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**THE PROBLEM OF INSECURITY IN KENYA'S REFUGEE
CAMPS: A CASE OF THE DADAAB REFUGEE CAMP**

BY

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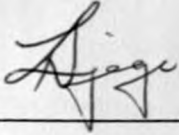
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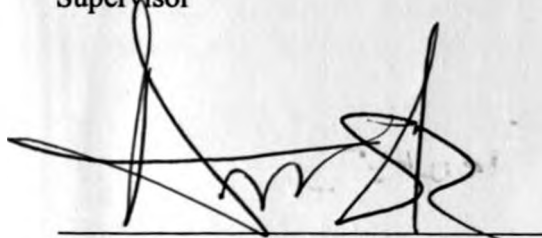


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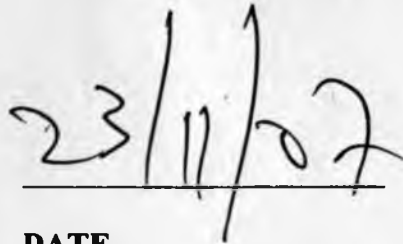


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This dissertation has been submitted for examination with my approval as University Supervisor



DR. KINDIKI KITHURE



DATE

DEDICATION

To all the victims of violence and war, who leave their motherland because of being mistreated in many ways and therefore run to seek protection in other countries. This is in the hope that they will eventually be able to return home in dignity and in security.

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ACRONYMS

ANC	AFRICAN NATIONAL CONGRESS
FRELIMO	FRONT FOR THE LIBERATION OF MOZAMBIQUE
ICCPR	INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS
NGO	NON GOVERNMENTAL ORGANISATION
OAU	ORGANISATION OF AFRICAN UNITY
UDHR	UNIVERSAL DECLARATION OF HUMAN RIGHTS
UN	UNITED NATIONS
UNHCR	UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
ZAPU	ZIMBABWE AFRICAN PEOPLE'S UNION

1 CHAPTER ONE: INTRODUCTION TO THE STUDY

One of the biggest legal issues of a refugee¹ is its safety. A refugee by definition is an individual fleeing persecution and violence who has lost the protection of his State and thus needs protection from another entity. In its 2002 global appeal for Kenya, the UNHCR states as its first main objective is to “ensure safe and dignified asylum for all refugees”. Refugee camps exist in order to provide refugees with protection and assistance. Of great concern is the question whether refugees are living in camps safe from dangers and consequently whether they have a right to be safe from danger. The challenge for the international community and host states is to comprehend the ways in which refugee policies and assistance may themselves help to reduce security threats.

In many cases, persons who have fled from violence in their home countries seem to find themselves confronted with violence in the country of asylum. This is particularly true with refugees living in camps (or ‘prima facie’ refugees in protracted refugee situations), who appear to be confronted on a daily basis to a whole range of security threats coming from within the camps and from outside the camps.

Kenya’s two refugee camps, Kakuma and Dadaab, have been home to hundreds of thousands of refugees for nearly two decades. But the camps have also been a prison for the refugees who have crossed the Kenyan borders in search of peace and safety.

This study seeks to explore the kinds of security problems that refugees face in Kenyan camps and will particularly look at the Dadaab Refugee camps. Focus will be put on the causes of insecurity and insecurity systems, and security management of refugees in the camps.

¹ According to the *1951 Convention Relating to The Status of Refugees*, a refugee is defined as a person who “owing to the well-founded fear of being persecuted for reasons of a 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 that country.”

Finally, given the reality in the refugee camps in Kenya, where the safety of refugees is not assured, and given the evident gaps between the existing international norms protecting refugees in refugee camps and the actual implementation of these norms, the study points to a general direction that might be taken to improve the security of refugees living in camps. This identifies measures that all the different actors: the State, UNHCR and the international community could conjunctly take to contain violence in and around the Kenyan camps, so as to make life more secure for the refugees living there and to enable them to fully enjoy their human right to security.

1.1 Background to the problem

Refugee camps should strictly be used as temporary solutions in situations of mass influx of refugees from wars, ethnic conflict and persecution. However, the camps have become an easy and long-term condition with no solution in sight for refugees some of whom have been there for more than 15 years.

Like Kenya, many countries with protracted refugee situations fall back on a camp or confinement system to manage their refugee populations. Encampment has become the more permanent and preferred way of dealing with the 'problem' of refugees as it has emerged as a stopgap measure and even a solution to prolonged refugee situations.

International and regional instruments that protects the rights of refugees and to which Kenya is signatory, recognize the rights of refugees to physical security, to work, own property, move freely and reside where they choose among others. But for refugees, enjoyment of these rights has become the exception rather than the norm.

International refugee law is comprised of the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees as well as of such regional agreements such as the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. Kenya is a signatory of these conventions and without

domesticating them; she has concentrated on providing protection for refugees using a legal and security approach.

Most refugees currently living in Kenyan camps, as they have not been processed individually to apply for asylum and potentially become Convention refugees have the status of prima facie refugees and thus, are not entitled to the rights offered by the international refugee regime. However, as human beings, refugees are protected by human rights and the right to security has its place in the human rights regime.

The current conditions in which refugees live under the government's policy of encampment coupled with the lack of a clear framework to manage their registration and protection leaves them with very few options for survival. The refugee situation can be managed better with the right policies and practices in place.

1.2 Statement of the problem

While refugee camps exist to provide a safe haven for those who fled for their lives, they often provide little protection and in fact can be dangerous places. Notably, programmes of assistance have concentrated on emergency and relief supplies in camps. However, there are a number of critical problems that afflict refugees in refugee camps and these as a result contribute to the rising insecurities in the camps.

Cases of violence are rampant in refugee camps and this puts the lives of refugees at stake. Harmful social and cultural practices also abide. Sexual and gender based violence is particularly notable and this includes rape, domestic violence, female genital mutilation, forced early and ghost marriages. Resource based violence is also prevalent as refugees rely on relief supplies and donor agencies for subsistence living. Other security threats include armed attacks and robbery in the camps, violence within and between national refugees and confrontation with local populations.

Evidently, the problem of insecurity within refugee camps is prevalent irrespective of various national and international instruments and institutions working with refugees. Given the reality of refugee camps in Kenya-where the safety of refugees in camps is not assured, and given the evident gaps between the existing international norms protecting refugees and their actual implementation, this project points to a general direction that might be taken to improve the protection of the physical security of refugees living in camps. Thus, identifying measures that all the different actors the state, UNHCR and the international community could conjunctly take to contain violence in and around the camps so as to enable refugees to fully enjoy their human right to security.

1.3 Objective of study

Specific objectives of this study can be encapsulated in the following statements:

- a) To examine existing international and national normative and institutional framework in Kenya on refugees with a view to establish the standards on refugee security.
- b) To explore the extent to which national and international frameworks have been invoked to ensure security within refugee camps.
- c) To identify the gaps between the existing national and international norms and their actual implementation and where they fall short of ensuring refugee security within refugee camps.
- d) To give recommendations geared towards the management of insecurity within refugee camps.

1.4 Research questions

This study seeks to answer the following questions:

1. What are the existing national and international normative and institutional frameworks in Kenya that govern the security of refugees living in refugee camps?

2. To what extent have the national and international frameworks in Kenya been revoked to ensure security within refugee camps?
3. What are the gaps that are created by the existing national and international frameworks governing issues of refugees living in camps?
4. What measures can be adopted to ensure security of refugees within refugee camps?

1.5 Justification of the study

For as long as armed conflict continues unabated on the African continent and around the world, displacement is bound to happen and the problem of refugees is not one that we can wish away.² The realization that no one is a refugee by choice and that everyone is a potential refugee would help in understanding the refugee situation better. Thus, refugees constitute a segment of society with needs and wants to fulfill in their efforts to survive and therefore, the need to ensure that they enjoy their basic human rights as enshrined in various international and regional instruments.

In the domain of refugee protection, the host state is responsible.³ International human rights norms require governments to ensure that all individuals within the territories, regardless of citizenship, enjoy the equal protection of law. In the case of refugees, the responsibility to protect “remains the primary responsibility of the countries where the refugees find themselves.”⁴

Most refugees living in Kenyan camps, as they have not been processed individually to become Convention refugees, have the status of prima facie refugees and therefore are not entitled to the rights offered by the international refugee regime. However, these refugees are entitled to human rights as Kenya has ratified the relevant

² *Daily Nation*, June 16, 2005.

³ Jeff Crisp, *A State of Insecurity: the Political Economy of Violence in Refugee-Populated Areas of Kenya*, Evaluation and Policy Analysis Unit of UNHCR, Working Paper No. 16, December 1999, Pg 24

⁴ *Report of the UN High Commissioner for Refugees*, 38 UN GAOR Supp. No. 12, UN Document A/38/12, 1983, Pg. 8

human rights conventions and some of the elements of the right to physical security are even considered customary international law.

The reality is that most of the world's refugees find themselves in developing countries. The obligation to protect and ensure physical security of refugees should not rest on asylum countries alone but should be imposed on all states, both individually, and collectively.⁵ Unfortunately, countries like Kenya find themselves in the very difficult situation of having legal obligation that they possibly do not have the means – or the will – to fulfill. Thus, the need to look into this study keenly in order to establish what favorable measures can consequently follow in improving the insecurities in refugee camps in Kenya.

The study therefore, addresses the issue as to why despite the intervention and assistance from the relief agencies and the host government, the problem of insecurity within refugee camps continue to plague. It therefore attempts to address questions on what action can be taken to avert the insecurities within refugee camps. The study emphasizes that the causes of insecurity are significant to policy formulation and planning among the refugees within the encampment areas. Furthermore, it looks at the extent to which states and the international community have an obligation to keep the refugee camps secure.

This study takes into consideration the 1951 Convention Relating to the Status of Refugees,⁶ the 1967 Protocol Relating to the Status of Refugees,⁷ as well as the Regional agreement, the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa⁸. Moreover, the study turns to the international

⁵ Elly-Elikunda Mtango, "Military and Armed Attacks on Refugee Camps," *Refugees and International Relations*, ed. Loescher and Monahan (New York: Oxford University Press, 1990), Pg 114

⁶ *UN Convention Relating to the Status of Refugees*, adopted on July 28, 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December, 1950, entered into force April 22, 1954.

⁷ *UN, Protocol Relating to the Status of Refugees*, taken note of with approval by the Economic and Social Council in resolution 1186 (XLI) of November 18, 1966 and taken note of by the General Assembly in Resolution 2198 (XXI) of 16 December, 1966, entered into force October 4, 1967.

⁸ *Convention Governing the Specific Aspects of Refugee Problems in Africa*, Assembly of Heads of African States and Governments, Addis Ababa, September 10, 1969, 1001 U. N. T. S. 45, entered into force June 20, 1974.

human rights law and seeks to identify human rights instruments which show the legality of the security of refugees within camps.

1.6 Literature review

Although refugees have existed as long as hostility, history has never known refugee problems of such magnitude as during the present century. After the Second World War, millions of refugees from Eastern Europe sought asylum in Western countries. Since the 1960's, the new states in Africa have to deal with refugee problems of enormous proportion.

Since the end of the 1960's, the majorities of refugees originates from the countries in the southern hemisphere and seek refuge in neighboring countries. Often, they settle in camps set up by the host country with support from the international community. Between the late 1970's and the end of the 1980;s, the largest concentrations of refugees were to be found in those areas of tension and open conflict where the two sides of the Cold War played out their surrogate East-West power struggle (South-East Asia, the Horn of Africa, Southern Africa and Central America). More recently, refugees have been fleeing from countries torn apart by their own internal conflict (Burma, Afghanistan, Tajikistan, Azerbaijan, Georgia, former Yugoslavia, Liberia, Somalia, Sudan, Burundi, and Rwanda). The main response of the international community to the increased scale of refugee movements has been humanitarian assistance. This is usually provided within the setting of refugee camps while their exiled populations wait out the months, if not years, in the hope that they will eventually be able to return home in 'dignity and in security'.

The phenomenon of the world's refugees is among the most complicated issues before the international community today. In Africa, the situation is particularly grave as Africa carries the largest population of refugees and has since the 1980's hosted some of the largest standing refugee's populations in the world. Kenya currently hosts an estimated 235,000 refugees (UNHCR 2000).

In today's Africa, we find some of the largest and most serious refugee problems of the world. Many of these problems have been caused by colonial oppression followed by

liberation wars, such as in Guinea Bissau, Angola, Mozambique, and in the entire Southern Africa with the abhorrent apartheid practices. In other parts of Africa, as in Ethiopia, the terror and turmoil have forced large numbers of people to flee. In the area around Western Sahara, thousands of refugees are living in camps under terrible conditions.⁹

The solution to security problems is to make sure all refugees are disarmed upon admission into the host country and to ensure as much as possible that refugees are not concentrated in one place, especially in border regions.¹⁰

In East Africa, refugees are usually settled in large camps a short distance from the border. These refugees come from war situations where weapons are readily available. Most refugees from Rwanda, for example, arrived en masse which made it difficult for Tanzania to disarm or settle them in a manner that took account of security considerations.

A recurrent issue in refugee protection is the increase in insecurity in the areas they inhabit. 'Physical protection of refugees and displaced persons in camps can be problematic even in 'normal' circumstances'.¹¹ In East Africa, the increase in crime is playing a paramount role in determining the response of the host states. Both Kenya and Tanzania, the major host states in the region, have responded to the deterioration in security by closing borders, calling for forcible repatriation and threatening, or actually expelling refugees. While the concerns of states may be legitimate, the measures taken in response are unfair and illegal.

Each refugee situation bears its own characteristics. Assistance to refugees must be carried out in different ways and the possibility to find asylum in a country varies from case to case. But all refugee problems have certain elements in common: all refugees are human beings in need of national and international protection.¹²

⁹ *Ibid* Pg. 11.

¹⁰ Bonaventure Rutinwa, *Refugee Protection and Security in East Africa*, RPN, 22, October 1996. Pg 8

¹¹ Relief and Rehabilitation Network, *The Joint Evaluation of the Emergency Assistance to Rwanda: Study III Principal Findings and Recommendations*, ODI, June 1996. Pg 26

¹² Melander G.& Peter N., *African Refugees and the Law*, Nordiska Afrikainstitute, Uppsala Offset Center, Uppsala, 1978. Pg. 9

Even in asylum refugees encounter threats to their security and well-being that are specific to their status as refugees. Some of these have to do with the peculiar vulnerability of refugee camps to external attack. Others arise from the isolation and dependency that often afflict camp populations, making them prey to manipulation and exploitations by petty officials or self appointed 'leaders'.¹³

1.6.1 Refugee camps

Camps may be a convenient way to channel and distribute humanitarian aid to large groups of refugees. At the same time, they are unnatural, closed environments which can leave refugees vulnerable to manipulation and exploitation, with the danger increasing where such situations are prolonged.¹⁴ Where encampment cannot be avoided in the first instance, planning is essential to ensure that the size, layout and organization of a refugee camp are conducive to the maintenance of security, especially for vulnerable groups such as female-headed households, single women unaccompanied children and the elderly.

Size and location of a refugee camp can make a difference. In Kenya, the huge refugee camp of Kakuma with 90,000 refugees, and the three camps of Dadaab (Dagahaley, Ifo and Hagadera) with more than 35,000 each, are quite difficult to manage in terms of aid distribution and oversight. To mitigate some of the adverse effects of encampment, guidelines advise that a camp's population should not exceed 20,000 and that it should provide at least 45 square metres per person.¹⁵

Furthermore, adequate access to basic services such as water, latrines, distribution points and educational facilities can help enhance security, as can proper lighting at night.

Placing or relocating refugee camps a significant distance from national borders or areas of lawlessness helps improve security. In 2003, the government of Guinea accepted the

¹³ *The State of the World's Refugees: The Challenge of Protection*, Penguin Books, New York, 1993. Pg 46.

¹⁴ J-F. Duriex, 'Preserving the Civilian character of Refugee Camps: Lessons from the Kigoma Programme in Tanzania', Track Two, Vol. 9, No. 3, November 2000. Pg. 18

¹⁵ UNHCR, *Handbook for Emergencies*, Second Edition, 2000. Pg. 137

relocation of refugees from the south to more central populations in order to reduce the threat posed by combatants infiltrating the settlements.¹⁶ In Panama and Chad, relocation has helped ease security concerns for Colombian and Sudanese refugees, respectively.¹⁷ Often, however, host governments are reluctant to have camps moved to, or established in, locations away from the border for political reasons. They may fear that the further from the border the refugees are, the more difficult it will be to send them home.

Many refugee camps today are places of insecurity and outright danger, both for refugees and relief workers, and, by virtue of their destabilizing effect, for those living around the camps. Karen Jacobsen observes that refugee camps need to be rendered secure in order to ensure the safety of displaced people and others working and living around the camps.¹⁸ As Jennifer Hyndman states, minimally the term refugee camp connotes safety. Too often, though, it means intimidation, lawlessness and violence.¹⁹ Camps do not provide physical security to refugees who live there. On the contrary, the camp organization itself often serves to exacerbate feelings of uncertainty and insecurity.²⁰

As some authors believe, camps are inherently dangerous places. Verdriamme refers to camps as 'anomalies'.²¹ Similarly, in Rutinwa's opinion, "to address....security, host countries should whenever possible, avoid putting refugees in camps." He also purports that the problems of criminality in refugee camps is often as a result of members of the host population who exploit the presence of refugees to increase their criminal activities. Criminality on the part of refugees may also be a function of their complete destitution and lack of gainful employment, the result of confinement in camps.²² Confining refugees in camps is unlawful as it denies them freedom of movement; as such, it violates Article 26 of the UN Refugee Convention. Moreover, freedom of movement is typically

¹⁶ UNHCR, *Hot Spots Brief on Guinea*, July 17, 2003. Pg 38

¹⁷ UNHCR, *2004 Annual Protection Report: Panama*, Pg. 12

¹⁸ Jacobsen Karen, *A "Safety-First" Approach to Physical Protection in Refugee Camps*, Working Paper No. 4, May 1999. Pg 1

¹⁹ Jennifer Hyndman, *Managing displacement. Refugees and the Politics of Humanitarianism*, Minnesota, University of Minnesota Press, 2000. Pg 27

²⁰ Cindy Horst, "Refugee Life in the Camps. Providing Security or Sustaining Dependency," Pg 5

²¹ Guglielmo Verdriamme, *Human Rights and Refugees: the case of Kenya*, Journal of Refugee Studies, Vol.12, No. 14, 1999. Pg. 54-57

²² Bonaventure Rutinwa, *Refugee Protection and Security in East Africa*, *Forced Migration Review*, October 1996. Pg 19

a prerequisite for the enjoyment of other refugee rights such as employment, education, association, which are also guaranteed by refugee and human rights instruments. Likewise, Norwojee believes that camps are not the solution and that, rather than acquiescing in the erosion of refugee rights, the international community should be promoting ways to return to more durable solutions.²³

1.6.2 Security problems in refugee camps

A survey of refugee hosting areas and camp conditions in 1997, set out in Table 1 below, revealed three main sources of security problems as: external military attacks or raids on camps and surroundings; violence and intimidation occurring from sources inside or outside the camps; and a breakdown of law and order in the camps that gives rise to crime and associated problems.

1.6.3 Military attacks or raids by Armies, Bandits, Militias, Rebel Groups

Refugee camps are targets for military attacks for two main reasons. Firstly, camps are largely undefended repositories of resources, including food, vehicles and relief supplies, as well as people, who can be forcibly recruited for military or sex or labor purposes, or taken hostage. Secondly, by containing combatants in their midst, camps are perceived by antagonistic forces, either in the country of origin or in the host country as giving assistance and protection to their enemies, and are therefore targeted. Large numbers of combatants amongst the refugees can lead to camps becoming militarized, with accordingly increased likelihood of attack. In addition the presence of combatants in camps undermines civilian authority and sources of law and order, and can lead to camps falling under the control of political or military elements. Refugees are then more likely to be deprived of their rights and otherwise subject to violence and intimidation.

²³ Binafir Norwojee, *In the Name of Security in East Africa, World Refugee Survey 2000*.

In recent years, a third reason for military attacks on camps has emerged. Governments involved in internal or regional conflicts have deliberately targeted refugee camps as part of a military strategy to weaken and demoralize opponents, and to promote ethnic cleansing. This has occurred most recently in Kosovo, where Serbian president Milosevic has pursued such tactics, but also occurs in Sudan and elsewhere, as part of a larger pattern of conflict in which civilians are targeted for military purposes. Camps are likely to be involved in armed engagements when they are located close to the border or in conflict-prone or sensitive areas. Then, even if camps are not directly targeted, their location is more likely to expose refugees to crossfire, or to landmine fields.

Refugee camps are a highly visible target. They house large concentrations of people often identified with one side of an armed conflict. Armed forces representing both countries of origin and countries of asylum sometimes attack refugee camps. Among the best known incidents are the South African raid on Kassinga camp in Angola in 1978, and the massacre in the Palestinian refugee camps and Sabra and Chatilla in Lebanon. But such attacks occur more often than is commonly supposed. For example, Cambodian camps in Thailand, Afghan camps in Pakistan, Salvadorian refugees in Honduras, Guatemalans in Mexico and more recently Somalis camps in Kenya have also drawn fire.²⁴

Most of the worst cases of camp insecurity occur in regions where the refugee flows and refugee camps have a long history of militarization. During the Cold War, the militarization of refugee groups and of camps, such as occurred with Afghan groups in Pakistan or the Khmer Rouge on the Thai-Cambodian border, was ignored or condoned because of the role they played in the superpower struggle, or because host state supporters of liberation struggles, particularly in Africa, condoned and enabled the use of refugee camps for use by liberation armies, as occurred by the Mozambican FRELIMO in Tanzania, by the South African ANC and Zimbabwean liberation forces (ZAPU) in Zambia.

²⁴ *The State of the World's Refugees: the Challenge of Protection*, Penguin Books, New York, 1993. Pg. 47

The situation has changed only in a few ways since the end of the Cold War. Camps and refugees continue to be used and targeted as part of the conflict, except that in most cases, superpower involvement has been reduced, and camp militarization has become less acceptable to the West. In the Post Cold War context, host governments' view of refugee camps and their willingness to prevent militarization of camps, is motivated by regional and border politics. This was graphically illustrated during the Great Lakes refugee crisis from 1994-1997,²⁵ but the situation also occurs elsewhere, for example in southern Sudan, along the Thai-Burmese border, and along the Tanzanian-Burundian border. Karen Jacobsen observes that now, as ever, refugees and camps are part of the political strategies of host sending governments, as well as whoever may be supporting these governments behind the scenes.

In almost every refugee situation, camps have been subject to some form of military engagement, ranging from artillery bombardment of camps in eastern Zaire by Rwandan government forces, bombing runs by the Turkish air force of Kurdish camps in northern Iraq, raids by rebel forces of Sudanese camps in northern Uganda, and 'hot pursuit' raids by Myanmar government forces across the border into Thailand. Around the Somali refugee camps in north eastern Kenya, bandits have operated with impunity, raping women, hijacking relief vehicles, and kidnapping relief workers. When camps are attacked or preyed on by armed gangs, it is not only camp populations and relief workers who are at risk, but also surrounding communities of local people and self-settled refugees.

Refugee camps in which civilians and armed combatants mingle are particularly vulnerable. Often, raids on camps are proclaimed as justifiable military actions, on the grounds that the camps are providing shelter for armed combatants. The demilitarization of camps is a prerequisite for the protection of their residents. It is also essential for the preservation of the non-political and humanitarian character of refugee status which is clearly incompatible with military activity.

²⁵ Boutroue, Joel, *Missed Opportunities: The Role of The International Community In the Return of the Rwandan Refugees from Eastern Zaire*, Center for International Studies, M.I.T. Cambridge, Massachusetts, 1998. Pg. 53

1.6.4 Violence and Intimidation

Inside many camps, refugees are subject to intimidation, violence, and harassment from a variety of groups and individuals. These include other refugees, who use violence for reasons of ethnic conflict, or political pressure; and camp guards or other host government authorities, who use physical intimidation to extort resources or sex from refugees, or to pressure refugees to leave the camps, or enter them, or to repatriate. Clashes can also occur between refugees and local people, usually outside the camp, and most often when there is resentment by locals towards refugees for perceived wrongdoings, such as theft or immoral acts, or for inequities resulting from refugees' access to relief resources.

Women refugees within camps are particularly at risk. Such protection is commonly subsumed under family law; the disruption of family circles inherent in forcible displacement leaves many women outside the usual structures of familial and community protection with enlarged responsibilities and few resources. There are innumerable instances of refugee women being subject to sexual coercion in exchange for normal entitlements such as food and medical services for themselves and their families. A particular problem has been the high incidence of rape among refugee women, often coupled with extortion.²⁶

Sexual assault is common in some settings, along with violations of basic rights such as equal access to education and freedom of movement. Women who speak out in defense of women's rights have, in some camps been targeted for abuse.

Ethnic and tribal tensions often follow refugees into a camp setting, and spark off fighting among different groups. In January 1993, at least 18 people, including several Kenyan guards were killed in cross border raids when armed men attacked refugee camps

²⁶ *African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention*, Lawyers Committee for Human Rights, June 1995. Pg 64

in search of food and vehicles. The enforced idleness (for men particularly) and frustration of prolonged camp existence contribute to a heightened level of tension and violence.

Rutinwa observes that it's unfair because often deterioration in camp security is as a result of the failure of UNHCR and the host states to disarm refugees and the concentrating of refugees in camps.

1.6.5 Breakdown of Law and Order

Another main reason for camp insecurity is the absence of law and order. Especially in the emergency phase, soon after an influx, camp populations consist of uprooted, often traumatized or destabilized people. Many refugees are rural people with little education, who have lost their ties to families and villages, and who find themselves cast adrift in alien, unstructured shantytown-like culture. The result is often increased crime and violence, or increased likelihood of recruitment into militias or organized crime.

Within the refugee camps, transgressions go unpunished because there is no adequate force to back up what rule of law does exist in camps. In the absence of effective rule of law, petty and violent crime flourishes and can lead to camps becoming zones of drug smuggling, human trafficking, organized crime, illegal logging, and gun running, with the attendant problems of violence. Relief supplies are diverted to enrich those in control or support the war effort, and the perpetrators are able to elude justice by hiding amongst the refugee population. As in any high crime area, the non-criminal population is subject to generalized violence, and the climate of violence leaches out into the surrounding community. The presence of weapons (even when hidden) increases the combustibility of the situation in and around the camps, as does the problem of bored and frustrated young men in camps, who are candidates for involvement in crime or recruitment to militias.

Insecurity in camps has also caused NGO's to reduce the number of their staff or completely halt their aid programmes to refugees. In May 1993, Mediciens sans Frontiers (Belgium) withdrew most of its women workers from camps in Northeastern Kenya after reports of a high incidence of violence on aid workers. Aid workers in Uganda have been subjected to a series of assaults including abductions and robbery; as a consequence Oxfam, the largest NGO operating there, recently withdrew staff. The existence of criminals in refugee camps does pose a moral dilemma for humanitarians. Many organizations battle with their conscience over whether to assist camps accommodating criminals or to refuse aid to such refugee groups. There is evidence that aid given to refugees has been converted by criminal fugitives among them for buying arm to continue subversive activities.²⁷

Law enforcement authorities in host countries are often reluctant to become involved in refugee-on-refugee crime unless it has political or security dimensions. Some states cite security concerns as a reason for keeping refugees in closed camps.

1.6.6 Security Threats to Refugees in Major Host Countries in Africa

The world refugee survey identified a number of actual and potential security threats to refugees in major host countries in parts of the world with refugee populations of over 20,000 in 1997. This was intended to give some idea of the types of threats confronting refugees.²⁸

The threat of direct military attack or bombardment to refugee camps is seen to be caused by the presence of combatants among refugees or as a way to force repatriation or break up of militarized camps. There are also cases of refugee camps getting caught up in a cross-fire or armed conflict and this is in the case where the camp sites are too close to borders or located in a zone of conflict or civil war in a host country.

²⁷ Bonaventure Rutinwa, *Refugee Protection and Security in East Africa, Forced Migration Review*, October 1996. Pg 12

²⁸ World Refugee Survey, U.S. Committee for Refugees, Washington D.C. 1998.

Armed raids by rebel groups or enemy forces are also a prevailing cause of insecurity of refugee camps. This can be as a result of recrimination, search for resources or hostages, to force or prevent repatriation and forced conscription.

Ethnic or political conflict between refugees or between refugees and locals of a host country also occur and disturb the security of refugees within encampment areas. This can be blamed to the poor organization or management of camps, ineffective policing by host authorities, or in a situation where refugees and/or locals are dissatisfied or resentful about camp conditions.²⁹

Violent crime inside the refugee camps is also a serious threat of security and is largely due to the absence of law and order or ineffective policing of settlement area. There are also cases of abuse or intimidation by camp authorities or refugee leaders which sometimes is done to prevent or encourage repatriation. However, this can also be due to absence of law and order or ineffective policing of encampment areas.

1.6.7 Main Refugee Populations and Security Threats in Africa

Of the 51 states in Africa, 20 hosted refugee populations of over 20,000 in 1997, and of these host countries, refugee experienced serious security problems in 10 of them.

Notably, many of these host countries hosted multiple 'case loads' whereby refugee populations from different sending countries experienced significant security problems.

Table 1

Host Country (UNHCR Total Refs) ^a	Country of Origin Total/UNHCR-assisted ^b	Refugee Distribution in Host Country	Threats to refugees (actual and potential)
Sudan 374,400	Eritrea 315,000/119,800	One third dispersed among 25 settlements in eastern region; remainder urban	civil war in Sudan might affect settlements

²⁹ UNHCR 1997 Statistical Overview, UNHCR, Geneva 1998.

	Ethiopia 44,300/14,800	15,000 in settlement sites and camps; remainder urban	civil war in Sudan might affect settlements
Ethiopia 323,100	Sudan 56,900/all	4 camps in w Sherkole (in Assosa)	none reported/unknown, but effects of Sudan civil war might affect camps; Camps divided along ethnic lines to avoid hostilities among refugees
Kenya 232,100	Somalia 174,100/134,100	120,000 in 3 camps in Dadaab (ne region)	Rapes, robbery, carjackings by bandits outside camps
	Sudan 37,400/all	Kakuma camp (nw) region	Sudanese rebels in camps exert pressure on refugees
Uganda 188,500	Sudan 160,400/all	Arua/nw region	Ugandan rebels attacks on settlements; Sudanese rebels in settlements exert pressure to repatriate
Rwanda 34,200	Burundi 6,900/2,300	3 sites in south	harassment and threats of expulsion from Rwandan officials
	DRC 27,100/26,600	2 camps on western border	Camps attacked by Hutu insurgents, general insecurity/civil war of region
Tanzania 570,400	Burundi 459,400/259,400	8 main camps along border	spilling over of conflict in Burundi into camps; political factions among refugees led to tension and violence, in turn this led to refoulement by Tanzanian authorities
	DRC 74,300/all	2 large camps on border	hardline elements sought to inhibit repatriation; Tanzanian authorities crackdown led to aggressive refoulement
Dem. Rep. Congo (DRC) 297,500	Rwanda 37,000/2,900	"the lost refugees" 3 makeshift camps subject to "insurmountable logistical difficulties" (UNHCR) then overtaken by war	thousands fled camps after outbreak of civil war and trekked into jungle, massive loss of life
	Burundi 47,000/5,900	sites and self-settled along border	civil war in DRC led to widespread insecurity of refugees
	Sudan 61,200/all	farming sites in ne	DRC civil war led to repatriation but effects unknown
	Uganda 44,300/all	self-settled	DRC civil war led to repatriation but effects unknown
Congo 20,600	Angola 20,600/5,900	6,000 in camps near city of Point-Noire	not directly affected by Congo civil war, but concern about presence of Angolan forces hostile to refugees

Liberia 126,900	Sierra Leone 126,800/25,000	sites along border	sites shelled by forces in Sierra Leone
Guinea 435,300	Liberia 243,000/all	sites in Forest region along border	Guinean police and military have subjected refugees to harassment and extortion
	Sierra Leone 192,200/180,200	sites in Forest region along border	Guinean police and military have subjected refugees to harassment and extortion

Sources: *World Refugee Survey*, U.S. Committee for Refugees, Washington D.C. 1998.
UNHCR 1997 Statistical Overview, UNHCR, Geneva 1998.

As indicated in the above table, it is apparent that security problems to refugees seeking asylum abide not only in Kenya but many countries over the world. Clearly, not much has been done to combat this insecurity as those seeking asylum continue to be in fear of the various types of insecurity.

From the above literature review, it is evident that insecurity within refugee camps is not only an issue of national concern but of international concern requiring a durable response. Thus, it is of paramount importance to render the camps secure in order to ensure the safety of refugees living in camps. Moreover, refugees are human beings whose human rights should be observed among other international law instruments which provide for the security of refugees.

1.7 Theoretical framework

The basic theory underpinning the concept of human rights is natural law which is an ethical theory that posits the existence of law whose content is set by nature and that therefore has validity everywhere. Natural law theories base human rights on the "natural" moral order that derives from religious precepts such as common understandings of justice and the belief that moral behaviour is a set of objectively valid prescriptions. Some have used religious texts to support human rights arguments. However, there are also more secular forms of natural law theory that understand human

rights as derivative of the notion of universal human dignity.³⁰ Notably, John Locke developed the concept of natural rights, the notion that people possess certain rights by virtue of being human. His ideas were important in the development of the modern notion of rights. The term “human rights” has replaced the term “natural rights” in popularity, because the rights are less and less frequently seen as requiring natural law for their existence.³¹

Human rights are a set of principled ideas about the treatment to which all individuals are entitled by virtue of being human. Over time, these ideas have gained wide-spread acceptance as international norms defining what was necessary for humans to thrive, both in terms of being protected from abuses, and provided with the elements necessary for a life in dignity. Belief systems in which rights are granted only in exchange for the performance of duties, or where different categories of people have different categories of rights contradict the basic idea that all people are entitled to equal rights.³²

Sadly, we are living through a period when international humanitarian law, international human rights law and international refugee law are all flouted with impunity. Civilians are targeted deliberately; rules of combat are ignored; people are detained and imprisoned outside of legal frameworks; some fourteen million have taken refuge; some twenty-four million have been internally displaced; and humanitarian, human rights, and refugee personnel are agonizing about how respect for the law can be restored.³³

1.8 Hypotheses

This study can be premised upon the following hypothesis:

³⁰ Kohen, Ari, In *Defense of Human Rights: a Non Religious Grounding in a Pluralistic World*. Routledge, 2007

³¹ Weston, Burns H, Human Right. In *Encyclopedia Britannica* online. Page 2

³² <http://www.google.com/search?q=cache:YtASnZvr1l0J:www.polisci.umn.edu/courses/spring2001/4485/ir2.pdf+'international+relations+theory'&hl=en&ct=clnk&cd=20> accessed on 13th May 2007.

³³ Ramcharan Bertrand, *Programme on Humanitarian Policy and Conflict Research*, Harvard University, Occasional Paper Series, Spring 2005, No. 3, pg 3.

1. Insecurity of refugees in refugee camps is largely due to failure to observe refugee law and human rights law.
2. Insecurity for refugees should be premised on the acknowledgement of their fundamental needs and rights as human beings.
3. Insecurity of refugee camps is not due to failure to observe refugee law and human rights law.

1.9 Research methodology

This study will be qualitative in nature and will make use of primary and secondary data. The primary data will be collected from primary documents such as policy documents. Secondary data will be collected from secondary sources which include treaties, books, journals and other recorded data on refugees useful in the achievement of the objectives of the study. The study will be analytical, descriptive and prescriptive in nature.

1.10 Scope and limitations

This study focuses on refugees in Kenya but with particular emphasis on the Dadaab refugee camps.

The main limitation to this study is that of time and availability of funds.

1.11 Chapter outline

Chapter One

This will have the project proposal which includes; introduction, statement of the problem, objectives of the study, significance of the study, literature review, theoretical framework, hypothesis and research methodology.

Chapter Two

This will provide an overview of the Dadaab refugee camp.

Chapter Three

The right to security of refugees within refugee camps in relation to Refugee Law.

Chapter Four

This will include a critical analysis of the insecurity within the refugee encampment areas and will look at the gaps of refugee law on security and thus focus on the human rights aspects of security of refugees in camps with relation to human rights law.

Chapter Five

This will include the recommendations and conclusion.

2 CHAPTER TWO: DADAAB REFUGEE CAMP

2.1 Historical background of Dadaab Refugee camp

Kenya is in the unpleasant position of sharing borders with five nations, which have all – with exception of Tanzania-generated sufficient internal conflict to produce asylum-seekers in Kenya.³⁴ It indeed shares borders with Somalia, Ethiopia, Sudan, Uganda and Tanzania. As such, it serves as an attractive gathering place and potential country of asylum for displaced persons from all these countries.

In the late eighties, Kenya experienced an influx of displaced people as a result of the continued conflict in Uganda after 1986, and later in Ethiopia and Somalia. In 1990-91, the crossing of 400,000 Somalis.³⁵ Combined with the arrival of a large group of Sudanese young men who came walking from Ethiopian camps after their stay there, was no longer safe. Before this large influx, the government of Kenya was responsible for status determination on a largely individual basis under pressure from the increasing numbers; however, the government lost its ability to deal with the refugees and sought the assistance of the international community.

In order to attract funding, the government of Kenya agreed to designate specific areas to house refugees in camps, and the UNHCR set up a number of camps throughout the country. In 1992 and 1993, the UNHCR thus spent forty million to establish refugee camps and border sites in Kenya.³⁶

The Sudanese refugees were largely settled in Kakuma camp. The Ethiopians initially mainly stayed in Mandera at the border of Kenya, Somalia and the Somalis were initially spread over a number of camps including Dadaab, a group of 3 camps near the Somali border. Due to tensions and to lack of effectiveness, between 1994 and 1997, the government of Kenya ended up closing most of the camps in Kenya leaving only Kakuma and Dadaab, the two camps in Kenya's most remote areas, for refugees to

³⁴ Jennifer Hyndman and Viktor Bo Nylund, UNHCR and the Status of Prima Facie Refugees in Kenya, *International Journal, of Refugee Law*, Vol. 10, No. 1, 1998, Pg 23.

³⁵ Guglielmo Verdriame, *Human Rights and Refugees: the case of Kenya*, *Journal of Refugee Studies*, Vol.12, No. 14 (1999), 56-57

³⁶ Jennifer Hyndman and Viktor Bo Nylund, UNHCR and the Status of Prima Facie Refugees in Kenya, *International Journal of Refugee Law*, Vol. 10, No. 1, 1998, pg 24

settle.³⁷10 The refugee population in Kakuma is mainly composed of Sudanese, with small members from Somalia, Ethiopia and Elsewhere. In Dadaab, most of the population comes from Somalia, with small numbers from Ethiopia, Sudan, Eritrea and Uganda.

2.2 Dadaab Refugee Camp

Dadaab refugee camp is located in Eastern Division, Garissa District, in North-Eastern Province. The camp is situated about 80kms from the Kenya / Somali border and about 550 kms from Nairobi city. There are three camps that make up Dadaab Refugee Complex: Ifo, Daghaley and Hagdera. As at March 2002 the number of registered refugees in the three camps was 136,032 persons. The table below gives a summary of the refugee populations in Dadaab by nationality, sex and age group.

2.3 Refugee Population in Dadaab by Nationality, Sex and Age Group as at March 2002

Country of origin	Sex	0- 4 yrs	5- 17yrs	18-59yrs	60 yrs	Total
Somalia	Female	9,347	22,763	31,819	1,502	65,431
	Male	9,894	25,876	29,692	1,821	67,283
Ethiopia	Female	120	288	476	12	896
	Male	133	315	769	25	1,242
Sudan	Female	49	118	143	2	312
	Male	44	147	522	-	713
Uganda	Female	4	3	4	-	11
	Male	1	1	27	-	29
Eritrea	Female	1	5	21	-	27
	Male	2	5	68	2	77
DRC	Female	1	-	-	1	2
	Male	1	-	3	-	4

³⁷ Cindy Horst, Refugee Life in the Camps, Providing Security or Sustaining Dependency, Pg 3.

Burundi	Female	-	-	-	-	-
	Male	-	-	4	-	4
Total		19,597	49,521	63,549	3,365	136,032

Source: UNHCR files

2.4 Definition of insecurity

Insecurity is a condition or quality of lacking protection against danger or loss. In the general sense, insecurity is a concept similar to lack of safety. In an objective sense, insecurity is the lack of security, certainty and lack of confidence.

In relation to this study, the above concepts can be applied to denote a potential negative impact to the well being of refugees' welfare. This is in relation to the state of being subject to danger or injury within the refugee camps and the anxiety refugees experience when they feel vulnerable and insecure.

Discussed below are the various types of insecurity.

2.5 Rape and other forms of gender based violence

Sexual abuses constitute a daily reality for refugees living in Northern Kenya, particularly women and girls. Rape and other sexual violence remain among the most serious problems facing women refugees. It is a common experience for refugee women in camps, which often provide them with little protection. The dislocation and violence experienced by refugee populations often destroys family and social structures, and with them, the norms and taboos that normally would have prescribed sexual violence.³⁸

Rape tends to occur when refugees predominantly, women and girls, leave the relative security camp in order to collect firewood with which to cook and in order to herd goats. Indeed, refugees who leave the camps for hours at a time in search of firewood are

³⁸ Human Rights Watch, Protection of the Rights of Refugee Women.pg. 1

vulnerable to bandit attacks. A bandit is a term used to describe wandering groups of men who are also responsible for theft, cattle rustling and other criminal activities. Around 80% of the rapes involve female refugees from 12-50 years of age and take place in the bush that surrounds the camps during the hours of daylight.³⁹ Moreover, as land surrounding the camps becomes more and more denuded, women must go further and further to collect firewood. This increases their chances of encountering bandits who threaten them, beat them, sexually assault and sometimes abduct them.

In addition, rapes also take place at night. After nightfall, unarmed households, especially those known to be headed by women, are easy targets of bandits from within the camp itself. According to Human Rights Watch, in the country of refuge, women refugees are targeted for rape because they are refugees, because of their actual, or perceived political or ethnic affiliations, and because they are women.

Moreover, rape is often used as a weapon of war. Women in refugee camps close to the site of conflict that caused the displacement are frequently the object of attacks from factions that enter the camps in order to dominate and punish the refugees perceived to be supporting other factions.

In a visit to refugee camps in 1993, 1994 and 1996, Human Rights Watch documented testimonies of rape survivors.⁴⁰ Many of those interviewed had been gang raped at gunpoint, some by as many as seven men. In the vast majority of cases, rape victims were also robbed, severely beaten, knifed and shot. A small portion of rapes was committed by Kenyan police and other refugees. Most of the rapes were clearly ethnically motivated aimed at demoralizing and destroying the social fabric of the refugee settlements. The lack of adequate investigation and prosecution of rape contributed to the situation of lawlessness and impunity. Indeed, bringing suspect to trial is difficult due to the lack of effective witness protection arrangements and to the fact that people fear revenge attacks. In addition, rape seems to be such a shameful experience for women that most incidents go unreported. It is thus difficult to get a good idea of the exact magnitude of rape and other form of gender-based violence in and around the camps.⁴¹

³⁹ Jeff Crisp, *A State of Insecurity: the Political Economy of Violence in Refugee-Populated Areas of Kenya*, Evaluation and Policy Analysis Unit of UNHCR, working paper No. 16, December 1999, pg 5.

⁴⁰ Human Rights Watch, *Protection of the Rights of Refugee Women*, pg 1.

⁴¹ Cindy Horst, *Refugee Life in the Camps. Providing Security or Sustaining Dependency*. Pg 2

2.6 Domestic and Community Violence

Rape and other forms of abuse do not only occur outside the camps, carried out by bandits, but much of the violence experienced is usually inflicted upon refugees by members of their own family and community. Domestic violence, normally involving the physical abuse of women, children and adolescents by adult men, seems to be common within the camps although the exact scale of the problem is unknown. The increase of domestic violence might be related to the fact that refugee men in camps have largely lost the responsibilities, work, property and status they used to have.⁴²

2.7 Armed Attacks and Robbery in the Camps: Bandits Activities

The problem of banditry in addition to being one of the main causes of rapes is also often manifested in the form of armed robbery. The majorities of armed robberies in Dadaab take place at night, and are committed by the same bandits that rape women during the day. These groups of armed robbers target refugees, especially those who have a business or a cash income. Their attacks inside the camp generally include robbing and looting, as well as sexual assaults, beatings and killings. The situation is aggravated by the proliferation of weapons that are the fall out of wars in the refugees' country of origin.⁴³

Bandits sometimes verify the clan of their intended victim before proceeding with a robbery. "The frequencies with which the victims of robbery are subjected to a thorough (and in some cases fatal) beating suggest that the bandits are eager to maintain a climate of fear and intimidation in Dadaab, thereby reinforcing the degree of impunity which they appear to enjoy."⁴⁴ The increasing banditry in the camps greatly reduces the feeling of security of refugees in the camps.

⁴² *ibid* pg 3

⁴³ UNHCR, *The Personal Security of Refugees*, EC/1993/SCP/CRP.3 paragraph 10

⁴⁴ Jeff Crisp, *A State of Insecurity: the Political Economy of Violence in Refugee-Populated Areas of Kenya*, Evaluation and Policy Analysis Unit of UNHCR, Working Paper No. 16, December 1999, pg 7

2.8 Violence within National Refugee Groups (Fights among Clans and Sub-Clans) and Between National Refugee Groups

Physical insecurity not only stems from a high level of violence in general, that affects every refugee equally, but is also clan-or sub-clan – related. Indeed refugee camps in Kenya are often the theatre of violent clashes between exiles of the same nationality. Kakuma has been especially affected by this phenomenon. Clashes also take place between the different Somali clans and sub-clans living in Dadaab, such as between the majority of Somali refugees and the minority of Bantu Somalis. It is important to recall that violence within groups in the camps often follow security incidents in the countries of origin. In addition to violence within national groups, refugee camps are also affected by tension and conflict between the refugees from different countries.

2.9 Confrontations with Local Populations – Host Communities

In Kenya, host community remains impoverished while the refugees are seen as better off and provided with food rations. This makes the resident community resentful and hostile towards the refugees.⁴⁵ Refugees are challenged socially and economically in their host countries. Whereas they were once productive members of their societies, the policies they encounter in their host countries render them heavily reliant in food aid as its evident in refugee camps. In their current situation their functioning both socially and psychologically is highly compromised due to this dependency, as they have to safely rely on the support provided by the donor community and have minimal chances of being involved in activities that promote self-reliance.

Refugees in Kenyan camps clearly present competition and create resentment among some locals with whom they share scarce resources. In Dadaab, there is a persistent climate of suspicion between Sudanese refugees and local Turkana populations. Fighting can occur as a result of this tension, resulting in high number of injuries⁴⁶ and refugees face intimidation, extortion and physical harassment.⁴⁷

⁴⁵ Newsletter of the Refugee Consortium of Kenya, Refugee Insights, Protracted Refugee Situations, Issue No. 8 January – June 2005

⁴⁶ Jeff Crisp, Forms and Sources of Violence in Kenya's Refugee Camps, Refugee Survey Quarterly, Volume 19, Security in Refugee Populated Areas, ed. Oxford University Press, No. 1 (2000), pg 58

2.10 Causes of Insecurity in Dadaab Refugee Camp

As Jennifer Hyndman states, minimally, the term refugee camp connotes safety. Too often, though, it means intimidation, lawlessness and violence.⁴⁸ Camps do not provide physical security to refugees who live there. On the contrary, the camp organization itself often serves to exacerbate feelings of uncertainty and insecurity.⁴⁹ Sexual coercion, torture and rape are relatively common occurrences in conflict zones. Despite being recognized places of asylum for people fleeing persecution, refugee camps can be unstable environments where residents are susceptible to sexual and physical violence. Hyndman speaks about a “bleak and insecure holding camps along Kenya – Somali border.”

The border area of north-east Kenya where Dadaab is located is insecure and characterized by banditry and insurgency, as well as violent clashes between the Kenyan army and local armed groups. As a result of conflicts taking place in neighboring countries (Ethiopia, Somalia, Sudan and Uganda), this area has been flooded with small arms and automatic weapons. While the area Dadaab has traditionally experienced high levels of insecurity, the establishments of the camps seems to have led to a geographical concentration of the violence and the proliferation of weapons evidently aggravates the security problems.⁵⁰ Life in the camps is directly affected by the events, which takes place in the refugees’ countries of origin.

In this section, the paper explores the kinds of insecurities that refugees face in Dadaab refugee camps.

⁴⁷ UN Note on International Protection, Executive Committee of the High Commissioner’s Programme, 52nd Session, 13th September 2001, paragraph 28

⁴⁸ Jennifer Hyndman, *Managing Displacement. Refugees and the Politics of Humanitarianism*, Minnesota, University of Minnesota Press, 2000. pg 27

⁴⁹ Cindy Horst, “Refugee Life in the Camps. Providing Security or Sustaining Dependency,” pg. 5

⁵⁰ UN Note on International Protection, executive Committee of the High Commissioner’s Programme, 44th session, A/AC, August 31 1993, paragraph 31.

3 CHAPTER THREE

3.1 Existing International and National Refugee law and Human Rights Law impacting on Refugee Security

The physical security of refugees living in Kenyan camps is threatened on a daily basis as has been shown in the previous chapter. This chapter seeks to examine the existing international and national normative and institutional framework in Kenya on refugees with a view to establish the standards on refugee security. This will explore the international refugee regime and its main principles and the international human rights law that relate to refugee's security.

3.2 International Refugee Law

International Refugee Law seeks to protect people who have been forced to flee their home country because of persecution or violence and whose own governments are unwilling or unable to protect them or to safeguard their basic human rights.

International refugee law is comprised of the 1951 Convention Relating to the Status of Refugees⁵¹ and the 1967 Protocol Relating to the Status of Refugees⁵², as well as of different regional agreements, such as the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa⁵³. The 1951 Convention and 1967 Protocol constitute together the most important international agreements concerning the protection of refugees, and their fundamental character has been widely recognized on a regional as well as international level.

The 1951 Convention was the first international agreement covering the most fundamental aspects of a refugee's life. It establishes the essential minimum norms

⁵¹ UN, *Convention Relating to the Status of Refugees*, adopted on July 28, 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December, 1950, entered into force April 22, 1954.

⁵² UN, *Protocol relating to the Status of Refugees*, taken note of with approval by the Economic and Social Council in resolution 1186 (XLI) of November 18, 1966, entered into force October 4, 1967.

⁵³ *Convention Governing The Specific Aspects of Refugee Problems in Africa*, Assembly of Heads of African States and Governments, Addis Ababa, September 10, 1969, United Nations Treaty Series no. 14691, entered into force June 20, 1974.

relating to the treatment of refugees. These norms must be applied without discrimination as to race, religion or country of origin. The 1951 Convention is the key legal document in defining who a refugee is, the rights of refugees and the legal obligation of states. It spells out the kind of legal protection, other assistance and social rights a refugee should receive from States parties to the document, as well as a set of basic human rights such as freedom of religion and movement, the right to work, education and accessibility to travel documents, which should for refugees be at least equivalent to freedoms enjoyed by foreign nationals. Equally, it defines a refugee's obligations to host governments and indicated people or group of people who are not covered by the Convention, such as war criminals as they do not qualify for refugee status.

Host governments are primarily responsible for protecting refugees and parties to the 1951 Convention and / or 1967 Protocol are obliged to carry out its provisions. They agree to cooperate with UNHCR in one of its duties, which is the promotion of international agreements for the protection of refugees and the overseeing of their application.⁵⁴ The UNHCR can intervene if necessary to ensure that displaced people that fall under the definition of refugees are granted asylum and are not forcibly returned to countries where their lives may be in danger.

Article 1(2) of the 1951 Convention states that the definition of a refugee shall apply to any person who:

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

⁵⁴ Article 35, paragraph 1 of the 1951 Convention and Article 2, paragraph 1 of the 1967 Protocol.

It is important to note that the 1967 Protocol removed the geographical and temporal restrictions that are present in the 1951 Convention. It is therefore the non-availability of effective national protection when a country is unable or unwilling to protect its individuals, and the need for international protection, which is the main characteristic of a refugee.⁵⁵

An interesting point for the purpose of this study as it focuses on African refugees is that the 1969 OAU Convention not only broadens but also reformulates the definition of a refugee. It adds, in article 1 (2), the provision that:

"The term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."

This broader definition of a refugee hence recognizes the legitimacy of flights in situations of generalized danger not limited to individual persecution. The 1969 OAU Convention is a cornerstone of Africa's asylum policy going beyond the confines of the 1951 Convention and reflecting "the hospitality of African governments towards the continent's refugees."⁵⁶

It is in addition important to mention that the 1951 Convention and 1967 Protocol do not contain a right to asylum.⁵⁷ States have in practice tended to accept at least a moral obligation to give asylum to those who meet the definition of a refugee in the 1951 Convention. However, what constitutes asylum is not defined in that or any other text.

⁵⁵ James Darcy, 'Human Rights and International legal Standards: What do Relief Workers need to Know?', *Relief and Rehabilitation Network*, Paper No. 19, February 1997, London: Overseas Development Institute, P. 27

⁵⁶ Statement by Mrs. Sadako Ogata, United Nation's High Commissioner for Refugees and Salim Ahmed Salim, Secretary-General, Organization for African Unity, OAU/UNHCR, Regional Meeting on Refugee Issues in the Great Lakes, Kampala, May 9, 1998.

⁵⁷ UNHCR, *The State of the World's Refugees: A Humanitarian Agenda*, 1997, Oxford University press, Chapter 5, "The Asylum Dilemma", 183-223.

The 1969 OAU Convention states that “member states of the OAU shall use their best endeavors ...to receive refugees....”⁵⁸ Accordingly, States have the right to grant asylum, but there is no universal right of asylum – that is, there is no legal obligation on States to grant protection to refugees, despite the wording of the Universal Declaration of Human Rights.⁵⁹ Article 14, paragraph 1 of the UDHR states that “everyone has the right to seek and to enjoy in other countries asylum from persecution.”

Nevertheless, the State’s discretionary right of non-admission is restricted by certain obligations, the most important of which being the principle of non-refoulement whereby nobody should forcibly be returned to a country where his or her life or freedom would be at risk. Article 33 (1) of the 1951 Convention in fact states:

“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.”

The 1969 OAU Convention has a similar article prohibiting refoulement, namely article 2(3). The principle of non-refoulement reflects the concern and commitment of the international community “to ensure the enjoyment of fundamental human rights, including the right to life, to freedom from torture of cruel, inhuman or degrading treatment or punishment, and to liberty and security of person.”⁶⁰ These, and other rights, are threatened when a refugee is forcibly returned to persecution or danger. The principle of non-refoulement applies to refugees irrespective of whether they have been formally recognized as such.

⁵⁸ Article 2 Paragraph 1 of the 1969 OAU Convention.

⁶⁰ UN, *Note on International Protection*, Executive Committee of the High Commissioner’s Programme, 44th session, A/AC.96/815, paragraph 10.

Kenya became a party to the 1951 Convention in 1966 and to the 1967 Protocol in 1981. The country is also party to the 1969 OAU Convention, which the government ratified on January 23, 1992.

It is important in this study to point out that refugees currently living in Kenyan camps would theoretically fall under the definition of refugees, if not under the 1951 Convention and its additional 1967 Protocol, in any case under the OAU's broader definition of a refugee. Indeed, most of them have been compelled to leave their countries due to war, an event seriously disturbing public order. Yet, the reality is somewhat different; despite being a signatory to the 1951 Convention and 1967 Protocol, the Kenyan government is currently not considering most asylum seekers for full Convention refugee status. Thus, most asylum seekers are not processed on an individual basis to observe whether they fall under the definition of a refugee, in which case they would benefit from the rights that go together with the status. Most of the refugees in Kenya receive a "prima facie" status which excludes them from the standard protection offered by the refugee regime.

The prima facie regime can be defined as the determination of eligibility based on first impressions, or in the absence of evidence in to the contrary.⁶¹ Prima facie determination is generally applied in situations of mass movements where individual determination is impractical. This designation is usually made on a group basis rather than by individual determination procedures that are the norm for determining Convention status. It is a temporary measure that tends to provide assistance in a contained area to a displaced group of persons. Temporary protection comprises atleast admission, protection against refoulement and respect for fundamental human rights, while awaiting a hoped-for safe return following international efforts to achieve a political solution.

Despite the individualistic focus on the 1951 Convention, the UNHCR started early to engage in situations where determination of refugee status was needed on a group basis.

⁶¹ Jennifer Hyndman and Bo Viktor Nylund, "UNHCR and the Status of Prima Facie Refugees in Kenya," *International Journal of Refugee law*, Vol. 10, No. 12, 1998, P. 29.

The concept of “good offices” indeed gives the High Commissioner for refugees the flexibility and discretion to assist specified groups of refugees without having to take a position on their legal status or having to expand the definition of a refugee.

Since the 1960’s, prima facie determination has become common practice for mass movements of refugees in Africa. Prima facie refugee status was established by the OAU Convention as a protection measure to complement the refugee determination procedures of individual states. The status was however not to be used alone because it stipulates neither conclusive actions nor solutions for refugees designated as such.⁶² Hence, majority of refugees in Kenya are not granted Conventions status, but rather temporary asylum under the prima facie regime. In a way, Convention status has been displaced, in the Kenyan case, by the discretionary group designation of prima facie refugees.⁶³

However, besides refugee law another path can thus be explored, namely human rights law to show refugees living in camps are entitled to the right to security.

3.3 International Human Rights Law

International Human Rights Law provides a set of universal standards which states must observe in the treatment of people under their jurisdiction. Human rights do not grant rights to individuals, instead, they impose obligations on signatory states to grant such rights.

Although most refugees living in Kenyan camps have not been granted status under any legal instruments, certain standards nonetheless apply to all people, citizens or refugees.⁶⁴ Human rights standards apply to all human beings, thus, also to refugees. Crossing an international border does not deprive asylum-seekers and refugees of their human rights and human beings have human rights, whatever label they are given and wherever they

⁶² Jennifer Hyndman, *Managing Displacement. Refugees and the Politics of Humanitarianism*, Minnesota, University of Minnesota Press, 2000, P. 176.

⁶³ Ibid pg. 25

⁶⁴ Jennifer Hyndman and Bo Viktor Nylund, “UNHCR and the Status of Prima Facie Refugees in Kenya,” *International Journal of Refugee law*, Vol. 10, No. 12, 1998, P. 38.

are.⁶⁵ Thus, the need to identify diverse human rights instruments that include a right to physical security and this study lays focus on the instruments that the state of Kenya is party to.

3.4 The Universal Declaration of Human Rights (UDHR)

Adopted and proclaimed by the UN General Assembly in December 1948, the Universal Declaration of Human Rights⁶⁶ stresses the inherent value of human dignity and the universal nature of human rights. Although the Declaration, which comprises a broad range of rights, is not a legally binding document, it has inspired more than sixty human rights instruments which together constitute an international standard of human rights.

Furthermore, the concepts enshrined in the UDHR have been reproduced in national and international legal instruments and several countries have used it as the basis of their bill of rights. In addition, the obligation to implement it has been repeatedly affirmed in international human rights instruments and declarations, including the 1993 Vienna Declaration.⁶⁷

According to article 3 of the UDHR: “Everyone has the right to life, liberty and security of person.” Article 5 states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” In addition, article 25 goes as follows:

“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food and the right to security in the event of unemployment, sickness, or the lack of livelihood in circumstances beyond his control.”

The Universal Declaration of Human Rights, together with the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and its optional Protocol are known collectively as the International Bill

⁶⁵ Amnesty International, *Rights Wherever You Are*, AI-index: POL 33/001/2002, November 4, 2002.

⁶⁶ UN, *Universal Declaration of Human Rights*, adopted and proclaimed by General Assembly resolution 217 A (III) of December 10, 1948.

⁶⁷ UN, *Vienna Declaration*, World Conference on Human Rights, UN Doc. A/CONF. 157/24, June 24-25, 1993.

of Rights. These form the cornerstone of the human rights regime. Kenya has ratified both covenants on the first of May, 1972.

3.5 The International Covenant on Civil and Political Rights (ICCPR)

According to article 9(1) of the ICCPR, “everyone has the right to liberty and security of person.” In addition, article 6 protects the “inherent right to life” of every human being, and article 7 states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

3.6 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment⁶⁸ was adopted by the UN General Assembly in 1986 and came into force a year later. Kenya has ratified it on February 21, 1997.

The Convention includes a definition of torture (Article 1) and states parties take on extensive obligations. These include the obligation to take measures to prevent acts of torture (Article 2), an obligation not to return any person to a state where there are substantial grounds for believing that he would be in danger of being subjected to torture (Article 3), and obligations to establish jurisdiction over the offence of torture (Article 4 and 5).

3.7 International Convention on the Elimination of All Forms of Racial Discrimination

International Convention on the Elimination of All Forms of Racial Discrimination⁶⁹ was adopted by the UN General Assembly in December 1965 and came into force in January 1969. Kenya became a party in September 2001.

According to Article 5(b), States parties

⁶⁸ UN, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN GAOR Supp. (No.51) at 197, UN. Doc A/39/51 (1984), adopted by General Assembly resolution 39/46 of December 10 1984, entered into force June 26, 1987.

⁶⁹ UN, *International Convention on the Elimination of all Forms of Racial Discrimination*, adopted and opened for signature and ratification by General Assembly resolution 2106 (XX), 660 U.N.T.S. 195, entered into force January 4, 1969.

“undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights. The right to security of person and protection by the State against violence and bodily harm, whether inflicted by government officials or by any individual group or institutions.”

3.8 Convention on the Elimination of All Forms of Discrimination against Women

Adopted by the UN General Assembly, in December 1979, the Convention on the Elimination of all Forms of Discrimination against Women entered into force two years later and was ratified by Kenya in March 1984. It is today one of the most widely ratified international human right instrument.

3.9 Convention on the Rights of the Child

Adopted in 1989, the Convention on the Rights of the Child⁷⁰ was the first international treaty to specifically target the rights of children. It seeks to protect children from practices which particularly endanger their welfare, including economic exploitation, traffic in children, illicit use of drugs, and all forms of sexual exploitation and abuse. The most widely ratified treaty was ratified by Kenya on 31st July 1990.

According to Article 19(1) state parties shall take all appropriate measures to protect the child from all forms of physical violence, injury or abuse, neglect or negligent treatment, maltreatment, or exploitation, including sexual abuse. In addition, Article 6 states that “every child has an inherent right to life” and that states parties shall ensure to the maximum extent possible the survival and development of the child.

Moreover, according to Article 34, “state parties undertake to protect the child from all forms of sexual exploitation and sexual abuse.” And in accordance with article 37(a), States Parties shall ensure that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

⁷⁰ UN, *Convention on the Rights of the Child*, G.A. resolution 44/25, annex, 44 UN GAOR Supplement (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990.

3.10 African Charter of Human and People's Rights

Adopted by the 18th session of the Assembly of heads of State and Government of the OAU in June 1981, the African Charter of Human and People's Rights entered into force on October 21, 1986, and Kenya became a party in January 1992.

According to Article 4, human beings are inviolable and "every human being shall be entitled to respect for his life and the integrity of his person." Moreover, article 5 says that every individual shall have the right to the respect of the dignity inherent in a human being. All forms of exploitation or degradation of man, particularly torture, cruel, inhuman or degrading punishment and treatment, shall be prohibited. Article 6 guarantees the right of every individual to liberty and to the "security of person."

3.11 African Charter on the rights and Welfare of the Child

This Charter was adopted by the OAU at the 26th session of the Assembly of Heads of State and Government in July 1990. It entered into force on November 29, 1999. Kenya became a party on July 25, 2000. The Charter acknowledges in article VI, that every child has an inherent right to life, in article XVI.I, that children shall be protected against child abuse and torture as well as against sexual exploitation as in Article XXVII.

4 CHAPTER FOUR: GAPS CREATED BY THE EXISTENCE AND ACTUAL IMPLEMENTATION OF FRAMEWORKS REGARDING REFUGEE SECURITY

4.1 Kenya In Relation to Refugee and Human Rights Law

The primary treaties that the UN human rights system is based on are the International Human Rights Covenants and the specialized conventions. One of the more important conventions is the Convention relating to the Status of Refugees adopted in Geneva in 1951. In 1967, a Protocol relating to the Status of Refugees was drawn up in New York. Then there was the OAU Convention Governing the Aspects of Refugee Problems in Africa.

These documents define the kind of refuge available in States-Parties to persons who qualify as refugees according to the definition in the international documents. The specialized agency in the UN is the Office of the UN High Commissioner for Refugees (UNHCR).

Kenya became a member of the UN in December 1963, hence thereby becoming a signatory of International human rights instruments/treaties. The international refugee instruments are reinforced in several countries by national refugee legislation. Many of these laws have been promulgated with, among other things, the specific objective of incorporating the principles and norms expressed in the international refugee instruments in national legal systems.

Refugees must be treated in accordance with recognized legal principles and standards relating to their personal safety and their social, civil and economic rights. Refugees must also be able, ultimately, to return voluntarily to their countries in conditions of safety and dignity. Realization of these fundamental rights for refugees entails specific legal obligations on the part of the asylum state. At the same time, the refugee, too, has certain obligations: Article 2 of the 1951 Convention relating to the status of refugees declares that “every refugee has duties to the country in which he finds himself, which

require that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.”

Given all this, there continues to be quite serious violations of the basic dictates of refugee law particularly within refugee camps as exemplified by the Dadaab refugee camps. These include; instances of denial of admission and asylum; restriction of refugees to camps or settlements; wrongful arrests or detentions; expulsion and refoulement; violence of various forms against refugees, particularly rape of refugee women and girls; recruitment of refugee children and adults into irregular forces; and the failure or inability to provide refugees with social and economic rights.

Enactment of legislation primarily geared to refugee protection and treatment in line with internationally recognized principles, is a relatively recent phenomenon. While various efforts promoting the enactment of positive legislation were already underway as early as the mid 1960's, the trend began in earnest in 1990, with the approval by UNHCR and the OAU of a jointly drafted model refugee legislation that was then used widely in discussions with governments concerning the promulgation of new laws or reform of existing one.⁷¹

Kenya is indeed a signatory to all the relevant human rights instruments from the 1948 Universal Declaration of Human Rights to the 1966 International Covenant on Civil and Political Rights and the International Convention on Economic, Social and Cultural rights as well as other international human rights instruments specific to vulnerable groups such as women vide Convention on the elimination of all forms of discrimination against women, children vide Convention of the rights of the Child, refugees vide Convention Relating to the Status of Refugees both internationally and in Africa and the disabled among others. Kenya has also ratified regional human rights treaties such as the African Charter on Human and Peoples Rights. Besides just ratifying and acceding to the above

⁷¹ UNHCR, *Focus Africa*. Refugees, No. 96, 1994, Pg 8.

instruments, Kenya has demonstrated these commitments in legislation despite adopting the dualist approach to international law.⁷²

The question is, therefore, the practice rather than the presence of human rights instruments in Kenya. Yet again it is important to examine whether or not indeed human rights as understood, for example, in international planes are also understood in the same light in the Kenyan context. There are the inhibiting factors which have frustrated the protection of human rights where such violations occurred in this case the refugee camps. Refugee camps are a history of marginalization, lack of infrastructural development, the near-absence of government, lack of measures to combat ethnic or clan rivalry within the camp areas, the existing gap between the refugees and the Kenyans living around the camps among others. For instance, the Dadaab refugee camps are situated in Kenya's North Eastern Province, a vast stretch of semi-arid land that has been the object of dispute between Kenya and Somalia since independence.⁷³ The area is unsustainable for agricultural production and has a very poor infrastructure and on top of that is insecure due to frequent attacks by Somali bandits.⁷⁴

Arguably, another important obstacle is the process of transferring the ratified international human rights instruments to the domestic legal systems. However, the ones that Kenya has ratified and acceded to can be sub-divided into two main categories. These are the standard-setting and obligation-setting instruments.

The UDHR listed and declared all those rights that accrue to all human beings and as article 1 therefore provides, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood". The UDHR accords to everyone all the rights without any discrimination whatsoever as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The UDHR therefore declares among other human rights, the right to life, liberty and security, recognition as

⁷² Antonio Cassese, *International Law*, (Oxford: OUP, 2001)

⁷³ Crisp, J. 1999, *A State of Insecurity: The political economy of violence in refugee populated areas of Kenya*. Working Paper No. 16, New Issues in Refugee Research. Geneva. UNHCR.

⁷⁴ Cindy Horst, *Connected Lives: Somalis in Minneapolis, family responsibilities and the migration dreams of relatives*. New Issues in Refugee Research, Research Paper, No. 124. July 2006. Page 1.

person before the law and most importantly, the UDHR provides that “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”

While the UDHR was merely declaratory of human rights, Kenya acceded and ratified specific instruments that created obligation upon the state and its government and departments towards ensuring that those rights as contained in the international human rights instruments were enjoyed by Kenyans. Effectively, Kenya agreed to be a duty-holder and to ensure the enjoyment of those rights within its jurisdiction by Kenyans and aliens alike.

It must also be noted that two fundamental problems obstruct the realization of those rights and the enforcement of those instruments in the context of Kenya. The first is that Kenya did not negotiate several of the obligation-setting instruments. This would naturally present problems of enforcement at the national level. It is that enforcement at the national level which is the yardstick for the realization of human rights in Kenya as it is indeed in other countries. In addition, such obligation-creating international human rights instruments as the ICESCR require of a country to demonstrate measures it has put in place for the progressive realization of ESCR.

The second obstacle is that Kenya assumes the dualist approach to international law. This means that even though Kenya ratifies, accedes to and or attends the signing of an international human right instrument, that treaty does not become automatically the law in Kenya. For an international human right instrument to be effective in Kenya, an Act of parliament must be enacted to enforce that law. This is embedded in the notion that international and municipal laws are two different legal entities. This is a practice that is common in the so-called common law.

The opposite of dualist approach to international law is the monist approach, which means that upon ratification of an international treaty, it automatically becomes law. This is a practice that is common in civil law jurisdictions such as Germany jurisdiction. In

other words, it is a practice of former British colonies. It is for this reason that there is often, for example, agitation for the incorporation of legislation in the areas of refugee law in Kenya.

4.2 The UNHCR

The protection of 20.8 million uprooted people is the core mandate of UNHCR. The agency does this in several ways. Using the 1951 Geneva Refugee Convention as its major tool, it ensures the basic human rights of vulnerable persons and that refugees will not be returned involuntarily to a country where they face persecution. Longer term, the organization helps civilians repatriate to their homeland, integrate in countries of asylum or resettle in third countries. Using a world wide field network, it also seeks to provide at least a minimum of shelter, food, water and medical care in the immediate aftermath of any refugee exodus.⁷⁵

The existence of a UN High Commissioner for Refugees distinguishes refugee law from every other UN human rights project. Only in refugee law is there an international organisation assigned exclusively to supervise implementation of the treaty.

UNHCR has a special responsibility under Article 35 to "supervise the implementation" of the Refugee Convention. But this provision does not create a monopoly on treaty oversight in favour of UNHCR. To the contrary, the Convention, as an international pact, is the responsibility of the states that signed it. UNHCR has been fundamentally transformed during the 1990s from an agency whose job was, in large measure, to serve as trustee or guardian of refugee rights as implemented by states to an agency that is now primarily focused on direct service delivery.⁷⁶

Simply put, UNHCR is no longer at arms length from the implementation of refugee protection. In most big refugee crises around the world today, UNHCR is — in law or in

⁷⁵ UNHCR, *Protecting Refugees*

⁷⁶ James Hathaway, "New Directions to Avoid? Problems: The distortion of the Palliative Role of Refugee Protection" *Journal of Refugee Studies* 1995 8(3) 288-294.

fact — the means by which refugee protection is delivered on the ground. UNHCR therefore faces a dilemma.⁷⁷ UNHCR is not really in a position to apply meaningful forms of pressure on states. UNHCR is, after all, an entity with a tiny core budget and is effectively dependent on the annual voluntary contributions of a very small number of powerful states, virtually none of which has been predisposed to empower UNHCR to act autonomously to advance a strong regime of international refugee relief and for humanitarian assistance.

Of all the reasons that drive refugees to flee their homes, none is as great as fear. It may be fear of direct physical attack or of a conflict where rape, torture and ethnic cleansing are part of military strategy. In their attempts to escape refugees may dodge bullets in a war zone, be chased by human traffickers or risk their lives crossing stormy seas on leaky boats. Even if they survive these dangers and make it to another country, they may find that their fears continue to dog them. The conflict they tried to escape may have followed them, and their lives and dignity may still be threatened.

Ensuring the physical safety of refugees is one of the most pressing concerns of UNHCR and its partners. The refugee protection regime was created by the international community to shelter those fleeing direct threats to their lives. But this very fact has meant that refugee protection has always been profoundly affected by larger security issues. Real and perceived security threats not only influence the willingness of states to provide asylum to refugees, they also determine the quality of the refuge provided. At another level, insecure environments weaken the ability of UNHCR and allied humanitarian agencies to assist and protect refugees – and thus to uphold their basic rights.⁷⁸

The beginning of the twenty-first century has seen a number of new developments with regard to refugee security. For one, UNHCR has become much more involved in security issues, especially as they affect ongoing operations. For another, the emergence of new

⁷⁷ James Hathaway, *Who Should Watch over Refugee Law?*

http://www.upf.pf/recherche/IRIDIP/RJP/RJP_HS03/18_Hathaway.pdf. accessed on 23rd July 2007.

⁷⁸ UNHCR, *The State of the World's Refugees*. Chapter 3, accessed from <http://www.unhcr.org/publ/PUBL/4444d3c4b.html> on 13 Jul 2007.

security concerns for states, such as terrorism, has led to the 'securitization' of practices related to asylum. Lastly, issues of migration, development and relief have become more closely linked to security.⁷⁹ Indeed, there is an increasingly widespread view that the viability of the refugee protection regime hinges on its real and perceived impact on international security.⁸⁰

4.3 The host state

Under Human Rights Law, as well as under Refugee Law, it is the state who is primarily responsible for protecting human rights. The nation-State remains the main unit of international law and the primary site of enforcement in relation to regional and international agreements. It is thus clearly the responsibility of the Kenyan government to protect and ensure the right to physical security, in its forms, of its citizens. In the domain of refugee protection, the host state is responsible. International human rights require governments to ensure that all individuals within their territories, regardless of citizenship, enjoy the equal protection of law. In the case of refugees, the responsibility to protect remains the primary responsibility of the countries where the refugees find themselves.”⁸¹

Kenya is party to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol but maintained reservations on its clauses providing exemptions for refugees from exceptional and provisional measures, the right to work, labor protection, social security, and administrative assistance. It is also party to the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa. In November, the Parliament passed the Refugees Bill, which called for an inter-ministerial Refugee Status Determination Committee to adjudicate asylum applications under a Commissioner for Refugee Affairs. The legislation would also designate a Refugee Appeal Board and allow additional

⁷⁹ N. Van Hear, 'Recasting Societies in Conflict', COMPAS Working Paper No. 22, University of Oxford, Oxford, 2005, pp. 1-5.

⁸⁰ G. Loescher, 'Refugees as Grounds for International Action', in E. Newman and J. van Selm (eds), *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State*, United Nations University Press, Tokyo, 2003, pp. 31-6.

⁸¹ Report of the UN High Commissioner for Refugees, 38 UN GAOR Supp. No. 12, pg 8, UN Doc. A/38/12, 1983.

appeals to Kenyan High Court. The Bill also mandated the documentation of refugees living in urban centers and outside of refugee camps. The President signed it into law in January 2007.⁸²

Where national legislation ignores the rights of refugees, it limits their ability to become self-reliant. For example, restrictive legislation in Kenya and Tanzania does not allow refugees to leave camps; as a result, most refugees in these countries remain entirely dependent on international assistance. Besides putting a large financial burden on the international community, this dependence contributes to a climate of idleness and apathy in the camps which may push refugees to crime or military activity.⁸³

The prima facie regime that applies to most refugees in Kenya puts these refugees outside of the international protection granted by refugee law. The only Convention refugee law protection that displaced people benefit from when they arrive in Kenya is the respect of the non-refoulement principle. Indeed, they are given temporary safety and protection from forcible return to the country they fled and thus receive protection of their right to life. Nevertheless, non-refoulement may be the most important principle of refugee law, but is inadequate in and on itself to address the massive scale of displacement and the conditions of those uprooted by these crises.⁸⁴

The prima facie status offers few if any, solutions to refugees. The government of Kenya effectively exiles them to remote border regions and prohibits them from living outside the camps. As displaced people in the country, they must either accept the term UNHCR offers – which include dependence on foreign foods and spatial segregation in the camps – or go underground to create an unofficial livelihood elsewhere and in the majority of cases, voluntary repatriation is the only available long-term solution for them. As a result, the prima facie regime that applies to most refugees in Kenya puts these refugees outside of the international protection granted by refugee law.

⁸² UNHCR, *World Refugee Survey 2007*. Pg 81

⁸³ UNHCR, *The State of the World Refugees*, 2006, Chapter 3.

⁸⁴ Jennifer Hyndman and Bo Viktor Nylund, "UNHCR and the status of prima facie refugees in Kenya," *International Journal of Refugee Law*, Vol. 10, No. 12, 1998, Pg 46.

Arguably, the physical safety of most refugees in camps is not protected by refugee law, as most refugees do not enjoy a full refugee status but only a prima facie status. In addition, it is interesting to note that, even if these refugees enjoyed a full status and were in that sense covered by the 1951 Convention and its 1967 Protocol, their right to security would still not be protected by refugee law, as this regime “lacks explicit provisions on the question of the physical security of refugees”⁸⁵

The challenge for the international community and host states is to comprehend the ways in which refugee policies and assistance may themselves help to reduce security threats.⁸⁶ As the mechanisms for enforcement of the Convention itself make clear, it is States that have the fundamental right and duty to ensure that other states actually live up to their obligations under the Refugee Convention.

⁸⁵ Elly-Elikunda Mtango, “military and Armed Attacks on Refugee Camps,” *Refugees and International Relations*, ed. Loescher and Monahan, New York, Oxford University Press, 1990, Pg. 113.

⁸⁶ UNHCR, *The State of the World's Refugees 2006*, Chapter 3.

5 CHAPTER FIVE: RECOMMENDATIONS

5.1 Bridging the gap of insecurity within refugee camps

All states that have acceded to the international instruments relating to the protection and assistance of refugees have an obligation to implement national legislation which is consistent with those instruments. A case can certainly be made that the mere existence of refugee law, through the values and ideas it aims to emphasize, shows that general principles of protection should be respected. This would apply to Kenya, as it is a full member of the refugee regime. As a signatory of the 1951 Convention, the 1967 Protocols and the OAU Convention, Kenya is thus under obligation to respect fundamental principles of refugee protection.

According to the Addis Ababa document, “governments should use their best endeavors to treat refugees according to the standards established under refugee law. In particular, this should ensure the personal safety of refugees, locate them in areas which are accessible, safe and where basic services and amenities can be provided, and enable them to regain a normal way of life.”⁸⁷

In addition, the international refugee instruments are all grounded in the Universal Declaration of Human Rights, and its affirmation that human beings shall enjoy fundamental rights and freedoms without discrimination.⁸⁸ As has been shown, there clearly exists a right to physical security in different instruments of human rights law. This right is expressed in such texts as the right to security of persons, but also the right to life, right to dignity, the right not to be tortured, and/or the right to respect of integrity of person. Children, as a vulnerable group, are moreover to be extensively protected against any abuse, torture or exploitation. Moreover, in the “State of the World’s Refugees” of 1997, one can further read that “people with temporary protection must be

⁸⁷ Addis Ababa document on Refugees and Forced Population Displacement in Africa, adopted by the OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa, Addis Ababa, September 8-10, 1994, Recommendation Seven (ii).

⁸⁸ Arafat Jamal, “*Minimum Standards and essential needs in protracted Refugee Situation. A Review of the UNHCR Programme in Kakuma, Kenya.*” UNHCR:EPAU/2000/05, November 2000 paragraph 29. Available from <http://www.unhcr.ch>.

treated in a manner which is compatible with internationally displaced human rights principles."⁸⁹

The obligation to protect and ensure the security of refugees should not rest on asylum countries alone but should be imposed on all States both individually and collectively.⁹⁰ According to the UNHCR Executive Committee, the international protection of refugees would be impossible without the cooperation of States, in a spirit of international solidarity and burden sharing, both in providing asylum to those who need it and in fostering solutions to refugee problems. The Executive Committee stated its hopes that ways will be found in which the UNHCR, concerned states and the international community as a whole "can most effectively discharge their responsibilities towards refugees."⁹¹

5.2 Potential measures to combat insecurity in refugee camps

This study, in part, has shown that refugees living in Kenyan camps are confronted to daily violence and threats to physical security. Although measures are being taken to enhance the security of refugees living in camps, they are somewhat insufficient as insecurity still looms large.

Many refugees are living with the uncertainty and fear that come from inadequate protection from threats to their physical security. In that sense, their human right to security is not satisfactorily protected and ensured. The Kenyan state has a legal obligation to better protect the security of refugees living in its camps, and the international community, according to the principle of burden-sharing and solidarity, must also play a role in helping the Kenyan government to fulfill its obligations. Moreover the UNHCR has gradually expanded in its activities to cover not only the legal

⁸⁹ UNHCR, *The State of the World's Refugees: A Humanitarian Agenda*, 1997, Oxford University Press, Chapter 5, "The Asylum Dilemma" Pg 210.

⁹⁰ Elly Elikunda Mtango, "Military and Armed Attacks on Refugee Camps," *Refugees and International Relations*, ed. Loescher and Monahan, New York: Oxford University Press, 1990. Pg 114.

⁹¹ UN, *Note on International Protection*, Executive Committee of the High Commissioner's Programme, 44th session, A/AC.96/815, August 31, 1993, paragraph 63.

protection of refugees but also the protection of physical security in protracted refugee situations.

Obviously, the lack of security in the Kenya refugee camps is a dramatic problem to which responses are difficult to find and to implement. Nevertheless, more can certainly be done towards refugee safety as is demonstrated for instance by the way in which the international community dealt with the refugee issues in the Balkans. Clearly, African refugees receive less attention than other refugees.

Thus, given the reality on the field, what better measures could all the different actors conjunctly take to contain the violence in and around the refugee camps in Dadaab and others in Kenya so as to make life more secure for the refugees living there and to enable them to fully enjoy their human right to security?

5.3 The Host State

The most radical way of approaching the issue of lack of security in refugee camps is to try to avoid putting refugees in camps. As some authors believe, camps are inherently dangerous places. Verdirame refers to camps as “anomalies.”⁹² Similarly, in Rutinwa’s opinion, “to address security, host countries should whenever possible, avoid putting refugees in camps.”⁹³ Likewise, Norwojee believes that camps are not the solution and that, rather than acquiescing in the erosion of refugee rights, the international community should be promoting ways to return to more durable solutions.⁹⁴

Pleading for more resettlement is another way of approaching the issue of insecurity in the refugee camps. Consistent with the principle of burden sharing, States other than the overburdened developing countries should be willing to resettle more refugees.

⁹² Guglielmo Verdirame, *Human Rights and Refugees: the case of Kenya*, *Journal of Refugee Studies*, Vol. 12, No. 14, 1999. Pg 54-77

⁹³ Bonaventure Rutinwa, *Refugee Protection and Security in East Africa*, *Forced Migration Review*, October 1996. Available from <http://www.fmreview.org/rpn225htm>.

⁹⁴ Binafir Norwojee, *In the Name of Security: Erosion of Refugee Rights in East Africa*, *World Refugee Survey* 2000. Available from http://www.refugees.org/world/articles/wrs00_eafrica.htm.

One difficult but essential measure of dealing with insecurity is related to the geographic location of camps: refugee camps should be located further away from the borders. The discouragement of frontier refugee settlements indeed seems to be a sensible response towards ensuring effective protection to refugees.⁹⁵

In order to minimize problems of international security, host states should implement article 2(6) of the 1969 OAU Convention as it 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. This will minimize if not prevent cross-border attacks 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.

In many cases, insecurity affecting refugee camps and refugee populated areas has resulted from a failure to strictly respect the civilian and humanitarian character of refugee operations. Accordingly, no weapon should be allowed in the camp, and camps must remain demilitarized. Refugee camps must retain an exclusively civilian and humanitarian character.⁹⁶ Jeff Crisp proposes a permanent deployment of the Kenyan army or of an anti-banditry unit in the vicinity of the camps.⁹⁷

Of equal importance to refugee protection are specific assessment and reconnaissance missions designed to provide a detailed evaluation of the security situation, determine the extent of infiltration by armed elements and recommend appropriate measures. For example, a security plan would document the best means to distinguish armed elements or combatants from bona fide refugees; identify traditional conflicts or grievances within the refugee population or between refugees and local groups.

⁹⁵ M. Othman-Chande, "International Law and Armed Attacks in Refugee Camps," *Nordic Journal of International Law*, Vol. 59, 1990. Pg 110.

⁹⁶ UNHCR, *Military or Armed Attacks on Refugee Camps and Settlements*, Executive Committee Conclusion No. 48(XXXVIII), 1987, Paragraph 4 (b) and UNHCR, *Conclusion on the Civilian and Humanitarian Character of Asylum*, Executive committee Conclusion No. 94(LIII), 2002. Preamble paragraph 7 and paragraph (a), (b), (c), and (f).

⁹⁷ Jeff Crisp, *A State of Insecurity: the Political Economy of Violence in Refugee-Populated Areas of Kenya*, Evaluation and Policy Analysis Unit of UNHCR, Working Paper No. 16, December 1999. Page 23.

Separating militants from the general refugee population is frequently not as important as addressing the root causes of refugee involvement in crime, violence and military or subversive activities. Some argue that more effort should go towards ensuring good camp management and providing general physical protection to refugees. This necessitates increasingly comprehensive approaches to security measures, and strategies for a broad range of refugee situations which engage key actors at every stage of the humanitarian effort.

One of the most effective strategies in reducing security risks for refugees is the effective dissemination of reliable information. Dependable information is the basis of an effective early warning and assessment system which improves refugee security by ensuring that appropriate assistance measures are put in the right place at the right time.

At the country or regional level, early warning of impending emergencies can provide an indication of the composition and needs of refugee groups. Early assessment of the general situation can help gauge requirements regarding the size and location of transit facilities, camps or settlements and other assistance centres. It will allow local and international actors to prepare for potential conflicts or risks. Ideally, it prevents security problems from arising, rather than just dealing with them when they occur. The early assessment of the security situation in the Presevo Valley in Kosovo, for instance, helped prevent an outbreak of violence in the area.

The development of effective and objective information channels as well as reporting and complaint mechanisms is crucial to refugee assistance and protection. Camp situations are often breeding ground for rumour and misinformation. Credible information channels are therefore vital to give refugees the accurate information required to defuse tensions. Regular and non-confrontational discussions between camp authorities, humanitarian agencies and representatives of host and refugee communities would allow grievances to be voiced and develop a forum for constructive dialogue.

Keeping information channels open is a priority if programmes addressing sexual and gender-based violence are to succeed. An atmosphere of awareness is a pre-condition when creating an environment in which vulnerable women and children can air their concerns without fear or retribution or social stigma.

Relationships of trust are the most basic building blocks of preventive security strategies. Trust relies not only on transparent procedures but also on direct and easy access to humanitarian and protection personnel, encouraging refugees to report security incidents and fears. This in turn provides a more accurate picture of the security situation and reinforces understanding and respect for mutual responsibilities and obligations under the law.

5.4 The UNHCR

According to Jamal, the UNHCR should develop more income generation and community self-management projects.⁹⁸ Likewise, as said by the women's Commission for Refugee Women and Children, the "UNHCR should consider conducting a review of the causes, dynamics and effects of refugee men's inactivity with a view to establishing a strategy which reduces male perpetrated violence in situations of uprooted ness. Such a strategy might include components like men's and boy's training in new skills more appropriate to the most likely durable solution, thereby providing not only activity but also a sense of purpose where non existed before."⁹⁹ States could also give more funds to the UNHCR in order for UNHCR to enable the majority of refugees living in Kenyan camps to be productive. This would diminish violence as refugees would not stay inactive all day long and lose their human dignity.

⁹⁸ Arafat Jamal, *Minimum Standards and Essential Needs in a Protracted Refugee Situation. A review of the UNHCR programme in Kakuma Kenya*, UNHCR: EPAU/2000/05, November 2000.

⁹⁹ Women's commission for Refugee Women and Children, *UNHCR Policy on Refugee Women and Guidelines on their Protection: An Assessment of Ten Years of Implementation*, May 2002. Available from <http://www.womenscommission.org/reports/pdf/unhcr2002.pdf>.

It is also advisable that additional security training be given to the UN staff and other NGO staff for their own security. This is besides improving police standards and of deploying female police officers among others.

Thus, although it is far from being easy, many ways can be envisaged to help make refugee's lives in camps more secure and human. Refugee camps exist in order to provide refugees with protection and all must therefore be done so that they really fulfill their function.

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