HUMAN RIGHTS VERSUS NATIONAL SECURITY: THE REFUGEE QUAGMIRE IN KENYA

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ABSTRACT

Refugees existed as early as the times when religion is said to have begun. There are various books in the Bible for instance where refugees were said to be people who were homeless and needed special attention from the society. During the first and second world wars, millions of people were displaced in Europe and this led to creation of laws that would ensure the safety and protection of refugees. Later on as African states developed, they started experiencing challenges similar to the ones were being experienced in Europe and as a result the laws were revised to incorporate legal protection of the refugees in Africa. Kenya has hosted thousands of refugees from neighboring countries like South Sudan, Somalia and Uganda during the dictatorial rule of Idi Amin. However, the Dadaab refugee camps, established in 1991 to host Somali refugees fleeing clashes and subsequent civil wars after the ousting of Said Barre in January 1991, have posed more security concerns to Kenya. The persistent insecurity in Dadaab refugee camps has put pressure on the Kenyan government on the need to comply with its international human rights obligations by continually hosting refugees. It has emerged that these refugee camps have become a breeding ground of Al-Shabaab activities. It is undisputed that human rights will always come first in all circumstances irrespective of whether one is a citizen or a refugee. But with national security on the other hand, how far can the state protect refugee rights? To what extent are host governments supposed to secure the rights of refugees when the security of its
citizens is at stake? And finally, what is the scope of the refugee rights? How Kenya will strike a ‘happy medium’ by ensuring that it complies with its international human rights obligations by protecting the refugees whilst ensuring that there is no compromise on security? This study seeks to analyse the threat posed by refugees to security, the extent to which the state should protect refugees’ human rights and ensure that the security of its nationals is not compromised. The study finally attempts to suggest viable options that may mitigate the problem.

Key Words: Refugee, Human Rights, National Security, Al-Shabaab and Non-refoulement.

1. INTRODUCTION

1.1 Background

The refugee crux can be inextricably traced back to the 1970s when the East African region was faced with a series of events that led to instability in most countries, ranging from the coup in Uganda, which was executed by general Idi Amin on 25th January 1975,¹ the defeat of the Said Barre regime in Somalia, who had risen to power through a coup, the Rwandan genocide mass slaughter of Tutsi community in Rwanda by Hutus which began on 7th April 1994 due to political issues,² to the numerous civil wars in Sudan.

These wars forced multitudes to flee from these countries to Kenya which this study could term as the safest surrounding haven. In the beginning, this did not appear to be a problem because

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after all Kenya was a welcoming and very accommodative neighbor until the numbers started surging and by 2013, there were over 600,000 refugees in Kenya.³

The Ministry of Home Affairs was then charged with the responsibility of handling and registering refugees. This matter never attracted any attention since the visitors who were being accommodated were very friendly and soon became part of the Kenyan system although they were not integrated into local communities which led to challenges of citizenship. The question that then arises is, to what extent is the principle of non-refoulement applied and what detriment does national security suffer in this case?

The main refugee group in Kenya is from Somalia, as per the United Nations High Commissioner for Refugees, followed by the refugees from Ethiopia. The Dadaab refugee camps for instance which was started in 1983 by the United Nations High Commission for Refugees houses thousands of refugees from Somalia and has been in existence for over 33 years and the numbers have been surging over the years. Thousands of other refugees are in Kakuma Refugee camp which is dominated by refugees from Ethiopia and all the other neighboring countries such as Sudan. This study will demonstrate that the surging presence of refugees has posed a huge threat to national security. Kenya was the 12th most impacted by terrorism in 2013.⁴

This article is divided into three parts. Part one is an introductory that sets out the background of the study. The part also sets out the problem statement in detail and seeks to draw a nexus between refugees and the threat they pose to national security. Part two is an analysis of the legal and institutional framework that governs refugees and the last part highlights the conclusions and recommendations. Some of the solutions suggested include strategies that are geared towards

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striking what the authors refer to as a ‘happy medium’ that strikes a balance between protecting refugees’ rights and national security.

1.2 Problem Statement: Tracing The Terrorist Threat

As early as 1998, Kenya had already started experiencing the torment of terrorist attacks from external sources for instance the bombing of the USA embassy in Nairobi. Another deadly attack also occurred in Kikambala Hotel where several citizens and Israeli nationals lost their lives.\(^5\) This was after missiles that had been launched at an Israeli passenger plane missed their target.

In late 2009, a series of terrorist attacks were experienced on Kenyan soil. This put the security of Kenyan citizens and tourists at risk. Tourists were attacked at the Kenyan coast while some of them were taken into captive into Somalia and the militia group used them to ask for ransom from the Kenyan government. To make matters worse, some of the tourists were killed by this militia group. The Kenyan economy was threatened because Kenya faced travel bans from countries that felt that their citizens could not be secure in Kenya due to the state of insecurity that the country was experiencing then.\(^6\) Countries feared for the safety of their citizens in Kenya while the danger was still eminent in the country and they even issued travel warnings.\(^7\) The Al Shabaab, after crippling the tourism sector in Kenya, targeted innocent civilians in the numerous attacks perpetrated in the coastal towns, in which several lives were lost.

The government then, being the custodian of the fundamental rights of the people, had to take action in order to ensure that lives were not at stake. This prompted the Kenyan government to


initiate the ‘LINDA NCHI’ initiative in which Kenyan soldiers went to Somalia to try and liberate it and bring it under the control of the federal government of Somalia. This however worsened the situation as the attacks increased and presumably in retaliation.

There have been over 130 terrorist attacks in Kenya since then and thousands of lives have been lost. On 17th September, 2011 a grenade shell was recovered from the premises of the office of the then prime minister but the issue was not given due attention as the authorities made reports that were published by the Kenyan media, to the effect that the grenade did not target anyone. This clearly indicated the seriousness of the threat of terror that had been waged against Kenya, as the attacks were directed to the government of Kenya. Between 2012 and 2013, there had been over 17 attacks occasioned by hand grenades and explosives in North-Eastern Kenya, Mombasa and Nairobi.

Kenya experienced one of the most disheartening terrorist attacks in one of the biggest malls in Nairobi, the Westgate Mall, on 21st September 2013, where 68 people lost their lives. Al-Shabaab claimed responsibility of the attack. Later in the year, there was an attack at Mpeketoni where innocent people were killed, most of them being of Kikuyu origin, and the Al-Shabaab claimed responsibility. In 2014, two simultaneous attacks were carried out in Mpeketoni where more than 60 people were killed. In 2015, there was an attack in some mines in Garissa where up to nine policemen were killed and some injured.

1.3 Impact of Refugees on Security

1.3.1 The Link between Refugees and Insecurity

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8Paul Wafula, ‘Kenya Has Experienced 100 Terror Related Attacks in 3 Years’ Standard Digital (Nairobi 18 August 2014).
9The Standard, September 21, 2013.
The fear of the state of insecurity in the North Eastern region, and especially with the influx of refugees (allegedly feared to be in possession of arms), started with the establishment of Dadaab refugee camps in 1991. This fear was accelerated by memories of the Shifta movement in the 1960's that waged secessionists wars in North Eastern supported by Mogadishu. This was because of Somalia's claim of an expanded Somali territory into Kenya's North Eastern region. Jomo Kenyatta, the then President, on this matter maintained that Kenya would not concede any of its territory to Somalia.11 To date, the Government of Kenya, through its Ministry of Interior, perceives refugees of Somali origin as a possible threat to national peace, order and security. These fears are predicated upon the clamor for constant safety.

The reason refugees have always been associated with insecurity is that the authorities, and especially the Ministry of Interior and National Coordination, through its cabinet Secretary, has always indicated that some refugees have in the past been apprehended in illegal possession of illicit firearms. Some of these apprehended persons propagate proliferation of the said illicit firearms. The use of illicit small arms leads to widespread illegal activity and eventually undermines the legitimate authority of the state.12 The international common borders are often not sufficiently policed and people can and do easily cross the border on either side. Thus, the porous nature of the border makes it easy for the trafficking of illegal arms. Besides, the number of officers deployed by the government is hardly enough for such an extensive common border.13 In the case of the Kenya-Somali border, the rough terrain and hostile weather make border policing more difficult. Some are of the view that the porous Kenya-Somalia border is part of a

broader, complex pattern of state failure and communal violence afflicting much of the horn of Africa.\textsuperscript{14}

The planning and execution of the dehumanizing Westgate mall attack was traced back to \textit{Dadaab} refugee camps but there was no direct evidence that linked the refugees to the attack. The Kenyan government had its suspicions but could not do much as there was no direct and substantial evidence; the tracks had been covered, and therefore no nexus could be drawn between the two.

Worse still, on 2\textsuperscript{nd} April 2015, gunmen stormed Garissa University in the wee hours and killed over 140 students. The \textit{Al-Shabaab} militant group claimed responsibility.\textsuperscript{15} This could be termed as a soft target for them. And the same inference was drawn but yet again there wasn’t any direct evidence to link the refugees directly to the attack.

A nexus could be drawn between the terrorist group and the refugees at \textit{Dadaab}, in that these refugees are Somali nationals and this group has its base in Somalia thus it was easier to manipulate or intimidate these citizens into harboring their activities.

Although it has not been proven, the refugee camps would be termed as a softer landing for the \textit{Al-Shabaab} because of the free commodities such as food that is provided in these camps. There is also less supervision and the security agents are less concerned about the presence of the refugees in the country, because, after all, a greater number have not been accorded documents to recognise them as refugees or asylum seekers legally.


\textsuperscript{15}Daily Nation Thursday April 2 2015.
Recently, Hagadera camp in Dadaab refugee camps, with several other camps in it, as per the United Nations fact sheet, experienced an attack when explosives went off injuring thousands of refugees.\textsuperscript{16} This then means that the camps are not safe for even the refugees themselves thus rendering them more vulnerable than they already are.

It is against this backdrop that this study argues that refugees are a real threat to national security.

### 1.3.2 Government’s Response to the Threat Posed by Refugees

These events led to the then Minister of Interior and Co-ordination of National Government, Nkaissery Joseph releasing a press statement clarifying that these refugee camps had become hosting grounds for the militant group that had caused deadly attacks on Kenyan soil.\textsuperscript{17} This led to the government’s decision to close down the camps.\textsuperscript{18}

The statement expressed the intention of the government to repatriate the refugees in these camps to their respective countries, as the danger that had prompted their coming to Kenya existed no more and besides that, Kenya’s security was at stake. However, this was not received well by civil society groups that claimed that the refugees’ rights had been infringed upon and that the government did not have a legal justification to repatriate the refugees. Security of its nationals was the main reason that led the government to choose to give the voluntary repatriation directive, but it is evident that there were other economic, political and environmental considerations that were taken into account.

The Tripartite Agreement between the Kenyan government, the Somali government and the United Nations High Commissioner for Refugees, provided that refugees could be repatriated as long as it was voluntary and as long as Somalia was safe for them. The refugees were allowed to voluntarily choose where they wanted to be settled in Somalia as a survey had been conducted and some parts were safe.

On the other hand, the rights of refugees cannot be assumed. They are to being treated as any other human being because they are to be protected from all forms of discrimination as any other Kenyan citizen who is protected under the Kenyan Constitution. They also have rights under the Refugees Act, 2006 and the Conventions on Refugees that have been ratified by Kenya. They have a right of non-refoulement unless they have voluntarily agreed to be returned to their countries only if they feel that it is safe enough for them to return. Human rights are applied universally in the world to all human beings; they are entitled to these rights regardless of their status. In the case of refugees, one of the constitutional rights that they cannot assert is the right to vote as it is exclusively for Kenyan citizens. The foregoing means that they should be facilitated to enjoy all other rights including the right to fair administrative action under Article 47 of the Constitution.

All in all, the principle of proportionality is vital and will have to come into play when determining whether repatriation is appropriate and necessary. Refoulement should be the last resort. Will the repatriation be necessary in the quest for security of the state or will it cause the refugees unwarranted detriment? As per the High Court’s decision in Kituo Cha Sheria and 7

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others versus the Attorney General\textsuperscript{21} the government’s directives were said to be a threat to the petitioners’ fundamental freedoms and rights and to the non-refoulement principle contained in Section 18 of the Refugees Act. As much as the Refugee Act is out to protect the rights of refugees, it does however provide for circumstances under which a refugee or members of their families can be expelled from the country that they have sought refuge. The reasons are on matters of national security and order after consultations between the minister of security and the minister of matters relating to immigration.\textsuperscript{22}

The foregoing court decision then signposts that refugee rights should be given due priority. If state cannot prove that the refugee camps are breeding grounds for the terrorist groups that pose a threat to national security, or that Somalia is safe enough to have its citizens return home or that the refugees have voluntarily accepted to go back to their countries, then this study contends that, Kenya will have to live with it. This article suggests that the Kenyan government may have to let the refugees stay as long as they want and even be forced to award citizenship to some or even all, as in the case of the Makonde people in the Kenyan coast because they would have stayed long enough to be registered as Kenyan citizens.

Countries such as the United States that have their wage bill calculated in trillions, would rather give financial aid than take in refugees although they have ratified these conventions, because they are aware of the adverse effects of hosting them. In the Matter of S-K,\textsuperscript{23} the United States of America government refused to grant refugee or asylum status and even entry into the country to

\textsuperscript{21} Petition no.19 and 115 of 2013 at Nairobi High Court.
\textsuperscript{22} Section 21, Refugee Act 2006.
\textsuperscript{23} 23 I&N,936(BIA 2006).
a group that had supported Chin National Front, which was considered an illegal group, including a Burmese national who had provided approximately 7,000 dollars to that group. Similarly, in other jurisdictions such as Canada, in the case of *Suresh v Canada* the court explained that in exceptional circumstances, deportation to face torture would be allowed. Exceptional circumstances can include threat to national security.

**1.3.3 Other Insecurities Posed by Refugee Accommodation**

Kenya has also experienced a strain on its economy because it is expected to treat these refugees no differently than Kenyan citizens. This means that it has to provide social needs, amenities and social services which add a strain on the already bad economy.

Apart from the attacks that have been associated with the presence of refugees in the country, there other adverse effects that have occurred as a result of hosting them. It would be absurd to assume that the residents of the semi-arid area where these refugee camps are, which are in fact the largest in the world, have the same livelihood as they did before.

Natives of that region for instance struggle and scramble for resources such as water and food for themselves and for their animals, so adding such a great number to the region means that the resources are going to be more scarce, which actually threatens their social security. It cannot be prudent to let your ‘children’ sleep hungry because you have a visitor, who is not keen on ending their stay and has actually overstayed their welcome.

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24 1S.C.R3, 2002 Supreme Court of Canada.
Kenya as country has the duty to accord its citizens positive rights as provided for in the Constitution under the Bill of Rights, and most of them are social rights which include provision of basic needs. Justice Mumbi Ngugi, in the case of Mitubell Welfare Authority v Kenya Airports Authority, a case that had been leveled against the government, held that,”…the government has to show that it is making an effort towards realising social economic rights although they are to be achieved progressively. Clearly, the government is not able to fully support its citizens economically, and therefore lacks the extra muscle to host and provide for refugees. The countries that are supposed to give aid to help support the refugees have blatantly failed to do so, not once but a number of times as per the 2010 Kenya National Commission on Human Rights Report on Refugee status in Kenya. It is a bit unreasonable to impose additional costs to the already hard pressed social and public welfare budget.

Secondly, it cannot be assumed that the environmental status in the refugee camps area will remain the same. Sudden and unplanned change takes place and it may lead to serious uncontrolled imbalance with an impact on the whole eco-system. This then means that the semi-arid region may eventually become a desert and the effects may be long term.

In addition to this, one cannot afford to ignore the political strain that has been caused by the refugee crux. For instance, the political heat that the repatriation announcement by the Cabinet Secretary of Interior generated. It almost became a battle between the country’s opposition and the government. The opposition was by all means right and justified to stand for the rights of

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26 Petition 164 of 2011, eKLR.
27 Mitubell (n26).
refugees, which actually bore fruits, but it caused a strain on the political standing of that country however insignificant it may be viewed to be.

1.3.4 Protecting State Sovereignty

Amid all this confusion on what action the government is best suited to undertake, and in an effort to justify the government’s decision to close down Dadaab refugee camps, one would argue for the sovereignty of the State and the freedom that a state has in making decisions that affect the state after taking into consideration the effects of that decision on its people. All sovereign power belongs to the people of Kenya who in turn delegate it to representatives to act on their behalf. The government thus acts on behalf of the people of Kenya and if it deems fit to repatriate the refugees, though weak, it can be said to be the decision of the people of Kenya as a whole.

2. AN ANALYSIS OF REFUGEES’ LEGAL AND INSTITUTIONAL PROTECTION FRAMEWORK

2.1 Legal Protection of Refugees’ Rights in Kenya

The State has put in place specific legislation to protect the rights of refugees. The State has also domesticated international human rights law instruments that protect refugees.

2.1.1 Domestic Legal Status of International Human Rights Law

The 2010 Constitution transformed Kenya from a dualist to a monist State by providing that all treaties ratified by Kenya would form part of the law of Kenya. This means that there is no longer need for implementing legislation, and international treaties can now be invoked before the courts, tribunals and administrative authorities in the Republic. However, Article 2(5) and 2(6) of the Constitution has to be given full effect and clarity through legislation. This is more so

29 Article 1 of the 2010 Kenyan Constitution.
since Article 21(4) of the Constitution requires the State to enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms. This means that where a treaty is non-self-executing, requisite legislation has to be passed particularly for human rights treaties.

2.1.2 Treaty Law

Kenya is a signatory to a number of conventions and treaties dealing with issues of refugees and their protection. The conventions have been domesticated by dint of section 16 of the Refugees Act which provides that every refugee shall be entitled to the rights and be subject to the obligations contained in the international conventions to which Kenya is a party.30

(i) The 1951 Refugee Convention Relating to The Status of Refugees

It was enacted to deal with the refugee problem that had come as a result of the first and second world wars. The Convention mainly focused in Europe as millions had been displaced and had sought refuge in neighboring countries. The Convention had restricted refugee status to those whose current status had been caused by events that has transpired before 1951. Its provisions were limited to Europe and it was temporal because the situation was believed to end soon in about a period of three years. However, the problem was not solved in the three years and this prompted the creation of the Protocol.

(ii) The 1967 Protocol Relating to The Status of Refugees

The Protocol was enacted to heal the loopholes that had been left by the 1951 Convention. It removed the geographical restriction and included other parts of the world, because it was discovered that there were refugees in several other areas apart from Europe. However, it

30 Section 26, Refugee Act 2006.
allowed the States that had ratified the Convention previously to choose whether they were to retain the geographical limitation clause or do away with it. It was basically enacted to correct the assumptions which had been made in 1951.

(ii) 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

The Convention was enacted to solve specific issues of refugees in Africa. It was out to encourage the receiving countries to enact laws and standards for the refugees, but it did not provide any remedies for the countries of origin of the refugees. However, the major question which arises is whether states have achieved the expectations of the Convention. For instance, Kenya, among other African countries has in the past treated refugees with suspicion, contempt and resentment, to the extent that it planned the closure of the Dadaab refugee camp.\(^{31}\) This may be attributed to the increased insecurity in, and other constraints that are occasioned on, receiving countries. The Convention also reinforces the principle of non-refoulement and emphasizes on the rights of refugees in Africa.

2.1.3 Domestic Legal Framework

(i) The 2010 Constitution

The 2010 Kenyan Constitution, which is in fact rated among the most liberal constitutions in Africa and in the world, has an expansive Bill of Rights. And as per the average understanding of human rights, they accrue to every person by virtue of them being human beings. Although the refugees might not have absolute title rights provided for in the Constitution, they are to enjoy basic rights such as the protection from discrimination,\(^{32}\) right to life\(^{33}\) and a right to fair

\(^{31}\)Petition no. 227 of 2016.
\(^{32}\)Constitution of Kenya 2010, Article 27.
\(^{33}\) (n32), Article 23.

To combat the insecurity in the country, the then President Mwai Kibaki approved an anti-terrorist statute to help curb insecurity.\textsuperscript{35}

The disputed “security rules” were proposed for approval in 2015 but the Kenyan Parliament failed to pass the Security Bill because it infringed on the people’s fundamental rights and principles including the right to privacy because the government allowed security agents to check the private information of people as a security measure.\textsuperscript{36}

(ii) \textit{The Refugees Act, 2006}

This Act was enacted in Kenya in 2006 and has been tailored to make provisions for the management, protection and recognition of refugees. It has provisions or requirements that one must meet in order to be recognised as a refugee. Some of the requirements are, that one must have left their country of origin as a result of fear of persecution on grounds of race, religion, sex or membership to a particular social group, and as a result, is unable to present themselves to their country for protection. It also provides for the rights of the refugees, which, among others, include the right of non-refoulement. It also provides for the procedure that should be followed in determining refugee status and also creates bodies which are in charge of the refugee status determination. It also has grounds that may lead to the deprivation of the refugee status and when one can be repatriated back to his or her county.

\textsuperscript{34} (n32), Article 43.
\textsuperscript{35} Prevention of Terrorists Act, 2012.
\textsuperscript{36}(n32), art 31.
2.2 The Principle of Non-Refoulement

The principle of non-refoulement, enshrined in Article 18 and Article 33 of the Organization of African Union Convention can be described as a fundamental protection for refugees where by a refugee cannot be repatriated back to their country if there is still fear of persecution. This principle has over time gained the status of an international customary rule. This then means that it is a jus cogens which is a peremptory norm all states are bound by it and cannot depart from it even through a treaty. This prompted the human rights activists to head to court to stop what was described as a violation of the refugee’s rights. In Kituo cha Sheria and 7 others v The Attorney General the petitioners argued that the government had breached the OAU Convention by giving an order that all the refugees in urban centers return back to Dadaab and Kakuma refugee camps in Kenya hosting refugees from Sudan, Somalia and Ethiopia.

The process of refoulement was also declared improper as it was conducted in disregard of due procedure. The petitioners further relied on the provisions of the Constitution; Articles, 27, 28, 30 and 39. They argued that it could be unlawful to force the refugees back to the refugee camps while their families had invested and made their lives in the urban centers, and worse still repatriate them against the wish of most of them because of attacks in the country even though there isn’t sufficient evidence pointing to them.

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40 Articles of the 2010, Kenyan Constitution. This may be deleted as it does not correspond with anything in the paper.
41 Petition 19 of 2013 eKLR.
The principle of *non-refoulement* is the pillar of international protection for refugees, because it binds all states regardless of whether or not they are signatories to the Organization of African Union Convention.

Once a country has admitted refugees, it then has a duty to either accord them the national treatment standard or the international minimum standard.\(^{42}\) This then means that a state should not give preferential treatment to its citizens as per the national treatment standard and it should not willfully neglect the refugees the international standard as it was laid out in the case of *USA v Mexican States*. This then means that they are to enjoy basic rights just like any other citizen of the host country.\(^{43}\)

The main reason why refugees leave their countries is war. Their livelihoods must have been threatened in a way or another, through militia attacks or activities.\(^{44}\) So, it is impracticable to assume that all refugees in these camps are there voluntarily and lack a compelling reason to justify their presence in those camps. Instead, it should be apparent that they are genuinely seeking to secure their right to life, away from their hostile home environment. This right to life is one of the rights that has no boundaries regardless that one is not a citizen of a particular country.

If offenders who have been found guilty of committing capital offences have had their lives protected such as in the South African case of *S v Makwanyane* and another,\(^{45}\) where the South African court ruled against the death penalty in an effort to protect the serenity and sacredness of life, why should Kenya choose to assume this right by handing back refugees back to their war

\(^{42}\)F Njeng’a, International Law and World Order Problems (2001) 43.

\(^{43}\) *USA V United Mexican States* 42B U. S543 (1976).


torn countries where their lives are clearly threatened? Other states have had to intervene to protect citizens of another country from the death penalty in their home country as it was in *Minister of Home Affairs v Emmanuel Tsebe*\(^\text{46}\) where the South African activists went to court to prevent the government from handing back two of Botswana citizens who had been found guilty of robbery with violence.

Refugees are entitled to the right to *non-refoulement* and this means that they are not to be returned to their countries unless they feel safe enough to go back or peace has been restored.\(^\text{47}\) Kenya is not expected to use the limitations to the non-refoulement principle to the detriment of the refugees. The exceptions should instead balance between national security and refugee protection. Kenya must not rely on the language of Article 33 of the OAU Convention and the 2010 Kenya Constitution\(^\text{48}\) to form broad anti-terror policies that exclude legitimate refugees, or otherwise damage refugee protection.\(^\text{49}\)

2.3 **Institutional Framework**

During the first phase of refugee presence in Kenya, between 1963-1986\(^\text{50}\) the Ministry of Home Affairs was in charge of refugee management but currently, there exists the Ministry of State for Immigration and Registration of Persons, which is in charge of the refugee affairs including the Refugee Status Determination.

\(^{46}\) (27682/10,51010/10) [2011] ZAGPJHC 115; 2012 (1) BCLR 77 (GSJ); [2012] 1 All SA83 (GSJ).

\(^{47}\) Section 18, Refugees Act 2006.

\(^{48}\) Article 24, Constitution 2010.

\(^{49}\) Alphax’icd Kipchumba, ‘Face of National Security Threats with A Special Focus On the Extent of the State Accountability for The Protection of Refugee Rights’ *Research paper; All Kenyan Moot Court Competition* 20 February 2015.

The said ministry is bound by the provisions Refugees Act, which require the creation of the Department of Refugee Affairs which department has since been disbanded under unclear circumstances and replaced by the Refugees Affairs Secretariat which performs all the functions that were initially performed by the department. The department is in charge of all administrative matters concerning refugees and it also coordinates activities and programs relating to refugees.

Also, there is established the Office of the Commissioner, under section 7, who is in charge of the Ministry, reception of applications for refugee status determination, reception of refugees, provision of durable solutions for refugees, among other things.

There also exists the Refugee Affairs Committee which helps the Commissioner in matters concerning the recognition of persons. The Refugee Affairs Secretariat is also in charge of issuing identification documents to refugees. Although this Ministry exists and there are provisions on how determination of the refugee status should be done, there isn’t enough capacity and will to implement these provisions in practice.

3. CONCLUSIONS AND RECOMMENDATIONS

3.1 Conclusions

Before the eyes of any jurisdiction with laws that advocate for basic and fundamental human rights such as the right to life, dignity and security of the person such as Kenya, it would be so improper and unfair to assume that the only people who are entitled to these rights are Kenyan citizens. Some of these rights are non-derogable unless one has had the rights limited by the law as a result of commission of a crime under the law. Is being a refugee a crime? Is there a person

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51 Section 6, Refugees Act 2006.
52 Refugees Act 2006.
54 Sections 26, 28 and 29 ,2010 Constitution.
who would choose to be born in war? And is it fair to fuel constant exiling of persons who have been exiled all their lives, from their war torn countries, and now from the country that they thought was their safe haven? Refugees may not be Kenyan citizens, but by virtue of them being human beings, natural law as well as the Kenyan Constitution accords them the right to human dignity and this paper suggests the right is not limited to Kenyan citizens only.

Has the government applied the proportionality test in repatriating refugees, vis-a-vis the danger that they are likely to face in their home countries? Has the government done all that it should do to protect its people against terrorist attacks before pointing a blaming finger to the refugees? What is the impact of corruption on our economy? Wouldn't the millions of money lost into pockets of the cunning public servants be sufficient to take care of Kenyan citizens and the surplus be directed towards protecting the refugees however little it maybe? How vigilant are our security forces and what is their response to intelligence reports?

This paper suggests that Kenyans themselves have neglected the duty to keep their country safe. They might be acting out of self-comfort through finding someone to blame for their woes, some of which are self-induced and can be prevented. This study is not implying that refugees have no role in all this, and asserts that there is a large group that is innocent, a group that might be handed over to the jaws of death. And if the government is able to directly and, without any doubt, entirely blame the refugees for Kenya’s insecurity, then it would also definitely stand up for Kenyans’ security. Kenyan authorities are worried that Al-Shabaab derives support from the
refugee community, yet closing *Dadaab* in such a manner would make Kenya ultimately less safe. It would feed the instability inside Somalia and cause further sufferings to the refugees. 

3.2 Recommendations

(i) **Provision of more durable solutions by the UNHCR**

This article argues that it is proper for countries to accommodate refugees. However, it is our view that this is supposed to be a temporary solution. There is body that has been entrusted the mandate to explore durable solutions to the refugee problem by the United Nations. This body is the United Nations High Commissioner for Refugees and it would, for example, take prevention as a long lasting solution.

The United Nations should pursue intervention in war torn countries and protect the civilian population so that they do not have to leave their countries in the first place. We don’t have to wait to have refugees so that we can try to accommodate them and protect them.

The United Nations High Commissioner for Refugees, the host states and other stakeholders should not assume that accommodation is all the refugees need. The emotional torture that they go through in these camps, the pain of not being able to be in their home countries, let alone in their own houses and homes, is enough to indicate that it is about time that the United Nations took a different channel towards solving the refugee problem that currently exists.

If the foregoing succeeds, countries would not complain about security threat or any other form of insecurity posed or perceived as so by refugees.

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The United Nations, besides protecting specific groups of people, is also out to protect individual countries and not making an effort to jeopardise state security in the process of protecting other groups that are also under its care.

Also being the body that is in charge of refugee affairs, the UNHCR is supposed to ensure that there is no radicalisation or use of weapons in refugee camps and that there is no life threatening activities taking place in this refugee camps. The Commission should be held responsible for any threats that may be caused to the host countries as a measure to ensure that the Commissioner acts diligently so as to protect countries that have been kind enough to host refugees.

Owing to the fact that Kenya hosts the fourth largest number of refugees in the world after Iran, Pakistan and Germany, the United Nations should create improved and new accommodation places to make it easier for even the Kenyan government to patrol and ensure its security. Owing to the fact that Kenya is surrounded by neighbors who over time have experienced civil wars that have led to massive displacements which has made Kenya suffer the effects, the UN is required to build habitable and manageable refugee sites to help in maintaining the country’s security and order in general.

(ii) Study and Application of the Principle of Proportionality

This principle seeks to ensure that all channels are unsuitable before repatriating a refugee. It is undeniably clear that there is a threat posed to the country by the presence of refugees, although it cannot be pointed out with blatant certainty. And also it is clear that refugees have rights despite the fact that the rights have limitations. It is therefore important to try and mitigate the two factors. The government thus ought to make reasonable measures and considerations before deciding to repatriate refugees. It is supposed to come to this solution as the last resort after the
government has explored all available avenues and still the threat posed by the refugees still exists. National tribunals are to use a proportionality test to balance the nature of the offence committed by a refugee, to the consequence that he or she will face if he or she is returned to his or her country. The government should look at the effects that these refugees will suffer if they are to be returned to their home countries and the state of Kenya’s economic, social and political security if they are to be allowed to stay in the country.

(iii) Consideration of The Right to Life

Looking at the Kenyan law, the capital offences such as and robbery with violence attract a death penalty as per the provisions of the penal code.\textsuperscript{56} This is because the law is trying to put across the point that no life is greater than the other. Right to life is a right that is open and applies equally to every person regardless of their nationality. Taking someone back to a war zone may mean that their life is something that can be gambled over.

As much as the government is justified to protect the rights of its own citizens, it should also entertain the thought of their lives that will be lost if the refugees were taken back to Somalia where Al-Shabaab, who are putting the lives of Kenyans at risk, live, eat and conduct their day to day activities. Repatriation will see many people put their lives at risk and some of them will even join the militia group\textsuperscript{57}.

The Kenyan government has a duty to protect the rights of refugees despite the fact that they are not Kenyan citizens. For instance, suspects of the USA embassy in 1998 bombing in Kenya’s

\textsuperscript{56} Section 186 and 20, Kenyan Penal Code, Chapter 63 Laws of Kenya.

\textsuperscript{57} IB Times in the United Kingdom; Exclusive 30 June 2016.
capital, Nairobi and USA embassy in Tanzania were arrested in South Africa and the USA government wanted them to be tried in the USA. Khalifan Khamis Mohamed sued arguing that the South African government had a duty to protect the individual’s right to life and should thus not allow them to be tried in the USA due to the existence of a death sentence and the court agreed.\textsuperscript{58} This shows that every state including Kenya has the obligation to put up a framework that will ensure protection of this right and that includes non-refoulement. The government should explore other options to prevent a violation of this right. If the government has found all reasons for repatriation, it should hold on to the protection of fundamental rights because failure to do so will be a mockery of the Kenyan Constitution that has been hailed for its good performance and its liberal nature. Also in several occasions, the South African government has brought out the picture that there can be extra territorial application of rights. The court protected a citizen of South Africa from being tried in Equatorial Guinea from being tried there because of the existence of the death penalty, in the case of \textit{Kaunda and others v President of South Africa}.\textsuperscript{59} Kenya should thus follow these footsteps. No life is greater than the other, a refugee’s life is equally important as a Kenyan citizen’s.

\textbf{(iv) Participation in Restoration of Peace in War Torn Countries}

The ideal approach to restoring peace in Somalia including eliminating the treat of \textit{Al-Shabaab} is one that adopts a combination of humanitarian development-oriented, diplomatic and militaristic approaches.\textsuperscript{60} This means that the Kenyan government can engage in diplomatic and military activities to help bring peace to these countries. Kenya has been taking impressive steps towards trying to restore peace in these countries by donating troops to organisations such as African

\textsuperscript{58} \textit{Mohammed v President of South Africa} CCT 17/01[2001].
\textsuperscript{59} (CCT 23/04) [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC).
\textsuperscript{60} Rufus Karanja, \textit{Stabilizing Somalia; Options for Peace and Stability}; Refugee Insights Newsletter 20\textsuperscript{th} Edition pg.8.
Mission in Somalia that aims at restoring peace in Somalia and the United Nations in its missions to restore peace in countries such Sudan, which have had prolonged civil wars.

The government however recently withdrew its troops that were taking part in the mission in Sudan. This was in response to the sacking of the Kenyan commander who apparently had failed to respond to an attack at Juba Hotel. This may have been a swift move that served the moment but this means that it is going to take longer to end the war in Sudan and more lives are at risk in Kenya and more refugees are going to keep coming into the country. Kenya might have achieved in expressing its frustration but added on the burden that it is trying to fight, the refugee crux. This is more helpful to curb the problem from the root so that it can be easier to send back people to a safe country and not making rash decisions that add more problems. The state may need to rethink its decision of withdrawing the troops.

(v) **Intensification of Security Within the State and Along the Borders**

Some governments will use the fight against terrorism as a fight to get rid of legitimate, non-violent, political opposition or as a justification for using disproportionate force in violation of international humanitarian and human rights law. Kenya is not one of the countries that have used the refugees as an excuse to breach international laws, but it can do more by guarding its borders and ensuring that only refugees get into the country and that they do not carry materials that may put the country’s security at a risk. All the loopholes at the entry points should be sealed to ensure that this is successful. The government should allocate more funding and recruit security experts from the developed countries such as Israel.

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62 U S Committee for Refugees and Immigrants Report (Refworl 2003).
(vi) **Integration of Refugees**

One of the qualifications that one should meet in order to qualify to stay in Kenya as a citizen is that one should have stayed in Kenya for over seven years. Some of the refugees have been residing in Kenya lawfully for over 30 years. One of the things that the government can do is to integrate the people into the Kenyan societies and this may boost the ailing economy.

The other reason that makes people engage in terror activities is the lack of economic stamina; the people cannot quite sustain themselves economically so when an opportunity arises to get a source of income, they take it up regardless of the hazards related to it. The refugees, if integrated into the society, will have little or no time to get involved in terrorism if at all they are engaging in the same. Although, this may take long and a lot of effort from the government, it is almost certain that it will reduce the insecurity threats because the people will be occupied and they have alternative occupations that will keep them from organising and planning crime.

The *Makonde* people at the Kenyan coast were refugees from Mozambique and came as refugees and settled at the coast as sugarcane farmers and workers at these farms. Over time, Kenya became their home because almost all of the people from that community know no other home as they have been born and brought up at the coast. They were awarded citizenship by the President although that was after a very long struggle on their part. This should be the case for the refugees who have met the qualifications of becoming Kenyan citizens.

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61 Constitution of Kenya 2010, Article 15.
(vii) Resettlement

This is where refugees are transferred from the country where they had sought asylum to a country that is willing to admit them ultimately and offer them citizenship. The United Nations High Commissioner for Refugees has the mandate, among other roles, to resettle refugees.

Other states like the United States of America does not take in refugees but they offer financial aid to countries that host them. This is to ensure that the security of its nationals comes first. Occasionally, the state also embraces the option of refugee integration which may lead to the permanent infusion of the refugees into the Kenyan populace and even seeking registration for citizenship.

Since refugee laws allow for coordination between states, Kenya can work with the UNCHR to find resettlement opportunities in foreign countries.

(viii) Holding of Supporters Individually Responsible

There might be reasonable grounds to believe that there is a group of people that sympathise with the Al-Shabaab. It is only fair that the government holds people individually liable and not dealing with the refugees as if they were all aiding the activities that have seen the security of the country deteriorate over time. The Refugees Act provides for grounds under which a refugee or a member of his family can be expelled if there are reasonable grounds to believe that a threat has been posed to national security or public policy after consultations with the Minister in charge of refugees.

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66 Section 21.