Volume 1, Issue 6, October-2018: 67-83
International Journal of Current Innovations in Advanced Research ISSN: 2636-6282

When the Victim Stings the Good Samaritan: Legal Implication on Refoulement of Refugees, a Kenyan Perspective

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Abstract: Statistics indicate that Kenya is the host to hundreds of thousands of asylum-seekers and refugees, approximately 70% of whom are from Somalia, 20% from South Sudan, while the rest are Ethiopians and Congolese, and about 20,000 are stateless persons. Kenya does this in fulfillment of its international obligations as a consequence of ratifying several treaties and conventions providing for protection of refugees pursuant to Article 2(6) of the Constitution of Kenya, 2010. Relatively recent terrorist attacks, most of which can be attributed to asylum-seekers and refugees, have forced the Kenyan government to reconsider and reevaluate its position on the grant of refugee status and general treatment of refugees in the country. Despite there being a clear legal framework on treatment of refugees: The reaction of the Kenya, government has been seemingly drastic and quite harsh to the asylum seekers and refugees. That is, the requirement of movement of all refugees from cities to camps, refoulment decision and exerting stringent restrictions on asylum seekers and refugees when it comes to employment and naturalization. Kenya's defense for its reaction to the terrorist attacks and the ramifications it has had on asylum seekers and refugees, is that the measures instituted are a necessary evil, and that the end should justify the means. This paper attempts to answer the question of whether or not Kenya is justified in inhumanely treating asylum seekers and refugees in order to protect her citizens from the menace of terrorism, assesses the efficacy of the measures taken and offers possible solutions to the available lacunas.

Keywords: Asylum seeker, stinging refugee, encampment, nonrefoulement, voluntary repatriation, Good Samaritan.

Citation: Alice Bitutu Mongare. 2018. When the Victim Stings the Good Samaritan: Legal Implication on Refoulement of Refugees, a Kenyan Perspective. International Journal of Current Innovations in Advanced Research, 1(6): 67-83.

Introduction

It was Philip Halsman who remarked that "a bundle of belongings isn't the only thing a refugee brings to his new country"[2] the statement meant that duty bearers in refugee

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[2] Lenaola Isaac, acknowledgement in, The magistrates and judges Association Judicial officers hand book on refugee law, p. 5. C.F Philip Halsman once à refugee.

protection should ensure due process in dealing with refugees is followed.[3] Kenya hosts large numbers of asylum-seeking and refugee population, which at present is managed jointly by the country's Department of Refugee Affairs (DRA) and the United Nations High Commissioner for Refugees (UNHCR) under the 2006 Refugees Act and the 2009 Refugees Regulations. Kenya recognizes two classes of refugees: prima facie refugees and statutory refugees. All asylum seekers go through an initial registration, they are screened for their eligibility to seek asylum and to obtain accelerated processing, followed by an interview. [4]

Recent terrorist attacks are said to have prompted Kenya to introduce changes to its refugee policy.[5] One notable change was the introduction of an encampment policy requiring all asylum seekers and refugees in urban areas to relocate to designated camps. Although refugees have been allowed to engage in informal employment in the past, this appears to be getting increasingly difficult as the encampment policy constrains their ability to move about the country. In addition, work permits are rarely issued to refugees. Similarly, while refugees are technically free to apply for naturalization if they meet certain requirements, which on their face are not prohibitive, in practice Kenya does not naturalize refugees.

An asylum seeker is issued with a pass upon applying for refugee status, which is replaced by a refugee identification card after his application is granted. [6] All asylum seekers and refugees are required to live in their designated refugee camps and need a movement pass in order to travel anywhere outside the camp. For purposes of this paper *good Samaritan* is a biblical connotation which is used in this context to demonstrate how Kenya has been playing host to the refugees who instead of cooperating has been used as a conduit for terror attacks. Hence posing as a security threat to the host and economic burden, hence interpreted as per this paper, the refugees- the *victim* has been *stinging* the host.

General Background

Kenya hosts a large asylum-seeking and refugee population. This is due largely to the country's location in a conflict-prone area. [7] For example, neighboring countries like Somalia and South Sudan have experienced ongoing civil wars that have caused internal and external displacement of large segments of their population.[8] Additionally it is to curb the security effect, likely to spill over it has been a real burden. According to the United Nations High Commissioner for Refugees (UNHCR), there were a total of 625,250 refugees and asylum seekers in the country in 2014,[9] the figure increased to 650,610 in 2015. [10] The majority of these people close to 70% were Somali citizens, while persons from South Sudan made up

[3] ibid
[4] Protecting Refugees- Questions & Answers, UNHCR, September 2005
[5] Oscar John Gakuo Mwangi (2018)The Somalinisation of terrorism and counter terrorism in Kenya the case of refoulment, Critical studies<https//doi.org/10.1080/17539153.2018>accessed on the 10.10.2018
[6] Self Study Module 2: Refugee Status Determination. Identifying who is a refugee, UNHCR, 1 September 2005.
[7] Mongare A.B, Terrorism as a global peril a Kenyan tactic (2018) http://www.ijsstr.com/data/frontImages/1._August_2018.pdf accessed on 10/10/18.
[8] Stephanie Thomas, The refugee crisis you've never heard of – and why it's about to get worse< https://www.mercycorps.org/curridesworlds-5-biggest-refugeecrisis>accessed on 10/10/18.
[9] United Nations High Commissioner for Refugees (UNHCR), Global Appeal 2014–2015: Kenya 2 (Dec. 1, 2013), http://www.unhcr.org/528a0a244.html
[10] UNHCR, Global Appeal 2015 Update: Kenya 2 (Dec. 1, 2014), http://www.unhcr.org/5461e600b.html

around 20% of the asylum-seeking and refugee population.[11] The remainder included Ethiopians, Congolese, and around 20,000 stateless persons.[12] Refugees in Kenya primarily reside in the Dadaab refugee complex which is in Garissa County consisting of five camps: Dagahaley, Hagadere, Ifo, Ifo II, and Kambios and the Kakuma Refugee Camp located in Turkana County.[13] In addition, as of April 2014, there were reportedly over 50,000 urban refugees in Nairobi.[14]

Legal Framework Governing Refugee Status in Kenya

Kenya is signatory to a number of international treaties applicable to individuals seeking asylum and protection. For instance, it acceded to the 1951 United Nations Convention Relating to the Status of Refugees on May 16, 1966, and its 1967 Protocol in 1981. Kenya is also a state party to the 1969 African Union (AU) formerly known as the Organization of African Unity, OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, which it signed in September 1969 and ratified in June 1992. In addition, Kenya acceded to the 1984 Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment in February 1997.Of particular relevance to refugee issues is a provision in the Convention on nonrefoulement, which states that "No State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.[15]

However, in domestic legal regime, Kenya only recently put in place a national legal framework governing refugee matters and assumed partial responsibility for the refugee status determination (RSD) process. It did this when it took a step to implement its obligations under international law by enacting the Refugees Act in 2006, which took effect the following year, and its subsidiary legislation, the Refugees (Reception, Registration and Adjudication) Regulations, in 2009.[16] Among other things, the Act established the Department of Refugee Affairs (DRA), whose responsibilities include receiving and processing applications for refugee status.[17] Prior to that, refugee matters were governed under the now repealed Immigration Act and Alien Restriction Act, and RSDs and other matters relating to refugee management were delegated to the UNHCR.[18].

This practice continued long after 2006 which was a step towards localization of the international legal regime. It was only in 2014 that the DRA assumed some RSD functions,

[11] ibid
[12] UNHCR, Global Appeal, Loc.cit
[13] UNHCR & International Organization of Migration (IOM), Joint Return Intention Survey Report 2014 at 21(updated Feb. 25, 2015), http://data.unhcr.org/horn-of-africa/download.php?id=1535
[14] UNHCR Seeking Access to Detained Asylum-Seekers and Refugees in Nairobi, UNHCR (Apr. 7, 2014), http://www.unhcr.org/5342b35d9.html
[15] States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, UNHCR, http://www.unhcr.org/3b73b0d63.html
[16] Ratification Table: AU Convention Governing Specific Aspects of Refugee Problems in Africa, African Commission on Human and Peoples' Rights, http://www.achpr.org/instruments/refugee-convention/ratification/
[17] Ratification Table: AU Convention Governing Specific Aspects of Refugee Problems in Africa, African Commission on Human and Peoples' Rights, http://www.achpr.org/instruments/refugee-convention/ratification/
[18] Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85, available on the Office of the United Nations High Commissioner for Human Rights (OHCHR)

mainly endorsement of RSD determinations made by the UNHCR and issuance of notifications of recognition to refugees that meet the required criteria under the Refugees Act.[19] The UNHCR is currently in the process of transferring all RSD functions to the DRA, and this transfer was scheduled to be finalized by the beginning of 2016.

The legal Concept of a "Refugee" and an "Asylum Seeker": A definition

In the bid to comprehend the legal definition of the term refugee and asylum seeking, recourse is made to the pertinent provisions of the 1951 Convention on the status of Refugees. The general understanding of the term refugee however seems to refer to persons who flee from their countries to take refuge in another country due to fear of injury or aggression premised on their political status, religious opinions and other characteristics peculiar to them or people who have faced persecution due to the same reasons. On the other hand, an asylum seeker is a person who comes requesting for admission to a host State as a refugee.

The 1951 Refugee Convention on the other hand defines refugees as persons who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable 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.[20]

The definition under the convention seems to have considered the prerequisites of granting the status of refugees. The provision makes it clear that there are certain grounds upon which refugee status would be granted. Thus, fear of persecution, is the basis upon which a person can be considered a refugee. Under Article 1 A (2), the proviso provides to the effect that no person would be granted the status of refugees unless the reason as to why he left his home country falls within the reasons herein above contemplated. Additionally, host States due to security and domestication of the international regulations, come up with their own regulations concerning the manner in which admission of refugees would be done. Kenya, is no exception, it has its own regulations as shall be discussed later in this paper. It is trite law under the 1951 convention that a person seeking admission as a refugee must satisfy the provisions of the relevant national law of the host State. Such law should not however be repugnant to the pertinent provisions of the 1951 Refugee Convention herein.[21] The overriding phrases that should guide the host State in making a determination on whether to admit an asylum seeker as a refugee or not are: *"where his life or freedom would be threatened"* and *"well-founded fear of persecution"* If returning the refugee would cause the life of the asylum seeker to be threatened and if he suffers from a well-founded fear of persecution due to the recognized grounds, such person is eligible for the granting the status of refugee.

[19] Sara Pavanello et al., Hidden and Exposed: Urban Refugees in Nairobi, Kenya 15 (HPG Working Paper, Mar. 2010), available on the Overseas Development Institute (ODI) website, at http://www.odi.org/sites/odi.org.uk/ files/odi-assets/publications-opinion-files/5858.pdf

[20] Assembly, U.G., 1951. Convention relating to the Status of Refugees. *United Nations, Treaty Series, 189*, p.137. Article 1(2).

[21] Calistus Mboya, 2016. Legal Implications Of The Decision Of The Kenyan Government To Close Down Dadaab Refugee Camp. Retrieved from: http://musol.academia.edu/CalistusMboya

Disqualification, Cessation, Withdrawal, and Expulsion of refugees

Certain persons are disqualified from attaining refugee status, while persons who have been granted such status may lose it under certain circumstances, including: if the person has committed a crime against peace, a war crime, or a crime against humanity: a serious nonpolitical crime in or outside of Kenya: has committed acts contrary to the purposes of the United Nations or the African Union or holds dual citizenship and could seek protection in one of the countries of his citizenship, and therefore does not have a well-founded fear of persecution.[22]

A person who has been granted refugee status may lose that status through a voluntary or involuntary change in circumstances. For instance, if a person voluntarily re-avails himself of the protection of his nationality, voluntarily reacquires a lost citizenship or acquires a new citizenship, or voluntarily reestablishes himself in the country where he feared persecution, he would lose his refugee status. Additionally, as a result of changes to his circumstances independent of his own doing for example, where the circumstances that formed the basis for the granting of status have ceased to exist.[23] The DRA may withdraw the refugee status of any person if it has "reasonable grounds for believing" that the person has ceased to be a refugee or should not have been recognized as such in the first place. [24]These may include circumstances, where the person was ineligible for the status or the status was granted erroneously as a result of misrepresentation or concealment of facts that were material to the refugee status determination. In addition, the Act authorizes the DRA to withdraw the refugee status of any person if it has reasonable grounds to believe that the person is a danger to national security or to any community in the country.

The withdrawal of the refugee status of a person also results in the withdrawal of all derivative rights. [25] When a person is granted refugee status, members of his family including a spouse, dependent child, or sibling under the age of eighteen, or dependent parent, grandparent, grandchild living in the refugee's household are also accorded the same rights.[26] If the person loses his refugee status, his family members also lose their status. However, any family member who loses his derivative status is entitled to petition for protection independently. In addition to withdrawing a person's refugee status, the DRA may also expel any refugee or a member of his family if it deems it necessary on the grounds of national security or public order.

Right of Appeal against DRA's decision

In theory, asylum seekers and refugees have the right to appeal any decisions of the DRA.[27] The Act establishes an Appeal Board chaired by an experienced legal professional, including as its members persons with knowledge of or experience in matters relating to

[22] UN Development Group (UNDG) Guidance note on durable solutions for displaced persons(Refugees, Internally Displaced Persons and Returnees.)UNDG October 2004(IOM/080/2004-FOM/082/2004).
[23] Pavanello, loc. cit
[24] Refugee Consortium of Kenya, Asylum under Threat: Assessing the Protection of Somali Refugees in Dadaab Refugee Camps and Along the Migration Corridor 15 (June 2012), available on the Reliefweb website, at http://reliefweb.int/sites/reliefweb.int/files/resources/Asylum_Under_Threat.pdf
[25] Madeline Garlick et al., UNHCR Policy Development and Evaluation Service, Building on the Foundation: Formative Evaluation of the Refugee Status Determination (RSD) Transition Process in Kenya 49, 68 & 255, U.N. Doc. PDES/2015/01 (Apr. 2015), http://www.unhcr.org/5551f3c49.pdf
[26] ibid
[27] Garlick, Loc.cit

immigration, refugee law, and foreign affairs, and requires that the Board operate independently in the exercise of its functions. Under the Act, asylum seekers and refugees are entitled to appeal any unfavorable decision of the DRA to the Board. However, Kenya has yet to constitute this body. As a result, the DRA and the UNHCR are said to "refrain from issuing rejections to asylum claims until an appeal process is established which could hear appeals against such negative outcomes. This is said to cause delays in the refugee determination process (RSD) in violation of the Act, which requires the DRA to decide within ninety days of an application.

Nonrefoulement and Voluntary Return

The Refugees Act[28] prohibits refoulement, stating that "No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or to be subjected any similar measure" if doing so would result in the persecution of the person or endanger his life, physical integrity, or liberty.

Nonrefoulement as a legal principle is concerned with the obligation of host State never to send back asylum seekers to their home countries contrary to the provisions of the 1951 Refugee Convention and other enabling international statutes. McAdam, opines that the pertinent provisions of the 1951 Convention prohibit States from returning back asylum seekers to their countries of origin when it is apparent that doing so would expose them to the persecution which made them escape from the country, to begin with.[29] The principle is derived from the word "refouler" a French word meaning to expel.[30] From the world, repel, the term has been coined "non-refoulment" which therefore means no expulsion.

The proviso under Article 32 of the 1951 Refugee Convention establishes the principle of nonrefoulement. The proviso herein reads to the effect that state concur not to repel persons seeking refugee status on any grounds, save for national security. Article 33(1) puts an obligation on the State parties to the convention never to return refugees to their countries of origin if they would face persecution therefrom. While the proviso under Article 32 anchors the consensus among State parties that they would not repel refugees or asylum seekers, the proviso under the aforementioned Article 33(1) puts an obligation on State parties not to return refugees. The latter proviso is different from the former due to the fact that it imposes an obligation. While contemplating the aforementioned grounds upon which persecution may be visited upon the asylum seeker or the refugee, the pertinent proviso reads: '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 1951 Refugee Convention contemplates certain grounds upon which a state can expel a refugee or asylum seeker notwithstanding the provisions of Article 31 and 33(1), herein above aforementioned. The proviso under Article 32(1) indicates that a host State may choose not to admit a person as a refugee if it is ascertained that such a person is a threat to national security of the admitting State. In the same manner, Article 33(3) permits host State to deny refugee status and/or expel an asylum seeker if it has been ascertained that they have formerly been convicted of some serious offence in their host country, which by implication,

[28] Refugees Act sec 18.
[29] McAdam, Jane. "Complementary protection in international refugee law." *Order* 60 (2007): 48-00.
[30] Goodwin-Gill, Guy S. "The right to seek asylum: Interception at sea and the principle of non-refoulement." International Journal of Refugee Law 23, no. 3 (2011): 443-457.

would reasonable lead to an inference that they would prejudice peace and security in the host country.[31] As contemplated by Goodwin Gill, it is however proper to note that such a determination of the fact that the person seeking refugee status has been convicted of such a serious non-political offence or he is a fugitive has to be done by a competent impartial national body permitted to make such a determination under the domestic laws of the host State.[32]

At the regional level, protection of refugees and asylum seeker is further anchored under the proviso under Article 12 of the African Charter on Human and Peoples' Rights: The Banjul Charter. The aforementioned provision grants every Africa the right to free movement and residence anywhere in Africa, provided that such a person obeys the laws of the host State. This provision reads to the following effect: "Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law." To this extent, the regional stature makes it possible for any person seeking asylum in any African State to move into that country and settle therein provided that such person does not engage in acts and/or omissions in contravention to the laws of the land.

Notwithstanding the position that all Africans have the right to move and settle anywhere in Africa provided they are law abiding; the Banjul charter reiterates the provisions of Article 32(2) and 33(2) by granting a host State the power to restrict the right to free movement and settlement within Africa. The regional statute does this pursuant to Article 12(2) by denying permission to a person seeking admission for the said purposes on grounds of public health, national security and public order.

At the global level, the pertinent provisions of the 1948 *Universal Declaration of Human Rights* (UDHR) have been of fundamental use in a normative way when the question of refugee admission is brought forward.[33] Under Article 14 of the UDHR anchors the right to seek asylum.[34] The UDHR makes it a universal right for any person who, for a justifiable cause would like to enjoy asylum. Admission as a refugee, by virtue of this provision is a fundamental right since it is properly provided for under the UDHR which is the most recognized international human rights statute that has ever existed, notwithstanding the fact that it is non-binding.[35]

Notwithstanding the proper anchorage of the right, the UDHR contemplates non-admission of asylum seekers on the premise that they have been convicted of serious crimes in their home countries. This is materially the same as the pertinent provisions of the 1951 Refugee Convention and the Banjul Charter herein above discussed.[36]

[31] Trevisanut, Seline. "Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection, The." *Max Planck YBUNL* 12 (2008): 205.
[32] Goodwin-Gill, Guy S. "The right to seek asylum: Interception at sea and the principle of non-refoulement." International Journal of Refugee Law 23, no. 3 (2011): 443-457.
[33] Marx, Reinhard. "Non-refoulement, access to procedures, and responsibility for determining refugee claims." International Journal of Refugee Law 7, no. 3 (1995): 383-406.
[34] Universal Declaration of Human Rights, Article 14.
[35] McAdam, Jane. "Complementary protection in international refugee law." *Order* 60 (2007): 48-00.
[36] Heyns, Christof. "The African regional human rights system: the African Charter." *Penn St. L. Rev.* 108 (2003): 679.

Further protection is found under Article 3 of the *Convention against Torture and Other Cruel and Inhumane Treatments*. The proviso under this Article reads to the effect that states shall not expel refugees or asylum seekers to their counties of origin if it is apparent that doing so would expose them to torture in such countries. While the 1951 Convention concentrates on persecution, the Convention against torture concentrates on protection of asylum seekers from torture and other acts which can be considered as cruel and inhumane treatment.

Other statutes operating to protect the refugees and asylum seekers out of Africa include the American Convention on human Rights and the American Declaration on the Rights and Duties of Man. Article 27 of the latter statute provides for the right of an asylum seeker to be admitted save for the situation in which such an asylum seeker is considered unfit due to reasons associated with national security, morals, public order and public health. In the same statute, persons admitted into the country are not supposed to be expelled therefrom unless there is a legal provision putting in place such a position in a recognized manner.

The proviso under Article 22(6) of the Act excludes arbitrary expulsion of aliens from their host countries. Protection of refugees and the principle of non-refoulement are realized under Customary International law. Customary International law is all binding to States upon admission to the international community of States. It is unwritten set of rules and principles governing Sates and the conduct of parties to the international law community including but not limited to non-State actors.

As Hailbronner indicates, to prove customary international law, one would need to satisfy to legal parameters namely: ascertainment of generality of practice and ascertainment of *opinion juris.*[37] There must be the element of generality of practice accompanied with *opinio juris*, which is latin term that denote a sense of legal obligation.[38]

In the present case, protection of refugees and the principle of non-refoulement have received a wide acknowledgement and recognition, the principle has received proper establishment as a general practice. Kenya as an example has in place the Dadaab and Kakuma refugee camps specifically reserved for refugees while some refugees are still found in urban centers of Kenya. The fact that there are so many regional statutes protecting refugees which statutes have been adopted by state parties is also indicative of the fact that the element of generality of practice on protection and non-expulsion of refugees is concerned.

The element of *opinio juris* is satisfied by the fact that there is a wide sense of legal obligation to protect refugees. Most countries have made it possible for asylum seekers to be admitted unless they are formerly convicted criminals or fugitives on the run.[39] Perhaps this can be said to be a good enough reason which indicates that States feel a sense of legal obligation to protect refugees and not to repel asylum seekers. A proper inference can therefore be drawn therefrom that protection of refugees and admission of asylum seekers as refugees is not just a practice under statutory international law but also under customary

[37] Hailbronner, Kay. "Nonrefoulement and “Humanitarian” Refugees: Customary International Law or Wishful Legal Thinking?." In The New Asylum Seekers: Refugee Law in the 1980s, pp. 123-158. Springer, Dordrecht, 1988.
[38] Feller, Erika, Volker Türk, and Frances Nicholson, eds. Refugee protection in international law: UNHCR's global consultations on international protection. Cambridge University Press, 2003.
[39] Hathaway, James C. The rights of refugees under international law. Cambridge University Press, 2005.

international law. According to Jean Allan, nonrefoulement principle has since acquired the status of *jus cogens*.[40] Pursuant to the proviso under Article 53 and 64 of the Vienna Convention on the Law of Treaties, peremptory norms are norms accepted by the international community of States as such, upon which no derogation is permitted. Peremptory norms are *jus cogens*, they are laws ranking at the apex of the international law provisions, notwithstanding the fact that there is no mention of such laws under Article 38 of the UN Charter and ICJ Statute which provides for the legal framework under international law.[41]

In the present discussion, the High Court in the case of *Kituo cha Sheria & Others v Attorney General*,[42] reiterated the fact that nonrefoulement has attained the status of peremptory norms. The implication of the same is that no derogation is permitted against the application of the principle.

Kenya adopted international law provisions to which it is a signatory under Article 2(5) and the general principles of international law under Article 2(6). This means that the principle of nonrefoulement as a general principle under international law was essentially adopted. At the same time, the country in recognition of the nonrefoulement principle put in place an act of parliament to control and guide issues relating to the refugees.[43] The proviso under Section 18 of the Act gives a proper protection to refugees while reiterating the principle of nonrefoulement. The proviso reads:

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

The Encampment Policy adopted in Kenya in relation to the principle of non-refoulement

Following the incessant terror threats in the country and since the citizens security comes first, an encampment policy was issued by the government.[44] The government felt it was acting *good Samaritan*[45] role but the *victim* refugee abused this role by stinging the rescuer.

[40] Allain, Jean. "The jus cogens Nature of non-refoulement." *International Journal of Refugee Law* 13, no. 4 (2001): 533-558.
[41] Betts, A. (2010). Survival migration: A new protection framework. Global Governance: A Review of Multilateralism and International Organizations, 16(3), 361-382. See also Orakhelashvili, Alexander. Peremptory norms in international law. Oxford: Oxford University Press, 2006.
[42] Petition No. 19 of 2013 Consolidated with Petition No. 115 of 2013
[43] M. Fleming, 'UNHCR Position on the Directive by the Kenyan Government on the Relocation of Refugees from the Urban Centres to the Refugee Camps' (2013) *UNHCR*, press briefing, Palais des Nations, Geneva.
[44] Amnesty International, 'Somalis are Scapegoats in Kenya's Counter-terror Crackdown' (2014). Available at http://www.amnesty.org/download/Documents/4000/afr520032014en.pdf
[45] ibid

The policy was concerned with containing the refugees in Dadaab and Kakuma refugee camps which were crowded and insecure just like they have always been.[46]

At the same time, the government became displeased with continued registration and admission of asylum seekers notwithstanding the legal provisions to that effect. The implication of this decision apparently prejudiced the obligation of Kenya under the nonrefoulement principle. The government stopped registration of refugees while at the same time asylum seekers were not welcome to the country notwithstanding the obligations of the country under the 1951 Refugee Convention, the Banjul Charter and the provisions of the Refugee Act of 2006.

In complete disregard to the rights of refugees to human dignity, the government officers manhandled refugees while forcefully removing them from their residence.[47] This was done notwithstanding the time of the day and in complete disregard to what activity they were undertaking. There was a lot of force used against the unarmed refugees and complaints of violation of personal integrity of the refugees were also registered. Further, the government went ahead to stop the provision of aid to refugees by the non-governmental organizations which had been, for a long time assisting the people living in refugee camps with basic needs such as food. According to Immanuel Kant, human dignity is basic and inherent in a person;[48] this is the same position of the *Constitution of Kenya* under Article 28.[49] The importance of the right to human dignity was perhaps discussed better in *S v Makwanyane and Another*[50] where Chaskalson P equated the right to human dignity to the right to life.

The policy was implemented through refugee hunt and violation of fundamental rights of people who were found without Kenyan Identification cards. There were target areas such as places dominated by people of Somali origin within Nairobi. Places such as Eastleigh never had peace during the daily operations that violated the fundamental rights and freedoms of the people living in such places.

In the case of *Kituo cha Sheria & Others v Attorney General*, the encampment policy and the operations herein aforesaid were declared inconsistent with the constitution and a breach thereof. The court in making this determination was keen to indicate that the decision issued in 2012 December ushering in the encampment policy was against the principle of nonrefoulement, hence could not stand the test of time as it was not a permissible limitation of fundamental rights and freedoms as contemplated in the general limitation clause of the Constitution: Article 24. As a fundamental requirement, the general limitation clause contemplates that a law seeking to limit rights guaranteed in the constitution must be of general application. Further, the limitation cannot be permitted to derogate from the core or the essential content of the right. This means that since the encampment policy could not be worthy of recognition under the general limitation clause herein above aforementioned.

[46] Ronda Porter, 'The Maltreatment of Women and Children in Kenyan Refugee Camps' (2013) Masters Thesis, University of Kansas

[47] Human Rights Watch, 'End Abusive Round-Ups' (2014). Available at ,http://www.hrw.org/news/2014/05/12/kenya-end-abusive-round-ups

[48] John Victor Enslin, 'Kant on Human Dignity: A Conversation among Scholars' (2014) A Dissertation Submitted to Boston College, Graduate School of Arts and Sciences, Department of Philosophy in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy.

[49] Constitution of Kenya, 2010. Article 28. This is the provision on the fundamental right to human dignity.

[50] *S v Makwanyane and Another* [1995] ZACC 3 para 144

Further, the fact that it infringes on the rights of people in vulnerable situations and the responsibility of the State to ameliorate their situations was also brought in for recognition.

While the constitution of Kenya 2010 contemplates non-discrimination under Article 27, the encampment policy was very discriminative as it targeted a specific group in isolation. Under the said provision, the State is restrained from taking discriminative measures against any person or entity, save for taking affirmative action to help the historically marginalized persons and/or entities. The implication of the same is that any policy of the State or a decision of the government should not be discriminative or any persons on the grounds contemplated under the provision under Article 27. In the present case, the action takes targeted urban refugees and refuges of Somali descent or origin,[51] and places they live in.

Apart from infringing on the right of refugees to non-discrimination, the encampment policy was in contravention of the provision of Article 26 of the 1951 Refugee Convention which anchors the right of refugees to free movement. The right of refugees to free movement within the territory of the host State upon admission would be infringed by the decision of the government to compel all refugees to get back to Dadaab and Kakuma refugee camps, notwithstanding the fact that the camps were already full and congested.[52] At the same time, the decision would be an infringement on the right of the people to move freely and reside anywhere in Kenya. Article 39 provides for the right to free movement and residence within the boarder of the republic. With the implementation of the encampment policy, the right of the refugees to move freely within the country upon admission as such would be seriously violated and/or infringed.

The encampment policy is a fundamental breach of the principle of nonrefoulement. While the principle contemplates that no state shall expel refugees to their countries of origin where they have a well-founded fear of persecution on the basis of race, religion, sex, opinion among other factors, the decision by the Kenyan government ushering in the encampment policy required the return of Somali refugees to their home land when it was apparent that their county was still facing violent attacks and internal aggression. It was apparent that the refugees had reasonable grounds to fear persecution from the internal violence that visited the place and remained the order of the day in Somalia. In *the Kituo Cha Sheria* case, the pertinent parts the decision of the court read in the following manner:

'The proposed implementation of the Government Directive is that it is a threat to the rights of refugees. First, the policy is unreasonable and contrary to Article 47(1). Second, it violates the freedom of movement of refugees. Third, it exposes refugees to a level of vulnerability that is inconsistent with the States duty to take care of persons in vulnerable circumstances. Fourth, the right to dignity of refugees is violated. Fifth, the implementation of the Government Directive threatens to violate the fundamental principle of *non-refoulement*.'[53]

[51] UNHCR, 'Update on the Impact of the Government Directive and Security Operation Usalama Watch on Refugees and Asylum-seekers in Urban Areas of Kenya' (2014)
[52] Human Rights Watch, 'Kenya: Don't Force 55,000 Refugees into Camps' (2013).
[53] Ibid, para 75

Repatriation and the general plight of Refugees in Kenya

A program aimed at voluntarily repatriating Somali refugees has not had much success. [54] In 2013, Kenya, Somalia, and the UNHCR signed an agreement to repatriate Somali refugees in the country. One of the provisions of the agreement requires that the repatriation be voluntary, that is parties hereby reaffirm that the repatriation provided for in this Agreement of Somali refugees who have sought refuge in the Republic of Kenya shall take place in conformity with international law pertaining to voluntary repatriation. However, a 2014 survey found that only 2.9% of Somali refugees in the Dadaab complex had expressed interest in returning to Somalia within two years.

Recent developments indicate that the Kenyan government has sought (more than once) to forcibly repatriate Somali refugees and asylum seekers to Somalia in possible violation of the Act and its agreement with Somalia and the UNHCR.

Recent terrorist attacks seem to have prompted Kenya to make drastic changes to its policy on asylum seekers and refugees. One of the key changes came in the form of an announcement of an encampment policy. Until recently,[55] Kenya allowed refugees and asylum seekers to live in urban areas, a policy that received official endorsement when, in 2011, the government began registering refugees in urban centers Nairobi, Malindi, Mombasa, and Nakuru and issuing them refugee certificates. For instance, by 2012, there were an estimated 100,000 refugees living in Nairobi, over three times the officially registered refugees in the city in 2006. Following a series of terrorist attacks in urban locations, the DRA announced an encampment policy at the end of 2012, requiring all refugees and asylum seekers in cities to relocate to refugee camps with the plan to repatriate them to their home countries. This triggered a legal challenge before the Kenya High Court at Nairobi. In a ruling issued in July 2013, the Court held that the government announcement was, among other things, a violation of the constitutional right of movement and the principle of nonrefoulement enshrined in the Refugees Act.[56]

In March 2014,[57] the government again issued a directive ordering urban refugees to go to and remain in designated camps. Citing security and logistical challenges resulting from the presence of refugees and asylum seekers in urban areas, the directive provided that: All refugees residing outside of the designated refugee camps must return to the camps immediately; All Kenyans must report refugees and illegal immigrants they encounter outside of camps; and An additional five hundred law enforcement officers were going to be deployed mainly to Nairobi and Mombasa "to enhance security and surveillance.

While the 2010 Kenya Constitution ended the unitary system of government and decentralized power by establishing county governments with executive and legislative powers, it put the authority to deal with matters relating to refugee management exclusively in the hands of the national government. Although, as noted above the hosting of refugees is a government portion, following a devolved government in Kenya, counties host refugees, county governments have neither the authority nor the budget to directly participate in any aspect of the refugee management process. However, there are a number of ways in which

[54] Tripartite Agreement Between the Government of the Republic of Kenya, the Government of the Federal Republic of Somalia and the United Nations High Commissioner for Refugees Governing the Voluntary Repatriation of Somali Refugees in Kenya, 2013(Nov. 10, 2013),
[55] UNHCR & IOM, *supra* note 5, at 9.
[56] Kituo Cha Sheria & 8 Others v. Attorney General [2013] eKLR
[57] Refugees Act sec 11; Refugees Regulations sec 4

county governments have indirect involvement in refugee management chief among them is the question of allocation of community land for use as a refugee camp.[58]

A sustainable integration of refugees into a host country is said to have three interconnected aspects: legal according of rights to refugees, including the right of employment, property ownership, movement, permanent residency, and citizenship economic refugees becoming self-sufficient, and social the ability of refugees to live among the citizens of the host country.[59]

In theory, refugees in Kenya are free to engage in any form of self-employment without the need to obtain formal authorization and they may take paid employment after obtaining a work permit. The Act provides that "every refugee and member of his family in Kenya shall, in respect of wage-earning employment, be subject to the same restrictions as are imposed on persons who are not citizens of Kenya." [60] Refugees and their spouses may apply for and obtain a class M work permit. A holder of a class M work permit "may engage in any occupation, trade, business or profession. Although obtaining a two-year work permit previously cost refugees 70,000ksh this is no longer the case as Kenya has removed this fee and made permits available free of charge.

While refugees may theoretically work, the practice is reportedly much different. The Refugee Consortium of Kenya stated in 2012 that the government does not issue work permits to asylum seekers or refugees except in "a few isolated cases. As a result, refugees and asylum seekers are forced to seek employment in the informal sector. However, this is increasingly being made difficult by the country's encampment policy, which restricts the ability of refugees and asylum seekers to move about the country freely.[61]

A path to naturalization is apparently not available to refugees. The 2010 Kenyan Constitution provides that a person who has been lawfully resident in Kenya for a continuous period of at least seven years" and who meets other conditions prescribed in the relevant legislation may be naturalized. Kenyan law on citizenship provides additional conditions, including the ability to speak Kiswahili or a local language and the capacity to make a substantive contribution to Kenya's development. However, in practice, Kenya does not appear to grant citizenship to refugees.[62]

Conclusion

Kenya, is alive to all the legal provisions on protection of the refugees but it finds itself stuck between a hard rock and surface. That is, it owes Kenyans security due to the social contract between the government and the citizenry. On the other hand, based on the law on protection of the refugees their decision is divided. However, the basis of Kenya's position to repatriate refugees, is the believe that some refugees disguise as refugees only to be used as terrorists. Hence, Kenya, *the good Samaritan*, feels that the victim who due to status ought to be vulnerable is *stinging*. Besides, there needs to be exit programme for the refugees, to ease the congestion. Kenya has hence attempted to follow due process, in solving the quagmire at hand. Firstly, Kenya, Somalia and the UNHCR had signed an agreement in November 2013

[58] Refugees Act sec 11. C.f Gakuo, the Somalinisation of Counter Terrorism
[59] Refugee Consortium of Kenya, *supra* note 13, at 79.
[60] Garlick et al., *supra* note 14, Annex I
[61] Kenya Citizenship and Immigration Regulations, 2012, Seventh Sched., 11 Laws of Kenya, Cap. 172 (rev. ed. 2014),
[62] Kenya Citizenship and Immigration Act, 2011, § 41, 11 Laws of Kenya, Cap. 172 (rev. ed. 20

on the "voluntary repatriation of Somali refugees. It says that both countries and the UN would make sure that Somalis return voluntarily and safely and would get help to resettle back home. A few months later UNHCR said that "the security situation in many parts of Somalia is volatile and protracted conflict has had devastating consequences, including massive displacement, weakened community structures, gross human rights violations and the breakdown of law and order. But Kenya has repeatedly referred to this agreement as evidence that it is time for all Somalis to go home, stressing that the UN agency should help Kenya "expedite" refugee repatriation.

Somali refugees have a collective memory of previous repeated attempts by Kenyan security forces to coerce "voluntary" returns. In late 2012, Kenyan police in Nairobi unleashed appalling abuses in an effort to enforce an illegal directive to drive tens of thousands of urban Somali refugees into the Dadaab camps and from there back to Somalia. In April 2014, Kenyan security forces, primarily police, carried out a second round of abuses against Somalis in Nairobi and then deported 359 a month later without allowing them to challenge their removal.

In May 2016, Kenya announced that "hosting refugees has to come to an end", that Somali asylum seekers would no longer automatically get refugee status and that the Department of Refugee Affairs, responsible for registering and screening individual asylum applications, would be disbanded. So far, the Kenyan police in Dadaab appear to have been acting properly and the refugees allegedly, they had not been harassed or directly coerced. Since mid-2015 4,000 Somali refugees have either returned to Kenya after facing conflict and hunger back home or fled to Dadaab for the first time.

The answer to the counter accusations lies in International and Kenyan law that require the authorities to make sure that anyone seeking asylum in Kenya is fairly heard and screened, to rule out any terror suspicion, if found to require protection, gets it. As long as Kenya continues to shred its commitments, thousands of others will languish hungry and destitute in legal limbo and wake up every morning wondering whether they are about to be deported back to the dangers that many have repeatedly fled and still fear. There is also need for the international community to come up collaborate with Kenya to restore confidence.

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