

**STATES' RESPONSE TO REFUGEE CRISIS: THE CASE OF SOMALI
REFUGEES IN KENYA**

**BY
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UNITED STATES INTERNATIONAL UNIVERSITY-AFRICA

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BY

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**A Thesis Submitted to the School of Humanities and Social Sciences in Partial
Fulfillment of the Requirement for the Master of Arts Degree in International Relations**

UNITED STATES INTERNATIONAL UNIVERSITY-AFRICA

SUMMER, 2016

STUDENT'S DECLARATION

I, the undersigned, declare that this is my original work and has not been submitted to any other college, institution or university other than the United States International University in Nairobi for academic credit.

Signed: _____

Date: _____

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This thesis has been presented for examination with my approval as the appointed supervisor.

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ABSTRACT

The refugee movements around the world currently are contributing to the global refugee crisis. With increasing wars and conflicts in most states as well as effects of climate change, displacements of people are witnessed and neighbouring countries have to face the burden of accommodating the large numbers of asylum seekers and migrants moving into their territories. With these movements, states continue to face external threats to their security. States have the obligation to allow asylum seekers into their territories in line with international obligations. However, state security also should be put at the forefront. As states take in asylum seekers, they have to ensure their national interests are protected as well as their citizens. For any state, the protection of the homeland comes at the core of national interests to be pursued. It is evident that terrorist elements take advantage of the asylum space to get into asylum territories hence posing a threat to the national security of the asylum state. With these increasing threats from terrorist elements, states are forced to take stringent measures when allowing asylum seekers and migrants into their territories. Some states have responded to these threats by closing their borders while others have toughened their refugee policies. Kenya has not been left out in the trend of responding to the refugee crisis in the country. It has in the recent past adopted some measures that have put it in the spotlight for infringing on the rights of refugees and going against its international law obligations.

With the growing influx of Somali refugees in the country and being host to the largest refugee camp in the world, Kenya heavily feels the burden that is associated with hosting them for a prolonged time. Kenya feels that the influx has an effect on its national interests and especially security in the country and this has caused the government to react in various ways that has put it on the spotlight as regards its international obligations and the agreements it has signed and is bound with. The Government of Kenya has been accused of breaching the human rights of the refugees through its various responses such as the encampment policy, *Usalama Watch*, *Operation Linda Nchi*, forced repatriations, police operations and harassments on the urban refugees, also some of the policies it has implemented such as the Security (Amendment) Act and also the reaction on the closure of Dadaab camp following a terrorist attack on Garissa University. The Kenyan Government has cited protection of its citizens in the pursuit of its national interests as the basis for its actions and responses.

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Special thanks to my supervisor Dr. Richard Bosire for his constant support, guidance and patience during the course of this research. I would also like to convey my thanks and appreciation to my colleagues Kanyi Mwangi, Ibrahim Abdi and Samuel Kotonya for their insightful contributions to this study. Further, working at the Department of Refugee Affairs and in particular in the Dadaab Refugee camp enabled me to perfectly relate with the research topic hence a clear understanding of the asylum space in Kenya.

DEDICATION

I dedicate this work to the citizens of Kenya as they try to cope with the rising insecurity in the country. I also dedicate it to all policy-makers and the Government of Kenya as they strive to strike a balance between refugee protection and state protection.

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LIST OF ACRONYMS

DRA:	Department of Refugee Affairs
DRC:	Democratic Republic of Congo
ICRC:	International Committee of the Red Cross
IGAD:	Intergovernmental Authority on Development
NFD:	Northern Frontier District
NEP:	North Eastern Province
NGO:	Non-Governmental Organizations
NPM:	National Political Movement
NPPPP:	Northern Province People's Progressive Party
NFDP:	Northern Frontier Democratic Party
RUF:	Tutsi-led Patriotic Front
RSD:	Refugee Status Determination
SNIF:	Sudan's National Islamic Front
PNL:	People's National League
UNHCR:	United Nations High Commission for Refugees
UDHR:	Universal Declaration of Human Rights
ICCPR:	International Convention on Civil and Political Rights
ICESCR:	International Convention on Economic, Social and Cultural Rights
OAU:	Organization of African Unity
RCK:	Refugee Consortium of Kenya
HRW:	Human Rights Watch
KNCHR:	Kenya National Commission on Human Rights

UNGA: United Nations General Assembly

UNSC: United Nations Security Council

DEFINITION OF TERMS

Asylum

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

Illegal Migrant

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

The Alien Restriction Act

This is An Act of Parliament to enable restrictions to be imposed on aliens, and to make such provisions as are necessary or expedient to carry such restrictions into effect. This Act may be cited as the Aliens Restriction Act.

Encampment Policy

A policy by government through which refugees who have gone through the status determination procedures, they are obliged to reside in a camp while awaiting a durable solution.

Somalia

The Republic of Somalia originated from the union of the Italian Somaliland and the British Somaliland on the First of July 1960

Somali

A person belonging to the Somali ethnic group that can be found in Somalia, Djibouti, Ethiopian Somali 5th Federal State and the Northeastern province of Kenya

Warrior Refugees

These are refugee communities, who cross the border to carry out subversive activities in their countries of origin.

CHAPTER ONE

INTRODUCTION

1.0 Background of the Study

Most nations are facing threats to their peace, security and sovereignty due to population migration. The global refugee crisis poses one of these threats. The conflicts in the Horn of Africa has resulted to mass migrations and thus contributing to the refugee crisis in the region. A great number of individuals have been uprooted while others have been forced to cross borders to seek asylum in neighboring countries (Bariagaber, 2006). According to the 1951 Convention Relating to the Status of Refugees under Article 1 (2), refugees are defined as individuals who,

...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such 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. (1951 Convention relating to the Status of Refugees, page 14)

The Kenyan Refugee Act of 2006 adopts the Convention's definition but adds 'sex' to the grounds of persecution. Haddad (2008) attributes the refugee problem to the breakdown of state-citizen relationship and the failure of the theory and practice of international states system and the concept of sovereignty to coincide. She explains this by saying that the discrepancy created by the gap between positive sovereignty of an individual state and negative sovereignty of the international society in which the state is located causes a failure both domestically and internationally thus leading to the creation of refugees (Haddad, 2008).

Kenya's geostrategic location in the Horn of Africa region has contributed to it attracting a large flow of migrants and a host to the largest Somali refugee population of more than a half million. Over the years, this Somali refugee influx in Kenya has significantly influenced both countries' foreign relations. Adar (1994) underscores the importance of the principle of territorial integrity in the Kenya-Somali relations. This principle upholds the claim that each state has fixed and safe boundaries that are not subject to any external violation (Adar, 1994). This is founded in the UN Charter in Article 2 (4), which makes a reference to the prohibition of the use of force. This principle is further enunciated in The Declaration of Principles of International Law, which is reflective of the customary international law. The Declaration prohibits states from undertaking any action that is aimed at either partial or total disruption of the national unity and territorial integrity of any other state or country (Vidmar, 2012).

The Kenyan Foreign Policy documents enunciate a number of objectives to be pursued by the country and they include: protection of Kenya's sovereignty and territorial integrity, promote sub-regional and regional integration and co-operation, enhance regional and global peace and security, advance Kenya's economic interests, foster international co-operation and multilateralism and project Kenya's image and prestige (GoK, 2014). Utete (1995) (cited in Musambayi, 1995) asserts that a state pursues and safeguards its national interests and objectives based on the internal social structure of a country and the political power configuration within it (Musambayi, 1995).

It is worth noting that foreign policy complements domestic policy since it is formulated to cater for and to take into account the needs of particular key entities on whose support a

regime depends on in order to retain power. Hermann (1995) (cited in Musambayi, 1995) points out that how a state behaves in its backyard is driven by the pursuit of goals or problem-oriented programs, designed by decision-makers and directed towards external entities (Musambayi, 1995). The study hence shall focus on the responses of the Kenyan Government to the refugee influx and specifically to the Somali refugees in the name of its pursuit of national interests.

1.2 Statement of the Problem

National interest has been a concept invoked by most leaders globally in their relations with other states and subsequently their actions or reactions to these states. Countries like the United States have categorized national interest into various tiers that are vital interests, critical interests, and serious interests and under the vital interests, protection of the homeland is considered key (Wittkopf, Jones & Kegley, 2008). In this age of globalization that has been marked with mixed and forced migration, we see large populations moving into other territories, and this being viewed as a threat by the host state. Kenya since the 1990s has continued to receive a huge influx of Somali refugees who are perceived to be a threat to Kenya's national security. Moreover, this has prompted Kenya's response to the Somali refugees which has raised questions locally and internationally. This response including formulation of some of its policies is against its international law obligations hence the question that arises is whether Kenya should give priority to her national interests and, in particular, national security interests or should it also abide by its international obligations? Further, Kenya has continued to have a shift in its security policies based on its core national interest being national security and this has been greatly influenced by the influx of refugees

and mainly Somali refugees and the insecurity in the country. This study seeks to analyze Kenya's response to the refugee influx and insecurity in the face of its national interests and international legal obligations relating to the protection of refugees and other migrants.

1.3 Research Questions

The study will be premised on the following research questions:

1. What national interests are threatened by the influx of Somali refugees in Kenya?
2. How has Kenya responded to the refugee influx problem and how has this influenced its behavior towards Somalia?
3. Does Kenya's response to the Somali refugee influx conflict with its international obligations as regards refugee protection?

1.4 Objectives of the Study

The overall aim of this study is to analyze Kenya's response to the Somali refugee influx based on its national interests and international obligations. The specific objectives include:

1. To analyze the threats that the Somali refugee influx poses on Kenya's national interests
2. To examine Kenya's response to the Somali refugee influx and its behavior towards Somalia
3. To establish whether Kenya's response towards Somali refugees is in tandem with its international obligations for the protection of refugees

1.5 Justification of the Study

This study will be justified in two ways:

i. Epistemological justification

A myriad of literature on refugees and asylum has focused more on the refugees themselves rather than the effects of refugee movements on the host state and communities. Little consideration has been made on the factors influencing states asylum policies. The process of asylum policy making at both national and international level has not received much focus hence there is need for attention to be focused on ‘national interest, domestic and foreign policy constraints, and ideological concerns of states which must be taken into account together with legal and humanitarian principles in order to understand both the reasons for and the response of states to refugee crises’ (Loesher, 1989:5). This study will thus contribute to the debate on the perception of Somali Refugees as a security threat to Kenya. It will thus help to give solutions to the existing problem in the country where the leaders and the citizens continue to perceive the Somali refugees as threats to Kenya’s national interests.

- ii. This study also aims to make a great contribution to academic research and for policy makers involved in asylum policy making and decision making. It also facilitates future research on the same topic considering it is an evolving area in Kenya currently.

1.6 Hypothesis

This study is premised on the assumptions:

1. The influx of Somali refugees is a threat to Kenya’s national interests

2. Kenya's response to the Somali refugee influx has influenced its behavior to Somalia
3. Kenya's response to the Somali refugee influx conflicts with its international obligations as regards refugee protection

1.7 Literature Review

The literature review presents an insight into the literature discussed on refugees and the theoretical perspectives pursued in explaining and exploring the same. The research that informed this study include journals, books, essays, handbooks, reports; public information from NGO's that focus on refugees and government materials that focus on the aspect of national interest. The benefit of this is to enable the researcher and other readers to have a solid basis of existing knowledge on certain aspects of refugees. The literature also highlights areas where there exists a 'knowledge gap' and which this study shall aim to fulfill.

1.7.1 Refugee Movements

The African refugee crisis has been there for long, and its magnitude is overwhelming. As such, the literature on the refugee crisis is not lacking. Veney (2007) argues that academic literature depicts the refugee crisis as a consequence of a failed state where the leaders or the governments are corrupt, propagators of human rights abuses, and that they foresee the crippling of their countries' economies hence leading to civilians fleeing to neighbouring countries (Veney, 2007).

According to Betts and Loescher (2011), refugees form an integral part of international politics and the international system since they always have to turn to the international

community for protection once they find themselves in a situation where their government is either unwilling or unable to protect their fundamental human rights or safety in their countries. The Peace of Westphalia of 1648 acknowledged refugees as people who had lost the protection of their state and recognized the importance of offering asylum to the world's refugees (Betts and Loescher, 2011).

On the other hand, Haddad (2008) stipulates that in the international system, refugees symbolize the failure of the state system to maintain international order and justice by upholding the state-citizen-territory relationship. Furthermore, the refugee domain is a highly politicized and internationalized area that affects the entire international states system and not just individual countries and hence the high interdependence between domestic and international politics. In dealing with the refugee issue, she posits the importance of international solidarity since it is beyond the capacity of a single government to deal with it effectively; because how one government deals with it has a high likelihood of affecting future relations between states (Haddad, 2008).

The refugee movements in Africa can be traced to the 1960s and 1970s period that marked the post-independence period of most African states (Veney, 2007). The refugees during this period were as a result of wars of national liberation in minority and colonial governed states. Milner (2009) underscores that during this period; most African states were generous in granting the refugees and the liberation movements' refuge in their countries as a gesture of African solidarity and as a means of highlighting the deficiencies of the colonial regimes. This period also had refugees who were a result of 'explosive internal, social and

political situations, that existed long before the colonial era but which came to a climax after independence was reached' (Milner, 2009:20). The great Lakes region and the Horn of Africa experienced significant refugee movements as a result of crises in countries such as Zaire, Rwanda, Burundi, Sudan, Ethiopia and Uganda, hence creating a lot of challenges for the countries in the regions (Ibid, 2009:20).

The next period in the refugee movement was in the late 1970s and 1980s that were marked by two contradictory trends. Milner (2009) points out the first pattern as the period of solutions that saw the repatriation of most refugees back to their countries of origin. However, much international assistance focused on the repatriation forces disregarding the conflicts in other countries that resulted again in a rise of other refugees and UNHCR notes that by 1980 there were over 2 Million refugees in Africa (UNHCR, 2000a:310).

Loescher (2001) argues that the globalization of the cold war resulted in new refugee movements in the Horn of Africa and Southern Africa. Milner (2009) underscores that the Western powers were more responsive to the refugee crisis in other parts of the world such as Latin America and were not willing anymore to support the large-scale resettlement and local integration programs in Africa. Further, repatriation efforts were frustrated, and many refugee populations were left in limbo after the disengagement of the superpowers from Africa by the end of the 1980s (UNHCR, 2000a, 136–43). It is during this period that most countries started viewing the refugees as a burden hence they were no longer accommodated in settlements but now in refugee camps so as to segregate refugees and to limit their impact on the local community. Loescher (2001:226) explains this through the behaviour of African

states that were ‘concerned about the security risks of hosting refugees from neighboring countries and about the enormous strains on local economic, political and physical resources.

Milner (2009) and Veney (2007) note that the 1990s period was characterized by an unprecedented influx of refugees in most African states and especially the horn of Africa and the Great Lakes Region.

1.7.2 International Protection of Refugees

Haddad (2008) acknowledges that a refugee is the unintended and inevitable consequence of the international states system and in moral terms, international protection should be the overriding concern. Haddad (2008) further recognizes that in the international system characterized by dichotomies and grey areas between the internal and the external, there is a clash witnessed between pluralism and solidarity, communitarianism and cosmopolitanism, sovereign rights and human rights, all because of the refugee.

Mogire (2011) points out that in the 1980s refugee studies dominated the humanitarian paradigm where the primary concern was the protection of refugees and the role of UNHCR in protecting those rights; while the host state was always considered secondary to refugee protection. He argues that this was justified on the basis of the plight of desperate people, the vast numbers involved and the difficulties in finding solutions (Mogire, 2011). However, in the late 1980s, this perception saw a drift from scholars such as Loescher and Manahan who pointed out the need to consider refugee problems as an integral part of international politics

since they pose humanitarian challenges marginal to the central issues of peace and war (Loescher & Manahan, 1989:2).

Kneebone (2009) argues that despite the rights of refugees being defined in international law, their implementation in national legal systems is subject to states discretion. She further argues that this option results in the refugees being denied the rights due to them in the international refugee law regime by the adoption of restrictive measures aimed at deterring or deflecting asylum seekers (Ibid, 2009). She points out some of these measures as denying asylum seekers access to the territory to claim asylum and denying access to refugee status determination procedures.

Loescher (1992) further argues that the paradigm shift from victims to threats resulted in new approaches. The first approach was the foreign policy/strategic approach involves a change from the refugee as an individual victim to the state policies and responses. This approach, Loescher notes that it tried to answer the questions: Why do states accept some refugees while they reject others? Under what conditions do refugees threaten peace? In what ways do foreign policy concerns shape refugee policies? How do refugees affect and how are they affected by domestic politics? (Loescher, 1992).

The second approach is the security/stability paradigm where refugees are connoted as security issues and hence focuses on the impact the refugees have on safety and stability (Ibid, 1992). It further analyzes refugee flows as an important regional and geostrategic dynamic with potentially crucial effects upon national, regional and international security.

Mogire (2011) contends that in many instances refugee influxes are considered as invasions and their activities equated to war and as such, states argue that this threat has to be countered and combated. Ogata (1997;4) notes that humanitarian crises such as refugee problems are increasingly becoming strategic crises that invariably affect critical state interests. However, they are infrequently dealt with as such.

Loescher (1992) acknowledges that the refugees and security link arises due to the various threats and dangers faced and the refugees presentation as existential threats to individual, societal and national security. UNHCR (2006:5) acknowledges the rise in the securitization of asylum seekers and the perception of them being causes of insecurity rather than victims of the 11 September 2001 terrorist attacks.

According to Loescher, Betts and Milner (2008), States created UNHCR not only for altruistic reasons but also to promote regional and international stability. States by building UNHCR aimed at having a regime to support the functions that best serve their interests such as sharing the costs of granting asylum and coordinating policies regarding the treatment of refugees. They acknowledge that UNHCR has the primary mandate of ensuring protection of refugees, however, with the pressure of representing states' interests and being dependent on state funding and on the other hand having to persuade countries to fulfill their humanitarian obligations towards refugees, is a significant challenge. They argue that this problem is further attributed to by the fact that governments' reactions to refugees have often been hostile. Due to security concerns and the burden of hosting refugees, states in both the global North and South have increasingly become concerned about the movements of people within

and across national borders and the mass arrival and prolonged presence of refugees within their borders (Loescher, Betts & Milner, 2008).

UNHCR (2012) recognizes that in the context where few states host the majority of the world's refugees due majorly to their geographical proximity to conflict-affected areas, there is need for global solidarity in pursuance of fair distribution of costs and burdens to global challenges (UNHCR, 2012). However, due to the recognition of refugees as a spill-over of conflict at both a regional and global scale, as a burden on local and national economies, and contributors of increased pressures on social cohesion and national identity; UNHCR faces the fundamental challenge of persuading states to meet their obligations towards refugees despite their reluctance to provide asylum or to share the burden of refugee protection in other ways.

1.7.3 Host State Behaviour

Loescher (1992:42) notes that refugees are potential threats to the relations between the sending and receiving states and at worst may lead to international war between them. According to Mogire (2011), the interstate conflict arising from the refugee problem takes different forms such as severance of diplomatic relations or military confrontations which may range from mobilization of forces to deployment of forces on the border, to cross-border attacks and even to war.

Mogire (2011) further notes that the threats refugees pose on host-state security can be viewed in the context of the impact they have on conflict within those states. He assesses this

in three main ways: first, a spill-over of ethnic conflict from the refugees' home state to the host state, refugees can become part of the domestic conflicts of host states by for instance engaging host governments and/or populations in violent confrontation, by engaging in ethno-national conflicts with other refugees and by participating in violent demonstrations or riots and finally by intensifying previously existing inter-communal tensions by shifting the balance of power between communities and by sparking discontent by local populations towards the refugees and the government.

According to Salehyan and Gleditsch (2006), the importation of arms, combatants and ideologies by refugee influxes from neighboring states can indirectly cause conflict and facilitate the spread of the same rather than by fighting openly with the host government. Mogire (2011) argues that these refugee' linked conflicts result in the breakdown of law and order within and in the vicinity of the refugee camps; for causing deaths and injuries to refugees, host populations and humanitarian workers and also underpin the misallocation of government resources.

The refugee crisis has led states into adopting various contingent policies with the aim of managing the problem because of the tremendous effects it has in the host countries. Most of the developed countries in the North such as the United States, Germany, and Australia, view the refugee influx as a national security threat (Bariagaber, 2006). This has led some of these countries to respond in various ways such as some have adopted policies that restrict immigration and at the same time they maintain strong pressure to bring about speedy repatriation of those already in their territories (Milner, 2009). For instance, the United States

and the European countries have adopted measures to enforce strict border controls. Germany, on the other hand, has taken steps to encourage the Eritrean nationals in their territory to return to their country by giving them financial assistance to enable them to start a new life (Bariagaber, 2006).

Bariagaber (2006) agrees with Teitelbaum (1984) that the countries in the developed north such as the United States have always treated the refugees and immigrants as national security threats despite their insistence on viewing the refugee problem as humanitarian and hence basing their refugee policy on humanitarianism. Loescher (2001:114) argues that ‘new African governments also seen refugees as a national security threat because of the severe interstate tensions they caused.’ For instance, during the 1960s and early 1970s, Sudan believed insurgent groups stemmed from the refugee populations in neighboring countries. The Sudanese military in response to this threat entered border areas in Uganda and Ethiopia, seizing refugees, and returning them to Sudan hence resulting in a significant strain on relations between Sudan and its neighbors (Milner, 2009).

Bariagaber (2006) furthermore points out that there has always been a connection between states’ foreign policies and the refugee and immigration issue and this relationship has now become increasingly important due to the transformation in its magnitude and nature and also because of the series of visible international events. Looking at an analysis of the policies adopted by states as regards the refugee issues, it is clear that during the 1960s and 1970s, often referred to as the golden age period; most African states adopted the open-door policy where their response to refugees was more liberal and accommodative since they admitted all

who were in search of safety and security (Milner, 2009). Further, looking at Kenya and Tanzania, Veney (2007) points out that in the 1990s there was a shift from free refugee settlement to forced encampment, restrictions on the granting of citizenship, asylum was no longer conferred on individual basis and forced repatriation took prominence over local integration or resettlement to third countries.

Bohmer and Shuman (2008) argue that the 11 September 2001 bomb attacks in the United States significantly contributed to the significant increase in the importance of the nexus between foreign policy and refugees and immigration. There has also been evidence in Europe of a severed relationship between humanitarian groups and politicians as a result of these policies since the humanitarian groups feel that the politicians have lowered existing protection standards for asylum seekers to protect Europe from being overrun by unwelcome outsiders (UNHCR 2004a, 7). There has also been evidence of increased repatriation and deportation. In 1984, the Netherlands had planned to deport 26,000 asylum seekers in the belief that they posed a threat to Dutch culture (UNHCR 2004b, 18).

Milner (2009) points out that some countries in Africa tend to adopt ambivalent and often opportunistic refugee policies and in some instances they welcome the refugees just because they view them as lucrative sources of much needed foreign aid. Furthermore, the refugee numbers are manipulated to attract more aid from governmental and nongovernmental agencies, extract political capital internationally and discredit refugee origin countries with which they do not agree. For instance, this was evidenced by the Somali government in the 1970s when it faced the influx of Ethiopian refugees (Bariagaber, 2006).

Furthermore, Bariagaber (2006) points out how some states use refugees to advance their national security interests. He highlights that to gain added leverage in their dealings with neighboring countries; these states arm refugees and help fuel instability in the home countries. For instance, in the Eritrea Sudan situation, Eritrea viewed the Eritrean opponents in the Sudan refugee camps and who received the Sudan's National Islamic Front (SNIF) backing to be an instrument behind the refusal by some refugees to return to their homeland hence causing political sabotage (Bariagaber, 2006).

Other states explicitly send troops to support the opposition in other countries. For instance, during the Democratic Republic of Congo (DRC) crisis, following the actions of Uganda and Rwanda in sending troops, DRC reiterated by accommodating the Rwandan ethnic Hutu refugees who massively fled from the state. After Rwanda had come under the control of the Tutsi-led Patriotic Front (RUF), the Rwandan ethnic Hutu refugees came back from across the border to carry out subversive activities inside Rwanda. In essence, the Hutu refugees exemplified what had always been referred to as 'warrior refugees' (Zolberg et al. 1989:125). It is worth noting that most developing states have adopted restrictive policies to restrict entry into their territories and also discourage assimilation with the host population as has been the case with Djibouti (Bariagaber, 2006; Veney, 2007 and Milner, 2008). Some of these policies discourage peaceful repatriation of refugees by creating artificial road blocks, for instance as it was experienced with the difficulty in repatriating Eritrean refugees from Sudan. Often, the refugee origin country adopts destructive behavior by covertly or overtly encouraging political dissent in the host country, and at times they may above-board allure

opposition movements to use its territory as an object for destructive activities in the host country. Mostly, such behavior is adopted by such states as a way of pursuing their national interests' objectives (Bariagaber, 2006). Loescher (2001) argues that this trend is caused by economic, environmental, social and security costs of hosting mass influxes of refugees since these numbers of refugees have the effect of threatening government authority especially in developing countries.

It is evident that in the refugee host state and refugee origin country relationship, refugees are not only pawns, but they also affect the nature of the interstate and intrastate relationship (Veney, 2007). Such relationships at the end tend to be conflictual and detrimental to the general interests of the nations involved. Bariagaber (2006) notes that, despite the conflicts that give rise to refugees and immigrants coming to an end, the refugee problem unceasingly continue to haunt various actors involved.

Veney (2007) underscores that the dramatic increase in refugee populations in the 1990s compelled Kenya to devise new refugee policies, hence adopting national legislation and practices that were more restrictive and ruthless. Veney (2007) notes that this was occurring at a time when most governments were becoming less generous and preferred containment model as a way of managing refugees. This raised complex political issues for the Kenyan government in its dealings with the refugees themselves, the international humanitarian community, and the own local communities among whom the refugees were settled. Questions of territoriality, sovereignty, and citizenship were brought into focus, and this was demonstrated by the location of refugee camps, regulation of refugee mobility, and

marginalization of groups sharing ethnic affinities with the refugee populations. For instance, the ethnic Somalis who bore Kenyan citizenship began to be viewed and treated as refugees and illegal immigrants and as such, to proof legal residence in the country; they were forced by the government to carry color-coded identity cards (Veney, 2007). Further, despite having proper documentation, many ethnic Somali Kenyans were apprehended in round-ups and sweeps in a bid to rid the country of refugees and illegal immigrants (USCR 1991, 44).

According to Milner (2009), he points out that most African host states have justified the adoption of the restrictive asylum policies on the basis of scale and enduring nature of the problem, the prolonged stay of many refugee populations like the case of Somali refugees in Kenya, the lack of refugee burden-sharing from the international donor community and finally security concerns to the host country. These states argue that the refugee population results in the competition for the scarce resources which limits the states' capacity to provide for its citizens (Ibid, 2009). Further, the mass arrival and prolonged presence of refugees has placed a strain on the environment, economy and public services in refugee-populated areas and the host states have continued to carry the burden for so long. Thus, with the declining support from the donor countries to fund assistance programs across Africa, the host states feel justified in geographically isolating refugee populations until a solution is found (Ibid, 2009).

In the 21st Century, refugees are continuously being viewed as a symbol of system overload unlike before where they were seen as victims of persecution and individuals who need security. It is clear that most countries have elicited various responses to this refugee influx

as some cite national interests as their reason. Kenya has not been left behind in this trend and this is evidenced by most of the policy actions it has been taking in pursuit of its national interests and the protection of its citizens (Aronson, 2011).

Despite Kenya being a signatory to numerous international laws, treaties and instruments in this context particularly the 1951 Refugee Convention, the 1967 Protocol and the 1969 OAU Refugee Convention, it has created numerous informal and unwritten policies to afford no extra rights or luxuries to refugees (Aronson, 2011). Kenya is therefore caught in a dilemma; should the Government give priority to protecting its national security interests or should it continually abide by its international obligations. Dowd (2008) posits that in pursuance of their national interests while at the same time observing its international law obligations, states are forced to balance their policies in a way that migrants still have faith that they have safe sanctuary within the country wherein they are seeking asylum; at the same time the Government needs to keep a close eye to ensure smooth but secure passage at the entry and exit points. However, most states have a challenge in maintaining this balance and in choosing between local law and international law; most states opt to protect their borders adequately by enforcing their domestic legislation in a way to limit migration, as opposed to imposing their human rights obligations (Dowd, 2008).

1.8 Summary and Gaps to be filled by the Study

Based on the literature analysis above, it takes cognizance of the fact that much focus is placed on the protection of the refugees. Little or no mention has been made to the security of the states facing the heaviest burdens of refugees in their territories despite this being an

issue of primary concern. Further, notwithstanding the principle of international solidarity and burden-sharing being provided for, the actors involved are not compliant thus leaving the burden to the host country. It is clear that refugee protection is an international obligation under international law and international refugee law, however, the question that arises is whether a host state facing the heaviest burden and threat of hosting the refugees entitled to compromise its national interests for the sake of abiding by its international obligations? Kenya's responses to the Somali refugee influx have been more vocal following various terrorist attacks in the country. It is thus unclear whether the responses are based on protection of national interests or not considering how recent the situation is.

1.9 Theoretical Framework

This study shall be premised on two major theories. When dealing with the issue of national interest as a justification for state actions, the study shall adopt the Realism school of thought. As regards refugee protection and the institutions in place to safeguard the rights of refugees and the international obligations of a state, the study shall adopt liberalism theory.

1.9.1 Realism Theory

Waltz (1979) argues about how features of the overall state's system affect their interactions in the international arena. Realists consider the world anarchic in nature hence classical realists, according to Wohlforth (as cited in Smith, Hadfield and Dunne, 2012) argue that anarchy is the principal underlying cause of war since it renders the security of states problematic and potentially conflictual (Smith, Hadfield & Dunne, 2012). Cox and Stokes (2012) argue that principal actors in the international system are sovereign states who regard

themselves as the highest authority and have control over its domestic affairs according to how it deems fit. Dougherty and Pfaltzgraff (2001) subscribe to the realist assumption of the nation state as a rational actor pursuing its national interests within an anarchical system, and an international system of self-help in which the primary concern is security otherwise defined as survival (Cox & Stokes, 2012).

The realist school of thought is based on three assumptions: statism, survival, and self-help. Statism recognizes states as the major players in the international system and they view other players such as the United Nations on a secondary basis as to whether or not they are useful for the national interest and to which extent. The state being the central actor in the international system aims at ensuring its survival and that of its citizens. In achieving this, the state elevates the defense of the national interest as primary and takes precedence over the national interest of other countries. Since this tends to be the pursuit of all states, international politics tends thus to be characterized by distrust and competition hence self-help becomes a critical tool for survival. Thus according to the realists, they will call upon international cooperation and international law only when it serves to advance their national interests.

It is evident that political realities constrain the commitments that states accept moreover, this has also been exhibited by the powerful states' behavior in that their interests set the terms of cooperation. Hence international rules and institutions have little if any, independent effect on state behavior. In essence thus, reaching out to others for realists is a self-interested act driven by the primacy of national interest (Coicaud and Wheeler, 2008).

Kenya's responses could be perceived as the state acting in its defense of national security as 'self-help' and hence the policies it adopts are meant to ensure its survival and hence the protection of its national interest.

According to realists, the promotion of national interests is the iron law of necessity for states. Machiavelli (1532:108) in trying to respond to the question of how leaders are supposed to act in a world animated by dark forces, states that if the security of a community is under threat, then all obligations and treaties with other countries must be disregarded. Waltz (1979), argues that states principal interest is security and hence to ensure their survival they seek the requisite amount of power. Hence, survival is viewed as a precondition for attaining all other goals whether through conquest or merely independence (Baylis, Smith and Owens, 2011).

1.9.2 English Theory

The English school proponents such as Bull (1977) consider the modern international system as an international society comprising of individual states. They posit that the international society is a society where states have established common rules, values and institutions, such as mutual recognition of sovereignty, and international law for their inter-state relations through dialogue and consent and they recognize their shared interests in maintaining these arrangements (Bull & Watson, 1984).

The English school posits that actors can tell between right and wrong and hence the state acts as a moral international agent in its pursuit of survival as an independent political entity,

hence justifying humanitarian intervention and use of force, though they caution against this being viewed as a cloak for power politics (Burchill *et.al*, 2005). However, they do not deny that national interests and power politics play a significant role in the international society (Ibid, 2005). They agree with the realists on one hand where they see the foreign policies of state leaders addressing the concern of the state and its citizens (Haddad, 2008). They consider that the morality of states is based on the responsibility of the *raison d'etat* or the national interest, the *raison de systeme* or the international system interest and the *raison de justice* or the global justice interest (Knudsen, 2002). Basically, priority is given to the pursuit of national interests by states, however, there is always a dilemma when states try to combine these concerns and hard choices have to be made (Ibid, 2002). Placing Kenya into context, there is a dilemma when the question of precedence between international law and municipal law arises and its moral obligation when formulating asylum policies.

The English school helps in analyzing state behavior through its actions and interaction and gives a basis for prediction of future state behavior. This is based on a shared understanding of the international society of what is reasonable, rational, just and legitimate (Viotti & Kauppi, 2012). According to Haddad (2008), this school recognizes other independent actors such as individuals. Hence, it helps in bringing out dilemmas most states face in balancing between providing the humanitarian needs of a refugee and the pursuit of the sovereign interests of the state (Haddad, 2008).

Based on a critic of the English school, Haddad argues that it is important to highlight the shift in statist conceptions of the refugee so as to understand how sovereignty and continually

changing state interests alter the concept of the refugee. She points out that this school fails to mention the role of the changing international norms on both state benefits and refugee protection (Haddad, 2008).

1.9.3 Liberalism Theory

According to liberals, their primary focus and interest are in explaining the possibilities of international cooperation or collaboration (Burchill *et.al* 2005). Viotti and Kauppi (2012) highlight four key assumptions of the liberal school of thought. First, both states and non-state actors such as International Organizations, Non-governmental Organizations, transnational organizations and human rights and environmental rights groups are important in world politics. Liberals, however, face the challenge of determining or explaining how, to what extent and under what circumstances the diverse actors affect world politics (Viotti & Kaupi, 2012; Hobson, 2000).

Second, liberals believe that state behavior is influenced by the economic or another form of interdependence or interconnectedness among state and non-state actors. Third they believe that the agenda for international politics is broad and entails economic, social and environmental issues besides military-security issues. Fourth in explaining state behavior, liberals take an inside-out approach to examining how factors at the state-society and individual level of analysis affect international relations and outcomes (Hobson, 2000; Burchill *et.al*, 2005; Viotti & Kauppi, 2012). Finally, in trying to establish under what circumstances international collaboration may be achieved, the focus is placed on the role international organizations play. Neoliberal institutionalists point out that the purpose of

monitoring and adjudicating of claims arising from decisions of states may be done by the staff of international organizations. Further, these organizations may have the agenda-setting power that influences how states define their interests (Viotti & Kauppi, 2012).

According to Burchill *et.al* (2005), regimes and international cooperation formalizes the expectations of each party to an agreement where there is a shared interest hence constraining state behavior. Further, they enhance trust, stability and continuity in an anarchical world by assuming the role of monitoring compliance, encouraging co-operative habits and sanctioning defectors (Ibid, 2005). As regards human rights, liberals develop and promote moral standards that require universal consent hence limiting the state's pursuit of its national interests.

An analysis of this takes cognizance of the fact that Kenya is a signatory to international treaties and conventions hence in its dealings; it has to abide by international law and institutions in place.

1.10 Research Methodology

This study will take a qualitative and descriptive approach and it will predominantly premise on review and critical analysis of literature and state practice to help in analyzing the foreign policy behavior of Kenya towards Somalia and particularly taking into consideration the influx of Somali refugees in Kenya and how the same is influencing Kenya's pursuit of its national interests.

This research shall focus majorly on secondary sources of data which include published books, printed and online journals, field research reports such as the UNHCR and other NGOs reports especially those dealing with refugee issues, policy documents such as the Kenya Foreign Policy Document, UNHCR policy documents, Conventions and treaties to mention but a few, and reports from state and non-state actors, such as international organizations, intergovernmental organizations and experts in the field among others. Unpublished Thesis and projects shall also be used which shall guide the research in identifying gaps and also providing valuable insights.

Ethical research standards shall be followed to avoid plagiarism and to ensure validity and reliability of the research content.

1.11 Organization of the Thesis

Chapter one will provide the general introduction to the study. It will give a brief background to the study, the statement of the problem, the objectives and research questions, brief literature review, the theoretical framework and the research methodology.

Chapter two will give an analysis of the general concept of national interests and Kenya's national interests highlighting the principal national interests that seem to be threatened by the Somali refugee influx. Chapter three will analyze the refugee protection regime. It will give an analysis of the international instruments under the international refugee regime giving an interpretation of the various provisions providing for the protection of the refugees. It will also analyze some of the provisions that Kenya is violating through its different

responses to the Somali refugee influx. Chapter four will examine Kenya's response towards the Somali refugees and analyze whether it is line with its international obligations and whether the response is justified on the basis of Kenya's pursuit of its national interests. It will also examine the nexus between refugee security and state security. Chapter five will cover the conclusion, findings and recommendations of the study.

CHAPTER TWO

KENYA'S NATIONAL INTERESTS IN THE FACE OF THE SOMALI REFUGEE INFLUX

2.0 Introduction

The idea of national interest has been invoked by various states to justify their actions in the international arena. Sovereign states have an obligation to protect their citizens whenever there is a threat. This chapter shall analyze the concept of national interest; identify Kenya's national interests in relation to hosting the largest refugee camp in the world. This chapter shall rely on the Realist theory which considers the nation state as a rational actor pursuing its national interests within an anarchical system, and an international system of self-help in which the primary concern is security otherwise defined as survival.

2.1 The Concept of National Interest

Due to its role in explaining state actions, the notion of national interest has long been central to theories of international politics (Weldes, 1996). Coicaud and Wheeler (2008) describe 'national interest' as the self-interest of states based on how they envision their defense and how they project their power beyond their borders. Weldes (1999) defines the national interest as a political process characterized by actors arguing and struggling over which norms, ideas, and beliefs should be included in this concept. Hammerstad (2014) argues that ideas and beliefs matter more at specific policy level since they are the ones that direct the decisions on particular policies to be put in place once national interests have been defined. Hence, in as much as interests are the driving force behind actions, ideas will govern the

direction in which the actor will adopt those interests. Described in Max Weber's famous analogy:

Not ideas, but the material and ideal interests, directly govern men's conduct. Yet very frequently the 'world images' that have been created by 'ideas' have, like switchmen, determined the tracks along which action has been pushed by the dynamic of interests (Weber, 1948: 280).

Most states thus have categorized national interests into those interests that are core or vital to a state for instance security and, on the other hand, those that relate to the promotion of more secondary interests. Coicaud and Wheeler (2008) argue that the pursuit of national interests is very closely linked to the geographical location where acts unfold and which constitute potential fault lines that have to be carefully watched. However, it should be noted that deterritorialization of politics such as the identification of human rights imperatives and their influence on individual and collective interests and values as well as its influence on policies at the national and international level has balanced the geographical anchoring of national interests (Coicaud and Wheeler, 2008).

For instance, looking at the situation in Kenya, the conflicts in the Horn of Africa and Great Lakes region have significantly influenced its pursuit of national interests. Kenya continues to receive refugees from the two regions, the majority being from Somalia and South Sudan. As regards Somalia, Kenya has been a host to refugees from 1991 following the fall of Siad Barre and due to their influx and continued stay in the country for close to twenty-four years, Kenya feels that its national interests such as sovereignty, security, economy, culture and the environment have been threatened.

Morgenthau (cited in Dougherty and Pfaltzgraff, 2001) is of the opinion that what entails international politics is a process and that diplomacy or war are the basis in which national interests are accommodated or resolved. Furthermore, he asserts that: The Concept of the national interest presupposes neither a naturally harmonious peaceful world nor the inevitability of war as a consequence of the pursuit by all nations of their national interests. Quite to the contrary, it assumes continuous conflict and threat of war to be minimized through the continuous adjustment of conflicting interest by diplomatic action (Dougherty and Pfaltzgraff, 2001:76).

Morgenthau (cited in Dougherty and Pfaltzgraff, 2001) goes further to assert how national interest is identified with national survival since all nations in an effort to prevent encroachments by other countries are compelled to protect their physical, political and cultural identity. He argues that in the world where sovereign nations compete for power, survival becomes the core national interest; hence nations will always pursue lesser interests once the national interest most related to national survival has been safeguarded (Dougherty and Pfaltzgraff, 2001). Kenya sent its forces to Somalia in a bid to protect and defend the country from the Somali-based al-Shabab group. Further, with the spill-over of the Somali conflict over the border to the North-Eastern part of the country and the thin line differentiating Somali-Kenyans and Somalis from Somali, it was imperative for Kenya to take action so as to ensure its national survival and defend its territorial integrity.

When we look at the subject of national interests and the pursuit of the same, it is hard to ignore the question of ethics and morality. Many people question the actions of some states

especially in their foreign relations with other states as to whether they are morally acceptable in the international system. Brown (cited in Smith and Light, 2001) argues that some policy makers, especially those informed mostly by realism disregarded normative theory as the basis of informing government policy and instead propagate that national interests should always be the foundation of foreign policy (Smith & Light, 2001). It can be argued that when a state formulates its policies, national survival is at the core hence the moral side of their actions does not come to the forefront. Kenya's asylum policies and its responses to the Somali refugee influx, which is greatly informed by the security policy, have been perceived by many especially from Human rights organisations to be against moral standards and to infringe on the rights of refugees who are also human beings. However, the government has argued that protection of its citizens and its sovereignty comes to the core and as such, it has to take any necessary action to ensure the same is upheld (Standard Newspaper, 27th April 2015).

Morgenthau (cited in Dougherty and Pfaltzgraff, 2001) argues that universal moral principles cannot be applied in their abstract when considering states' actions. However, they must be filtered through the concrete situations of time and place. Hence, it is imperative to distinguish between state morality and individual morality so as to avoid national disaster because the leaders' primary responsibility is to ensure the survival of the nation-state. Taking this into consideration, the leaders' obligations to their citizenry needs a different judgment mode from that of an individual.

The decision makers determine a state's national interests in the country and for most states, state sovereignty, territorial integrity, security and economic interests encompass the major values of national interest (Morgenthau, 1967). Taking this into consideration, Snyder, Bruck and Sapin (cited in Dougherty and Pfaltzgraff, 2001) define the state as its official decision makers-those whose authoritative acts are, to all intents and purposes, the actions of the state. Okoth (cited in Korwa and Nicasius, 2011) argues that the very essence of leadership is the enhancement and insurance of the state's survival, and this forms the basis of a security policy. He posits that this security should be perceived in more state-centric terms and emphasis should be on external threats (Korwa and Check, 2011). Azar and Moon (1990) agree with this position by referring to it as the physical protection of the state from external threats. One can thus argue that how Kenya has been behaving in its regional background as regards the Somali refugees is in pursuit of its national interests such as state sovereignty, territorial integrity and security of its citizens and the nation as a whole.

Okoth (cited in Korwa and Check, 2011) further argues that the extent to which a state is not in danger of sacrificing its core values determines how secure it is. Hence in this pursuit, a state develops a security policy that presupposes danger that is external and internal to the state. He also claims that the quest for security by a country can also encompass its desire and ambition to retain and create wealth and development for its citizens (Korwa & Check, 2011). With increase in terrorist attacks in the country and in the wake of the terrorist attacks on the Westgate Mall in Nairobi and the Garissa University attack in Garissa County, Kenya proposed some amendments to its security policy. The intention of the lawmakers was to ensure the safety of its citizens is guaranteed. Kenya was willing to sacrifice its stance in the

international arena to protect itself from the external threats perceived to have an internal component presumed to be in the refugee camps.

Brown (cited in Smith and Light, 2001), argues that the primary duty of policy makers is to pursue the interests of their citizens but taking into consideration a state's responsibility towards other countries and through other states, the whole humanity. These functions, which give governments an obligation to take a wider enlightened view of their self-interests, include non-interference in the affairs of other states, obedience to international law and particularly the principle of *pacta sunt servanda*, international cooperation with others and arguably humanitarian intervention to stop gross violations of human dignity. Despite his view, he recognizes the possibility of a clash between the government duties towards its citizens and those owed to the world; however, he is of the opinion that the same can be resolved by direct political argument on the issues (Smith & Light, 2001). As shall be discussed in the coming chapters, Kenya finds itself in this dilemma of fulfilling its duties to the citizens and on the other hand its obligations to the international community as regards protecting the refugees in its territory.

According to Okoth (cited in Korwa and Check, 2011), foreign policy determines the behavior of a state in its regional backyard and it must consider the pursuit of the state's objectives and how it intends to realize these goals. Therefore Modelski's functionalist perception of foreign policy asserts that foreign policy is the process through which the state tries to balance its options by minimizing adverse effects and maximizing on the advantageous ones (Korwa & Check, 2011). Frankel (1968) takes a sociological perspective

by defining foreign policy as ‘a combination of aims and interests pursued and defended by a state and its ruling class and its relations with other countries, and the methods and means used by it for the achievement and defence of these purposes and interests’ (Frankel, 1968). Fierke (2001) (cited in Smith and Light, 2001) argues that for ethical foreign policy, there is need for checks and balances on government actions since the government can only act upon justifying its policies. Fierke (2001) agrees with Cochran that for foreign policy to be ethical, the government should be willing and ready to engage in dialogue with those most affected by it (Smith & Light, 2001). In this regard, the international community and civil society within the state can take up the role of providing checks and balances for government action. In Kenya, UNHCR and other human rights groups such as Amnesty International, Human Rights Watch, and Refugee Consortium of Kenya among others have been very vocal in criticizing government action towards the Somali refugees.

In pointing out the importance of diplomacy, Morgenthau (cited in Dougherty and Pfaltzgraff, 2001) affirms four conditions that diplomacy must meet. It must be divested of its crusading spirit; foreign policy objectives must be defined in terms of national interests and must be supported with adequate power, nations must view foreign policy from the point of view of other nations and finally states must be willing to compromise on issues that are not vital to them (Dougherty and Pfaltzgraff, 2001:80).

2.2 Kenya’s National Interests

Kenya’s foreign policy agenda is driven by the need to pursue ‘a peaceful, prosperous and globally competitive Kenya’ while aiming at ‘projecting, promoting and protecting Kenya’s

interests and image globally through innovative diplomacy'. The purpose of this is to contribute towards a just, peaceful and equitable world (Government of Kenya, 2014:5). Kenya pursues its foreign policy with an objective of promoting, projecting and protecting its national interests abroad. Kenya's foreign policy objectives highlights Kenya's national interest objectives as: 'protection of Kenya's sovereignty and territorial integrity; promoting integration; enhancing regional peace and security; advancing the economic prosperity of Kenya and her people; projecting Kenya's image and prestige; promoting multilateralism; promoting the interests of Kenyan Diaspora and partnership with the Kenyans abroad' (Government of Kenya, 2014).

It has been argued that refugees pose a threat to a state's national interests. Kenya has not been left out in this. Despite being a host to refugees from various neighboring countries, it has been argued especially by the political leaders that Somali refugees are the ones who pose much threat to the country's national interests. Various scholars such as Kirui and Mwaruvie (2014), Milner (2009) and Veney (2007) acknowledge that Somali refugees pose various threats to Kenya as regards security, economy, environment pressure, culture, its sovereignty and territorial integrity and also the proliferation of small arms and light weapons. Having thus highlighted the various national interests, this paper shall delve into discussing the two primary national interests that are perceived to be under threat from the influx of Somali refugees and of which have elicited various responses from the Government of Kenya.

2.1.1 State Sovereignty and Territorial Integrity

The question of Somali refugees in Kenya and Kenya's pursuit of its national interests as regards territorial integrity can be traced back to the pre-independence years following the pursuit of a greater Somali by Somalia (Korwa, 1994). Kenya faced underlying threats by secessionist movements in the former North Frontier District (NFD) who felt that on the basis of their race, they should have a separate state or integrate into the greater Somali (Pan-Somalism) so as they can reunite with their Somali counterparts (Ringquist, 2011). The Northern Frontier District (NFD) covers a quarter of Kenya's territory, and it is inhabited by Somali-Speaking nationals with close ties to Somalia.

The secessionist movement was composed of four political parties: the National Political Movement (NPM) based in Nairobi, the Northern Province Peoples Progressive Party (NPPPP), the Northern Frontier Democratic Party (NFDP) located in Garissa and the People's National League (PNL). The NPPPP was the largest and the most active and gained much of its support for the campaign for self-determination from Mogadishu. Their aim was to ensure session of the NFD before Kenya gained its independence (Zartman, 1985; Okoth, 2010).

It is worth noting that the Somalis in the NFD were unevenly distributed throughout the area hence their self-determination would result in their right to acquire the entire territory in the NFD, of which Kenya wasn't ready to let go being part of its territory (Korwa, 1994). Countries in the region, with an exception of Somalia signed the OAU Charter which sets out an obligation upon states to respect and maintain the national borders drawn by the colonial

powers (Art. 3, OAU Charter, 1963). Instead, the 1960 Somali Constitution went ahead to grant all Somalis residing outside citizenship and equal rights as those who live in Somalia (Pérouse de Montclos, 2001:298).

Prior to independence in 1963, the NFD was a point of contention and the Commission of inquiry set up to find out the outcome of the session debate from the Somali nationals established that most of the people in the NFD preferred secession and reunification to Somalia (Lewis, 1963:158; Orwa, 1989: 232). However, secession was not granted and the NFD now formally North Eastern Province (NEP) was created within Kenya upon independence. This resulted in violence within the region where rebels attacked outposts of the newly- independent Kenyan government leading the Kenyan government to declare a state of emergency in the area which lasted until 1991 during Moi's regime (Milner, 2009). The state of emergency prohibited movement in and out of the region, strict prohibitions on the pastoral communities in the area and allowed for detention without charge.

Upon Kenya gaining its independence in 1963, its sovereignty was guaranteed and any claim by Somalia of its territory became an apparent threat to its territorial integrity and interference in its internal affairs (Okumu, 1970; Makinda, 1983). This position was further influenced by the Shifta activities in the NFD where the Somali nationals waged a guerrilla campaign for secession allegedly supported and supplied by the Somali government in Mogadishu (Milner, 2009). In a bid to preserve Kenya's territorial integrity and to prevent an invasion from Somalia, President Jomo Kenyatta 'spent US\$70 million in unplanned for

military expenditure between 1964 and 1967 in a war of attrition with the shiftas' (Orwa, 1989: 232).

According to Korwa (1994) and Okoth (2010), the NFD dispute was twofold in that it propagated a threat to Kenya's territorial integrity and also a threat to internal security through the *shifita* movement that received support and materials from Somalia. President Jomo Kenyatta acknowledged that many Kenyans were losing their lives in the fight of a greater Somalia and that the support from Somalia of the *Shifita* movement had the effect of severing Kenya-Somalia relations (Kenya, 1963; Touval, 1972). Kenya, however, managed to contain and defeat the *shifitas* by 1967 which resulted in Kenya and Somalia signing a non-aggression and cooperation agreement in October 1967 at Arusha, Tanzania (Milner, 2009).

Despite the agreement being in place, the Somali expansion continued being an important foreign policy and national interest issue for Kenya especially after the coming into power of Siad Barre who continued with the push for a greater Somali. The Somali population in the formally NEP and the Somalis from Somali were collectively viewed as a threat to Kenya's national security hence draconian measures were employed against them and a huge presence of police and army was mounted in the region. Africa Watch (1991) notes that after the securitization of Kenyan politics which led to more security activities in NEP, around 5000 men were in 1984 arrested on suspicion of being *shifitas*. The Moi regime was keen on doing away totally with any *shifita* elements in the region. It is reported that the arrested men were taken to a local airstrip where they were stripped naked and were asked to lie on the hot tarmac and were beaten and tortured. Those who refused to lie on the hot tarmac were shot

dead while others were denied food and water for several days (Africa Watch, 1991). All Somalis continued to be repressed by the Kenyan government on the basis of national security, and this extended even to the 1990s with the arrival of refugees from Somalia (Milner, 2009).

Upon the fall of the Siad Barre regime in 1991, Kenya, which is largely dependent on aid was at the time facing an economic crisis due to the cutting of assistance by the donors due to its state of democratization and abuse of human rights (Orwa, 1989:226). To woe the donors and the international community, Kenya opened its border and welcomed all the refugees from Somalia, who were seeking asylum. This led the donors to support Kenya due to the pressure of granting asylum to a large number of refugees (Hyndman and Nylund, 1998, 24). As a result of the quantity of refugees granted asylum and the security concerns arising from the influx, the refugees were contained in the formally NEP. Pérous de Montclos (2001:297) argues that this was because it was perceived to be easy to carry a potential threat in the region due to its geographical location and also due to its economic and political relegation.

Having laid the background of Kenya's claim on territorial integrity as regards the Somali population in Kenya, it is imperative to create an understanding of the principle. The principle of state sovereignty and territorial integrity, which is one of the national interests pursued by a state, can be traced back to the Treaty of Westphalia in 1648, where states were identified as sovereign entities in the international system other than individuals as had earlier been asserted by scholars such as Thomas Hobbes and Jean Bodin (Krasner, 1999). Further, Article 2(4) of the UN Charter recognizes this principle by prohibiting states from

the threat or use of force against the territorial integrity or political independence of another state.

Morgenthau (1967) defines sovereignty in legal terms as the presence of centralized power that exercises its lawmaking and law-enforcing authority within a particular territory. He was concerned with whether sovereignty was challenged by international law that placed legal constraints on sovereign states. However, he dismisses this assertion by recognizing that national sovereignty is the very source of international laws decentralization, weakness, and ineffectiveness (Morgenthau, 1967).

Waltz (1979) on the other hand, relates sovereignty with the ability of a state to make decisions on how to cope with its internal and external problems, based on the concept of anarchy. Bodin (1955) recognizes sovereignty as a matter of law and not stature and defines it as an authority that is derived from a state's constitution, and it exists in its right. Gzoyan and Banduryan (2014) underscore that a states' territory is the primary determinant factor of security and wealth of the state, and the protection of land is the impetus of the state's foreign policy.

Stephens (2013) asserts that sovereignty has been used by various countries as a tool of politics and selfish interests to advance beliefs and assertions. It is argued that sovereignty of states tends to be limited by treaties and international obligations as well as the notion of international law being binding to states. He goes ahead to argue that sovereignty by day is becoming ineffective as states power is being diffused into non-state actors. Latham (2000)

on the other hand posits that sovereignty has gotten to an age where it stands as either a question or a defensive assertion.

This principle, however is tending to wane away in the 21st century due to a myriad of factors such as globalization, internationalization, the rise of human rights, regional trading and economic blocs, multinational corporations, new political ties in the international system and cultural resurgence among others (Baker, 2000). Haddad (2008) argues that:

the ‘refugee problem is a consequence of nationalism and sovereignty since the moment the nation concept was attached to the state concept, importance was attached to the borders and hence those who were forced to cross borders due to circumstances such as the break of state-citizen relationship had no more protection from their country and consequently were trapped in the figure of the refugee’ (Haddad, 2008:15).

She asserts that when an individual is forced out of the domestic political community and is pushed across borders he/she falls into the gaps between sovereign states. She thus affirms that refugees are consequences of the international system that again fails to take responsibility for them (Haddad, 2008). She further claims that the sovereign right of each state to decide who may enter their territory and hence receive their protection denies the refugees a right to international protection which relies on individual states. Since refugees are viewed as outsiders, they become a threat to state sovereignty and thus sovereign rights and human rights clash (Haddad, 2008). Veney (2007:65) agrees with Haddad (2008) and posits that ‘even in poor countries the state is more than able to exercise sovereignty by deciding who to let in, who to keep out, how to treat those who are let in, and who to kick out when they are no longer wanted’ (Veney, 2007:65).

Kenya's relations with Somalia have been based on the principle of territorial integrity since its independence in 1963. This was greatly influenced by external actors who provided economic and military aid to Somalia; of which Kenya perceived to be the basis of the conflict in the formally NEP (Korwa, 1994). This principle projects Kenya's right to fixed and safe boundaries free from any external violation such as the Somali expansion and the conflicts in the formally NEP.

It has been clear from the discussion about Kenya's perception of all Somalis and, unfortunately, Somali refugees have been dragged into this quagmire. This has posed a significant challenge to Kenya when it comes to adopting the option of local integration of Somali refugees with the local population since the threat of a greater Somali has not faded away despite the continuing conflict in Somalia. It can be argued that local integration may strengthen the force of the Somalis in the formally NEP, and once Somalia gets back to being peaceful, there is a likelihood of worse secessionist movements in the formally NEP. Further, the country has witnessed many attacks in various parts of the formally NEP where alleged non-locals are targeted. It can be argued that such attacks are likely aimed at removing all non-locals to make the region remain with only Somali nationals and with the refugees also being in the region, there is the danger of further threats to Kenya's sovereignty and territorial integrity. Kirui and Mwaruvie assert that due to the fear of renewed insecurity in NEP, the Kenyan government has continued to view Somalis and especially refugees with suspicion.

2.1.2 Security

In the field of forced migration, security has been an issue for most countries, both in the global North and South. Migration is increasingly being considered as a contemporary security threat with grave implications for socio-political and economic stability (Themistocleous, 2013). Mogire (2011), argues that refugees are increasingly considered significant issues in international politics, national politics and security and this can partly be attributed to the large numbers involved and the experiences of hosting refugees taking into consideration their military and political activities.

It is imperative to define precisely the term security threats in the African context since what amounts to a threat differs with time and place. Unlike Buzan (1983) who views security as a contested subject, Baldwin (1997:10) points out that it's ambiguous rather than an essentially contested issue and in dealing with flexible conceptualization of national security, he raises three questions: Security for whom?; Security from what?; And how? (Baldwin 1997:13-16). Buzan *et.al* (1998:21) argues that it is important to be keen while conceptualizing security since its invocation has been perceived as a justification of the use of force and states have used this window to mobilize or take special powers which includes using whatever necessary means to handle existential threats.

For a long time, refugees had been viewed on a humanitarian basis. Loescher (1992, 5) however, argues that 'it is no longer sufficient to discuss the subject of refugees within a narrow national context or as a strictly humanitarian problem requiring humanitarian solutions.' Refugee problems are in fact intensely political since mass migrations create

domestic instability, generate interstate tension and threaten international security. Loescher (1992) and Mogire (2006) acknowledge that refugees are viewed as threats to national, regional and international peace and security and as such, this has led to most states adopting strict measures and policies towards asylum seekers, refugees and migrants in general.

Hammerstad (2014) acknowledges that with the widening of the security concept, refugees and forced migrants are continually depicted as threats to identity and cultural homogeneity, the state welfare, political cohesion, and, particularly after 9/11, as potential terrorist threats. In highlighting the categories under which refugees or migrants may be perceived as security threats to the host country, country of origin and to the host and country of origin relationship, Weiner (1993) points out four categories.

First, when tensions arise between the host state and sending state due to the migrants engaging in opposing the regime in their countries. Second, migrants can become a security or political concern for the host state when directly or indirectly they engage in either armed campaigns against the host state or when they participate in criminal activities involving foreign elements. Third, besides social and economic pressure threats, migrants are also perceived as threats to the culture of the host state. Finally, migrants can be threats when used by the host state as instruments against the country of origin (Weiner, 1993, 19–21).

UNHCR (1998a:71) recognizes the intractable nature of the refugee problem and acknowledges the burden it places on weak states. Most African states argue that they can no longer afford to keep their borders open or to allow the refugees to remain for long periods in

their countries. These states argue that the refugees pose threats to the economic and environmental sectors and that they also engage in illegal activities such as organized crimes like drug trafficking, human trafficking and illegal gun running (UNHCR, 1998a:71).

Milner (2009:62), points out categories of security concerns as ‘direct security concerns which include the presence of armed elements within the refugee population, proliferation of small arms and weapons and spill over of violence within the host country; and indirect security concerns which include increased crime and insecurity within the refugee-populated area, grievances against refugees by the local population, and changes in the domestic political opportunity structure arising from the arrival and prolonged presence of refugees’ (Milner, 2009).

Securitization, as argued by Themistocleous (2013) is a process by which a verbal reference is made to a particular actor altering the normal or political issue hence creating new potential security threats. Basically, this entails the moving of a matter from the typical political realm to the exception field so as to justify legitimate and/or non-legitimate action by avoiding the bureaucratic rules that generally apply (Themistocleous, 2013). In most cases, as Mogire (2011) points out, the actor involved in making the verbal reference is usually a state through the intrastate and intergovernmental institutions, political parties and individuals and the most common arguments these players use are related to the fields of economic, social cohesion and political stability. Waeber (1995: 45-55) agrees with Mogire (2011) and points out that states are the major security actors besides others such as interest groups, academics, the media, public opinion and international and regional organizations.

The Somali refugees in Kenya have been perceived and referred to as potential and real security threats following various terrorist attacks in the country, the worst being the Westgate mall attack in 2013 and the Garissa University attack. As a result, the Kenyan government has adopted various countermeasures and responses that have led to the profiling of all Somalis as Al-Shabab elements or sympathizers. In turn, the citizens have developed xenophobia towards all Somali natives due to the perception that they are security threats and a danger to the stability of the country.

Milner (2009:85) notes that the perception of Somalis, regardless of their country of origin, as security threats dates back to the Shifta movements in the 1960s that waged secessionist wars in the formally NEP supported by Mogadishu in a bid to expand Somalia into Kenya's formally NEP and the securitization of Kenyan politics by the Moi regime after the attempted coup in 1982 (Rono, 1999). Further, this was escalated by the fear of the state of insecurity in the formally NEP and the establishment of the Dadaab refugee camps in 1991.

During the Shifta movement, President Kenyatta maintained that Kenya would not concede any of its territory to Somalia and since then, the government has always treated the Somali refugees with suspicion hoping to avert any possibility of renewed insecurity (Orwa, 1988). Kiama and Karanja (2013) further note that the granting of *prima facie* status to the Somali refugees continues to be a thorny issue among the Kenyan public due to the increased insecurity incidences in the form of terrorist attacks that have taken place in various Kenyan towns. Themistocleous (2013) notes that securitization of terrorism has also been employed

by the US in the wake of the 9/11 terrorist attack where Arabs and Muslims in the developed world have been incriminated against hence cultivating the perception that every Arab or Muslim constitutes a potential terrorist threat (Themistocleous, 2013).

Mogire (2011) argues that not all refugees pose or constitute a potential security threat to host or sending states and that for refugees to constitute a security threat it will depend on their level of militarization, that is, their participation in or support for armed activities as well as politicization. Hammerstad (2008:1-2), while noting that asylum seekers could be potential security threats, warns against over-securitization of forced migration since it could undermine the international refugee protection regime.

Mogire (2011) points out that traditionally, refugees were primarily viewed as insecurity victims rather than security perpetrators. However, in the current refugee discourse, refugees are continuously regarded as a danger and threat to security rather than as a humanitarian issue. Further, it is evident that refugee policy is increasingly concerned with the protection of national security rather than that of refugees (Mogire, 2011). Kirui and Mwaruvie (2012), postulate that there is an enormous mistrust between refugees and host states resulting to mutual avoidance due to the coldness and suspicion exhibited during reception by the host state. This has been attributed to the fact that refugees are no longer viewed as short-term challenges hence the reluctance of most states to host them (Kirui & Mwaruvie, 2012).

Realists consider the state as the principal actor in international politics whose primary goal is survival hence national security is paramount. They believe the external military power to

be the main source of security threats hence to achieve security there is a need to use military power (Dougherty and Pfaltzgraff, 2001). Hence, Mogire (2011) notes that the protection of the state, that is, physical, political, and cultural identity, is the primary goal of security against the threats and potential threats posed by the capabilities of others through military means. However, it is worth noting that realists don't discredit the existent of threats emanating from non-military sources and the distinction between individual security and national security, though they acknowledge that military threats occupy the heart of national security concerns. Buzan (1991: 19) asserts that the freedom from a threat to survival is security's primary goal. Hence, security understood in this way implies that it is a condition of the state to be achieved through the instrumentality of military power.

According to Hammerstad (2014) state sovereignty, territorial integrity and national self-determination; ethical values such as freedom, equality, the rule of law, human rights; natural/physical goods such as water resources, oil, the biosphere; and individuals and sub-state groups all amount to security elements of a state that warrant its survival. With this in mind, it is easy to point out the non-military sources of threats such as small arms proliferation, narcotic trafficking, organized crime, mass migration, economic security, ethnicity, religious fundamentalism and regional power clientism as major issues affecting safety and this also covers refugees as sources of security threats (Mogire, 2011).

Kenya seems to have been successful in the securitization of refugees as an existing threat based on their link to the terrorist attacks in the country and the allegation that the camps are harboring the Al-Shabaab militants.

2.1.3 Refugees and the terrorist threat

According to Huysmans (2006:11) and Seidman-Zager (2010:11), the post-Sept. 11 2001 era saw various actors such as politicians, governments, other public figures and the media linking asylum-seekers to terrorism. Mogire (2011:128) also notes that the UN in the pursuit of trying to link terrorism and asylum, passed some Resolutions such as UNGA 1994:Art 5 (f); 1996: para 3 and 1999: para 4 urging states to prevent refugee status from being abused by those involved in terrorist activity. Further, as an international response to terrorism, the UN Security Council Resolution 1373 (2001) calls upon states to ensure that before granting refugee status, the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts.

This link of refugees to terrorism has been apparent in various political and media discourses, in policy actions and legislative measures. For instance, in the UK, the Anti-Terrorism, Crime and Security Act (ATCS) established firm legislative links between asylum and terrorism by including measures meant to deny prospective or suspected terrorists access to asylum (Bosworth and Guild, 2008: 708).

According to IRIN (2003a), Kenya's most significant security concerns from the Somali refugees presence relates to the flow of small arms into Kenya and the terrorism threat which is attributed to Kenya's long and porous border with Somalia which facilitates the uncontrolled movement of weapons and the spillover effects of the conflicts in Somalia. The linkage of refugees to terrorism is not entirely misinformed since there is the belief that

terrorists could potentially use asylum channels to infiltrate a target state and as Rimsa (2003) notes, the al-Qaeda, and other terrorist organisations often employ immigration as one of their infiltration tactics. For instance, Kenya had to close its border with Somalia in 2007 following the Ethiopian Invasion of Somalia on the basis of preventing the infiltration of Islamic fighters and other terrorists (Milner, 2009; Kirui & Mwaruvie, 2012). Government officials at the time argued that the response was necessary for purposes of vetting the refugees carefully since at the time it was not possible to precisely ascertain who genuine refugees were and who were fighters (BBC, 3rd January 2007; Gettleman, 2007).

Following this response, Kenya arrested 10 foreign Islamist fighters who were trying to cross the border disguised as refugees in January 2007, and in March 2007, 150 individuals claimed to have had terrorist links were arrested and secretly flown to Somalia and Ethiopia. This act was critiqued by Human Rights Watch (2007) and civil society groups who described it as an extraordinary rendition that was carried out with the connivance of the US (Bloomfield, 2007).

Further, it is believed that uncontrolled refugee camps can provide bases for terrorist training, recruitment and radicalisation as is the case with the Dadaab refugee camps in Kenya due to the fact that Somali refugees are mostly Muslim and that a number of radical Islamic groups and charities supporting terrorism operate from those camps (Mogire, 2011). Some reports have elicited the view of the Dadaab refugee camps being training, recruitment and radicalisation ground for terrorist elements and as stated by Austin (2002):

I had specific information about terrorist training in Dadaab before Sept.11. I was looking at arms networks going from Somalia into Kenya, and I ran into

terrorists competing with criminal elements and clans to take advantage of those systems...Dadaab is an important pit stop in the arms pipeline and also a perfect training ground for terror organizations. There are a large number of people in a confined state with little scrutiny...meanwhile, more radical Islam is taking hold there and being imposed on those not interested (Cited in Harman 2002).

Another report pointed out that the Al-Haramain Islamic Foundation (AHF), accused of sponsoring terrorism, set up religious schools and social programs for refugees in Dadaab and also provides training and political education to Somali refugees together with the AIAI cells in the camps along the lines of Pakistan-style Madrassa classes to prepare them to defend Islam and the Somali nation (Kagwanja and Juma, 2003, Khadiagala 2004). According to Menkhaus (2004), the AIAI has strong ties with refugees outside the camps especially in Nairobi and Mombasa. The Kenyan state has thus continued to reinforce its encampment policy based on these perceived threats and the perception that the Somali refugee population is a security concern.

Loescher, Betts and Milner (2008) argue that refugee camps are attractive to terrorists and their recruiters due to their ready pool of recruits hence agreeing that the protracted Somali refugee situation is a potential source of terrorist recruitment. According to Human Rights Watch (2009), there is evidence that al-Shabaab, AIAI, other Islamist groups and the Transitional Federal Government recruited fighters among the Kenyan Somali refugee communities. A UN Security Council report corroborated this information stating that al-Shabaab and Hizbul Islam freely travelled to Nairobi to obtain treatment for wounded fighters, to raise funds and to recruit from the Somali community (UNSC 2010: para 74). According to Kagwanja (2003), Somali refugees both in the diaspora and in Kenya are

actively involved in funding the Al-Shabaab and AIAI and this is because they exploit the trust based hawilaad or hudi banking system that is used by the Somalis in the diaspora to move funds into the camps.

Kenya has continued to face some significant security concerns in recent years. There have been quite a number of terrorist attacks in the country the first major one being in early August 1998 where over 250 people were killed and some 5000 injured when a car bomb attacked the US Embassy in central Nairobi (Rake, 2004, 552). Another attack happened in 2002 in Mombasa where three suicide bombers attacked the Paradise hotel, killing 16 people during two surface-to-air missiles narrowly missed their target of an Israeli charter plane during take-off from the Mombasa airport. According to BBC, 2002a reports, the US intelligence sources believed that a group known as al-Ittihad al-Islamiya, 'a prominent militant group in the Horn of Africa with links to Osama bin Laden's al-Qaeda network' as responsible.

According to Harman (2002), investigations carried out by the group led to Dadaab refugee camps and this was attributed to the presence of the large refugee camps in Kenya's remote areas and the long porous border with Somalia which provided an ideal haven for terrorist operations of a terrorist organization, while the disaffected and desperate camp population provided a fertile base for recruitment (Harman, 2002). A connection was hence established between the terrorist attacks in Kenya and the presence of refugees (Milner, 2009).

As a result of the rise of terrorism in Kenya, which is linked to refugees, there has been evidence of increased anti-Somali sentiments thus further justifying the restrictions placed on Somali refugees. Human Rights Watch (2002a) reported that the November 2002 terror attacks were used by the Kenyan police to justify a crackdown on refugees in Nairobi (HRW, 2002a). According to Juma (2002), Kenya's approach to the question of Somali refugees is motivated by the desire to 'stave off militant nationalism and irredentism, which are inspired and often supported by global pan-Islamic groups' and also its 'suspicion and resistance to radical Islamic ideology among sections of refugees' (Juma, 2002, 10). However, this profiled war on terrorism has been criticized to be a war on refugees (RCK, 2003b).

It has however been argued that Kenya ought to take into consideration foreign policy implications as it pursues its national interests since how it deals with the question of Somali refugees is likely to sever its relations with other countries and also the donor community of which it is dependent on (Milner, 2009).

2.3 Conclusion

National interests are material when it comes to the guarantee of state survival. Realists believe that in an anarchical world, states have to act on self-help basis to ensure their survival in the international system. They believe in using power and force to achieve their objectives in the international system. Hence to justify their actions, states will always adopt the notion that they are pursuing their national interests so as to protect its citizens. For Kenya, the pursuit of its national interests such as preservation of national security,

sovereignty, and national integrity is its prime responsibility as a sovereign state. Hence for Kenya's survival, regional stability is the sine qua non.

It is evident from the above discussion that the refugee influx especially those of Somali origin, has resulted in increased insecurity along the Kenya-Somali porous border, increased competition for scarce resources among Kenyan citizens and the refugees, proliferation of small arms and light weapons along the borders, increased number of illegal migrants who are neither asylum seekers nor refugees especially in the urban areas and major security threats in the country and also increased terrorist activities.

As discussed above, it is evident that the Somali refugee influx and their extended stay in the country has led the Kenyan government to treat them with suspicion and spite due to the perception that they pose a threat to their sovereignty and territorial integrity and also security. Kenya has thus responded in various ways to the Somali refugee influx and has also opted for strict policies all in the name of pursuing its national interests and protecting its citizens. This protection of its citizens has been challenged by various factions of the citizens especially the Kenyan Somalis as to whether it is really in the leaders' interest or in the national interest which entails all citizens within the country. Having highlighted the national interests, it is not clear whether these responses are on the basis of national interests and hence justified or not.

Before delving into an analysis of the responses of the Kenyan government to the Somali refugees, the next chapter will look into the international refugee law regime, the legal

framework so as to set a basis for the legality of the various responses of the Kenyan government.

CHAPTER THREE

RESPONSIBILITY FOR REFUGEE PROTECTION IN KENYA

3.0 Introduction

Refugees are an integral part of the international community hence they are guaranteed rights and freedoms. However, the international refugee protection regime continues to face a challenge since most states tend to focus more on state sovereignty than providing refugees with the necessary protection through limiting their rights and developing policies to prevent entry of asylum seekers into their countries. This chapter discusses international refugee protection based on the various international instruments dealing with refugees. It also discusses the various entities responsible for refugee protection and the rights of refugees in an asylum state.

3.1 Responsibility for refugee protection

Goodwin-Gill (1989) argues that the word ‘protection’ is often unclear hence the lack or denial of protection is a principal feature of the refugee character of which its deficiency is sought to be met by international law. Refugee protection originates from human rights contexts in which every human being has the right to life, liberty and security, of which may easily be jeopardized by breach of the principle of refuge (Goodwin-Gill, 1989). Protection, in the refugee law context encompasses an unrestricted human rights competence and is based on the connection between the rights of refugees and solutions to the refugee situation. Protection thus will look into the reestablishment of the refugee within a community as well as its implications in the wider sociological and political dimension (Ibid, 1989).

Primarily, the state has the responsibility of ensuring refugee protection. However, international organizations and in particular The United Nations High Commissioner for Refugees (UNHCR) also play a role in refugee protection and since its inception, it has partnered closely with governments in ensuring refugee protection (Inter-Parliamentary Union, 2001). States under international law retain the discretion of granting asylum however they are bound by the non-refoulement principle which prohibits returning refugees to persecutions or similar situations of personal danger (Goodwin-Gill, 1989). Hence, the country of first refuge has the territorial responsibility to offer protection against any non-refoulement eventuality in accordance with human rights and international law standards (Ibid, 1989).

3.1.1 The Role of the Host State (Kenya) in Refugee Protection

Article 14 of the 1948 Universal Declaration of Human Rights points out that ‘everyone has the right to seek and enjoy in other countries asylum from persecution’ (UDHR, Article 14). Goodwin-Gill (1996) argues that states have a right, rather than a duty to grant asylum and this originates from their sovereign right to control admission into their territory. Principally, it is in the state’s interest to determine who to admit into its territory and whom to deny entry (UNGA, 1951). However, in as much as every state has the right to adopt its own asylum adjudication process in pursuit of its national interests, it has to ensure that the adjudication process aims at ensuring that the minimum standards set out in the international human rights framework, refugee treaties and customary international law are met (Abuya & Mukundi, 2006).

Dating back to history, Moore (1908) argues that the right to grant asylum 'is to be exercised by the government in the light of its own interest, and of its obligations as a representative of social order. Morgenstern (1949) further settled the competence of states to grant asylum upon 'the undisputed rule of international law' that every state has exclusive control over the individuals in its territory, including all matters relating to exclusion, admission, expulsion, and protection against the jurisdiction by other states.

The permissive nature of the 'right to seek and enjoy asylum' contained in the Universal Declaration Human Rights, Article 14 (1), the failure to include duty to grant asylum in the Declaration on Territorial asylum, and in the failed attempt to draft a binding international convention on the subject of asylum clearly indicates the position of states as regards asylum. The right does not find expression in the 1951 Convention or the 1967 Protocol and neither is it mentioned in the 1950 United Nations High Commissioner for Refugees (UNHCR) Statute. However, the final act of the conference that adopted the 1951 Convention, recommended that "governments continue to receive refugees in their territories and act in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement."

Similarly, the OAU Convention does not also specifically speak of the right to be granted asylum but rather, asylum is influenced by the hospitality of the host country. Asylum is granted for humanitarian purposes and not as a right (1969 OAU Convention, Article 2(1). In its preamble, 1969 OAU Convention encourages a pan-African solution to dealing with the refugee problems in the continent and it also explicitly 'recognizes the need for an essentially

humanitarian approach towards solving the problems of refugees'. The African Charter on Human and Peoples' Rights under Article 12(3) is another regional instrument which affirms the right to seek asylum like the other instruments, there is no right to receive asylum or an obligation on states to grant asylum.'

However, despite there not being an international law obligation on states to grant asylum, states are still bound by the customary international law principle of non-refoulement as defined in Article 33 of the 1951 Convention (Lauterpacht & Bethlehem, 2001). UNHCR has declared that:

A State presented with an asylum request, at its borders or on its territory, has and retains the immediate refugee protection responsibilities relating to admission, at least on a temporary basis. This responsibility extends to the provision of basic reception conditions and includes access to fair and efficient asylum procedures (UNHCR, 2004).

A state has the responsibility to protect refugees residing within its territory and accord them the same standard of treatment as the citizens of the state as codified in the 1951 Convention (Steiner, Gibney & Loescher, 2003). The host country has a role to play in ensuring that refugees are protected against physical, emotional, and psychological harm. Kenya has an obligation to protect refugees since it is a member of the international community. In this regard, the primary goal should be to ensure that refugees live in a safe environment. The Kenyan government has the responsibility for guarding the refugees against any internal or external attacks. Refugees, just like the citizens have rights and freedoms that ought to be protected and guaranteed.

UNHCR states that refugees have freedom of movement, expression and thought (UNHCR, 2015). They also have freedom from torture and other forms of abuse. The government of Kenya has a role to play in ensuring that refugee rights and freedoms are protected. The Kenyan government has a responsibility of meeting the basic needs of the refugees. The basic needs will include food, shelter, clothing, health facilities, education, security amongst others (UNHCR, 2015). However, UNHCR and the international community have an obligation to assist the host countries, especially when there is a humanitarian crisis. In the case of Kenya, where there is an influx of refugees, the Kenyan government has to be assisted in feeding the refugees and providing other services.

Kenya has an obligation to support refugees through ensuring that its asylum and refugee laws are consistent with the international laws. Recently, Kenya was condemned by the international community for proposing laws that were deemed to infringe on the rights of the refugees (Human Rights Watch, 2015). Kenya was responding to the security threat and the influx of refugees. Its goal was to minimize the number of refugees who can be allowed in the country at any moment. Kenya has a role to play in facilitating the integration of the refugees with the local people. The local population must be prepared to accept the refugees, and allow them to share the resources available. It is the responsibility of the Kenyan government to facilitate the process of integration. This will prevent any form of conflict between the local people and the refugees.

3.1.2 The Role of UNHCR

UNHCR which is a humanitarian and non-political organization is mandated by the United Nations to protect refugees and help them find solutions to their plight (Inter-parliamentary Union, 2001). The primary role of the UNHCR is to protect the rights of the refugees and to respond to emergencies. The UNHCR works in close collaboration with other institutions in order to have permanent solutions to the challenge of the refugees (Loescher, Betts & Milner, 2008). In realizing its core mandate, the UNHCR also works in collaboration with member states. In addition to offering legal protection, UNHCR now also provides material relief in major emergencies, either directly or through partner agencies (Inter-Parliamentary Union, 2001).

At the international level, UNHCR promotes international refugee agreements and monitors government compliance with international refugee law. UNHCR staffs promote refugee law among all people who are involved in refugee protection, including border guards, journalists, NGOs, lawyers, judges and senior governmental officials.

At the field level, UNHCR staff work to protect refugees through a wide variety of activities, including responding to emergencies, relocating refugee camps away from border areas to improve safety; ensuring that refugee women have a say in food distribution and social services; reuniting separated families; providing information to refugees on conditions in their home country so they can make informed decisions about return; documenting a refugee's need for resettlement to a second country of asylum; visiting detention centres; and giving advice to governments on draft refugee laws, policies and practices.

UNHCR seeks long-term solutions to the plight of refugees by helping refugees repatriate to their home country, if conditions are conducive to return, integrate into their countries of asylum, or resettle in second countries of asylum. The UNHCR has a role to facilitate voluntary repatriation of refugees. The UNHCR works toward ensuring that areas for refugee resettlement are safe and have resources such as clean water and food. For instance, while UNHCR supports Kenya in the effort to reduce the pressure of the refugees at the Dadaab camp by repatriating the Somali refugees, the process has been delayed until all requirements are met (Steiner, Gibney & Loescher, 2003). The tripartite agreement signed in 2013 between Kenya, Somalia, and the UNHCR paved the way for the voluntary repatriation of refugees. However, the UNHCR ensures that this is done within the law, hence protecting refugees.

UNHCR also has a significant role to play in fostering the integration of refugees in the country that has granted them asylum. UNHCR has in the past pleaded with state parties to give full citizenship to refugees who do not wish to return to their countries of origin (Milner, 2009). While most countries do not give citizenship to refugees, statistics indicate that in the past decade, about 716 refugees have benefited from the program (Loescher, Betts & Milner, 2008). However, the United States has the majority (about two-thirds) of the refugees who have been granted citizenship. The UNHCR goes further to ensure that the refugees are able to integrate locally. The local people are encouraged to accept the refugees as part of the society. This includes supporting them in activities that lead to national development. The UNHCR works closely with the governments in fostering the process of integration. Further,

UNHCR also facilitates the integration of the refugees once they are repatriated to their home countries.

Resettlement of refugees is another significant role of the UNHCR. In war-torn countries, such as DRC and Somalia, most of the refugees have been resettled in third countries due to the situation in their countries of origin. From 2013, for instance, it is reported that about 23,500, 12,000 and 9,000 from Myanmar, DRC, and Somalia respectively, were resettled in third countries due to various factors (Feller, Turk & Nicholson, 2003). The UNHCR facilitates the resettlement program, by providing the necessary resources.

UNHCR also has a role to promote an international legal framework. It achieves this by working closely with member states, especially on amending refugee laws. UNHCR has to ensure that the refugee legislation in every host country conforms to the international standards, as stipulated in the 1951 Convention. UNHCR has been vocal on its stance on the Security (Amendment) law in Kenya which infringes on the rights of refugees by limiting the number to 150,000 refugees at any time in the country and this has been through supporting the civil society groups such as Refugee Consortium of Kenya (RCK), Katiba Institute and Kituo cha Sheria in facilitating the cases in courts (UNHCR, 2015). UNHCR also supports governments and legal institutions in strengthening their refugee laws in relation to the international laws.

Another important role of the UNHCR is to assist refugees through the provision of food, clothing, and medicine. UNHCR responds to emergencies, providing the victims with

fundamental human needs. It does this to help the countries providing asylum to the refugees. Further, UNHCR takes part in monitoring the situation to ensure that the refugees' rights to basic needs are protected at all times. In addition to this, the UNHCR has to ensure that refugees respect the laws of the countries that have given them asylum. This is done with the aim of ensuring that they do not get into conflict with the law enforcers. On the other hand, governments have to ensure that refugees are accorded similar rights to those of other citizens. For instance, UNHCR expects the refugees to have the freedom of expression, thought, and movement, socio-economic rights and freedom against torture and inhumane treatment (Newman & Selm, 2005).

3.1.3 The Role of Civil Society

In Kenya, the civil society plays a critical role in fostering good governance, rule of law and ensuring that the marginalized communities have access to justice (Amnesty International, 2013). One of the primary goals of the civil society is to advocate for the protection of the fundamental human rights. On the issue of refugee protection, civil societies act as whistleblowers, especially when the government contravenes its international obligations (Garbutt, 2008). Organizations such as Kituo Cha Sheria have voiced their grievances concerning the decision by the government to repatriate the Somali refugees (Garbutt, 2008). They work to ensure that the rights of refugees are protected.

Civil society respects and promotes human rights by working closely with the public. They educate people about their rights as a way of empowering them. They ensure that the marginalized and the poor understand their fundamental rights due to the fact that ignorance

of the law and the judicial process has been the primary challenge in Kenya. The civil society is, therefore, a voice to those who are denied access to justice.

Civil society in Kenya also plays a significant role in ensuring that past human rights abuses have been addressed. In the recent past, the civil societies have challenged the government on ethnic profiling in the war on terrorism. The Usalama Watch Operation, which was meant to flush out illegal refugees and suspected terrorists, was disputed by the civil societies, including Kituo Cha Sheria for selectively targeting people of Somali origin (Amnesty International, 2013). This operation subjected suspects to inhumane acts, including forceful evictions and detention without trial. They can also work with other institutions, such as the Independent Police Oversight Authority (IPOA) to bring into justice politicians and police suspected of engaging in crimes against humanity.

The civil society also plays the role of ensuring that refugee laws conform to the constitution and international law. In 2014, the Kenyan government proposed several amendments to the security laws, as a way of addressing the state of insecurity in the country. While such changes were important to empower the security forces and the government in handling insecurity, most of the laws were against human rights. The civil societies of Kenya joined Amnesty International and opposition parties to reject and condemn some of the proposed clauses (Petition 19 and 115 of 2013). The civil society indicated that the provisions infringed on human rights and were inconsistent with the constitution and international law.

The limiting of the number of refugees who could be admitted into Kenya amounts to a contravention of the international instruments. The pressure from civil society and other

institutions helped in ensuring that the clause on the refugees did not become law (Petition 206 of 2014).

3.2 The legal and Policy Framework for Refugee Protection in Kenya

The promulgation of the Constitution of Kenya in 2010 marked a significant step in Kenya as regards its stance on international law. By virtue of Articles 2(5) and 2(6) of the Constitution, Kenya acknowledges and domesticates the general rules of international law as part of the law of Kenya (Constitution of Kenya, 2010). As regards refugees internationally, Kenya is a signatory to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 OAU Convention Governing the Specific Aspects of Refugees in Africa (Verdirame, 1999). These instruments outline some of the rights of refugees. Kenya is also a signatory to other international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Universal Declaration of Human Rights (UDHR), International Convention on the Rights of the Child (CRC), Convention Against Torture (CAT), Convention on the Elimination of Discrimination Against Women (CEDAW) and the African Charter on Human and Peoples' Rights (Ibid, 1999).

At the national level, it was not until 2006 that Kenya officially had a legal instrument on refugees. Wakahiu (2007) points out that talk on domestic refugee law began in the 1990s. Initially, refugees were referred to as non-nationals; however, with the passing of the Kenya Refugees Act, all rights enshrined in the conventions became part of Kenyan law. Despite the principle that primary responsibility of dealing with refugees lies with the state, Kenya

initially pursued the policy of abdication of refugee affairs to UNHCR. The effect and danger of adopting this policy was that most government officials believed that the responsibility of dealing with refugees was solely for UNHCR and not the host government (Helton, 2002).

The continued policy of abdication of responsibility to UNHCR was influenced by the state's failure in 1991 to pass legislation to formalize its *ad hoc* approach to refugees and subsequently a legal basis for its responsibility for refugee affairs. In 2002 however, the government in place made refugee legislation a priority. Based largely on the 1990 Refugee Bill, a draft refugee bill was introduced in parliament in 2003 and finally passed into law in 2006 (The Refugees Act, 2006). The 2006 Refugee Act gave provisions for the establishment of a Department of Refugee Affairs (DRA), which would assume responsibility 'for all administrative matters concerning refugees in Kenya' and would 'in that capacity, coordinate activities and programs relating to refugees' (The Refugees Act Section 6, 2006).

Further, the Act gives provision for a Refugee Affairs Committee (RAC) tasked with assisting the Commissioner for Refugee Affairs (CRA) in matters concerning the recognition of persons as refugees as per the definition in the Act as well as international instruments relating to refugees (Section 8, Refugees Act, 2006). A Refugee Appeals Board (RAB) is also established tasked with considering and deciding appeals brought under the Act as regards refugee status (Section 9, The Refugees Act, 2006). With the passing of the Act and the establishment of the various bodies under the Act, it is hoped that the responsibilities undertaken by UNHCR as regards refugee affairs shall be taken up by the Government and that UNHCR will assume more of an advisory and supervisory role. The Refugee Act states

that 'every recognized refugee and every member of his family living in Kenya shall be entitled to the rights and duties and be subject to the obligations contained in the international conventions to which Kenya is party' (The Refugee Act: Art. 16 (1) (a)).

Besides the 2006 Refugees Act, there are other legislations that also deal with refugee issues in the country and that should also be put into consideration when handling refugee claims. For instance, The Kenya Citizenship and Immigration Act, 2011 and its regulations provides for matters relating to citizenship; issuance of travel documents and immigration. A director in charge of citizenship and immigration matters is appointed under the Act and one of his functions includes border management including the control and regulation of entry and exit of all persons at ports and points of entry and exit (Kenya Border and Immigration Act, Section 4, 2011). The Act also provides for powers to remove persons unlawful in the country (Ibid, section 43).

Based on this provisions, in managing refugee affairs, the Department of Refugee Affairs ought to work closely with the immigration department in managing the persons in the Kenyan territory including refugees and upon decisions on refugee claims, once an asylum seeker has been denied refugee status, and has been accorded a fair hearing up to appeal level, the immigration department should come in to ensure the removal of that person from the Kenyan territory back to his/her country of origin. This will also include asylum seekers who meet the provisions of exclusion as provided under the Refugee Act and the international instruments relating to refugees.

There is also a Kenya Citizens and Foreign Nationals Management Service Act, 2011, which establishes the service charged with the responsibility of implementation of policies, laws and any other matters relating to citizenship and immigration, births and deaths, identification and registration of persons, issuance of identification and travel documents, foreign nationals management and the creation and maintenance of a comprehensive national population register (Section 4, 2011). Gilbert (2010) articulates the importance of examining national jurisprudence in the implementation of the Conventions as part of international law since there lacks an international refugee court or tribunal to oversee treaty interpretation.

3.3 Rights of Refugees in Kenya

With the increasing challenges emanating from migrations, states tend to adopt restrictive policies so as to protect their sovereignty. Control of national borders is paramount for all states (ICJ, 2014). The restrictive policies some of which are enshrined in national law adopted by the states tend to infringe on the rights of refugees and other migrants within a host state through exploitation and abuse (Ibid, 2014). Helton (cited in Steiner, Gibney & Loescher, 2003) argues that the term asylum can be construed to mean the act of granting territorial protection to refugees. He postulates that refugees have no categorical right to asylum hence describes protection to entail the act of respecting the fundamental human rights provided in the UDHR, ICCPR and ICESCR (Steiner, Gibney & Loescher, 2003).

Refugee rights are broad and include, right of nonrefoulement, right to acquire movable and immovable property, intellectual property rights, right of association, right to access courts, right to employment, right to housing, right to education and freedom of movement. Kenya

has an obligation to grant and respect these rights as well as those outlined in the bill of rights. Kenya has been perceived to infringe on some of these rights in relation to the Somali refugees in the country especially the freedom of movement and the right to nonrefoulement.

3.3.1 Principle of Non-Refoulement

This principle prohibits returning an asylum seeker or refugee to a country where he or she is likely to face real risks of grave human rights violations or persecution or of further transfer to a third state where there would be a real risk of such violations (ICJ, 2014; Art. 33(1) 1951 UN Convention Relating to the status of Refugees). This principle places a limit on the right of states to expel someone from their territory as an expression of sovereignty (Freudenthaler, 2011). This principle in international human rights places an obligation on states to recognize, secure and protect the human rights of all individuals within their jurisdiction and for the interpretation and application to be done in a way to ensure its safeguards are adequate and practical (ICCPR, Art. 2; ACHPR, Art. 1). This principle binds all states regardless of signing the relevant treaties such as the 1951 UN Convention Relating to the Status of Refugees (Amnesty International, 2014).

According to Freudenthaler (2011), most States recognize that nonrefoulement principle is valid from the moment the asylum seeker presents himself or herself for entry hence it encompasses both non-return and non-rejection at the border and implies at least temporary admission to determine an individual's status. Refugee Status Determination to a person temporarily admitted is vital since it prevents an individual from being returned or sent away

to a country where persecution is awaiting and possibly a life-endangering situation (Goodwin-Gill, 2007).

Article 33 (2) of the Geneva Convention places a restriction on the principle which may not “be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country” (Freudenthaler, 2011). Unlike Article 1F which provides for exclusion from refugee status, this principle focuses on the refugee representing a danger to the security or to the community of the host country thus bears a higher threshold since it’s limited to future threats coming from the person rather than the past activities of the individual (ICJ, 2014).

The Kenya Refugee Act also takes notes of the nonrefoulement and even broadens the Refugee Convention definition by stating that:

No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or subjected to any similar measures, if [...] the person may be subjected to persecution on account of race, religion, nationality, membership of a particular social group or political opinion or 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 Refugees Act, Section 18)

Article 2(3) of the AU Convention also provides that, “no person shall be subjected by a Member State to measures...which would compel him to return or remain in a territory where his life, physical integrity or liberty would be threatened...” Hence, States are obligated to follow due process when removing, deporting or repatriating refugees from

where they are to the States of origin failure of which is in violation of the principle of nonrefoulement.

Once identified as a danger to national security, the authorities concerned must conduct an individual assessment based on the principles of proportionality and necessity. This involves taking into consideration the seriousness of the danger to national security; the likelihood of the realization of the danger and its imminence; whether the danger to the security would be diminished significantly or eliminated by the removal of the individual; the nature and seriousness of the risks to the person from refoulement; and whether other avenues may be found whether in the country of refuge or in a safe third country (Lauterpacht & Bethlehem, 2001).

The danger to the community refers to the safety and well-being of the entire general population, unlike national security, which majorly focuses on the interests of the state (ICJ, 2014). In this regard, it is essential to consider the requirement of “having been convicted by a final judgment of a particularly serious crime” consistently with the exclusion clause in Article 1F (b) which applies to those having committed a serious non-political crime outside the country of refuge prior to their admission to the country as a refugee (Ibid, 2014). Kenya has for long asserted that Somali refugees pose a threat to national security and are linked to the al-Shaabab group. Further, there have been several attacks in the country within the cities (Nairobi and Mombasa) and also in the former NEP. Quite a number of suspects have been arrested on the allegation of their involvement in the attacks. However, none of the arrested suspects has ever been a refugee. Terrorism is a serious crime that would warrant the

expulsion of a refugee if found. However, Kenya has never arrested any refugee based on these allegations hence can't purport to return them to their country without any explicit accusation.

This principle applies to risks of violations of the prohibition of torture and cruelty, inhuman or degrading treatment or punishment; right to life violations; and denial of justice and right to liberty according to findings by the international courts and tribunals (Freudenthaler, 2011). For instance, in *Soering v. the United Kingdom*, the European Court derives the nonrefoulement principle from states' obligation to "secure" human rights to all people subject to their jurisdiction (Article 1 ECHR). The court, in this case, took into consideration the ECHR's "unique character as a treaty for the collective enforcement of human rights and fundamental freedoms", and that "its provisions should be interpreted and applied so as to make its safeguards practical and effective" (ICJ, 2014).

During the 'golden age', most African states respected this principle. However, from the 1990s, with the growing influx of refugees, countries started adopting strict asylum policies leading to the exclusion of refugees from their territories (Freudenthaler, 2011). For instance, after the Rwandan genocide which had precipitated huge refugee flows into Tanzania, the government ordered all Rwandan refugees to leave the territory which indeed constituted forced repatriation and, thus, a breach of the nonrefoulement principle (Whitaker, 2002).

Kenya has severally violated the principle of nonrefoulement through its responses to the Somali refugees. For instance, in 2007, it violated this law when it closed its border with

Somalia in a bid to prevent entry of Somali refugees (Amnesty International, 2007).

According to Amnesty International report (2007):

At the day of the border closure in 2007, around 400 people who had been waiting at the Refugee Centre of Liboi were forced to return to Somalia as the Kenyan police ordered them into a truck and drove to the Somali side of the border to an unknown place, where they were left without any further thoughts about humanitarian assistance or the reasons for their flight.

Further, Somali refugees in Kenya continue to face police harassment and abuse. Despite them being recognized as refugees, they are continually treated like illegal immigrants. Refugees in Kenya are not allowed to move freely. The police disregard the movement passes, arresting them or forcefully return them to their country of origin if they fail to pay the demanded bribes (Amnesty International, 2010: 2014). For instance, Njamwitha (2005) points out the plight of one Somali asylum seeker who had been granted an appointment slip from UNHCR for the RSD process. However, police tore the sheet and went ahead to charge him with illegal entry. He was unrepresented in court and due to the language barrier, he was unable to follow effectively the proceedings hence he was sentenced to a fine and repatriation to his country of origin. The court failed to assess his claim that he was, in fact, a recognized refugee (Freudenthaler, 2011).

According to Human Rights Watch (2009), in July 2008, around 70 Somali refugees were stopped by the police and detained for ten days in a prison in Garissa. They were later picked up by the police and driven to Somalia, where they were asked never to return to the country. Further, in 2014, the Government issued a directive to enforce the encampment policy which required all the refugees in the urban areas to relocate to the designated camps. The 'Usalama Watch Operation' aimed at flushing out all the illegal immigrants and refugees from the

cities (Yarnell & Thomas, 2014). During this operation, it is documented that close to 259 Somali refugees who had received refugee status were deported back to Somalia by plane in clear violation of the nonrefoulement principle (Ibid, 2014). Further, the deportation of Somali refugees was in violation of Kenya's obligation under the Tripartite Agreement.

Following this directive, a case was launched by *Kituo cha Sheria and others V Attorney General* challenging its constitutionality. The court in the matter held that the directive not only breached statutory and treaty law but was also in violation of the nonrefoulement principle (Petition 19 of 2013 Consolidated with Petition 115 of 2013). The court in this matter tended to give an ambiguous reference to the term 'general principles of international law' as outlined in Art. 2(5) of the Constitution to also imply customary international law as envisioned in Article 38(1) of the statute of the ICJ (Oduor, 2014).

Despite the principle of nonrefoulement being customary international law, Article 33(2) of the 1951 Convention restricts the right on any refugee whom on reasonable grounds is regarded as a danger to the security of the host country or whom upon conviction and final judgment of a serious crime endangers the community of the host country (1951 Convention Relating to the status of Refugees). Article 1 (F) also provides grounds upon which an asylum seeker may be excluded from refugee status and these includes commission of a crime against peace, a war crime, a crime against humanity or a serious non-political crime. It can be argued that these provisions of the 1951 convention may guarantee a state to derogate legally from its duty to the right of nonrefoulement when a refugee is identified as a threat to a host state's security. Based on this argument, then it can be argued that the safety

of a country takes precedence over the protection of refugees. However, despite this provision, Kenya has never legally arrested any refugee suspected of being a threat to the state's security or even a member of the Al-Shabaab. Failure to do this puts it in the spotlight in the international arena of the legality of its responses to the Somali refugees in the country. Lentini (1985) argues that territorial sovereignty which gives a State the absolute right to decide whether or not to allow an alien to enter its territory, also ensures that no State is under any obligation to return a non-national to his native country, even upon the request of the alien's government.

3.3.2 Refugee Status Determination Process

Asylum is granted by states themselves through conducting RSD process to determine who to grant protection and in some other states; it is the UNHCR that carries out the process due to the inability of those states to carry out this process or due to inadequate administrative capacity to conduct RSD. Helton (cited in Steiner, Gibney & Loescher, 2003) advances that one of the critical aspects of refugee protection is fair and non-discriminatory status determination in the receiving state. This process entails the formal recognition of an asylum seeker as a refugee, falling within Article 1 refugee definition of the UN Refugee Convention. This process is an essential protection tool to an asylum seeker since it entitles one to international protection and eligibility to enjoy the fundamental rights due to a refugee and access to durable solutions (UNHCR handbook).

RSD process is the responsibility of host States. However since the 1990s Kenya delegated this process to UNHCR (Verdirame, 1999). Following the influx of Somali refugees from

Somalia in 1991 and 1992, Kenya's asylum policy was profoundly affected. This came at a time when Kenya had initially restricted entry of asylum seekers into its territory. Following the opening of its borders and entry of the large number of asylum seekers from Somalia, the Kenyan government ceased to conduct individual refugee status determination (RSD) and UNHCR almost exclusively took up management of refugee affairs in the country (Milner, 2009).

The RSD process can be a lengthy one, and this is attributable to limited resources and huge caseload considering the number of new arrivals requiring full RSD. Somali asylum seekers are granted prima facie refugee status as per Section 3 of the Refugees Act hence they don't require the full RSD process (Freudenthaler, 2011). The challenge that comes with the lengthy process is that it exposes the asylum seekers to vulnerability since without the UNHCR recognition papers, they are considered as illegal aliens hence vulnerable to police arrest, harassment and deportation (RCK, 2005).

The transition from UNHCR mandate led RSD to Government led RSD is a critical aspect in the current state of refugee protection in Africa. Ideally, RSD should be a government led process in that they have the responsibility to determine whom they want to recognize as refugees and hence grant them refugee status and UNHCR is mandated to take on the observatory and monitoring/supervisory role in the application of the set standards in the RSD process (RSD Watch, 2005). Currently, there is a transition period in place where the RSD process is to be handed over fully to the government (UNHCR, 2015). This was necessitated by the security situation in the country where the government saw it fit to

conduct the RSD process so as to assess the individuals getting into its territory. UNHCR is expected to take an advisory role after it has handed over the responsibility. However, the transition is being faced by various challenges since there is fear by UNHCR as well as a civil society that refugee rights are likely to be infringed, and many asylum seekers are likely to be rejected. Hence despite the security situation in the country and protection of national interests, the government has to be objective when handling asylum claims and recognizing the asylum seekers as refugees.

3.3.3 Freedom of Movement and Choice of Residence

This freedom is one of the most fundamental human rights which is protected by numerous treaties and agreements. Article 13 (1), of the Universal Declaration of Human Rights (UDHR), underscores the right to freedom of movement and residence within the borders of each State. This freedom was further highlighted in the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), The Refugee Act, 2006 and The Constitution of Kenya, 2010 (Chaloka, 2000).

Article 12 (1) of the ICCPR provides for the right to liberty of movement and freedom to choose residence to everyone who is lawfully within the territory of a state. However, under Article 12 (3), three conditions for restriction of this freedom are given: the restriction has to be provided for by both domestic and international law, it has to be requisite to protect national security, public order, public health or morals, or the rights and freedoms of others (which is line with the principle of state sovereignty) and finally, it has to be

consistent with other rights in the Covenant (Freudenthaler, 2011). Human Rights Watch (2002) reports that the restrictions on movement based on public order and public health must be proportionate to the public interest in danger; hence it is imperative to weigh the severity of the security concerns against the established limitations in a bid to prevent the threat to the public interest. Further, by placing a restriction on the freedom of movement, this should not infringe on the other rights due to an individual.

The freedom of movement and choice of residence is also accorded to refugees on the basis of Article 26 of the UN Refugee Convention which states that “Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances” (UN 1951 Convention Relating to the Status of Refugees, Article 26).

However, just like the ICCPR, the Refugee Convention also includes restrictions on the freedom of movement classified into three categories: national security as per Article 9, which requires an elaborate procedure including the proclamation and notice of war, the proportionality of the limitation and the connection of the measure to national security. This restriction only refers to asylum seekers and not regularized refugees (Beyani, 2000). The second limitation in Article 31 refers to the movement of asylum seekers entering the country unlawfully. Article 26 of the UN Convention also provides a barrier to refugees who have been granted status and lawfully leaving within the state territory (Freudenthaler, 2011).

Despite the freedoms provided to refugees, Kenya has been held to be in contravention of this obligation as regards its asylum policies. The Kenyan government has applied the

encampment policy from the 1990s and in 2006; it finally got its endorsement in national legislation through the Refugees Act, 2006. The Act under Section 16 (2) places a regulation on the location of designated refugee camps. The Act further under Section 25 places sanctions on refugees who leave the camp since it is considered an offence which on conviction makes one liable to imprisonment or a fine or to both fine and imprisonment (Kenya Refugee Act, 2006).

Hence, if refugees wish to travel outside the camps, they are supposed to apply for permission which is granted through the provision of a time-limited Movement pass. For Somali refugees, it is harder to acquire the movement pass as they have to undergo serious vetting before being granted the pass. This stringent process was necessitated by the government on the basis of security reasons and fear of terrorism (Human Rights Watch, 2009). Human Rights Watch (2009) further noted that the criteria for a valid reason to obtain a Movement Pass has been developed on an ad hoc basis over time, are not prescribed by law or regulation, and are not available in written form.

UNHCR (2005) acknowledges the importance of the Pass as essential to preventing police harassment to refugees who have legally left the camps. The police always ask for bribes from the refugees and those who fail to give the bribes risk being returned to the camps involuntarily. At times, authorities intentionally decline to recognize the Movement Pass in a bid to limit refugee movement totally (UNHCR, 2005).

There has however been much debate on the absolute nature of the freedom of movement for refugees. Following the Government directive in March 2014 ordering all urban refugees to be relocated to the camps, the court in *Kituo cha Sheria & 7 others V The Attorney General* ruled that refugees enjoy the freedom of movement under Article 39 of the Constitution as read with Article 26 of the 1951 Convention (Petition 19 and 115 of 2013). However, another contradicting judgment was given in the case brought by the opposition group CORD and others challenging the Security Laws Amendment Act of 2014, which placed a limitation on the number of refugees in Kenya, required asylum seekers to report immediately on arrival and also required refugees and asylum seekers to reside in the designated camps. The court in this matter held that the freedom of movement of refugees is not an absolute right. The court making reference to Article 2, 1951 Convention and Article 3, 1969 OAU Convention argued that the right to freedom of movement is not an absolute right under Article 25 of the Constitution hence can be limited under Article 24(1). The court further argued that the freedom to enter, remain and reside anywhere in Kenya is limited to citizens based on Article 39. Based on these two contradicting judgments, the question that arises is whether the decisions are influenced by the political environment in the country as regards security threats or whether the interpretation of provisions in various instruments has an effect.

3.4 Conclusion

The protection of the state interests, as argued by realists, should always come first. Kenya continues to find itself in a difficult situation as it tries to strike a balance between the rights of the citizens and those of refugees. With the escalating security situation, Kenya intends to close its border with Somalia. While this may be interpreted as preventing the entry of

terrorists from entering the country, it is argued that the Kenyan government has a right to act to protect its interests.

However, there has been a debate on the place of international law in Kenya and what takes precedence between local law and international law. Different courts have had differing opinions as regards what takes precedence. Koome, J. in *The Zipporah Wambui Mathara* Case was of the view that international law made supremacy over local law. However, Majanja, J. had a different opinion in *Beatrice Wanjiku and Another v Attorney General and Others* (Petition 190 of 2011) where he favored the supremacy of local law over international law (Oduor, 2014). Justice Majanja in his judgment was of the opinion that if international law was to supersede local law, then that would mean that Kenyans surrendered their sovereignty to the international legal order in so far as legislation was concerned; of which was not the intention of the Constitution drafters. There has been a further argument that since the two are provided for by the Constitution, they take an equal stature and hence any conflicts arising from the two must be resolved through the ordinary rules of interpretation (Ibid, 2014).

Based on this analysis, the place of international law in Kenya is unclear. However, I am of the opinion that domestic law and international law take the same position. However, when there is a conflict between the two, then it calls for wisdom in interpreting so as to ensure that no party is aggrieved. As regards Kenya's responses to international law, human rights are enshrined in both the constitution and the international human rights instruments hence a state has an obligation to respect them regardless of the person it is applicable to. Citizens

and non-citizens alike ought to enjoy their fundamental human rights; hence no state can be justified at any time for breaching these rights. In responding to a threat to the security of a country, the proper procedure outlined under both international and local law should be observed. Further, it is evident that the implementation of the 1951 Refugee Convention is overseen by UNHCR in conjunction with the host Government and it is the responsibility of UNHCR to ensure that governments implement laws in accordance with the Convention.

CHAPTER FOUR

KENYA'S RESPONSES TO THE SOMALI REFUGEE SITUATION

4.0 Introduction

The Government of Kenya, for almost quarter a century continues to grapple with challenges of hosting the largest numbers of Somali refugees within its borders. The Dadaab Camp, initially designed to accommodate less than 100,000 refugees is now home to almost half a million people (Human Rights Watch, 2015). The unprecedented increase in the number of refugees has been attributed to, among other things, the Al Shabaab menace in Somalia, hunger and famine.

Kenya, based on its foreign policy principle of good neighborliness, has continued being a host to a number of refugees from the neighboring countries the majority being from Somalia. However, despite following this foreign policy principle, Kenya continues to struggle with security challenges within its borders due to the Somali based Islamist group, the Al-shabaab. This has seen Kenya wary of the Dadaab refugee camp which hosts a large number of Somali refugees as an infiltrating ground for the Somali Islamist group who continue to launch attacks in the country.

Based on this, The Kenyan government has responded in various ways to the presence of Somali refugees in the country, which has seen it contravene the set of standards of treatment of refugees under international law. Kenya finds itself at the crossroads where it has to balance between abiding by international obligations and the pursuit of its national interests. This chapter discusses the responses taken by the Kenyan government toward the refugees'

influx and protection of its national interests. This will entail responses through review of asylum policies, the 2007 border closure, KDF incursion into Somalia, the Government directive on the relocation of all urban refugees to the designated camps (Usalama Watch Operation), security laws amendments and the views by the Kenyan politicians on the closure of Dadaab.

4.1 Asylum Policies

Prior to 1991, Kenya primarily pursued an open asylum policy where individual refugee status was granted by the government, and the refugees enjoyed their rights enshrined in the 1951 Convention such as the freedom of movement, access to employment markets and benefitted from social rights (Milner, 2009). This was attributed to the fact that majority of the refugees were from Uganda and they contributed to Kenya's development and prosperity through the skills they brought in as doctors and teachers (Kagwanja, 2002, 98). At this time, there was no formal refugee policy or national legislation on refugees and Kenya's priority was to socially and economically integrate refugees as quickly as possible (Milner, 2009).

However, this approach dramatically changed with the arrival of the first Somali refugees in the late 1980s and early 1990s which was evidenced by the significant presence of the Kenyan military at the border and off the Kenyan coast to prevent the arrival of the Somali refugees. However, with the fall of the Siad Barre regime in 1991, the number of Somali refugees increased dramatically to around 400,000 by the end of 1992 which saw the Government shifting responsibility to UNHCR to manage the seven camps it had opened to accommodate the refugees (Milner, 1991). There was increased insecurity within the camps

and there was evidence of violence spill over from Somalia into Kenya and according to Human rights organizations reports, former Somali government soldiers and other armed groups routinely staged raids into North Eastern Kenya and then ‘retreated over the border, eluding capture by Kenyan security forces’ (HRW, 1995, 37).

Kenya’s response to these events led it into adopting a new refugee policy centered on two principles: ‘abdication’ of responsibility for refugees to UNHCR (Kagwanja, 2002, 102) and the containment of the refugee population on the periphery of the state. The government did not close the borders to new arrivals but instead it placed increasing limits on the quality of asylum it offered to these refugees by insisting on their containment in isolated camps. These responses further motivated Kenya’s refugee policy seeing the passing into law of the Kenya Refugee Act (2006) (Milner, 2009).

Since the stabilization of the refugee population in 1995, the government sought to situate the refugee ‘problem’ as far as possible from the political core of the state and to insulate the regime from the presence of refugees by closing refugee camps close to urban areas in the mid-1990s, especially Nairobi and Mombasa (UNHCR Kenya, 1998), and relocating refugees to camps in the border areas, on the political and physical periphery of the state. To reinforce this encampment policy, Parker (2002) and Kagwanja and Juma (2008, 224–5) note that there have been regular raids in urban areas by the police to apprehend refugees residing there illegally since at least 1996.

To justify its approach to refugees, the Kenya government argues that it was overwhelmed by the magnitude of the refugee influx in the early 1990s, which affected its refugee reception and management procedures, and that the numbers remain too high to reverse its encampment policy. Further, there is a lack of burden sharing from the parties involved since the refugees presence place a strain on the environment and public services. The government argues that it has carried the refugee burden for too long and that a solution to the refugee problem should, therefore, be found. Finally, the government argues that there has been a rise in crime and insecurity both in populated refugee areas and in urban areas which have seen the proliferation of small arms and light weapons in Kenya (Milner, 2009:90).

To further justify the strict asylum policies, Carver (1994:53) highlights that in January 1993, the Kenyan government asked UNHCR to repatriate all refugees, arguing that ‘the number of refugees in Kenya has not only seriously compromised the security of this country, but significantly overstretched the infrastructure and medical services, has adversely affected the economy, the environment and the proliferation of Small arms and Light weapons’ (Parliament of Kenya, 2003, 3981). This push for repatriation and the closure of refugee camps near urban areas was further advanced by authorities and this was evidenced by a series of sweeps conducted by police in Nairobi in 1996 to apprehend undocumented aliens and refugees who were not residing in designated camps against government policy (Kirui & Mwaruvie, 2014). This led UNHCR to close two camps in 1996 including Utange, which was the largest in the coastal area.

It should be noted that since then, Kenya has never had a clear asylum policy to help in the management of refugees in the country. Despite not having a clear substantive policy, the government continued to handle refugee issues. As a result of this, Kenya continued to respond to the refugee problem in ways that breached the rights and freedoms of the refugees. Further, in as far as asylum or refugee policy, Kenya has been relying on the pronouncements of ministers (now cabinet secretaries) and/or government officials of the different governments in place; of which pronouncements are influenced by the security policy.

4.2 Closure of Kenya-Somali Border in 2007

The closure of the Kenya-Somalia border in 2007 was a response by the Kenyan government to the influx of Somali refugees, and it was aimed at preventing the arrival of additional Somali asylum seekers. This was a state declaration informed by the National Security Council. The then Provincial Commissioner made the pronouncement on advice from the top security organ. It was estimated that close to 1,000 refugees were crossing into Kenya due to violence and other human rights abuse in Somalia (UNHCR, 2009). In reaction to the unprecedented action by the Kenyan government, the Human Rights Watch (2009) described the incidence as *'from horror to hopelessness.'* Oxfam International (2009) lamented that the failure by the Kenyan government to allow the refugees into the country led to a humanitarian crisis. Chronic ailments, malnutrition, and overcrowding, were being reported as Somali refugees resorted to living in informal camps. It was also difficult for humanitarian aid to reach the victims (Oxfam International, 2009). Despite the presence of Kenyan forces

on the border with Somalia, it was estimated that close to 80,000 refugees managed to cross into the country (Human Rights Watch, 2009).

At the moment, the government was afraid of a spread of the Somali conflict by fighters entering Kenya, which would have endangered Kenya's national security (Freudenthaler, 2011). Kenya's then Foreign Minister Raphael Tuju argued that the country was not able to ascertain whether the Somali immigrants were genuine refugees or fighters, and, therefore, the best measure was to block their entrance to Kenya (Amnesty International, 2007). However, one of the main challenges is that Kenya shares a large porous border with Somalia. For this reason, hundreds of refugees could still cross into the country daily (Human Rights Watch, 2009).

In 2009, Kenya found itself in a dilemma. It had to choose between protecting itself, and protecting the refugees. As aforementioned, Kenya, like any other country, has a right and responsibility to protect its citizens from any external aggression. In 2009, the threat to the Kenyan security was real. The threat of Al Qaeda group that had launched a terrorist attack on the American embassy in Kenya in 1998 was still eminent. Without a formal government, Somalia was a breeding ground for terrorists. Kenya was, therefore, prepared to take all necessary measures to protect itself and its citizens. Another major challenge was to isolate suspected terrorists from the refugees (Human Rights Watch, 2009). The only option, though considered illegal, was to stop the influx of fleeing refugees.

The central issue raised by the human rights groups was whether Kenya's action to close the border contravened international law. Human Rights Watch (2009) asserted that Kenya's decision indeed violated the rights of refugees. The move violated the principle of nonrefoulement since the rejection of asylum seekers at the frontier was already considered as violating the principle of not returning a person to a place of possible danger (Freudenthaler, 2011). Further, by closing the border, it put the asylum seekers at risk of further persecution, thus violating this principle (Amnesty International, 2007).

The government argued that this action was justified on the basis of national security. A refugee who is deemed as a threat to the safety of the country of asylum can be expelled, however, this measure is only applicable for individual refugees who have undergone a fair refugee status determination process (Ibid, 2007). The closure prior to the RSD process denies access to a fair asylum process since it fails to take into consideration specific individual cases hence challenging the allegation of national security. The closure was a violation of human rights; it paved the way for arbitrary police arrests and harassments and numerous incidents of refoulement (Freudenthaler, 2011).

While Kenya has a role to protect its self-interests, the closure of the border was unjustified. A majority of people fleeing from Somalia at the time were women and children who did not pose any security threat to Kenya (Human Rights Watch, 2009). Secondly, closing the border led to the loss of more lives, due to lack of food and clean water. Kenya should have boosted surveillance at the border with Somalia, arrest any suspects, and let the innocent people cross. As mentioned before, Kenya's action was not forbearing since hundreds of refugees

still made their way into the country because in 2008 around 60,000 new arrivals crossed the border (Human Rights Watch, 2009). While it is apparent that a country should protect itself, the strategy employed by the government was not the best. If the goal was to stop militia men from entering the country, Kenya had failed as the Kenya-Somali border remains porous, and they could still gain access at their will.

4.3 Kenya Defense Forces Incursion into Somalia

Prior to the KDF incursion into Somalia, Kenya's security and tourism industry had been threatened by the series of kidnappings and cross-border attacks carried out by Al-Shabab terrorist group. By the end of 2011, Kenya had witnessed the kidnapping of two foreigners and another being killed in one of the resorts on the east coast, abduction of two aid workers from Dadaab refugee camp. Further, the Al-Shabab conducted land incursion into Kenya territory through the use of Improvised Explosive Devices (IEDs), landmines, roadside bombs, and raids by fighters using small arms and Rocket Propelled Grenades (RPGs) against Kenyan forces on the Somali border in retaliation for Kenya's support given to anti-Al-Shabaab militias (Odhiambo *et. al*, 2012).

In a bid to protect its national security interests, the government responded by invoking Article 51 of the United Nations charter on 'the right to self-defence' by pursuing the Al-Shabaab terrorist group into Somalia. The KDF incursion to Somalia, which kicked off in mid-October 2011, dubbed as 'Operation Linda Nchi' was meant to flush out the Al-Shabab from the country (Wilkinson, 2011). Khalif (2011) asserts that there were speculations of

further attacks from the Al-Shabab hence it was paramount for Kenya to take action to protect its territory and sovereignty.

The instability in Somalia posed various threats to the region such as increased piracy in the Gulf of Aden, terrorist activities in East Africa and the Great Lakes region and also an increased flow of refugees to Ethiopia and Kenya who were escaping from the drought-induced famine in Somalia (Onyango-Obbo, 2011). Initial unsuccessful attempts by the United Nations (UN), African Union (AU), the United States, Uganda and Ethiopia to stabilize Somalia did not dissuade Kenya from pursuing a similar course of military action. Odhiambo *et.al* (2012) argues that Kenya's military incursion to Somalia appeared to fulfill domestic and regional demand signal for the firm and decisive action against a major regional security threat.

Odhiambo *et.al* (2012) considers the incursion as a preventive action which was justified due to the previous terrorist attacks that had been launched in the country by the Al-Shabab. Article 2(4) of the UN Charter prohibits the use of force or threat against the territorial integrity or political independence of another state. However, Article 51 of the UN Charter provides two exceptions to the general rule against the use of force: when there is an authorization by the Security Council and in cases of self-defense. The Security Council justifies the use of force in cases of self-defense where there is an attack underway or has already happened and that the force must be, necessary, reasonable and proportional (Jennings, 1996). In the 1986 *Nicaragua case*, the ICJ justified the use of force when the state concerned is a victim of an armed attack. It can be argued that Kenya, based on the

provisions of the UN Charter was justified to enter Somalia to fight off the Al-Shabab based on the series of attacks that it had encountered with the group.

Prior to Kenya entering Somalia to fight Al-Shabab, most countries in East Africa suffered from food insecurity and due to years of conflict, south and central Somalia was worst hit by the famine. Close to 4 million people in Somalia were in need of assistance, but it was a challenge for the humanitarian aid organization's to reach them because of the Al-Shabab who controlled those areas. As a result, Kenya continued to receive close to 1500 Somali refugees per day beyond the capacity of the camps. Due to this influx of refugees, Kenya was under pressure to open another camp Ifo II to help decongest the other Dadaab refugee camps (UNHCR Report).

Kenya was hesitant in opening the camp and argued that it would encourage more refugees into the country and also create environmental and economic impacts in the country (Ibid). The government further argued that the Somalis who were fleeing from drought should not be considered as refugees and urged the humanitarian organizations to offer support to those in the regions where al-Shabab were not a threat.

Based on this analysis, it can be argued that Kenya felt the need to enter Somalia to fight the al-Shabab since they proved to be a national security threat to both Kenya and Somalia. It is further evident that the al-Shabab contributed to the growing influx of refugees in the country thus adding pressure to the government in hosting the already large numbers in the camps. It

was thus imperative for Kenya to take action to defend its territory. However it is unclear whether this move actually helped the situation or not.

The KDF incursion into Somalia could thus be justified on the following accounts. Firstly, under the international and local laws, Kenya has a right to protect itself from external aggression. Secondly, there was a clear indication that the Kenyan national interests had been threatened. Third, Somalia did not have a strong government at the time to handle the situation. The incursion helped in stabilizing the government in Somalia. This was part of the plan to ensure that the rule of law was restored.

One of the main questions is whether KDF and indeed Kenya, achieved the set objectives. Critics argue that the continued stay of KDF soldiers in Somalia is actually contributing to the increased insecurity in Kenya. Prior to the incursion into Somalia, Kenyans had not witnessed attacks of such a magnitude and intensity from Al Shabab. A UN report (2014) has also linked the KDF to illegal activities such as selling charcoal. The charcoal business was operated by the Al Shabaab to finance their operations. The Human Rights Watch (2012) expressed concerns that Kenyan soldiers had killed innocent people in their operations. However, it has been difficult to substantiate some of these claims as the KDF has always denied any involvement in violations of human rights. However, Kenyan soldiers have played a significant role in restoring stability in Somalia.

4.4 The Government Directive on Enforcement of the Encampment Policy (Usalama Watch Operation)

Kenya has recently experienced a number of terrorist attacks that have prompted the government to take certain measures to protect its citizens and secure its borders. In 2013, for instance, the attack on Westgate Mall of which the Somali-based Al-Shabaab claimed responsibility left scores of people dead (Daily nation, 2013). There have been similar attacks in Lamu, Mombasa, Nairobi's Eastleigh and Garissa. The government believes that illegal immigrants, especially those of Somali origin, may have taken part in the terrorist activities. In Nairobi urban areas, the government through the Minister of Interior and Coordination of National Government issued a directive ordering all urban refugees to relocate to the designated camps (Yarnell & Thomas, 2014).

With the pressure to take decisive actions to protect the Kenyan lives, the government launched the Usalama Watch Operation, which within the Government was dubbed as 'Operation Sanitization of Eastleigh' (IPOA, 2014). The operation was meant to flush out illegal immigrants and refugees who had moved out of the camps as well as capturing Al-Shabaab elements and their sympathizers. Intelligence officials and the Antiterrorism Police Unit (ATPU) claimed that refugees were the main suspects (Yarnell & Thomas, 2014). However, Amnesty International (2013) indicated that Somali refugees were being used as 'scapegoats' by the government. On its part, the Human Rights Watch (2014) reported that the Kenyan Police were harassing innocent people at Kasarani, where the suspected illegal immigrants, mostly Somalis were held. Complaints of bribery, extortion, and other forms of abuse of human rights were reported from Kasarani (Yarnell & Thomas, 2014). The

government did not inform the public, whether it found any culprits who may have staged the attacks in Westgate or any other part of the country.

During the Operation Usalama Watch, the police demonstrated impunity and contravention of the rule of law through the manner in which they conducted the process. In some instances, the ATPU would arbitrarily search houses for illegal weapons and illegal immigrants (Human Rights Watch, 2014). There were also several forceful arrests, which is against the Kenyan Constitution (Human Rights Watch, 2014). There was a general perception that the government was profiling the Somali community as potential terrorists. According to Human Rights Watch report (2014), a number of ATPU confirmed that they were responsible for the disappearance of some suspects and extrajudicial killings. The government was quick to reject the allegation, which was also raised by the independent police oversight authority (IPOA, 2014). The IPOA (2014) report points out that the Operation “was not conducted in compliance with the law, respect for the Rule of Law, democracy, human rights and fundamental freedoms as envisaged in Article 238(2) of the Constitution.

Further, during the operation, there was evidence of forced relocation and deportation of the refugees. This resulted in the separation of children from their parents and cases of unaccompanied minors (Yarnell & Thomas, 2014). This operation challenged the refugees’ right to dignity, freedom from discrimination and fair administrative action. Following this operation a case by *Kituo cha Sheria and 7 others V The AG* was launched in court. The court in the matter held that the Government directive was a threat to the petitioners’

fundamental rights and freedoms including the freedom of movement, right to dignity and infringed on the right to fair administrative action and was a threat to the principle of nonrefoulement incorporated by Section 18 of the Refugees Act, 2006. The court went ahead to quash the directive stating that it violated state responsibility to vulnerable persons (Petition 19 and 115 of 2013).

One of the central questions is whether the Usalama Watch Operation was justified. If there was any evidence that some illegal immigrants and refugees were responsible for staging terrorist attacks, then such an operation was imperative. It would ensure that the suspects are arrested and prosecuted. The government has a right to ensure that individuals who are bent on harming others are eliminated from the rest of the society. However, one would be justified to criticize the manner in which the whole process was conducted. Firstly, it would have been anticipated that the government was relying on credible intelligence. This means that they should have had an idea of the persons behind the terrorist activities. It is absurd that a whole community would be subjected to such inhumane acts in the name of looking for illegal immigrants, Al Shabaab terrorists, and refugees. Secondly, the police acted with impunity and disregard of human rights. It was unconstitutional for people to face forceful arrest and search without a warrant. The Usalama Watch Operation was deemed discriminatory owing to the fact that it seemed to target a particular group of people (Human Rights Watch, 2014). The Muslim community also raised its concerns regarding ethnic profiling and violation of human rights (Petition 206 of 2014).

Nevertheless, the operation was in Kenya's national security interests. When there is credible evidence that particular people within the community are out to harm citizens, the government has the right and responsibility to move swiftly to address the situation. Nevertheless, the government must act within the constitution and its international obligations. It has to ensure that the fundamental rights of the citizens, including those of the refugees are protected. The government has a right to take any action within the law on any refugees engaged in terrorist activities or any unlawful acts. This right has been recognized by the OAU convention of 1969 which acknowledges the danger of armed elements or combatants to the safety of refugees and the country of asylum (OAU Convention, 1969). Hence, it gives a leeway for authorities of the host country to take immediate action to separate and disarm the armed elements or combatants (Kirui & Mwaruvie, 2014).

According to the UNHCR report (2015), refugees are not supposed to move out of their camps. Hence, the Kenyan government's initiative of looking for refugees who were illegally in other parts of the country was justified. In conclusion, therefore, the Usalama Watch Operation was vital to assist in arresting and prosecuting any suspects. The only challenge was that the action violated human rights, and the operation was not done within the confines of the law.

4.5 Amendments to Security Laws

Kenya has faced threats to its national security and safety of its citizens as a result of the terrorist attacks that have been taking place in various parts of the country. As a consequence, the state felt the need to take appropriate and urgent measures to ensure the security of the homeland and its citizens. One of the steps involved amendment of the Security laws. It was, however, arguable whether in protecting the nation; the government could be justified to derogate from its obligations under the constitution and international law. This was because of the harshness that had been exhibited by the security laws amendments, which were perceived to be infringing on the rights of both the citizens and refugees in the country.

Prior to passing of the Security bill into law, the matter was tabled in parliament and in less than the 14 days required period, the issue had already been debated and assented to by the president even without public participation on the various provisions (Petition 628 consolidated with Petition 630 of 2014). The security laws amendments raised a number of fundamental institutional concerns such as the public participation process, right to privacy, access to justice and freedom of assembly and information, and the rights of refugees in regards to the nonrefoulement principle. This discussion shall solely dwell on the amendments regarding refugees as one of the responses taken by Kenya in the name of protecting its national security.

Section 48 of the Security Laws (Amendment) Act had the effect of adding a new section to the Refugees Act at Section 16A by giving the provision to limit the number of refugees in the country to 150,000 at a time. The part went further to give the legislature to vary the number of refugees in the country to be valid for a period of not more than 6 months. The amendments further limited the right to freedom of movement under Article 39 and the rights of refugees under Articles 2(5) and 2(6) of the Constitution and International Conventions by requiring them to stay in the designated camps. Kenya is a signatory to the 1951 Refugee Convention and the 1969 OAU Convention. States have an obligation under these instruments to open their borders and allow asylum seekers into their territory (Article II, 1969 OAU Convention). The instruments further provide for the grounds of exclusion and cessation of refugees from the country of asylum (Article 1F, Article 32 & Article 33 (2) 1951 convention).

A number of Human rights organizations and civil society groups such as Human Rights Watch, Katiba institute, RCK, Kituo cha Sheria and KNHCR criticized the clause as infringing on the principle of nonrefoulement. KNHCR and Kituo cha Sheria argued that limiting the refugee number to 150,000 was against the principle of nonrefoulement and despite being applied in the African region, it constitutes a dangerous practice and defeats the purposes of the Constitution as regards an open and democratic state (Petition 628 consolidated with Petition 630 of 2014). RCK further argued that the clause was illegal, irregular and discriminatory since the limit introduces another ground of cessation not in the Refugees Act and the procedure for identifying the set number was not explicitly provided hence it would lead to many asylum seekers being discriminated (Ibid, eKLR 2015).

While Kenya has received a scathing attack from the local and international community for proposing what has been termed as controversial security laws, the government still has a role to play in protecting its people. The lives of Kenyans and their property have to be protected. The Kenyan government has been under pressure from the opposition, religious institutions and the international community to protect its people (Daily Nation, 2015). Hence, while Kenya has an obligation to protect refugees, it has also a right to protect itself from any adverse events emanating from refugees. Kenya has already submitted a report to UNHCR stating that it needs assistance to deal with the influx of Somali refugees. In November 2013, a three-party agreement was signed between the UNHCR, Kenyan government, and the Somalia government. According to the agreement, all the parties were to work closely to facilitate a smooth return of refugees to Somalia.

Realist scholars argue that national interests always come first on the agenda of the state. However, there must be a balance between the pursuit of national interests and protection of refugee rights. The government needs to amend the proposed laws to ensure that they are not inconsistent with the fundamental human rights. In addition to this, the government needs to ensure that it respects its international obligations as regards refugees.

4.6 Political Decision on the Closure of Dadaab Camp

The decision to close the Dadaab camp was first hatched in 2013 when a tripartite agreement was signed binding Kenya, Somalia and the UNHCR (UNHCR, 2013). Kenya had approached the UNHCR and expressed the desire to have the Somali refugees repatriated

back to Somalia. Kenya was responding to the growing number of Somali refugees. The three parties agreed to cooperate to ensure that the process of repatriation was done in a smooth manner and in accordance with Article 33 of the 1951 UN Convention Relating to the status of Refugees taking into account refugee rights and protection against forceful relocation. More recently, however, Kenya's decision to relocate the refugees into Somalia has been precipitated by the security challenges. The government has threatened to force the Somali refugees out of the country. This is against Article 33 of the UN Convention on Non-refoulement (UNHCR, 13). While the UNHCR allows for repatriation, it has to be done in a manner that will not lead to persecution of the refugees. Repatriation is also supposed to be voluntary. The refugees have to decide whether they feel safe moving to another location back in their country of origin. In a move to repatriate the Somali refugees and close the Dadaab refugee camp, the government went ahead to disband the Department of Refugee Affairs, the government body tasked with refugee management in Kenya.

Kenya has received condemnation internationally over plans to repatriate refugees. According to a report by the Amnesty International (2015), close to 350,000 Somali refugees will be affected. According to the report by the UNHCR on repatriation, one of the primary goals is to focus on the reintegration process of the refugees (UNHCR, 2013). This is aimed at preventing any conflict between the refugees and the host communities. This means that prior to the relocation; the host community has to be prepared to receive the refugees. The decision to close the camp will be in violation of the international laws, especially the rights to nonrefoulement.

As indicated before, the Kenyan decision to close Dadaab camp is not only aimed at curbing the current humanitarian crisis and the influx of refugees, but also as a security measure. It is alleged that the camp has been used as a training ground for Al-Shabaab recruits (Goldman, 2015). However, the government is yet to release any tangible evidence about the number of Al Shabaab members arrested at the Dadaab camp. The Amnesty International (2015) does not support the government's efforts to close the camp indicating that the allegations of terrorism are unjustified. The government is accused of using the current security challenges in the country as a justification for closing Dadaab (Human Rights Watch, 2015). This will not just affect the Somali refugees, but other refugees from Southern Sudan, Burundi and Ethiopia who also reside at the camp. Further, with the disbandment of the Department of Refugee Affairs, the government leaves a grey area as regards refugee management in the country.

The bottom line is that Kenya can use other strategies to address the challenges the Dadaab camp. The decision to close the camp will have negative implications that will include physical and emotional harm to the refugees. This does not, however, mean that Kenya has no obligation to control the influx of Somali refugees. Kenya should work closely with the Somali government in an effort to share intelligence. With peace gradually being experienced in Somalia, many refugees will begin returning to their country. Kenya should work with the UNHCR and the Somali government in an effort to make necessary preparations for humane repatriation. The camp should remain open for those who are not yet ready to leave, or they should be relocated to another country.

4.7 Conclusion

Kenya finds itself in a dilemma of protecting itself or having to protect the rights of the refugees. Kenya, being a signatory to international treaties and conventions, has an obligation to adhere to international refugee law. Refugees, just like the general population, have to be protected against physical and psychological harm. At the same time, Kenya has a right to ensure the security of its citizens. With the increased terror attacks and influx of refugees, Kenya needs to secure its border with Somalia. However to achieve this, it can use other strategies that will control the influx of refugees and improve security without necessarily infringing refugee rights.

CHAPTER FIVE

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

This study set out to investigate the different responses by the government towards Somali refugees. There is a common perception amongst the Kenyan political arena and the general public that the Somali refugees pose a threat to Kenya's national security. This perception stems from the myriad of terrorist attacks that have been happening in the Kenyan soil both in the cities and in the former NEP. The study also set out to contribute to this debate on the perception of Somali refugees as security threats to the country. This chapter presents the summary, conclusion and recommendations.

5.1 Summary of the Study

Kenya has been a host to a large number of refugees from mainly the Horn of Africa and Great Lakes Region. These refugees are primarily in Kakuma refugee Camp in the north-western part of the country and Dadaab refugee camp in the North Eastern part of Kenya. As a result of these security concerns and the threat to its citizens, Kenya saw it imperative to respond so as to protect its national interests and national security. However, its responses to the Somali refugee influx have been received with great criticism from the international community and civil society groups in the country. Kenya is now caught in a dilemma as to whether to obey its international obligations or whether to defend and pursue its national interests for the sake of protection of the homeland. This study has come up with various findings.

First, national security interests are vital for any country as a means of ensuring its survival. Among Kenya's vital national security interests is the preservation of territorial integrity and establishing peace, security, law and order. It was evident that most states, and not only Kenya, tend to respond in various ways to refugee influxes for different reasons but it was clear that some especially in the global North react in a bid to safeguard the homeland, protect its citizens and pursue their national interests. With the rise of terrorist attacks in the country and the influx of Somali refugees, the study established that Kenya's national security interests were under threat. The realist school supports the use of force in securing and defending the state's survival. The use of force is prohibited in international law with an exception of when a country's security is under threat after an attack or there is conceivable threat. The study established that Kenya's response by sending its forces to Somalia was in a basis of self-help and they acted within the realm of international law.

The study further established that this response has not bore any positive outcome. Instead, the Al-Shabab terrorist attacks in Kenya have escalated leaving scores of citizens dead. The study further established that instability and insecurity in Somalia threatened Kenya's territorial integrity. Further, Kenya continues to receive new asylum seekers from Somalia who are fleeing the conflict escalated by the Al-shabaab in the country. The study hence establishes that Kenya's political decision to close Dadaab camp and repatriation of the Somali refugees into Somalia places the lives of the thousands of the refugees at risk. This is in contravention of the principle of nonrefoulement set out in the 1951 UN Convention and the 1969 OAU Convention of which Kenya is a party.

Second, the study established the importance of international law and institutions in ensuring protection of refugee rights and also in acting as checks and balances to government behavior. The study identified the primary international law instruments that guarantee the rights of refugees and the specific rights that refugees should enjoy. The study set out the particular rights that have been infringed by the Kenyan government from its responses to the Somali refugee influx and the terrorist attacks in the country. The study revealed that the government had the perception that there is a link between the refugees and the insecurity in the country, and in particular as regards the terrorist attacks. The study identified that due to this linkage, the refugees' right to nonrefoulement, freedom of movement, right to a fair RSD process and right to fair administrative action had been infringed. This was evidenced by some of the responses such as the government directives on relocation, political decisions to close Dadaab camps, the 2007 border closure and the asylum policies that have been adopted. The study revealed the contradicting judicial decisions by the courts regarding particularly the freedom of movement. It was established that the freedom of movement is not an absolute right. The study further established that it is important for Kenya to oblige with its international obligations. From the study, it is important for Kenya to follow the proper procedure under international law as it pursues its national security interests. The study found that the refugee protection and state protection debate is quite complex considering the changing nature of the international system and the increase in conflicts around the world.

5.2 Conclusion

Kenya, as a member of the international community has an obligation to adhere to international obligations. While pursuing its national security interests, Kenya should act

liberally taking into consideration its international obligations. Protection of the homeland is vital, however, it has to be done within the ambits of the law and to successfully achieve this; adherence to law and international cooperation are material. Kenya cannot solve the insecurity problem in the country by solely shifting the blame on the refugees to the extent of limiting the numbers and forcefully repatriating them back to Somali. Due procedure has to be followed. Further, it is imperative for the root causes of insecurity to be established before profiling an entire community for being a threat to national security interests.

5.3 Recommendations

Having looked at the summary and analysis above of the study, the research suggests the following recommendations. The refugee protection versus state protection debate is a thorny issue that needs various stakeholders and partners to be involved to help and support governments that are carrying the largest burdens of refugees. As such, to help Kenya in dealing with the Somali refugee influx and security issues, there is need for international cooperation from UNHCR, the international community, donor countries, the neighboring countries and the government to join efforts in dealing with the root cause of refugee flows and finding sufficient and effective durable solutions to the refugee problem. It is imperative for the Kenyan government and the international community to join hands to help restructure Somalia both economically and politically to help the country in peace building and development.

As regards the protection of refugees, it is paramount for the Kenyan government to come up with a comprehensive and substantive refugee policy to help in refugee management. The

institution of refugees in Kenya is informed by the security policy. If refugee management was designed on a National Policy Framework, it would be easy to address the security concerns of the country especially with the existence of a refugee national policy in place. Further, the Kenyan government should deal with the issue of police harassment and community violence against the Somali refugees. This should be done by providing training and sensitization to the police force on human rights issues. Further, there is a need for awareness to the general public to avoid the general profiling of the Somali community as terrorists. Further, stakeholders should support the ongoing systematic police reforms. Donors should support efforts to train police forces and government departments on refugee rights and refugee documentation.

In the endeavor to protect its citizens and its national interests, the Kenyan government must address, in line with its obligations under refugee law, the responses it has been having towards the Somali refugees both in the urban areas and in the camps. The Government should follow the right procedure under international law in addressing the refugee problem and also in pursuing its national interests.

UNHCR and the Government should work together to improve the Refugee Status Determination system, which is currently backlogged and inefficient. Further, UNHCR should support the Government fully in the transition process as it hands over the RSD process.

Kenya's elected officials must end calls for an immediate mass return of refugees to Somalia and should adhere to international law on refugee protection and rights. The government must be more thorough in the screening, reception and registration of new arrivals. However, while doing this, the officials and authorities concerned should not infringe on the rights of individuals and all refugees should be treated equally. It should adhere to the respect to nonrefoulement and do it in a humane manner, in consultation with Somalia, third states and UNHCR. The government should further review the granting of *prima facie* refugee status to the Somali refugees.

The Kenyan government should also pursue the option of local integration. There are refugees who have been in the country since the inception of Dadaab refugee camp and others have been born in the camp thus considering the camp more as their homes. To such categories of refugees, the government should consider locally integrating them, providing them with full citizenship and according them the full rights and freedoms accorded to citizens. They should be allowed to contribute fully to the economy of the country by having access to equal work opportunities.

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