention relating to the International Status of Refugees: each of the Contracting Parties undertakes, in all cases, not to return refugees across the frontiers of their country of origin. Although non-refoulement is not

³⁹United Nations High Commissioner For Refugees, Handbook On Procedures And Criteria For Determining Refugee Status Under The 1951 Convention And The 1967 Protocol Relating To The Status Of Refugees 7 (1979)

⁴⁰OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Art II(1), *supra* note 15, at 193, 195

as sweeping as the right of asylum, it provides an asylum-seeker with at least a temporary refuge and thus partial or de facto asylum.

Today, binding and non-binding international, regional, and instruments provide for the principle of non-refoulement. Article 33(1) of the 1951 Convention relating to the Status of Refugees (entitled Prohibition of Expulsion or Return provides 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.⁴¹ Moreover, the duty of non-refoulement exists only with respect to persons determined to be refugees under the Convention. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also prohibits refoulement⁴². Article 3(1) stipulates: "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"⁴³.

A comparison of the non-refoulement provisions of the Refugee Convention and the Convention Against Torture manifests an apparent difference in the category of persons protected from refoulement. While the Refugee Convention only protects those determined to be refugees under its provisions, the Convention Against Torture extends its protection against refoulement to any person who would be in danger of being subjected to torture.

Although the principle of non-refoulement provides a duty not to return an asylum-seeker to a place where he would be persecuted, it does not provide a duty to grant him asylum or a duty not to send him elsewhere. In practice, the principle of non-refoulement often amounts to little protection from persecution. Persecution has also frequently been defined as "the infliction of

⁴¹Convention relating to the Status of Refugees, *supra* note 54, art. 33(1)

⁴²Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., at 197, U.N. Doc. A139/51

⁴³ *Ibid*

suffering or harm upon those who differ in a way regarded as offensive.”⁴⁴ Persecution is usually physical but can also be emotional or psychological.

2.7 Asylum Law in Kenya

Kenya is signatory to the 1951 UN Convention Relating to the Status of Refugees and its 1967 Protocol as well as to the 1969 OAU Convention Governing Specific Aspects of the Refugee Problem in Africa.⁴⁵ Importantly, Kenya did not enter any reservations in regard to any of these treaties, thus taking on all the legal obligations to protect refugees under the terms therein. In addition, while Kenya has ratified various complementary human rights treaties applicable to refugees and thus bears international legal obligations under these conventions.

The Constitution of Kenya is the supreme law of the land that binds all persons and state organs.⁴⁶ Substantially, Article 2 (5) of the Constitution of Kenya 2010 states that the general rules of international law shall form part of the law of Kenya. According to Article 2 (6) any treaty or convention ratified by Kenya shall form part of the Kenyan law. A plain reading of this article implies that, by virtue of this provision, treaties and conventions ratified by Kenya do not now have to be domesticated for them to have the force of law. However, it is arguable whether treaties relating to human rights and fundamental freedoms are self-executing, as another constitutional provision requires the State to legislate international obligations in respect of human rights and fundamental freedoms.

Equally, the Bill of Rights under the Constitution may positively influence the protection of refugees. The Bill of Rights is comprehensive and covers civil, political, economic, and cultural as well as group rights. Asylum-seekers and refugees are also set to benefit from its progressive provisions in as far as they apply to all persons, for benchmarks are provided against

⁴⁴ Ibid

⁴⁵ Kenya ratified the 1951 Convention and its 1967 Protocol in 1981 and the 1968 OAU Convention in 1972.

⁴⁶ Government of Kenya (2010) Constitution Article 2(1)

which the enjoyment of human rights in Kenya is to be measured. And whereas many rights and freedoms may be limited, any such limitation shall only be by law, and only to the extent that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Thus, for instance, for the policy of refugee encampment to be lawful, beyond description in law, it must also meet the test established by the limitation clause otherwise it is null and void.

2.8 The Refugees Act 2006

The Refugees Act was passed by Parliament in November 2006 and commenced on 15 May 2007. The Act was significant for a number of reasons, most importantly; it allowed the Kenyan government to formally assume overall responsibility for the management of refugee matters through the creation of an institutional framework, including the administrative processes on refugee status determination. Moreover, the law was also to serve as a guide to all stakeholders on how to deal with refugee matters in Kenya.

Prior to 2006, Kenya did not have refugee-specific legislation, and refugee affairs were administered under the general framework of immigration-related laws, notably the Immigration and the Alien Restriction Acts (both now repealed Cap 172 and 173 respectively). From 1992, on the invitation of the government, UNHCR assumed overall responsibility for refugee protection. This included the receipt of asylum applications and refugee status determination, resulting in the granting of refugee status based on UNHCR's mandate.

Under the 2006 Act, UNHCR recognized two classes of refugees: mandate and prima facie. Mandate status applied to those refugees who had undergone some form of individual refugee status determination (RSD). Further, the Act provides that the Minister may declare prima facie status to any class of persons. The use of the term may imply that the minister [now

Cabinet Secretary] is at liberty to declare prima facie - but it is unclear what happens if he does not make such a declaration⁴⁷. Who is not a refugee is defined in similar terms as those of the 1951 Convention.

The Act moreover establishes the Department of Refugee Affairs (DRA) which is headed by a Commissioner of Refugees and is charged with overall responsibility for all administration, coordination and management of refugee matters. The Act and its implementing regulations, the Refugees (Reception and Adjudication) Regulations of 2009, spell out the asylum application procedures as well as the rights and duties of refugees.

With regard to asylum applications and procedure, the Act and its implementing regulations, the Refugees (Reception and Adjudication) Regulations of 2009, outline the procedure for individual status determination. Under the Act, the function of refugee status determination is to be carried out by the DRA, with the Refugee Affairs Committee being responsible for issuing first instance decisions which can be appealed to an independent Refugee Appeals Board²³. However, both the Act and the Regulations are silent on the process to be followed in the case of prima facie refugees, a classification to which Somali refugees in Kenya belong.

Section 18 of the Refugees Act⁴⁸ conforms to the principle of non-refoulement through the following provision:

No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or subjected to similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return or remain in a country where -

⁴⁷The Refugee Act 2006 Kenya Gazette Supplement No 97 (Acts No.13)

⁴⁸The Refugee Act 2006 Op.cit.,p.48

- 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.*

2.9 The Question of Refugees/Asylum-seekers and National Security

The Kenyan government's recent decision to force all refugees to leave urban centres and report to camps has been heavily criticized for its violation of human rights and represents a backslide in the government's approach to urban refugees. Hosting to nearly 700,000 refugees, Kenya has since 2006 implemented laws and policies that increasingly improve compliance with international human rights standards. Urban refugees have enjoyed legal status, access to employment, opportunity, and services outside of camps.

Gerry Simpson, a senior refugee researcher at Human Rights Watch in reaction to the recent crackdown said "Kenya's deportation of Somalis to their conflict-ridden country without allowing them to seek asylum would be a flagrant breach of its legal obligations. "Scapegoating and abusing Somalis for heinous attacks by unknown people is not going to protect Kenyans, Somalis, or anyone else against more attacks,"

Since April 2, almost 4,000 people are reported to have been arrested and detained in Nairobi and Mombasa. According to Human Rights Watch research, some of the detainees have been released after they produced identification documents, but only after days in deplorable detention conditions or after they paid bribes. On April 9, the Kenyan authorities summarily deported 82 undocumented Somali nationals from the capital, Nairobi, to Somalia. Kenyan

officials have said that they plan to deport all undocumented Somali nationals as part of the response to recent grenade and other attacks in Kenya by unidentified people.

The Kenyan government began a massive security operation in Nairobi's predominantly Somali Eastleigh district on April 2. On April 9, Interior Cabinet Secretary Joseph Ole Lenku told the media that, during "Operation Usalama Watch," police had arrested "almost 4,000 people." According to Kenyan officials, the operation began in response to a number of recent terror attacks in the country, the most grievous being an attack on a Nairobi shopping mall in September 2013 that killed 67 people and injured hundreds. In late June 2012, 4 aid workers were kidnapped from the Dadaab region allegedly by al-Shabaab, the same group thought to be responsible for the recent attacks in Nairobi. Uprooting refugees who are rebuilding their lives in urban centers and placing them in unstable refugee camps where militias have already attacked civilians and has the potential to further unrest and violence. The police sweeps follow an announcement on March 26 that all urban refugees were required to move to refugee camps. Such a move would violate a July 26, 2013 Kenyan High Court ruling, which quashed an identical government refugee relocation plan from December 2012. The Kenyan government should provide full access to staff of the United Nations High Commissioner for Refugees (UNHCR) to interview and register asylum claims of undocumented Somalis.

Human Rights Watch said the Kenyan authorities were obliged to allow UNHCR to register asylum claims from anyone in Kenya, regardless of how long the person had been in Kenya before lodging a claim. Although Kenyan refugee law says an asylum seeker should lodge their claim with the authorities within 30 days of arrival, UNHCR does not impose any such deadline.

Somali nationals' access to UNHCR is all the more important after Kenya suspended all services to urban refugees, including registering new asylum seekers, in December 2012. Kenyan immigration law allows the authorities to regulate who is in Kenya, and Kenya may prevent certain categories of people from entering or remaining in the country, including those deemed to be a security threat. The practice of internment or forced encampment itself violates refugees' right to freedom of movement. In this instance, it also places refugees at risk of violent attack including rape. Rerouting refugees to internment camps is not an adequate solution to national security concerns.

The principle of non – refoulement prohibits the expulsion, extradition, deportation, return or otherwise removal of person in any manner whatsoever to a country or territory where he/she would face a real risk of persecution or serious harm. The State has not demonstrated that the proliferation of the refugees in urban areas is the main source of insecurity. Furthermore, confining some of the persons of independent means, those who are employed or carry on their business to refugee camps does not serve to solve the insecurity problem. While national security is important and should not be compromised, the measures taken to safeguard the same must bear a relationship with the policy to be implemented.

Security concerns must now be viewed from the constitutional lens and in this regard there is nothing to justify the use of security operation to violate the rights of urban based asylum seekers. Section 11 of the Refugees Act 2006 provides that those who come to Kenya seeking protection as refugees must be allowed to do so regardless of whether or not their entry into Kenya was by legal or illegal means. However, once they are within the Kenyan territory, it is the responsibility of every asylum-seeker to report his/her presence to the Appointed Officer. This must be done within 30 days.

Section 11 (2) of the Act also recognizes that persons that are already lawfully in Kenya can apply for refugee status and requires that they surrender other permits issued under the immigration laws for cancellation in exchange for the Asylum Pass. Essentially, this section is a codification of the non-criminalization principle that provides that asylum-seekers should not be penalized for failing to conform to the set immigration procedures. Furthermore, the refugee status determination procedure should be independent of immigration regulations and procedures regarding entry.

2.10 Proliferation of Small Arms and Light Weapons

Kenya -where armed crime, urban and pastoral violence, cattle rustling, poaching and trafficking are common problems - is grappling with rampant trafficking of illicit small arms and light weapons but needs to pass tougher laws to contain the problem. Criminal elements among the refugee population have been identified as being actively involved in arms trafficking, banditry, and other illegal acts in and near the refugee camps, particularly in North Eastern Province. It has been alleged that arms have been introduced into a refugee camp in that province and temporarily stored there. The bulk of refugees in Kenya, however, do not participate in criminal activity and those that do, including those in the country, are subject to criminal proceedings under Kenyan law.

Although weapons circulation in Kenya is complicated and usually involves many actors, the government typically attributes weapons trafficking, along with other crimes, to refugees/asylum seekers living in the country and indiscriminately accuses them of being the major source of insecurity.

The Fire Arms Act of Kenya (revised 1972) regulates licensing, certification, acquisition, maintenance of premises, and the forfeiture of certificates and firearms. To a great extent the act is clear and adequate; however, some of the sentences and fines are too lenient to deter the illegal possession of firearms. In Kenya, possession of illegal firearms is bailable since it is treated as petty case notwithstanding the gravity of crimes that may be committed.

The patterns of weapons movements largely reflect the situation of widespread armed conflict in the region. Somalia has been a prominent source of arms since the early 1990s.⁴⁹ Unconfirmed estimates for the volume of arms entering Kenya from Somalia range as high as 5,000 automatic rifles per month, with recovered weapons reportedly showing Chinese, U.S., and Bulgarian markings. As fighting in Somalia has quieted down and armed violence has flared up elsewhere in recent years, weapons siphoned from conflicts in Sudan and Uganda have become increasingly common.

Traders find it worthwhile to smuggle guns into Kenya because they command a much higher price there. For example, in 1999 Sudan People's Liberation Army (SPLA) deserters reportedly could sell an assault rifle to pastoralist Karamojong traders on the Sudan/Uganda border for 30,000 Ugandan shillings (approximately \$20), the Karamojong traders would in turn sell the weapons to Pokot traders living on the Uganda/Kenya border, who could sell it in Kenya for Ksh.10,000 (approximately \$135). That same gun could then be sold in Nairobi for as much as Ksh.40,000 (approximately \$530). In addition, it is not unusual in Kenya for guns to be bartered for other commodities. On the Kenyan border guns can be exchanged, depending on the current supply, for two goats or a cow. It's clear that in order to promote security in a country the members of the society should be free from illicit firearms or their easy access. Law enforcement

⁴⁹*The Scope and Implications of a Tracing Mechanism for Small Arms and Light Weapons*, (UNIDIR and SAS.2003), 23

agencies, including the police, play a legitimate and central role in combating and preventing arms trafficking to or through conflict zones.⁵⁰

2.11 Immigrants and Political/Economic instability

Physical security is paramount if any country is to progress both politically and economically. the problem of physical insecurity in Dadaab refugee camps in North Eastern Kenya in the last two decades Despite the Government of Kenya and the United Nations High Commissioner for Refugees(UNHCR's) effort to promote security in and around Dadaab refugee camps, has seemed deep rooted hence calling for attention from all stakeholders.

It is argued that refugee settlement impacts on physical security not only in and around the camps, but even nationally and internationally. It reveals that the security dynamics in a refugee settlement are complex because of the spillover effects from refugees' home countries and the varied interests of both UNHCR, as a refugee agency, and host government as a law enforcement agency.⁵¹ It reveals that refugees and the host community often conflict over resources, systems of governance and other varied interests.

Kenya's case in refugee-hosting has always resulted in the dilemma of hosting refugees as a humanitarian gesture and that of endangering their national security due to refugee security dynamics, posing a serious national security challenge to Kenya. Given the proximity of the porous Kenya-Somalia border, the similar features of Somalis of Kenya and those of Somalia, it is indeed difficult to monitor and screen the influx of refugees into Dadaab refugee camp. This poses a major security threat to the host community. The Kenya's military incursion into

⁵⁰*The Scope and Implications of a Tracing Mechanism for Small Arms and Light Weapons*, (UNIDIR and SAS.2003), 23

⁵¹Gil Loescher and Ann Dull Loescher, *The Global Refugee Crisis*, (1994) London: Oxford University Press

Somalia in pursuit of Al-Shabaab could have been greatly contributed by these refugee security dynamics-some combatants posing as refugees threatening the national.

In the face of widespread armed violence and crime, the Kenyan government has failed to provide adequate security. Affected citizens in the hardest-hit areas often suggest that the main obstacle to greater security is a lack of will on the government's part. An additional explanation for poor security is that police-community relations are tense in some areas. Persistent allegations of widespread corruption by the police have further eroded public trust.

The Kenyan government has legitimate security concerns with regard to those who seek to use refugee cover to traffic arms, conduct cross-border military activities, or evade prosecution for criminal acts they have committed previously in their own country or elsewhere. Many refugees are themselves victims of armed violence, with residents of the refugee camps being especially vulnerable to attacks and violent crime.

The responsibilities of a government to ensure national security and to uphold its obligation to respect refugee rights are not contradictory. To the contrary, long-term security interests are best served through the implementation of mechanisms that uphold the rule of law. Ultimately, abusing the human rights of refugees and indiscriminately penalizing refugees without due process or individual accountability is neither an acceptable option under international law nor does it provide the most effective and sustainable domestic security policy. Where national security is cited as a reason for imposing any restrictive measures on the enjoyment of fundamental rights, it is incumbent upon the State to demonstrate that in the circumstances, such as the present case, a specific person's presence or activity in the urban areas is causing danger to the country and that his or her encampment would alleviate the menace. It is not enough to say, that the operation is inevitable due to recent grenade attacks in

the urban areas and tarring a group of person known as refugees with a broad brush of criminality as a basis of a policy is inconsistent with the values that underlie an open and democratic society based on human dignity, equality and freedom. A real connection must be established between the affected persons and the danger to national security posed and how the indiscriminate removal of all the urban refugees would alleviate the insecurity threats in those areas. Another factor, connected to the first one is the element of proportionality. The danger and suffering bound to be suffered by the individuals and the intended results ought to be squared.

The Kenyan government can take other, more just steps to address security and prevent covert rebel activity, such as increased police patrols and intelligence surveillance along the border or among communities with high numbers of refugees, the relocation of the refugee camps and settlements with refugees further away from the borders with Somalia, Sudan, and Uganda, and the impartial investigation and prosecution of those individuals responsible for criminal activity, be they Kenyans or non-nationals. Each of these proposals is less restrictive than the indefinite confinement of thousands of people who have not historically jeopardized Kenya's safety, and would allow for a more sustainable and rights-respecting security policy over the long-term.

Refugee and immigrant communities can also pose considerable political risks for host governments. They are a political force for their country of residence, and the way they react to the politics of host country, and their political relationship with the country of origin, have become important factors in influencing relations between the sending and receiving countries.⁵²

According to Garissa District Development Plan (GDDP) 1994-1996, the influx of refugees into the district resulted into insecurity hence adversely affecting the supervision of development

⁵²International Journal of Business and Social Science Vol. 3 No. 8 [Special Issue - April 2012] 163

programmes. The insecurity problem posed by the coming of refugees to Dadaab has always been stressed by the various government officials as manifested in the various Garissa District Development Plans. Apart from the GDDP report of 1994-1996 referred above, the GDDP report of 1997-2001 reiterated on the insecurity posed by the refugee influx, a lot of resources have been diverted to attending refugees and in stemming the problem of insecurity. Sophisticated weaponry has found their way into the district promoting banditry, cattle rustling and general violence in the district.⁵³

Besides al-Shabaab threats, the other security threat troubling Kenya and linked to Somalia is the piracy threat.⁵⁴ This new tactic of hijacking ships and other sea vessels before it was cubed threatened business and general voyage particularly in the Indian Ocean. Kenya government, the International police and other navies from many countries have successfully combated this sea crime. Somali pirates have been the most linked with these illegal activities though it is possible that the network is larger than it is thought. Security issues are a matter of concern in the region especially given the fact that Somalis are both in Kenya and Somalia. The ever increasing influx of refugees suggest the danger this poses to Kenya since the extremists groups are likely to find their way into Kenya in the name of being civilians or refugees.

2.12 Conclusion

This chapter has discussed the place of asylum in international law. Legal frameworks relating to the protection of asylum seekers was presented from international, regional, and domestic legal instruments. 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

⁵³*Garissa District Development Plan 1997-2001*, Office of the Vice President and Ministry of Planning and National Development, (Nairobi: Government Printer), 59.

⁵⁴AFP, "Kenya declares war on Al-Shabaab", *Daily Nation*, Saturday October 15, 2011, p.1

state claims that its national security was under threat. The Abdullah Ocalan case was cited as a case in point where an asylum seeker (Abdullah Ocalan) in Kenya was discovered to have committed heinous crimes in Turkey and thereby being branded an international terrorist by western nations and therefore a threat to Kenya's national security. He was captured and extradited back to Turkey. Therefore this chapter achieved the study's second objective by investigating whether there has been any incident of an alien granted asylum and later involved in any activity that threatens national security

CHAPTER THREE

NATIONAL SECURITY IN KENYA

3.0 Introduction

Different studies have used either the traditional view which equates security to the defence of the state which is threatened by the military power of other states and therefore has to be defended by its own military power⁵⁵. Walt is a proponent of this school of thought and argues that security is “the study of the threat, use and control of military force”⁵⁶ with Lippman summing it up by asserting that a nation is only secure to such an extent that it is not in danger of sacrificing its core values if it does wish to avoid war, and is also able to maintain them in the same way by victory if challenged⁵⁷. Therefore, the traditional concept of security views the state as the sole protector of its sovereignty and territorial integrity by the use of force and that threats are always military in nature and arise from external sources rather than internal.

The Post-Cold War international system has seen the emergence of new sources of threats which are mainly internal in nature and trans-boundary in scope. Therefore the field of security studies was widened by the inclusion of non-military issues. Buzan took into this debate and argued that security threats emanate from different sectors which are: political, military, environmental, economic and societal⁵⁸. Thus Buzan made military threats just one of the threats that a state can face. This was followed by the concept of human security developed by the United Nations Development Programme (UNDP). This concept moved away from the traditional and widening schools and brought the individual as the referent object offering a

⁵⁵ Snyder C, (1999) “Contemporary Concept of Security” in Snyder, C. (ed) *Contemporary Security and Strategy*. Macmillan, London p. 57

⁵⁶ Walt Stephen (1991) “The Renaissance of Security Studies”, *International Studies Quarterly*, Vol.35, No.2 p.212

⁵⁷ Lippman Walter (1943) “United States Foreign Policy: Shield of the Republic,” cited in Ayoob, M (1995) *Third World Security Predicament: State Making, Regional Conflict and the International System*, Lynne Rienner, London p.5

⁵⁸ Barry Buzan, *People, States, and Fear: An Agenda for International Security Studies in the Post-Cold War Era* (Colchester, ECPR Press, 2007; first ed. 1983)p.25

multi-dimensional approach that combined elements of national security, economic development and human rights to the study of security⁵⁹. This approach consists of seven areas of emphasis which include: economic security, food security, environmental security, health security, community security, political security and personal security.

3.1 Threats to National Security

Mathur asserts that the concept of security does not have an operational meaning in the absence of some identification of a threat either implicitly or explicitly⁶⁰. Ullman defines a security threat as an “action or sequence of events that threatens drastically and over a relatively brief span of time to degrade the quality of life for the inhabitants of the state, or threatens significantly to narrow the range of policy choices available to the government of a state or to private, non-governmental entities within a state”⁶¹

The broadening of the concept of security studies and that of national security risks the inclusion of lesser problems in the absence of a threshold that can establish which threats can be considered *major* national security threats. This chapter employs the criteria of national interests as the threshold. Penelope Hartland- Thunberg noted that, national security is the ability of a nation to pursue successfully its national interests, as it sees them, any place in the world.⁶² This definition begs the question, what are Kenyan national interests? According to Donald Neuchterlein⁶³, a state has four interests: survival; vital; major; and peripheral. Survival interests exist when the existence of a country is in jeopardy due to attack or threat of attack. According to

⁵⁹ Ball N. and Fayemi K. (eds), *Security Sector Governance in Africa: A Handbook*. Centre for Democracy & Development, Lagos, 2004

⁶⁰ Mathur, K. M (1996) *Crime, Human Rights and National Security*, Gyan Publishing House, New Delhi p. 304

⁶¹ Ullman Richard (1983) “Redefining Security”, *International Security Review*, Vol. 8, No.1 p. 123

⁶² Penelope Hartland-Thunberg, “National Economic Security: interdependence and vulnerability”, in Frans A.M. Alting von Geusau and Jacques Pelkams (eds), *National Economic Security* (Tilburg: John F Kennedy Institute, 1982), p.50

⁶³ Donald Neuchterlein, “National Interests and National Strategy”, in *Understanding U.S. Strategy: A Reader*, ed Terry L. Heyns [Washington, DC: National DEFENSE University, 1983], p.38

Neuchterlein, the survival of a country can only be threatened by a nuclear attack. As Kenya is not faced with any nuclear threat, its survival interest is not threatened.

Vital interests have been termed as circumstances where serious harm to the nation would result unless strong measures, including the use of force are often employed to protect the interest. On this type of interest, the state cannot willingly compromise on its territorial integrity. Neuchterlein argues that the real test of vitality is in how intolerable a situation would be if not resolved in your favor.⁶⁴ Some of the intolerable situation that Kenya has faced has been the terror attacks by the Somalia Islamist group Al-Shabaab leading to the Kenya Defence Forces incursion into Somalia.

The third type of interest is major interests, which entails situations where a country's political, economic, or social well-being may be adversely affected but where the use of force is deemed excessive to avoid adverse outcome⁶⁵. The threats to Kenyan major interests include transnational crimes like money laundering, piracy, drug trafficking and cattle rustling. Lastly, peripheral interests are situations where some national interest is involved but where the country as a whole is not particularly affected by any given outcome or the impact is negligible⁶⁶. These kinds of threats hardly appear on the national security agenda.

3.2 National Security Threats Debate: A Not All Catch up Phrase?

While describing the typologies of crimes handled by the Kenyan Police, Omeje and Githigaro identified transnational crimes as one of the typology and which was manifested through terrorism, drugs trafficking, human trafficking, arms trafficking, illegal immigrants and

⁶⁴Donald Neuchterlein, "National Interests and National Strategy", in *Understanding U.S. Strategy: A ReaderOp.cit.*,p.38

⁶⁵ Ibid

⁶⁶ Ibid

money laundering⁶⁷. These threats are transnational in scope and therefore debate on whether such kind of threats fall within national security cannot be ignored. Mwangi argues that the traditional(western) understanding of what constitutes security threats to states are not wholly applicable in the African setting where threats to security are conditioned by its different operating environments⁶⁸.

This debate of was part of David Deudney's essay, "The Case Against Linking Environmental Degradation and National Security"⁶⁹. Deudney rejects the idea of broadening the concept of national security beyond its traditional definition to include transnational threats. He argues that environmental degradation is not a phenomenon that can cause interstate war and thus cannot be a national security threat because expanding the definition of national security beyond the states pursuit through military means of security from violence organized by other states is unnecessary, as this kind of move "saps the concept of "national security" of its analytical utility"⁷⁰. He maintained that national security should entail the "pursuit of national-security-from-violence through military means"⁷¹ and that "many transnational threats, including terrorism, organized crime, drug trafficking, infectious diseases, and environmental degradation, do not typically involve one state organizing violence against other states"⁷². Therefore, Deudney anticipated a definition of national security that entailed military security against interstate violence and that transnational threats did not "deserve a place at the national security table"⁷³

⁶⁷ Kenneth Omeje and Mwangi Githigaro, "The Challenges of State Policing in Kenya" *Peace & Conflict Review* Volume 7, Issue 1 ISSN: 1659-3995 (2012) p.

⁶⁸ Mwangi Makumi, *African Regional Security in the age of Globalization*, (Heinrich Böll Foundation Regional Office, East and Horn of Africa, 2004), p.1

⁶⁹ Daniel Deudney, "The Case Against Linking Environmental Degradation and National Security," *Millennium: Journal of International Studies* (1990); 19: 461-476.

⁷⁰ Ibid

⁷¹ Ibid., p.462

⁷² David Fidler, "Transnational Threats to National Security: Daniel Deudney's Case Against Linking Environmental Degradation and National Security" *Princeton Project on National Security* p.5

⁷³ Ibid., p.5

David Fidler counters Deudney's arguments by asserting that a lot of historical and contemporary examples show that Deudney's narrow definition of national security as being the state's pursuit of security from violence through military means, "does not do justice to the complexity of the exercise of national power in the face of shifting political, economic, and ideological vulnerabilities" therefore according to Fidler, Deudney's narrow definition of national security is not relevant because "the "war" system and its military trappings cannot exclusively define a state's power and vulnerabilities in the international system and that the traditional definition of national security used by Deudney bears the heavy imprint of the Cold War, a configuration of power politics, and threats the world no longer faces"⁷⁴

It is against this backdrop that this chapter adopts a broadened definition of national security and welcomes transnational threats at the "national security table" for a clear analysis of the major national security threats that confront Kenya. In determining the *major* national security threats, national interests were used as the threshold because national security is the pursuit and protection of national interests. Kenya faces no threat on its survival interests, therefore vital and major interests were used as the threshold for choosing the *major* national security threats facing Kenya. Threats to peripheral interests were omitted. This mechanism of "choosing" which threats are *major* will enable the study show how the selected threats - some of which are transnational threats in nature - crossed the said threshold from being a domestic or foreign policy concern to a national security problem.

3.3 The National Security Council and the Status of National Security in Kenya

Having mapped out Kenya's national interests as the threshold to use in determining national security threats; a clear understanding of the country's national security status call for a close look into the activities of the National Security Council (NSC). The constitution of Kenya

⁷⁴ Ibid.,p.15

(2010) calls for the establishment of the NSC. This council consists of: the President; the Deputy President; the Cabinet Secretary responsible for defence; the Cabinet Secretary responsible for foreign affairs; the Cabinet Secretary responsible for internal security; the Attorney-General; the Chief of Kenya Defence Forces; the Director-General of the National Intelligence Service; and the Inspector-General of the National Police Service⁷⁵.

The NSC is given the responsibility of integrating the domestic, foreign and military policies relating to national security in order to ensure that the national security organs cooperate and function effectively; and also assess and appraise the objectives, commitments and risks to the Republic in respect of actual and potential national security capabilities⁷⁶.

The Kenya NSC held its first meeting on 25th February 2014. In the meeting, security situation in the country was discussed. The NSC observed that two areas needed immediate concern: Increased threats of radicalization; and Persistent conflicts among pastoral communities. They noted that the threat of radicalization was manifested in the increase of radicalization centers. The named radicalization centers were: Masjid Musa and Sakina Mosques in Mombasa and Pumwani Riyadh Mosque in Majengo, Nairobi. NSC further noted with concern the impact of radicalization on the political, economic, social, and security well-being of Kenya.

In a bid to ameliorate the situation, the NSC approved measures to deal with the matter by enhancing security measures to contain the threat; targeting persons (leaders) preaching and financing radicalization; dealing with economic hardships which lead to unemployment;

⁷⁵ Constitution of Kenya 2010: Chapter 14 Art. 240(1)

⁷⁶ Constitution of Kenya 2010: Chapter 14 Art 240 (3)

implement the counter radicalization strategy developed by the Government; engaging the youth in gainful employment; and continuous monitoring of all radicalization activities⁷⁷.

The other threat that the NSC noted was the inter-communal conflicts which adversely affected national security in Marsabit, Mandera, Tana River, Turkana and West Pokot, Samburu, Baringo, Taita Taveta, Kitui and Isiolo counties. The approved measures of resolving or ending these conflicts were: continuous engagement of the leaders in the affected counties at the highest level; sustaining of peaceful building mechanisms; adopting a regional disarmament program; diversifying the economy in the affected areas away from one form of production; enforcing electronic branding of livestock among all pastoral people, and strengthening the criminal justice system⁷⁸.

3.4 Kenya's Major National Security Threats

The NSC provided some of the national security threats that Kenya face. This chapter identifies four threats as the *major* national security threats confronting Kenya: terrorism; proliferation of small arms and light weapons; poaching and trafficking in wildlife products; and refugee influx.

3.4.1 Terrorism

Contrary to Deudney's claim that national security should entail military security against organized interstate violence, the 1998 American Embassy bombing in Kenya, the 2002 Kikampala bombing and the frequent grenade attacks by the Al-Shabaab militants in Kenya shows that non-state actors who constitute a transnational network are a major threat to Kenya's national security.

⁷⁷Press Release: *National Security Council Meeting* February 25, 2014 available at: <http://www.president.go.ke/press-release-first-national-security-council-meeting/>

⁷⁸ Ibid

On 7 August 1998, a truck loaded with a bomb was driven by terrorists to the basement garage of the US Embassy in Nairobi. The attack killed two hundred and twenty four Kenyans and twelve Americans and injured more than five thousand people, mostly Kenyans. The Al Qaeda claimed responsibility. Although the Al Qaeda claimed responsibility, details about where the attack was planned, who was involved in the attack and who funded the attack is crucial in mapping out national security threats.

In 1994, Mohammed Saddig, one of the key players in the 1998 Embassy bombing arrived in Kenya and settled in Mombasa. He established a fishing business as a cover with the help of Al Qaeda funding. This was followed by the arrival of HarunFazul who was also connected to the 1998 and 2002 bombings. Together with Wadih-el-Hage a US citizen who was also arrested in connection with the Embassy bombing, set up a gem business in Kenya. HarunFazul then helped Wadih-el-Hage fraudulently obtain a Kenyan national identity card and travel to Somalia to coordinate Al Qaeda operations. After his arrest in connection to the 1998 bombing, HarunFazul alias Abdulkarim, took over the leadership of the cell⁷⁹.

After the 1998 bombing, Abdulkarim fled to Afghanistan and disguised as an Islamic preacher sneaked back into Kenya from Afghanistan. In order to remain undetected, he set up a base in Lamu Island on the coast and entrenched himself in the community founding three football teams for local youth which he named: Al Qaeda, Kandahar, and Kabul, for the local youth⁸⁰. Before the 2002 terrorist attacks of the Israeli-owned resort hotel and AIZ flight, he married a Kenyan woman and went underground after the attacks.

⁷⁹Mickolus, Edward F., and Susan L. Simmons (2002) *Terrorism 1996-2001: A Chronology*. Connecticut and London: Greenwood Press, pp.140-43

⁸⁰Mutinga, Murithi (2004) How Terrorist Attack was Planned and Executed. *The East Africa Sunday Standard*, Nairobi, 27 November. Available at: www.eastandard.net/hm_news/news.php?articleid=789290802/content/articles/article1c01.html.

On 28 November 2002, suicide bombers detonated a truckload of explosives at an Israeli-owned hotel near Mombasa, Kenya. Killing twelve Kenyans and four Israelis and injuring more than eighty others. This terror attack was coordinated with a simultaneous surface-to-air missile attack on Arkia Israeli airliner (AIZ) as it was taking off from the Mombasa airport. The airliner was carrying about two hundred and sixty four passengers. The two missiles missed the airliner. Al Qaeda claimed responsibility.

The two terror attacks were facilitated by Kenyans who had been recruited by the Al Qaeda network with Somalia providing a fertile ground for training and radicalization. They facilitated intelligence and logistical support in the form of marriages and forged documents. For example, a Kenyan drove the truck that was loaded with explosives to bring down the US embassy⁸¹.

In June 2010, three grenades attack were detonated at a political rally in Uhuru Park killing six people and injuring thirty others. The attack was blamed on the Al-Shabaab. In December 2010, another grenade attack on a bus in Nairobi killed three people and injured thirty nine. Also in the same month, three policemen were killed in a separate grenade attacks in Nairobi. Two weeks later, a grenade exploded at Kampala Coach Bus terminus killing one person and injuring twenty six others. Following these attacks, the Kenya Defence Forces moved into Somalia in pursuit of the Al-Shabaab on 16th October 2011.

However the incursion in Somalia did not mean an end to terror attacks. On 17th October 2011, a grenade was thrown into Mwaura's pub killing one person and injuring fifteen. Seven days later, a grenade was thrown at OTC bus stage killing one person and injuring eight others.

⁸¹Muiruri, Stephen, David Mugonyi, and Eric Shimoli, NjugunaMutonya, Edmund Kwena, Francis Thoya, Patrick Mayoyo, and AP and Reuters News Agencies. 2002. Two Suspects Arrested After Terror Bomb on Hotel Kills 13. *Daily Nation on the web*, 29 November. Available at: http://www.nationmedia.com/daily_nation/oldarchives.asp?archive=True.

The terrorists also attacked Garissa East African Pentecostal church on 16th November 2011 killing two people in a grenade attack. On 17th October, 2011, a vehicle carrying KCSE materials in Mandera was hit by a grenade killing four people.

The year 2012 saw a continuation of terror attacks by the Al-Shabaab. On 11th January 2012, armed Al-Shabaab militants killed six people including three police officers in Gerille camp, Wajir District. Feb. 19, 2012 the Al-Shabaab claimed responsibility for an attack on Hulugho police station in Garissa, killing a policeman and a civilian and injuring two other civilians. On March 2012, four grenades were thrown into Machakos bus station in Nairobi killing six people and injuring over sixty. On Sunday 29th April 2012, a grenade was hurled at worshippers at God's House of Miracles Church at Ngara Estate in Nairobi killing one person and injuring eleven others. On May 15th, three hand grenades were thrown at the Bella Vista night club in Mombasa killing one and injuring five others.

On 21st May 2012, four Kenyan soldiers were injured when their patrol vehicle hit a landmine in the north-eastern Mandera region. On May 28th, 2012, a blast at Nairobi's shopping stall injured twenty seven people. June 24, 2012, three people were killed and thirty more wounded when a hand grenade was thrown into Jericho Beer Garden in Mombasa as football fans watched the Euro 2012 quarter-final match. On July 1, 2012, two church attacks in Garissa town killed seventeen people and injured sixty others while also Catholic Cathedral and African Inland Church (AIC) were also attacked. Police arrested eighty people in an operation after the killings.

On July 18th, 2012, a grenade attack at a barber shop in Wajir town injured three policemen. In August 3rd, 2012, two separate attacks in Nairobi's Eastleigh neighborhood killed four people. August 28th, 2012, three policemen were killed and twelve wounded during riots in

Mombasa following the killing of Muslim Cleric, AboudRogo who was accused of radicalizing the youth and having links to the Al-Shabaab. The Al-Shabaab claimed responsibility for riots. On 29th September 2012, sixty people on board a bus from Garissa to Nairobi were arrested by the authorities for possessing bomb making materials. On Friday, 7th December, five people were killed and eight others injured in an explosion near a mosque in the Eastleigh area of Nairobi. Member of Parliament Abdi Yusuf Hassan was one of the wounded.

On January 4th, 2013, two people were killed in grenade attack in Garissa from a saloon car at a tent where people were chewing khat. On January 16th, 2013, in Garissa town, suspected Al-Shabaab militia men shot dead five people and injured three others. On January 17th, 2013, two men who were believed to be suicide bombers of Somali origin died after improvised explosive devices went off in Hagdera refugee camp in Dadaab. February 2, 2013, a blast in Wajir town killed a Kenya Defence Forces soldier and injured two others. April 18, 2013, six people were shot dead and ten others were seriously injured by armed gangsters who stormed KwaChege Hotel in Garissa and started shooting.

On Sept. 21st, 2013 a terror attack of equal magnitude to the 1998 terror attack happened. Armed masked terrorists stormed Westgate shopping mall in Nairobi, killing sixty seven people and injuring more than one hundred and seventy five people. The Al-Shabaab claimed responsibility for the attack. On 31st March 2014, explosives killed six people in Eastleigh area of Nairobi. On 23rd April 2014, a car exploded at the Pangani police station in Nairobi, killing the four occupants who were: the driver, a passenger, and two police officers who had boarded the vehicle to guide it to the police station for investigation.

The above increased terror attacks in the country and from NSC resolution that there are radicalization centers in: Masjid Musa and Sakina Mosques in Mombasa and Pumwani Riyadh

Mosque in Majengo, Nairobi and that radicalization affects political, economic, social, and security well-being of Kenya, terrorism is one of the major threats facing Kenya.

3.4.2 Proliferation of Small Arms and Light Weapons

Kofi Annan, former secretary of the United Nations, remarked “the world is awash with small arms and light weapons, numbering more than 600 million, enough for one in every ten people on earth.”⁸² UN Panel of Experts on Small Arms in its 1997 report noted that small arms include revolvers and self-loading pistols, rifles and carbines, sub-machine guns, assault rifles and light machine guns.⁸³ This chapter adopts this definition.

Boutwell and Klare observe that the trade in small arms and light weapons consumes at least \$10 billion of the world’s \$850 billion per year in military expenditures⁸⁴ with the suppliers being independent dealers, brokers, and middlemen controlling the illicit trade while the permanent members of the UN Security Council along with Germany, Israel, Italy, Belgium, Brazil and Austria being part of the suppliers.⁸⁵ However, the major consumers of these arms are developing countries where they are used to fuel civil wars, criminal violence and terrorism; they are estimated to be more than one hundred million⁸⁶. SALW are cheap, widely available, highly lethal, and simple to use, durable, portable, and easily concealable

As earlier observed, the National Security Council noted that inter-communal conflicts in Marsabit, Mandera, Tana River, Turkana and West Pokot, Samburu, Baringo, TaitaTaveta,

⁸² Kofi Annan, “Foreword” *Small Arms survey 2002 Counting the Human Cost*. A project of the Institute of International studies, Geneva, 2002

⁸³ Report of the Panel of Government Experts on Small Arms, United Nations Document A/52/298, United Nations, New York, 7 August 1997.

⁸⁴ Jeffrey Boutwell and Michael T. Klare, “A Scourge of Small Arms,” *Scientific American* No. 6 June 2000, pp. 48–53

⁸⁵ *Small Arms Survey 2009: Shadows of War*, (Cambridge: Cambridge University Press, 2009) p. 8.

⁸⁶ Michael T. Klare, “The Kalashnikov Age.” *The Bulletin of the Atomic Scientists*, Vol. 55, No. 1 (January / February 1999), p. 21

Kitui and Isiolo counties adversely affected national security. One of the approved measures of resolving or ending these conflicts was the adoption of a regional disarmament program.⁸⁷

Pastoralist communities often trade cattle for these weapons. The reason behind this proliferation has been the long and porous borders that Kenya shares with her unstable neighbors in Somalia and Sudan and continued conflicts in Northern Uganda and Ethiopia. For example, the fall of Mengistu's regime in Ethiopia in 1991 resulted to the loss of many fire arms while the fall of Siad Barre's government led to what has been called an "arms bonanza"⁸⁸. These borders are poorly policed with rampant corruption among the security officials. According to Sabala, the towns that are on or close to the borders are the major entry points for illegal firearms⁸⁹. Mombasa has been identified as the main entry point used by smugglers⁹⁰ with Mandera, Moyale, El Wak, and Lokichoggio being the inland border towns that serve as conduits for small arms trafficking in the country⁹¹. A market near Isiolo popularly known as a small arms supermarket was closed by the Kenyan Police⁹².

The high number of disarmament programs that the Kenya government has initiated shows how proliferation of small arms has been a frequent problem to the country's national security. For example it is believed that in his twenty four year rule, President Moi ordered over

⁸⁷Press Release: *The National Security Council* February 25, 2014 Op.cit

⁸⁸Adan, M and Pkalya, R, *Closed to Progress: An Assessment of the Socio-economic Impact of Conflict on Pastoral and Semi-Pastoral Economies in Kenya and Uganda* (Nairobi: Practical Action, 2005), p.47-48

⁸⁹Sabala, Kizito. 2002. 'The Proliferation, Circulation and Use of Illegal Firearms in Urban Centers: The Case of Nairobi, Kenya' In Bonn International Center for Conversion (BICC) *Small Arms in the Horn of Africa: Challenges, Issues and Perspectives* Brief No. 23. Bonn: BICC, pp. 36-41.

⁹⁰HRW (Human Rights Watch) 2002 *Playing with Fire: Weapons Proliferation, Political Violence, and Human Rights in Kenya* New York: HRW p. 11

⁹¹Wairagu Francis and James Ndung'u, (2003) "The Problem of Small Arms and Initiatives for Combating Their Proliferation, Circulation and Trafficking" In Intermediate Technology Development Group East Africa (ITDG EA) *Peace Bulletin*, No. 2 Nairobi: ITDG EA

⁹²Ibid

twenty disarmament operations among the Pokot⁹³. These disarmament programs involved a lot of coercive measures with the 1984 Operation Wajir being described as a massacre because of the deaths involved⁹⁴.

The 2008 Operation OkoaMaisha (Save Lives) in Mt Elgon which was military led, dismantled the Sabaot Land Defence Force and recovered 103 assorted fire arms and 1,155 rounds of ammunition. These arms were believed to have been acquired from Uganda through the Chepkube and Lwakhakha border points. Operation DumishaAmani (Maintain Peace) in Rift valley helped in recovering 1,201 firearms, 1,665 rounds of ammunition, and 201 head of livestock⁹⁵ while operation ChungaMpaka (Guard the Birder) in Mandera recovered 48 weapons and 1,200 rounds of ammunition. However, the 2012 small arms survey⁹⁶ indicates otherwise with Western Province recording an increase from 4 per cent to 10.4 per cent, also the number of SALW in Rift Valley increased by a margin of 6.8 per cent. This shows that despite the government's efforts to forcefully disarm these regions, the proliferation is still going on thus explaining the cause of inter communal conflicts noted by the National Security Council.

Proliferation of illicit arms in Kenya has led to the displacement of populations. For example, in northern Kenya, small arms fuelled pastoralist violence has displaced a lot of people while in North Rift area, insecurity caused by small arms has led to a gun culture which has

⁹³ SIKOM PeaceNetwork for Development (2010) *Progress Report and In-depth Analysis of the On-going Military Disarmament in North Rift, Particularly in Pokot Region*. Unpublished report prepared by SIKOM for stakeholders.

⁹⁴ Manasseh Wepundi, James Ndung'u, and Simon Rynn (2011) *Lessons from the Frontiers: Civilian Disarmament in Kenya and Uganda*. Nairobi: Saferworld

⁹⁵ Kenya National Focal Point on Small Arms and Light Weapons (2010a) 'Disarmament in Kenya' Presentation at the Regional Centre on Small Arms (RECSA) Practical Disarmament Validation Workshop, Mombasa, Kenya, 30–31 August

⁹⁶ Manasseh Wepundi, EliudNthiga, EliudKabuu, Ryan Murray, and Anna Alvazzi del Frate, "Availability of Small Arms and Perceptions of Security in Kenya: An Assessment" *Small Arms Survey Special Report 16* October 2012 p.3

contributed to low business investments and cases of sexual violence⁹⁷, banditry, cattle rustling and inter-ethnic clashes.

3.4.3 Poaching and Trafficking in Wildlife Products

The tourism industry is one of the major sources of foreign income for Kenya, East Africa's largest economy. This has made the industry to become one of the major national interests in Kenya and a threat to such an interest equals a threat to Kenyan national security. Over the years, trafficking in wildlife products from Kenya has also become a lucrative illicit business. The products that traffickers obtain from Kenya are ivory and rhino horns.

In accessing this kind of a threat, a brief chronology of the trafficked products is important. In July 2009, three hundred kilograms of illegal ivory and black rhinoceros horn on a cargo plane headed to Thailand and Laos were seized by Kenyan authorities⁹⁸; February 2010, two hundred and thirty nine tusks an equivalent of two tons on an Emirates airline flight from Nairobi was intercepted in Bangkok⁹⁹; in May 2010, a Korean national who owns casinos in Nairobi was arrested with forty seven elephant tusks which he admitted to have been sourced in Kenya; July 2010 saw Thai custom officials intercept one hundred and seventeen tusks and other ivory pieces worth about \$1.2 million. This seizure brought a total of six hundred and fifty two tusks in a period of five months, meaning that three hundred and twenty six elephants must have been killed¹⁰⁰; in August 2010, two tons of ivory and five rhino horns were being smuggled through Jomo Kenyatta International Airport to Malaysia before interception by Kenyan authorities; in December 2010, a Singaporean was arrested after he attempted to smuggle raw

⁹⁷ Kamenju, Jacob Alex Nderitu, MwachofiSingo, and Francis Wairagu (2003) *Terrorized Citizens: Profiling Proliferation of Small Arms and Insecurity in the North Rift Region of Kenya*. Nairobi: Security Research and Information Centre pp.71-79

⁹⁸ Tom Odula, "Kenya Ivory, Rhino Horn Seizure Tops 660 pounds," *Associated Press*, July 14, 2009, available at www.huffingtonpost.com/2009/07/14/kenya-ivory-rhino-hornse_n_231641.html

⁹⁹ Ibid

¹⁰⁰ Jaya Savannah, "Stop the Ivory Triangle, Kenya>Thailand>China", *Sacred Elephants*, available at www.sacredelephants.com/2010/07/theivory-triangle-kenya-thailand-china.html.

elephant ivory out of Kenya¹⁰¹. In January 2011, a Chinese national tried to smuggle seventy five kilograms of ivory through Jomo Kenyatta International Airport to China¹⁰²; April 2011 saw Thailand seize two hundred and forty seven elephant tusks - the largest in its history. These tusks were being smuggled through Bangkok port from Kenya. The seizure was estimated to be worth Ksh 247 million (\$3.3 million) can be equated to at least one hundred and twenty three elephants killed.¹⁰³

The year 2012 witnessed the killing of thirty rhinos with double the number being killed in 2013. On this incidence, Interpol noted that criminal gangs were making millions at the cost of Kenyan wildlife. In January 2014, a Kenyan court handed out a record sentence to a Chinese ivory smuggler - the first person to be convicted under a new law - after he was arrested carrying an ivory tusk weighing 3.4 kilogram's. The court ordered him to pay 20 million shillings (\$233,000) or else go to jail for seven years.¹⁰⁴ In his second state of the Nation address, President Uhuru Kenyatta said that the government would not tolerate individuals focused on killing animals to create wealth, and in his speech at the East African Legislative Assembly in Arusha, Tanzania, President Kenyatta reiterated that the challenges facing the region fill him with as much disgust as the recent upsurge of illicit trade in wildlife products, especially ivory and rhino horn, with the latest Interpol report, estimating a 68% increase in 2013 over the total tonnage seized in 2012. These developments represented a deadly threat not only to the livelihoods of communities that benefit directly and indirectly from wildlife, but also to the

¹⁰¹David McKenzie, "Singaporeans Arrested in Kenya for Suspected Ivory Smuggling," *CNN World*, December 11, 2010, available at http://articles.cnn.com/2010-12-11/world/kenya.ivory.bust_1_elephantivory-elephant-populations-african-elephants?_s=PM:WORLD.

¹⁰²"Chinese Citizen to Face Ivory-Smuggling Charges in Kenya," *Asia Pacific News*, January 18, 2011, available at www.monstersandcritics.com/news/asiapacific/news/article_1612508.php/Chinese-citizen-to-face-ivory-smuggling-charges-in-Kenya

¹⁰³Cyrus Ombati, "Sh274 Million Ivory Confiscated in Thailand in Largest Seizure Ever," *The Standard*, April 2, 2011.

¹⁰⁴Agence France Presse (AFP) "Rhino Poaching In Kenya Doubled In 2013" available at: http://www.huffingtonpost.com/2014/02/27/rhino-poaching-kenya-2013_n_4868665.html

tourist industry which in some of the East African partner states contributes more than 10% of the Gross Domestic Product (GDP)¹⁰⁵.

Traffic, the international agency that monitors illicit trade in ivory, has accused China of being the main destination for trafficked ivory. Their report notes that:

Chinese nationals have been arrested within or coming from Africa in at least 134 ivory seizure cases, totaling over 60 tones of ivory; and another 487 cases representing almost 25 tones of ivory originating from Africa was seized en route to China. ... As ever, more than any other country, China seemingly holds the key for reversing the upward trend in illicit trade in ivory¹⁰⁶.

3.4.4 The Poaching - Terror Nexus

Just as with all other transnational crimes, the proceeds of trafficking in wildlife products are used to buy weapons that contribute to clan violence and cattle rustling in north eastern Kenya. For example, a number of poachers killed in Kenya were traced to a Somali war lord who runs a private army in Somalia¹⁰⁷, while Interpol has pointed to possible links between wildlife trade and terrorist activities or insurgencies¹⁰⁸. The US State Department believes that the Lord's Resistance Army, the Janjaweed, and Al-Shabaab are partly involved in this illegal trade while some insurgent groups are directly involved and who then trade wildlife products for weapons or safe haven¹⁰⁹. It is estimated that the Al-Shabaab derives an estimated 13-40% of its money from the sale of ivory and rhinoceros horn for conducting its terror missions and paying its foot soldiers.¹¹⁰ With terrorism being a major threat to Kenya's national security, President Kenyatta

¹⁰⁵“Kenya: Uhuru Expresses His ‘Disgust’ With Poaching Trade” available at: <http://the-star.co.ke/news/article-160221/uhuru-expresses-his-disgust-poaching-trade>

¹⁰⁶ Richard Black, “Crime Rings Boost Ivory Smuggling,” *BBC News*, available at <http://news.bbc.co.uk/2/hi/8355527.stm>

¹⁰⁷ Sharon Begley, “Extinction Trade,” *Newsweek*, March 1, 2008, available at www.newsweek.com/2008/03/01/extinction-trade.html

¹⁰⁸ Interpol, “Powerful Alliance to Fight Wildlife Crime Comes into Effect,” press release, November 23, 2010, available at www.interpol.int/public/ICPO/PressReleases/PR2010/PR098.asp.

¹⁰⁹ Kerri-Ann Jones “International Wildlife Trafficking Threats to Conservation and National Security” available at: <http://www.state.gov/e/oes/rls/remarks/2014/222649.htm>

¹¹⁰ Johan Bergenas, Rachel Stohl and Alexander Georgieff, “The other Side of Drones: Saving Wildlife in Africa and Managing Global Crime” *Conflict Trends Issue 3*, 2013 p. 4

observed that a more worrying concern of poaching was that the proceedings were possibly funding terrorist activities.

3.5 Refugee Influx as a threat to National Security

According to the 1951 United Nations Convention Relating to the Status of Refugee:

A refugee is any person who, owing to a well-founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of the country¹¹¹.

The organization of Africa Unity (O.A.U) adopted the UN definition and broadened it to include people fleeing external aggression, internal civil strife, or events that are seriously disturbing public order in African countries¹¹².

People fleeing their own country because of the above mentioned reasons are called asylum seekers until they acquire refugee status. When the authorities ascertain - through the Refugee Status Determination Process- that the asylum seekers are genuine, they are registered and given refugee status and officially handed over to UNHCR as mandate refugees.

Over the years Kenya allowed refugees to move freely, integrate themselves within the country and gain employment, however most of the refugees relied on social assistance by aid agencies. With the influx in refugees in the country, the government did not suspend the refugees' status but created refugee camps in Dadaab near the Somali border and Kakuma in the north of Kenya next to South Sudan. With the creation of these camps, the refugees were

¹¹¹The 1951 UN Convention Relating to status of Refugees, 28 July 1958, United Nations Treaty, Vol. 189 No. 2545, 137.

¹¹²The Organization of African Unity Convention: *Governing Specific Aspects of Refugee Problems in Africa*, 10th September 1969, OAU Document CM/267/ Rev.1.

expected to stay in the camps until a 'durable solution was found'. These actions saw a rise in xenophobic and anti-refugee discourse by Kenyan masses and the political leaders¹¹³.

The UN Refugee Convention,¹¹⁴ to which Kenya is party to, contains the right of asylum seekers not to be returned or expelled to any other country where they might be persecuted. This right is called the principle of *non-refoulement*. Observance of this principle has not been easy to Kenya because refugees have been seen as a threat to Kenya's national security.

Kenya's Dadaab refugee camp consists of three camps: Ifo, Dagahaley and Hagadera. As of July 2009, the three camps approximately accommodated 300,000 refugees, a number that far exceeds its capacity of 90,000 refugees making it the largest refugee camp in the world. This influx has been caused by economic refugees fleeing from famine and Al shabaab threats and attacks. This situation has further pushed the number to 470,000 refugees as of January 2012.

3.6 National Security Threats Posed by Refugee Influx

National security threats that are posed by refugee influx have seen scholars start examining refugees as a security concern¹¹⁵. This has been the case in Kenya. The Garissa District Development Plan (GDDP) report of 1997-2001 observed that refugee influx was causing insecurity:

With the political instability in the Somalia and the resultant influx of more than 150,000 refugees, a lot of insecurity in the district is now being experienced. A lot of resources have been diverted to attending refugees and in stemming the problem of insecurity. Sophisticated weaponry has found their way into the district promoting banditry, cattle rustling and general violence in the district¹¹⁶.

¹¹³Rutinwa Bonaventure (2002), "The End of Asylum? The Changing Nature of Refugee Policies in Africa" Refugee Survey Quarterly, Vol.21, No. 1&2, p. 13

¹¹⁴Convention relating to the Status of Refugees: Art. 33(1)

¹¹⁵Mogire Edward, *Victims as Insecurity Threats: Refugee Impact on Host State, Security in Africa*, (England; Ashgate Publishing Company)

¹¹⁶*Garissa District Development Plan 1997-2001*, Office of the Vice President and Ministry of Planning and National Development, (Nairobi: Government Printer), 59.

Whilst the GDDP report of 2002-2008 asserted that:

Dadaab and Jarajila divisions are a bit insecure compared to others. This has mainly been caused by the presence of refugees in Jarajila and Dadaab, which has made the divisions adjacent to be insecure. Proximity to Somalia Republic border in these regions makes insecurity a challenge to development¹¹⁷

Insecurity issue in these camps has seen Kenya close its border with Somalia in a number of times. In 1999, the border remained closed in a bid to tame the further influx of Somali refugees, defeated militiamen and the proliferation of arms into Kenya. In 2007, the government once again closed the border and deployed helicopters and tanks to ensure the mission was successful. This was from concerns that Islamist fighters and especially Al-Qaeda operatives might find their way into the country thereby endangering Kenya's national security. Kenya's Foreign Minister Raphael Tuju justified this move and asserted that the government was "not able to ascertain whether these people (Somali refugees) are genuine refugees or fighters and therefore it's best that they remain in Somalia"¹¹⁸.

Currently, refugees in Kenya have been termed as "The monster that no one can fight"¹¹⁹. People of Garissa have seen the Dadaab refugee camp as a monster which had become an eyesore. They have complained that the camp had brought environmental degradation; insecurity; pushed up the cost of living; big business deals that exclude them and jobs being taken up by foreigners. Mr Mohamed Shidiye, former Lagdera Member of Parliament argued that the refugees had overstayed their hospitality and they should be taken back home. National

¹¹⁷ *Garissa District Development Plan 2002-2008*, Office of the Vice President and Ministry of Planning and National Development, (Nairobi: Government Printer)

¹¹⁸ "Kenyans close border with Somalia" *BBC* Wednesday, 3 January 2007

¹¹⁹ EmmanOmari and Jacob Ngetich "The monster that no one can fight" *Daily Nation* Thursday 1, 2011 p.17

perception has been that Somalis crossing to Kenya were behind security problems in the country¹²⁰.

The overflowing camps have been seen as a security threat by the residents who fear that Al-Shabaab fighters could have infiltrated the refugee camps because the locals were being outnumbered by the refugees from Somalia. The local residents and leaders around the refugee camp claimed that amidst the innocent-looking pitiable multitude, lays grave danger to Kenya. They also claimed that members of Al-Shabaab had infiltrated the camps posing as starving refugees and thereby putting the regions security at risk. Wajir South Member of Parliament Dr Mohamed Sirat also observed that the camps could include members of Al-Shabaab and other tribal militia who could extend their war in Somalia into Kenya¹²¹. Refugees in Kenya have also been seen as a security threat to the host community. For example, in Kakuma refugee camp the Turkana accused the Dinka (a Sudanese ethnic group) of raping their women and cutting down their trees leading to environmental degradation.¹²²

While host states perceive refugees as a threat to their national security, refugees have also accused their host of harassment and segregation based on their nationalities. For example, after the West gate terror attack, and a series of grenade attack by Al-shabaab, the government claimed that these attacks had been planned inside the refugee camps. Therefore, the government in an operation dubbed Operation Usalama Watch, detained four thousand people. Among the detained were Somali refugees and Somali-Kenyans. Kasarani Sports Stadium became the detention center for people who were being detained, including women and children. Those who did not have official Kenyan identification documents were deported to Somalia.

¹²⁰ Ibid., p.17

¹²¹ Jacob Ng'etich "Overflowing camps pose a security threat" *Daily Nation* May 15, 2011 p. 11

¹²² Aukot, E. "It is Better to be a Refugee Than a Turkana in Kakuma: Revisiting the Relationship between Hosts and Refugees in Kenya." *Global Movements for Refugees and Migrant Rights* 21.3 (2003); 73-83

3.7 National security and the paradox of Asylum Seeking

For decades, Kenya has been hospitable to refugees, however, the recent trends of refugee influx has changed Kenya's stand. The issue of national security has led Kenya to adopt refugee policies that are geared towards keeping out refugees and asylum-seekers by closing borders, denying entry and asylum as well as forcefully sending them back. This action has brought a dilemma to Kenya: how can it balance its international obligations in protecting refugees and also ensure its national security it's not compromised in this terrorist age?

Even though Kenya is party to many international and regional refugee conventions which they have also domesticated by adopting a Refugee Act, from the above examples it is clear that when it comes to national security, the host state view asylum seekers and refugees as a security threat and a burden. When such a claim is generalized then the genuine asylum seekers can easily be profiled as national security threats and deported back to the war zone.

In 2004, Kenya's Vice President Moody Awori threatened urban refugees: "I am asking all refugees to report to the camps and those that will be found to be in the city and other urban places without authorization will be treated like any other illegal aliens...The government will soon mount a crackdown on these illegal aliens with a view to flushing them out"¹²³

In 2007, the then Kenyan Foreign Minister Raphael Tuju while replying to criticism from the UNHCR for deporting more than four hundred and twenty Somali refugees in government trucks after being taken from the border transit camp in Liboi in north-east Kenya argued that, "Kenyans are overburdened, in fact Europe and America does not give us enough aid to support these refugees and it's not a written rule that when there is fighting in Somalia that people should

¹²³ Campbell Elizabeth, (2006) "Urban refugees in Nairobi: Problems of Protection, Mechanisms of Survival, and Possibilities for Integration" *Journal of Refugee Studies*, Vol. 19, No. 3. Pg.341

run to Kenya, other nations should also take the burden”.¹²⁴ The UNHCR reiterated that the deported refugees were entitled to seek asylum in Kenya and through their spokesperson noted that, “it’s against international law to deny people access to humanitarian assistance under such circumstance”¹²⁵.

3.8 Conclusion

This chapter presented the various debates in security studies and the place of transnational threats in national security debate because asylum seekers present issues affecting more than one country. The status of Kenya’s national security was investigated by analyzing the activities of NSC. The major national security threats that were linked to refugees and asylum seekers were: terrorism; proliferation in SALW; and poaching and trafficking in wildlife products. The chapter finally looked at the paradox that asylum presents to national security. It is this paradox that makes closing borders to prevent the entry of refugees violates the principle of non-refoulement because such an action prevents asylum seekers from having the slightest opportunity of proving their innocence thereby placing them at the risk of further persecution. On the other hand, the Kenyan government felt justified of such a closure because it was concerned with its national security not realizing that the Constitution of Kenya 2010, changed the provision of freedom of movement from applying to “all citizens” to “every person has the right to freedom of movement”¹²⁶ with “every person” including refugees and asylum seekers. Therefore this chapter has achieved the study’s first objective of investigate whether asylum portends any security threats in Kenya and confirming the first hypothesis that asylum seekers are conduit of terrorists and small arms proliferation agents.

¹²⁴“Kenya close border with Somalia” *BBC*Op.cit

¹²⁵ Ibid

¹²⁶ Constitution of Kenya 2010: Art. 39

CHAPTER FOUR

ASYLUM AND NATIONAL SECURITY STRATEGY IN KENYA

4.0 Introduction

Kenya is estimated to host 700,000 registered refugees and asylum seekers from Somalia, Sudan, Ethiopia, Eritrea, Rwanda, Burundi and the DRC. The cause of such an influx dates back to the 1970s. For example, the political coup in Uganda in the 1970s, the 1990 overthrow of Mohammed Siad Barre's regime in Somalia, the long civil war in Sudan, the collapse of Mengistu regime in Ethiopia, the Rwandan genocide in 1994, and the conflict in DRC has left Kenya as the only stable destination for asylum seekers fleeing such conflicts and persecution.

In order to analyze the nexus between asylum seeking and national security strategy, a definition of strategy is necessary. Samuel Huntington broadly defined national strategy as "the development and use of the entire range of resources (political, economic, or military) by a government to achieve its objectives against the opposition of another government or group"¹²⁷. Huntington's definition of strategy calls for the formulation of a strategy in response to a threat. According to Yarger, Strategy is fundamentally a choice; it reflects a preference for a future state or condition¹²⁸, he also observes that, "National Security Strategy lays out broad objectives and direction for the use of all the instruments of power. From this National Security Strategy the major activities and departments develop subordinate strategies"¹²⁹ and that strategy provides direction for the coercive and persuasive use of national power to achieve specified objectives; thus strategy is proactive and anticipatory¹³⁰, while Grattan contends that strategy formulation is a

¹²⁷ Samuel P. Huntington, "The evolution of U.S. National Strategy," in Daniel J. Kaufman, David S. Clark, and Kevin P. Sheehan, eds., *U.S. National Strategy for the 1990s* (Baltimore: The Johns Hopkins University Press, 1991), p.12

¹²⁸ Yarger, *Towards a Theory of Strategy: Art Lykke and the Army War College Strategy Model*, 2.

¹²⁹ *Ibid.*, Model 3

¹³⁰ *Ibid.*, pp.1-3

process that is to end in outcomes. The decision provides ways of achieving the objectives or aims established for the organization within the means available. The process and the decision are influenced by the nature of the decision maker and the context in which the decision is made¹³¹.

4.1 Laws Governing the Admission of Asylum Seekers in Kenya

According to UNHCR, an asylum seeker is a person who says is a refugee, but whose claim has not yet been completely evaluated. In other words, asylum seeking is the process through which a person claims for the refugee status. A refugee is an asylum seeker who has successfully managed to complete all the necessary legal requirements in order to achieve a permanent residency within the host country. A person does not automatically become a refugee upon entry into Kenya. He or she must apply for registration to be recognized as such. Under **Section 11(1)**¹³² of the Act, —*Any person who has entered Kenya, whether lawfully or otherwise and wishes to remain within Kenya as a refugee in terms of this Act shall make his intentions known by appearing in person before the Commissioner immediately upon his entry or, in any case, within thirty days after his entry into Kenya.* **Section 4**¹³³ of *the Act* excludes certain persons from being considered refugees. It provides as follows;

(1) A person shall not be a refugee for the purposes of this Act if such person has –

(a) Has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument to which Kenya is a party and which has been drawn up to make provisions in respect of such crimes;

(b) Has committed a serious non-political crime outside Kenya prior to the person's arrival and admission to Kenya as a refugee;

¹³¹ Robert F. Grattan, *The Strategy Process: A Military-Business Comparison* Palgrave MacMillan, (2002) p. 155

¹³² The Refugee Act 2006 Kenya Gazette Supplement No 97 (Acts No.13) p.437

¹³³ Ibid

(c) Has been guilty of acts contrary to the purposes and principles of the United Nations or the African Union;

(d) having more than one nationality, had not availed himself of the protection of one of the countries of which the person is a national and has no valid reason, based on well-founded fear of persecution.

4.2 Securitization of Migration versus Human Security Paradigm

Scholars of security studies have dealt with migration issues from different perspectives. This chapter will adopt a constructivist approach, as taken from the Copenhagen School to explain how migration in particular asylum seeking, is a security issue for Kenya with emphasis on non-legitimate asylum seekers. In order to arrive at an objective analysis, human security paradigm will be employed in order to access the insecurities faced by legitimate asylum seekers and the host community.

4.2.1 Securitization of Migration

Securitization has been termed as a fusion of constructivist and classical political realism. Connected with the Copenhagen School, securitization is a process-oriented conception of security which examines how a certain issue is transformed by an actor into a matter of security¹³⁴. By enabling the use of extraordinary means in the name of security, securitization studies seeks to understand “who securitizes (Securitizing actor), on what issues (threats), for whom (referent object), why, with what results, and under what conditions”¹³⁵. For Buzan the main question that arises is “how to define what is and is not a security issue in the context of a

¹³⁴ Charrett, Catherine. *A Critical Application of Securitization Theory: Overcoming the Normative Dilemma of Writing Security*. Spain: International Catalan Institute for Peace, 2009

¹³⁵ Buzan B, de Wilde J., Waver O., (1998) *Security: A New Framework for Analysis*, Boulder, CO: Lynne Rienner. P.32

broadened understanding of security”¹³⁶. Buzan contends that as a concept, security is basically about survival. This is because when an issue possesses an existential threat to the survival of a referent object, then none is dealing with a security threat. From a conventional point of view the term ‘referent object can simply be understood as the state’¹³⁷. Therefore, within this concept, it is assumed that the state has to survive and therefore has to do whatever is necessary to protect itself from any existential threat.

According to McDonald, securitization is essentially about studying the construction of security discourse in contemporary international politics¹³⁸. By using the framework provided by the Copenhagen School, it allows for discourses to be seen as a form of socially and historically situated social practice revolving around the use of communication that is both socially shaped and socially constitutive¹³⁹.

According to Waever¹⁴⁰ in order for securitization to work, an audience has to accept a threat as credible. It is also important to note that, a successful securitization requires not only a securitizing speech, but also the presence of what Waever calls ‘conditions’ that increase the likelihood of successful securitization. Securitization can be defined as “...the positioning through speech acts (usually by a political leader) of a particular issue as a threat to survival, which in turn (with the consent of the relevant constituency) enables emergency measures and the suspension of ‘normal politics’ in dealing with that issue”¹⁴¹.

¹³⁶Peoples, C., Vaughan-Williams, N., (2010) *Critical Security Studies: An Introduction*, Routledge Press.

¹³⁷ Ibid

¹³⁸McDonald, M. (2008) ‘Securitization and the Construction of Security’, *European Journal of International Relations* 14(4): 563-587.

¹³⁹Watson, S.D., (2009) *The Securitization of Humanitarian Migration - Digging moats and sinking boat*, Routledge.p.4

¹⁴⁰Waever Ole, “Securitization and Desecuritization” In *On Security*, edited by Ronnie Lipschutz, 39- 69 New York: Columbia University Press, 1998.

¹⁴¹Ibid., p.567

Waever observes that the first condition for a successful securitization is an existential threat presented as legitimating the use of measures to combat that threat. The second condition refers to the actor that is attempting to securitize a given issue. Therefore, the actor has to have enough social and political capital to convince the audience of the existent threat. Thirdly, it is easier to present an issue as a threat if it carries historical connotations to danger, fear, or even harm. These conditions underline the fact that securitization theory acknowledges that certain actors and institutions are better at securitizing than others as they may be perceived as being more credible for audience.¹⁴²

As with all theoretical frameworks, securitization theory has some shortcomings, it under-specifies the role of the audience by focusing on the speech act itself rather than the audience at whom the articulation is directed. This fact is considered as one of the limitations of the securitization theory. Critics argue that securitization does not analyze how political communities are constituted or how a community deals with a certain articulation of security¹⁴³. Regardless of these limitations, this chapter uses securitization theory as it still can provide the general dynamics through which asylum issues are securitized.

For all states, the security concept has two faces: internal and external. According to Buzan, states can be threatened and destroyed by internal upheavals as well as external forces¹⁴⁴. In the horn of Africa, Kenya has always been seen as a desirable place to live by those fleeing conflicts and political persecutions in the neighboring countries. As some of these immigrants pose a threat to Kenya's national security, the state has to protect itself and to maintain its survival. Therefore, asylum becomes a threat to the state's sovereignty as observed by the UNHCR:

¹⁴² Ibid

¹⁴³ McDonald, M. (2008) 'Securitization and the Construction of Security' Op.cit, p. 572

¹⁴⁴ Buzan B, de Wilde J., Waver O., (1998) *Security: A New Framework for Analysis* Op.cit

The emergence of new security concerns for states, particularly since the events of 11 September 2001, has led to the ‘securitization’ of asylum practices. Increasingly refugees and asylum seekers are perceived as harbingers of insecurity, rather than victims of it.¹⁴⁵

4.2.2 Human Security Paradigm

While the securitization theory has placed the state at the centre, the Post Cold War international system has seen the security agenda move from a strict focus on the security of the state towards a broader focus of having the people as the main referent object. Individuals’ security has been seen to be threatened in many fronts: economic welfare, environmental concerns, cultural identity, and even political. This section presents human security approach as the alternative to the securitization approach in what regards its utility. This is because the human security paradigm provides an approach where the objective is not to trace who can securitize what issues and under what conditions but rather what the insecurities of individuals or groups of individuals¹⁴⁶.

Human security as a concept was introduced by the United Nations in the 1994 Human Development Report and defined ‘human security’ as “...safety from such chronic threats as hunger, disease and repression, and protection from sudden and hurtful disruptions in the patterns of daily lives, whether in homes, jobs or communities.”¹⁴⁷ This provided an alternative to the traditional focus on the state, into focusing at security as being freedom from fear and freedom from want. Peoples¹⁴⁸ contend that freedom from fear is to be understood as the aspiration of people wanting to be secure from the threat of violence, while freedom from want

¹⁴⁵ UNHCR: The State of the World’s Refugees, (2006), p. 5

¹⁴⁶ Floyd, R., Human Security and the Copenhagen School’s Securitization Approach: Conceptualizing Human Security as a Securitizing Move, *Human Security Journal*; (2007) Volume 5

¹⁴⁷ Human Development Report (HDR), 1994, p. 23; http://hdr.undp.org/en/media/hdr_1994_en_contents.pdf

¹⁴⁸ Peoples, C., Vaughan-Williams, N., (2010) *Critical Security Studies: An Introduction*, Routledge Press

entails the aspiration that people should be free from poverty and entitled to basic means of survival. Therefore, “Human security is not a concern with weapons- it is a concern with human life and dignity”¹⁴⁹.

Human security has created a new dimension for national security. This is because the state alone could not fully assure the respect of the entire specter of human rights and therefore a people centered approach was necessary. Alice Edwards¹⁵⁰ contends that human security is similar with the concept of human rights, as it prioritizes dialogue around people and their rights and needs. Edwards also agrees that the notions of territory, borders, and citizenship have not disappeared from the discourse, but instead their importance is being reduced in the favor of a human-centric view of security¹⁵¹. This human-centric approach identified seven elements that comprise human security: economic security, food security, health security, environmental security, personal security, and community security. At the core of the human security concept is the underlying fact that all individuals as human beings, have a right to exist free of threats from the seven sectors.

Like securitization theory, human security paradigm has its own shortcomings. Krause contends that a “broad vision of human security...does not allow us to see what is distinctive about the idea of “security”, and how it is inextricably tied up with the threat and use of violence”¹⁵². To counter this shortcoming and ensure a streamlined focus, this chapter will focus solely on ‘freedom from fear’. This narrow approach will enable the human security

¹⁴⁹Ibid., p. 22

¹⁵⁰Edwards, A., (2009) *Human security and the rights of refugees: transcending territorial and disciplinary borders*. http://www.humansecuritygateway.com/documents/UMICH_HumanSecurity_RightsOfRefugees.pdf

¹⁵¹Edwards, A., (2009) *Human security and the rights of refugees: transcending territorial and disciplinary borders* Op.cit

¹⁵²Krause, K., (2004) *The Key to a Powerful Agenda, if Properly Delimited*, Security Dialogue 2004: 367-368

paradigm provide a framework for assessing fear as a threat to the asylum seekers as well as the host state.

4.3 Refugee Influx and Government of Kenya National Security Strategy

The influx of refugees in the country has raised eyebrows within the government. In 2012, the department of refugee affairs made a press release:

The Government of Kenya has decided to stop reception, registration and close down all registration centres 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.¹⁵³

In order to enforce this press release, the Permanent Secretary in charge Provincial Administration and Internal Security in a letter dated 16th January 2013, directed the Permanent Secretary Ministry of Special Programs as follows:

The government intends to move all refugees residing in urban areas to the Dadaab and Kakuma Refugee Camps and ultimately to their home countries after the necessary arrangements are put in place. The first phase which is targeting 18000 persons will commence on 21st January 2013. The security officers will start by rounding the refugees and transporting them to Thika Municipal Stadium which will act as the holding ground as arrangement for moving them to the Camps are finalised. We do not intend to hold any of the refugees for more than two days at the stadium. The purpose of this letter is to request you to extend humanitarian assistance both at the holding ground and during the transportation. This includes food, water, tents and health care.¹⁵⁴

¹⁵³High Court of Kenya Petition 115 and 19 of 2013 Judgment p.2

¹⁵⁴ Ibid.,p.3

This directive to the Ministry of Special Programmes was followed by a letter dated 10th December 2012 from the Department of Refugee Affairs addressed to the officers in charge of Refugee offices in Kakuma, Dadaab, Mombasa, Malindi, Nakuru and Isiolo as follows:

Following a series of grenade attacks in urban areas where many people were killed and several more injured in grenade attacks in our streets, churches, and buses and in business places. Due to this unbearable and uncontrollable threat to national security, the government has decided to put in place a structured encampment policy. The government has decided to stop registration of asylum seekers in urban areas with immediate effect. All Asylum Seekers should be directed to Dadaab and Kakuma refugee camps for Reception, Registration and Refugee Status Determination, Issuance of Movement Passes for non-resettlement cases should also stop immediately. In addition, the government shall put in place necessary preparation to repatriate Somali refugees living in urban areas. Please take necessary action accordingly.¹⁵⁵

The seriousness of the government's directive was seen when on the same day, 10th January 2013, the Commissioner of Refugee Affairs wrote a letter to the County Representative of the United Nations High Commissioner for Refugees (UNHCR) Branch Office – Kenya, as follows:

As you are aware, the government issued a directive to relocate all refugees living in urban areas to refugee camps. The directive also requires that non-governmental organisations transfer refugee programs to the refugee camps so as to avoid attracting refugees to urban areas. Consequently, the government has set up a high level inter-ministerial committee to oversee and guide the relocation process. The Committee held a meeting on 9th January, 2013 and made the following recommendation: the process of relocation will be co-ordinated by the Department of Refugee Affairs with UNHCR and other stakeholders. DRA and UNHCR were asked to come up with a program of action; the program of relocation will be a quick impact project carried out through a —Rapid Results Initiative(RRI) in 100 days'; the committee has approved opening of Kambios at Dadaab Refugee Camp and Kaiobei Refugee Camp to host refugees relocated from urban areas; UNHCR is requested to mobilize resources and work closely with the Department of Refugee Affairs on this matter. There is need to set a technical team to oversee the mobilization; UNHCR to stop funding of urban refugee programs but limit funding of urban refugee programs to process relocation, e.g., sensitization, transportation, transit assistance and reception at the camps. This is to ensure urban refugees do not undermine the government directives; Department of Refugees Affairs 'urban officers to remain open

¹⁵⁵Ibid., pp.3-4

to coordinate relocation from different parts of the country; Provincial Administration and the police to conduct continuous operations to support the relocation process; that the relocation program to officially start on 21st January 2013. The purpose of this letter is to inform you of the guidelines and ask for your cordial cooperation.¹⁵⁶

4.4 National Security Strategy versus the Principle of Non Refoulement

One of the fundamental principles in international refugee protection is the obligation of *non-refoulement* to be found in **Article 33(1)** of the *1951 Convention*¹⁵⁷ which provides as follows;

1. 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.

2. 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.

Article 2(3) of the *AU Convention*¹⁵⁸ provides that, *No person shall be subjected by a Member State to measures...which would compel him to return or remain in a territory where his life, physical integrity or liberty would be threatened....* States are prohibited from removing, deporting or repatriating refugees from where they are to the States of origin without following due process. This principle is so fundamental that it is considered a customary law norm. It is considered the cornerstone of international refugee protection¹⁵⁹.

¹⁵⁶ Ibid., pp.4-5

¹⁵⁷ The 1951 UN Convention Relating to status of Refugees, 28 July 1958, United Nations Treaty, Vol. 189 No. 2545, 137

¹⁵⁸ The Organization of African Unity Convention: *Governing Specific Aspects of Refugee Problems in Africa*, 10th September 1969, OAU Document CM/267/ Rev.1.

¹⁵⁹ see *Encyclopedia of Public International Law* Max Planck Institute for Comparative Public Law and International Law, Amsterdam, New York, 1985), vol. 8, p. 456

The *non-refoulement* principle is incorporated in **section 18** of the **2006 Refugee Act**¹⁶⁰ which states as follows;

18. 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 whole of that country.

The government's national security strategy of dealing with the influx of refugees and asylum seekers entailed: stopping the registration of asylum seekers and refugees in urban areas by closing all registration centres; directing all refugees and asylum seekers to move back to refugee camps by using security authorities to round off 18,000 refugees and take them to Thika Municipal Stadium; and directing UNHCR and other agencies to stop providing assistance and direct services to urban refugees and other asylum seekers, was countered by Kituo cha Sheria – a nongovernmental organization- dealing with the rights and welfare of refugees and asylum seekers within the Republic of Kenya.

Kituo cha Sheria moved into court in a petition dated 21st January 2013 to quash the Government Directive and stop its implementation. They argued that it violated the rights and fundamental freedoms of refugees living in Kenya, and observed that it violated the Kenyan

¹⁶⁰The Refugee Act 2006 Kenya Gazette Supplement No 97 (Acts No.13) p.437

constitution in Article 28 which protects the right to dignity, Article 39 which protects the right to movement, Article 27 which prohibits arbitrary and discriminatory actions and also violation of Kenya's international obligations under the 1951 United Nations Refugee Convention which has been domesticated by the Refugees Act, 2006 (No. 13 of 2006) and the International Convention on Civil and Political Rights (ICCPR)¹⁶¹.

The government defended its directive by arguing that most refugees in urban areas were not registered or were evading registration, while those registered at the refugee camps and issued with time-restricted movement passes had not gone back to camps or renewed them thereby violating the terms of issue. Therefore the government prayed the court to dismiss the petition as it "would lead to an influx of refugees in urban areas which shall in turn pose administrative challenges to the Department of Refugee Affairs thereby impacting on the well-being of the country as a whole"¹⁶².

The ruling was made on 26th July 2013 by Justice Majanja who noted that:

the government's directive is a threat to the petitioners' fundamental rights and freedoms including the freedom of movement, right to dignity and infringes on the right to fair and administrative action and is a threat to the *non-refoulement* principle incorporated by **section 18** of the **Refugees Act, 2006**. It also violates the State responsibility to persons in vulnerable situations and that the policy intended to be implemented by the Government Directive cannot be justified under **Article 24**.¹⁶³

The ruling concluded that the government's fears that if the directive is not issued, "an influx of an extravagant and uncontrolled number of refugees and asylum seekers in urban areas shall in turn pose administrative challenges to the Department of Refugee Affairs thereby impacting on the well being of the country as a whole" was unfounded because the Constitution

¹⁶¹Universal Declaration of Human Rights:International Convention on Civil and Political Rights P. 6

¹⁶²High Court of Kenya Petition 115 and 19 of 2013 Judgment Op.cit P.12

¹⁶³Ibid.,P.43

and Kenyan laws pertaining refugees are sufficient in handling refugees. The court then directed the State to establish a system of registering refugees that is consistent with the principles and values of the Constitution.¹⁶⁴

4.5 Asylum Pretensions as Cause of Terrorism in Kenya

This section will explore how asylum pretensions and terrorism are interrelated. It will illustrate how border security is significantly enhanced if a national security strategy that denies asylum seekers entry to the country is put into place. Camarota points out that if terrorists are unable to enter or remain the country; their ability to carry out an attack is significantly diminished¹⁶⁵.

In order to succeed in their operatives, terrorist organizations need operatives who have the ability to enter and reside in the target country in order to conduct surveillance on potential targets and conduct the actual attack. They also need logistical support located within the country in order to facilitate financial transactions, arrange safe houses and make travel arrangements. Leiken argues that regardless of “whether the terrorist seeks mayhem by truck bomb or hijacked airplane, whether he carries a smallpox virus or sarin gas, to carry out his attack he himself must enter the country”¹⁶⁶

While examining terrorist travel patterns, Janice Kephart reported that representatives from every terrorist organization included within the scope of her study used fraud to some

¹⁶⁴ Ibid

¹⁶⁵ Camarota S. *The Open Door: How Militant Islamic Terrorists Entered and Remained in the United States, 1993-2001* (Center Paper 21). (2002b) Washington, D.C.: Center for Immigration Studies.

¹⁶⁶ Leiken, R, *Bearers of global jihad? Immigration and national security after 9/11* Washington, D.C.: The Nixon Center (2004). P. 24

degree in order to gain admission into or remain in the country. This fraud ranged from failures to disclose information on immigration forms to altered or forged documents¹⁶⁷.

Susan Martin and Philip Martin observe that, “Immigration policy changes cannot prevent terrorism, but they are key ingredients of the effort to combat terrorism”¹⁶⁸. They proceed and outline three areas that need improvements: preventing terrorist mobility, prosecuting individuals suspected to be terrorists, and protecting the rights of individuals who have been unfairly accused of being terrorists. They also propose: improving the visa issuance process and border inspections; better mechanisms for tracking foreign nationals once they have entered the country; reducing unauthorized entries and increasing interior enforcement¹⁶⁹. These observations were part of the 9/11 Commission that observed that targeting travel is at least as powerful a weapon against terrorists as targeting their money and that the United States should combine terrorist travel intelligence, operations, and law enforcement in a strategy to intercept terrorists, find terrorist travel facilitators, and constrain terrorist mobility.¹⁷⁰

According to Kenyan authorities, refugees and asylum seekers, mainly from the war-torn Somalia, are used by the Al-shabaab militia group to advance terrorism in Kenya. Even though the government’s national security strategy that entail rounding off the refugees and asylum seekers from urban areas and taking them back to the camps was quashed by the high court in 2013, frequent terror attacks in the country in 2014 has seen the government implement the same

¹⁶⁷Kephart, J. L. *Immigration and terrorism: Moving beyond the 9/11 staff report on terrorist travel* (2005) [Center Paper 24]. Washington, D.C.: Center for Immigration Studies.

¹⁶⁸ Martin, S. & Martin, P. International migration and terrorism: Prevention, prosecution and protection. *Georgetown Immigration Law Journal*, 18(2), (2004) p. 329

¹⁶⁹ Martin, S. & Martin, P. International migration and terrorism: Prevention, prosecution and protection Op.cit 329-344

¹⁷⁰National Commission on Terrorist Attacks upon the United States (2004) *The 9/11 Commission report: Final report of the National Commission on Terrorist Attacks upon the United States*. New York: Norton p.385

strategy by deporting hundreds of illegal immigrants to Somalia, accusing them of coordinating terror activities and recruiting Kenyan youth to the shabaab army as foot soldiers. This national security strategy dubbed “Usalama Watch” was followed by calls by the Kenyan National Assembly to close refugee camps in the country citing national security.

The Kenya Parliamentary Joint Committee on Administration and National Security, and Defence and Foreign Affairs tasked with investigating terror attacks in Nairobi, Kilifi and Mandera counties in 2013 , including the September al-Shabaab attack on the Westgate shopping mall, claimed that asylum seekers in the country were a threat to Kenya’s national security and recommended that the department of Immigration Services, the Registration of Persons Department, the National Registration Bureau, and the Department of Refugee Affairs should be held accountable for compromising national security by registering aliens who later turn out to be terrorists because of their “systemic failure” in vetting people entering the country. The committees report revealed that immigration officials allowed people who pretend to be asylum seekers to enter the country illegally after paying bribes at the border control points and registration centers, mainly in Nairobi, Coast and North Eastern areas.¹⁷¹

The Joint Committee recommend that the Dadaab refugee camp be closed and for the government to find ways to mitigate radicalization of Kenyan youth and “stern action, including prosecution, should be taken against those found to be indoctrinating youths.”¹⁷² Weeks after the Westgate Mall attack, fifteen officials in the department of immigration were sacked were after being implicated in the issuance of Kenyan identification documents to illegal immigrants, but they later sued the government and their sacking letters were invalidated. However, even though

¹⁷¹“Kenyan Parliamentary Committee Faults Immigration Department for Terror Incidents” *All Africa* 22 January 2014 available at: <http://allafrica.com/stories/201401230098.html>

¹⁷² Ibid

he argued they would be paid their dues, President Uhuru Kenyatta announced that their services would still not be required.¹⁷³

4.6 Asylum Seekers versus Economic Migrants

Many people fleeing from conflicts in Sudan and Somalia pretend to be asylum seekers fleeing from war or political persecution. These people are often fleeing from drought and poverty in their homelands. This has made it very difficult to ascertain who the genuine asylum seekers are. Therefore, asylum seekers have been associated with illegality and deviance and are perceived to be economically motivated.

This concern about genuine-ness of asylum seekers has constituted a threat to Kenya's human security as the local population feel that they don't need such preferential treatment and pose as threat to the local economy, environment and health sectors. These economic immigrants eventually get refugee status and shops, restaurants, and other businesses inside the camps without paying taxes. These conditions which are now happening at Kenyan refugee camps are similar to those that existed at the other closed Kenyan camps such as Jomvu in Mombasa, with its closure being attributed to the unfair business competition between the locals and the refugees due to the tax-free status of the latter¹⁷⁴.

The economic immigrants posing as genuine asylum seekers have contributed to an influx of the refugee population which has continued to aggravate desertification in the area due to the refugee's negative environmental impacts. This has been caused by huge demand for fuel

¹⁷³ "15 top immigration officers fired in Westgate probe" *Daily Nation* 25 October, 2013 available at: <http://mobile.nation.co.ke/News/15-top-immigration-officers-fired-in-Westgate-probe/1950946/2046640/-/format/xhtml/-/uxbmshz/-/index.html>

¹⁷⁴ Crisp, J. A State of Insecurity: The Political Economy of Violence in Kenya's Refugee Camps. *African Affairs*, (2000)99: 601-619

demand leading to deforestation which has led to livestock loss and subsequent impoverishment of the local pastoralists due to the destruction of their natural resources by the huge refugee population thereby making them poorer. This has been the same with competition for water sources between refugees and their hosts which has prompted refugees to sink water boreholes for both groups all drawing on the Merti Aquifer and being exploited beyond its natural recharge.

On the question of “economic migrants” versus “refugees”, the UNHCR has provided an important qualification in their 2011 issue of the UNHCR Handbook on Procedures and Guidelines for RSD. They observed that the distinction is sometimes blurred.

Behind economic measures affecting a person’s livelihood there may be racial, religious or political aims or intentions directed against a particular group. Objections to general economic measures are not by themselves good reasons for claiming refugee status. On the other hand, what appears at first sight to be primarily an economic motive for departure may in reality also involve a political element, and it may be the political opinions of the individual that expose him to serious consequences, rather than his objections to the economic measures themselves¹⁷⁵

As signatory to the 1951 Refugee Convention, Kenya has obligation to hear – without prejudice - the testimony of each asylum seeker before presuming that their claim for refugee status is not valid because of their nationality or ethnic origin. However, this obligation poses serious problems to Kenya as far as protection of its human security is concerned thereby contradicting Kenya’s national security strategy of moving refugees and asylum seekers back to the camps and also repatriating them to their home countries.

4.7 Conclusion

Having set out to investigate asylum and national security strategy in Kenya, this chapter looked into Kenya domestic laws governing admission of asylum seekers in Kenya. Such laws require Kenya to protect asylum seekers and exclude individuals that have committed crimes

¹⁷⁵UNHCR Handbook on Procedures and Guidelines for RSD

against peace, war crimes or crimes against humanity and are guilty of acts that are contrary to the purposes and principles of the UN and AU. In order to assess Kenya's national security strategy, the chapter critically examined the government's national security strategy in relation to refugee influx and if the strategy violated the principle of non refoulement or whether the asylum seekers are threats to Kenya's national security while pretending to be in need of international protection. The study found out that some asylum seekers were economic migrants and were a threat to Kenya's human security and the government's strategy of "security swoops" and the inefficient and corrupt officials at the immigration department don't allow efficient screening of people crossing the borders with terrorist and economic migrants getting into the country and posing as threats to Kenya's national and human security. Therefore the government needs an efficient national security strategy in relation to asylum.

CHAPTER FIVE

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

5.0 Summary and Conclusions

This study started off by bringing out the problem statement that proposed to investigate if asylum poses threat to national security. To achieve this endeavor, the place of asylum in international law was discussed. Legal frameworks relating to the protection of asylum seekers were presented from international, regional, and domestic legal instruments. 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. The Abdullah Ocalan case was cited as a case in point where an asylum seeker (Abdullah Ocalan) sought asylum in Kenya and later discovered to have committed heinous crimes in Turkey and thereby being branded an international terrorist by western nations and therefore a threat to Kenya's national security. He was captured and extradited back to Turkey. This analysis achieved the study's second objective by investigating whether there had been any incident of an alien granted asylum and later involved in any activity that threatens national security.¹⁷⁶

Kenya's national security and the major threats that Kenya was grappling with was presented through the various debates in security studies, with the place of transnational threats in national security debate being investigated because activities of asylum seekers involve more than one country. The status of Kenya's national security was investigated by analyzing the activities of NSC. The major national security threats that were linked to refugees and asylum seekers were: terrorism; proliferation in SALW; and poaching and trafficking in wildlife

¹⁷⁶ See Chapter Two

products. The study then looked at the paradox that asylum presents to national security. It was discovered that it is this paradox that makes closing borders to prevent the entry of refugees. This action prevented asylum seekers from having the slightest opportunity of proving their innocence; this placed them at the risk of further persecution and this meant that the government was violating the principle of non-refoulement. On the other hand, the Kenyan government felt justified of such a closure because it was concerned with its national security not realizing that the Constitution of Kenya 2010, changed the provision of freedom of movement from applying to “all citizens” to “every person has the right to freedom of movement”¹⁷⁷ with “every person” including refugees and asylum seekers. Therefore this study achieved the its first objective of investigating whether asylum portends any security threats in Kenya and confirming the first hypothesis that asylum seekers are conduit of terrorists and small arms proliferation agents.¹⁷⁸

The study further looked into asylum and national security strategy in Kenya. This entailed examining Kenya’s domestic laws governing admission of asylum seekers. It was found out that such laws require Kenya to protect asylum seekers and exclude individuals that have committed crimes against peace, war crimes or crimes against humanity and are guilty of acts that are contrary to the purposes and principles of the UN and AU. In accessing Kenya’s national security strategy, the study critically examined 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 found out that some asylum seekers were economic migrants and were a threat to Kenya’s human security. The government’s strategy of “security swoops” and the inefficient and corrupt officials at the immigration

¹⁷⁷ Constitution of Kenya 2010: Art. 39

¹⁷⁸ See Chapter Three

department were found not to undertake efficient screening of people crossing the borders with some being terrorists and economic migrants who posed as threats to Kenya's national and human security. Therefore it was clear that the government of Kenya needs an efficient national security strategy in relation to asylum.¹⁷⁹

5.1 Recommendations

In order to ameliorate the challenges faced by asylum and national security, this study makes recommendations to the government of Kenya; refugees and asylum seekers; the African Union; and the UNHCR

5.1.1 Recommendations to the African Union

The human security framework of analysis used in chapter four revealed the complexity of the questions involved in developing a fair and humane approach to refugee protection in Africa and in Kenya in particular. It showed that a rights-based approach to protection demands a multi-dimensional solution, one which extends beyond the refugee protection provisions of the Refugee Convention, and which also encompasses protection in regions of origin. The AU has the potential to develop a comprehensive solution to refugee protection, which engages with the global refugee crisis. This would involve the development of measures to facilitate refugees' access to urban areas, as well as a significant expansion of resettlement programmes to provide protection for those refugees in protracted situations. It would also encompass an engagement with the root causes of refugee generation through development assistance. This would translate into a stronger international role for its member states and for Kenya in particular.

The regional 'export value' of Kenya policies means that the Kenyan practice has substantially weakened the asylum norm of the African refugee protection regime. Indiscriminate

¹⁷⁹ See Chapter Four

measures used on refugees and asylum seekers by the government of Kenya citing national security will easily be adopted by other states in the region, even though these states receive relatively few asylum seekers. Kenya needs to ensure that its own asylum regime is consistent with international refugee and human rights law, and that all states in the region consistently implement the same laws.

The AU need to lead the continent in developing innovative protection tools, which will ensure that refugees have access to human rights protection and that refugees that pretend to be asylum seekers yet pose as threats to national security are not used as scapegoats for undermining the asylum system as stipulated in international refugee law. These measures will go along away in ensuring members state's national security is not compromised while at the same time ensuring refugee protection.

The AU also needs to engage fully with regional organizations within the continent and ensure the establishment of a well-resourced policy unit backed by diplomatic efforts that will be working with the regional organizations and civil society organizations in developing the key elements of a regional cooperation and protection framework based on burden sharing by the member states. In order to minimize problems of international security, host States should also implement article 2(6) [of the 1969 OAU Convention]¹⁸⁰. This will minimize, if not prevent, cross border raids into refugee camps. It will also make it difficult for camps to be used as a base for launching attacks (on their country of origin), thus removing the possibility of potential interstate conflict

¹⁸⁰Article 2(6) of the 1969 OAU Convention makes it an obligation for States, on grounds of security, to settle refugees at a reasonable distance from the frontier of their country of origin.

5.1.2 Recommendations to the Government of Kenya

Although refugees are a matter of humanitarian concern, there is need to understand the political implication of hosting refugees-the threat to national and international security. There is therefore the need of striking a balance between obeying international obligations and that of protecting national interests. A proper analysis of refugee security dynamics may lead to the development of policies guaranteeing sustainable peace and security in the refugee camps and in the host state at large.

The government of Kenya has an obligation of providing security to its citizens and also to protect the physical security of refugees living in its camps. The lack of security in the Kenyan refugee camps is a problem that the government needs to address. The government's practice of detaining asylum seekers through "security swoops" should be abolished. Detention should only be used under special defined circumstances such as to establish the identity of the claimant or if the claimant is found by a magistrate to be a risk to the community. Minors should not be detained under any circumstances and there should be regular judicial review of a decision to detain any asylum seeker rather than holding them in detention camps for weeks. Conditions of detention should be habitable and torture should not be allowed and no detainees should be held in penal institutions.

The government should also create new accommodation centers with greater flexibility for people who present ongoing security concerns or require intensive social support in urban or regional hub locations for ease of service delivery, better oversight and reduced cost. The recommendations, if adopted, would create a more humane and cost effective approach to dealing with undocumented asylum seekers who cross the Kenyan border illegally than the current practice of universal detention. This would also allow the government to control entry

into Kenya without penalizing genuine asylum seekers for exercising their basic right to seek protection from persecution.

There is need for Kenya to ensure that its refugee regime is grounded in fundamental human rights values. The principal barrier to the realization of a rights-based Asylum System is the national security strategy, which informs Kenya asylum policymaking. The analysis of the securitization of asylum in Kenya presented in the previous chapters demonstrates how trans-governmental decision-making structures continue to allow refugees to be considered as an exceptional category. It demonstrates how this framing has translated into supranational asylum legislation, which abjectly fails to provide adequate protection safeguards for protection seekers in Kenya. Although Kenya through the 2006 Refugee Act has binding supranational legislation in place to cover the full spectrum of its asylum system, its asylum system contains significant protection gaps where issues of national security arises, for example the indiscriminate use of migration control mechanisms and border controls contradicts the good faith requirements of refuge protection.

These measures will also ensure that Kenya adheres to all international conventions which it has voluntarily signed; quickly and correctly identifies those who are refugees and grants them protection consistent with UNHCR policies and guidelines; protects Kenyans from any health or security concerns posed by refugees and asylum seekers; affords all people in Kenya their human rights, as well as access to the legal systems which deliver them; and rapidly returns home in safety and dignity those who are found not to be in need of Kenya's protection.

5.1.3 Recommendations to Refugee and Asylum Seekers

While most of the refugees and asylum seekers are genuine, refugees and asylum seekers need to follow domestic laws of the host state, should not harbour terrorists, and when their

country of origin are stable, they should wilfully return home and discard of the culture of refugeeism.

5.1.4 Recommendations to the UNHCR

Though the UNHCR has gradually expanded its activities to cover not only the legal protection of refugees but also the protection of the physical security of refugees in protracted refugee situations, UNHCR needs to take a leading role in restructuring the debate on national security and asylum in Kenya. To achieve this endeavor, this study recommends it to: establish an independent and professional commission with a small secretariat and budget to facilitate informed public debate about refugee and asylum issues in Kenya; establish an independent Refugee, Asylum and Humanitarian Assistance Authority to administer the policy and programs that fall under Kenya's humanitarian programs, underpinned by legislation that clearly articulates the values, principles and objectives of Kenya's refugee and asylum policies; and ensure that no weapon should be allowed in the camps, and that camps must remain demilitarized. Refugee camps must retain an exclusively civilian and humanitarian character with the UNHCR taking on the tough task of excluding militarily active elements from the camps. This Authority will contribute to a better balance between humanitarian and national security issues.

While the Kenyan government has cited refugee camps to being the place where radicalization and terror attacks are planned, the study recommends that the international community should avoid putting refugees in camps and promote ways of returning refugees in their home countries by providing more durable solutions. The international community should also give more funds to the UNHCR, in order for the UNHCR to enable the majority of refugees living in Kenyan camps to start micro-projects to be productive. This would diminish violence as refugees would not stay inactive all day long and lose their human dignity.

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