

**THE PRINCIPLE OF BURDEN SHARING: A STUDY OF BURDEN SHARING
AS A VIABLE SOLUTION TO THE REFUGEE FRAMEWORK IN KENYA**

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Declaration

I, **LUCY WANJIRU MWANIKI**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.



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

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ABSTRACT

The world has experienced an increase in the number of refugees and asylum seekers. A large number of refugees and asylum seekers are hosted in developing countries, Kenya being one of them. This has led to situations whereby the Kenyan government has sought to enforce encampment policies and repatriation of refugees. These moves by the government between 2013 to 2019 have led to court cases whereby the courts ruled that forced repatriation and encampment policies were a violation of constitutional refugee rights and the principle of non-refoulement. This means that in order to deal with the refugee situation without infringing on any rights, there has to be a use of divergent thinking in order to come up with a legally acceptable, viable method. The principle of burden-sharing is an internationally recognized and non-binding principle. It is proposed in the 1951 Refugee Convention as a means of helping countries that receive refugees to share the burden and responsibility of receiving and maintaining refugees with other countries. It is purely on a discretionary basis. This dissertation will focus on the expansion and implementation of the principle of burden-sharing through use of regional blocs with a specific approach on Eastern Africa. Adoption of this principle in Kenya as a member of the East African Community (EAC), will be essential in proving that this principle is functional and beneficial to the member states involved. Thus, the principle of burden-sharing should be adopted as a binding legal approach to the current refugee framework.

List of abbreviations

AU	African Union
EAC	East African Community
ECOWAS	Economic Community of West African States
EU	European Union
DGMM	Directorate General of Migration Management
DRA	Department of Refugee Affairs
IOM	International Organization for Migration
LFIP	Law on Foreigners and International Protection
RAS	Refugee Affairs Secretariat
UN	United Nations
UNHCR	United Nations High Commission for Refugees

List of cases

Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others [2015] eKLR.

Kituo cha Sheria & 7 others v the Attorney General [2013] eKLR.

Kenya National Commission on Human Rights & another v the Attorney General and 3 others [2017] eKLR.

List of legal instruments

Constitution of Kenya, 2010.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 21 Feb 1997.

Convention Governing the Specific Aspects of the Refugee Problem in Africa, 1969.

Convention on the Rights of the Child, 30 July 1990.

Convention relating to the Status of Refugees, 28 July 1951.

Council Resolution of the European Union, 1995.

ECOWAS Protocol Relating to Free Movement of Persons, Residence and Establishment, 1979.

Kenya Citizenship and Immigration Act, No. 12 of 2011.

Refugee Act, No. 13 of 2006.

Security Laws (Amendment) Act No. 19 of 2014.

Treaty for the establishment of the East African Community, 1999.

Turkey: *Law on Foreigners and International Protection*, No. 6458 of 2013.

Universal Declaration of Human Rights, 10 December 1948.

CHAPTER 1: INTRODUCTION

1.1 Background

There are various conventions relating to the status of refugees. Kenya is a signatory to several conventions and treaties. Kenya acceded to the 1951 Convention Relating to the Status of Refugees¹, the 1967 Protocol Relating to the Status of Refugees² and the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa³. In addition, Kenya is a signatory to a number of international legal instruments covering international human rights law. This includes the 1984 Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment⁴ which was acceded to in February 1997, the Convention on the Rights of a Child⁵ acceded to in September 1990 that laid the blueprint for handling refugee minor cases and the Universal Declaration⁶ of 1948 adopted in July 1990. Kenya was among the top 20 refugee hosting countries in the period 2000 to 2014 in the world.⁷ As of 1 January 2019, there were 475,412 registered refugees and asylum seekers in Kenya.⁸ This is an increase as compared to 466,134 registered refugees and asylum seekers in 2018.⁹ This steady increase of refugees has been problematic for the Kenyan government as evidenced by the country's legal developments.

In 2013, the Department of Refugee Affairs announced an encampment policy requiring the relocation of refugees and asylum seekers in urban areas to refugee camps. The reason for this government directive was that there had been a series of grenade attacks in urban areas

¹ *Convention relating to the status of refugees*, 28 July 1951, 189 UNTS 137.

² *Protocol relating to the status of refugees*, 31 January 1967, 606 UNTS 267.

³ *Convention governing the specific aspects of refugee problems in Africa*, 10 September 1969, 1001 UNTS 45. This was ratified by Kenya on 4th February 1993 and came into effect on the same day.

⁴ *Convention against torture and other cruel, inhuman or degrading treatment or punishment*, 21 Feb 1997, 1465 UNTS 85.

⁵ *Convention on the rights of the child*, 30 July 1990, 1577 UNTS 3.

⁶ *Universal declaration of human rights*, 10 December 1948.

⁷ United Nations High Commissioner for Refugees, *UNHCR Statistical Year Book*, 2014, 1.

⁸ United Nations High Commissioner for Refugees, *UNHCR Kenya, Statistics Based on UNHCR's Refugee Registration System*, 1 January 2019, 1.

⁹ United Nations High Commissioner for Refugees, *UNHCR Kenya, Statistics Based on UNHCR's Refugee Registration System*, 30 April 2018, 1.

leading to the death of many people. The High Court ruled that the government directive was a violation of the state responsibility towards persons in vulnerable situations, the refugees' freedom of movement, right to dignity, right to fair administrative action and the principle of non-refoulement enshrined in the Refugees Act^{10, 11}. The High Court ordered that the government directive to be quashed. The principle of non-refoulement is found in the 1951 Convention which states that no contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.¹²

In December 2014, Kenya made amendments to its Refugee Act.¹³ The key provisions of the amendment sought to make permanent the encampment policy¹⁴ and to dramatically reduce the number of refugees and asylum seekers potentially through forced repatriation.¹⁵ In 2015, the Constitutional and Human Rights Division of the High Court found the amendments unconstitutional and in violation of the principle of non-refoulement.¹⁶ During the same year, Kenya announced that it would close the Daadab refugee complex and repatriate its residents.

The Daadab refugee complex is located in Garissa County and consists of four camps. It is the third largest refugee complex in the world.¹⁷ The first camp was established in 1991 when refugees fled the civil war in Somalia. Majority of the refugees in the complex are from Somalia. Neil Turner, the Kenya Country Director of the Norwegian Refugee Council, opined in 2018 that it was not necessarily the Kenyan government's intention to close Dadaab, but to send a message "that the status quo from the Kenyan government's perspective is not acceptable and that the UN refugee agency (UNHCR), in particular,

¹⁰ Section 18, *Refugees Act* (Act No 13 of 2006).

¹¹ *Kituo cha Sheria & 7 others v the Attorney General* (2013) eKLR.

¹² Article 33(1), *Convention Relating to the Status of Refugees*.

¹³ *Refugees Act* (Act No 13 of 2006).

¹⁴ Section 46, Security Laws (Amendment) Act No. 19 of 2014.

¹⁵ Section 48, Security Laws (Amendment) Act No. 19 of 2014.

¹⁶ *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* (2015) eKLR.

¹⁷ <https://www.arcgis.com/apps/MapJournal/index.html?appid=8ff1d1534e8c41adb5c04ab435b7974b> on 11 April 2020.

should do more."¹⁸ However, the High Court declared the declaration unconstitutional as it violated various refugee rights and the principle of non-refoulement.¹⁹

In seeking to end the influx of refugees in Kenya, the government cited overcrowding in camps, terrorist attacks, huge economic costs, human trafficking, proliferation of arms, strained government resources and insecurity.²⁰ Although the reasons were deemed insufficient by the High Court for the government to win its case, all these show the burden Kenya faces when receiving and maintaining refugees. This also indicates the similarity of reasons given by the Kenyan government showing dissatisfaction of the Kenyan government with the current status quo of the refugee situation. The Kenyan government has also displayed the synergy between the executive and the legislature in making efforts to effectively reduce the number of refugees in Kenya.

Recital 4 of the preamble of the 1951 Convention mentions the principle of burden-sharing in the refugee regime. It expresses this principle as follows: "considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation to help to distribute refugees across the world."²¹

Legislation and case law indicate that non-acceptance or forced repatriation of refugees and asylum seekers is not a viable solution. It is therefore time for evaluation of burden sharing as a plausible refugee protection strategy for developing countries with emphasis on Kenya as a member of EAC.

¹⁸ Anker E, 'Nearly impossible to close Daadab' Norwegian Refugee Council, 13 June 2018 <https://www.nrc.no/news/2018/june/nearly-impossible-to-close-dadaab-new-page/> on 2 October 2019.

¹⁹ *Kenya National Commission on Human Rights & another v the Attorney General and 3 others* (2017) eKLR.

²⁰ *Kenya National Commission on Human Rights & another v the Attorney General and 3 others* (2017) eKLR.

²¹ Preamble, 1951 Convention Relating to the Status of Refugees.

1.2 Statement of the problem

The greatest number of displaced people are in Middle East and Africa, meaning that low-income states bear the greatest burden²². It is untenable for the burden of asylum to be met by a few states whereas financial support is given on a discretionary basis and is dropping.

As of 2018, some important innovations started to gather momentum: a focus on insurance and anticipation, more funding for cash transfer programmes, and greater investments from multilateral development banks. On the other hand, a slow-down in international humanitarian financing, inadequate long-term development funding, and little progress in supporting localisation was observed. A small number of donor governments continue to contribute the majority of international humanitarian assistance. The three largest donors accounted for 59% of all government contributions. International humanitarian assistance contributions from European governments plateaued after a sharp rise in 2016 but still made up 53% of total government funding. Contributions from the Middle East and North of Sahara region continued to fall for a second consecutive year – by a further 30% from 2016.²³

Therefore, there is need for an analysis of the principle of burden-sharing on a regional basis which could provide a framework for countries within a regional block to effectively assist each other in the maintaining of refugees especially in the developing countries. The reason for having a framework for countries in regions is because uncontrollable conflicts, natural disasters and environmental fragility happen in different countries. The resultant effect is the immigration of people to considerable safer zones. For this reason, an individual country cannot bear the burden of hosting asylum seekers and refugees and neither can individual countries bear the funding burden alone. Thus, this study focuses on the EAC developing a burden sharing initiative for refugees and asylum seekers with focus on Kenya as a member of the EAC.

²² Hovil I, 'Why is the Cost of Hosting Refugees Falling on the World's Poorest States?' The Guardian, 13 May 2016 <https://www.theguardian.com/global-development/2016/may/13/why-is-the-cost-of-hosting-refugees-falling-on-poorest-states-kenya-dadaab-closing> on 15 February 2019.

²³ Development Initiatives Limited, *Global Human Assistance Report 2018*, 19 June 2018, 4.

1.3 Purpose of the study

The purpose of this study is to examine the applicability and effectiveness of the principle of burden sharing to contemporary refugee structure in developing countries with focus to Kenya.

1.4 Hypothesis

The adoption and implementation of the principle of burden-sharing in Kenya's current legal framework is the preeminent method of alleviating the refugee burden through making the influx of refugees in the country more manageable.

1.5 Research questions

- i. What is the principle of burden sharing and why has it not been used as a viable method for addressing the refugee crisis?
- ii. What is the effectiveness of the principle of burden sharing when used in regional blocs as opposed to conventional and discretionary voluntary aid?
- iii. How would Kenya adopt and implement the principle of burden sharing as a member of EAC?

1.6 Justification of the study

This dissertation aims to review the principle of burden sharing as an international obligation. This study is important as it will establish the principle of burden-sharing as the most viable refugee protection strategy in the face of a global increase in the population of refugees and asylum seekers. It will also explore the need for developing countries to work together in order to alleviate burdens placed on developing countries as financial aid decreases from highly developed donor states. Further, it will also attempt to prove that the above principle can be incorporated into a binding legal framework.

1.7 Scope and limitations of the study

This study is conducted through use of secondary research. Since the principle of burden-sharing is not a compulsory method in current refugee frameworks, there are few regional burden sharing success cases. One such successful case is the use of burden sharing in Europe through the EU-Turkey Statement for analysis on implementation of burden sharing.

This study has also used the approach taken by West African countries through free movement protocols.

1.8 Definition of terms

- i. Non-refoulement principle – Non-expulsion or return of a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.²⁴
- ii. Burden sharing principle – The use of international cooperation to help to distribute refugees across the world as a burden relief mechanism placed on certain countries.²⁵

1.9 Chapter breakdown

The study will go through a detailed explanation of what the principle of burden sharing entails and touches on how the principle was founded. It will then follow that there are theories that support this principle. The study will also look at state interest and state challenges as weighed against the benefits or disadvantages of this principle, if any. There will be a comparative study on relatable cases, for example the EU-Turkey Statement and the West African free movement protocols, to the topic and how the principle can be applied to Kenya and EAC. Subsequently, the dissertation will entail a summary of the findings and also convey the complementarity of alternative solutions, to reducing the refugee crisis, as a supporting mechanism to the principle of burden sharing. In conclusion, there will be recommendations and a summary of the overall dissertation.

Chapter One is an introduction. This chapter introduces the Kenya's refugee regime and the various conventions that Kenya is a signatory to. It also details Kenya's internal responses to refugee hosting and strides made to accommodate refugees. It then introduces the burden-sharing principle and proposes its use as a solution to alleviating the refugee burden. It poses objectives and research questions of this paper which questions the applicability and effectiveness of the burden-sharing principle. The chapter also outlines the flow of the paper.

²⁴ Article 33(1), *Convention Relating to the Status of Refugees*.

²⁵ Preamble, *Convention Relating to the Status of Refugees*.

Chapter Two is a detailed theoretical framework which consists of the theories that consists of the bedrock of the principle in question and sheds light on the topic. The fundamental theory that is discussed is the theory of cooperation. This theory introduces why it is important to have international cooperation in addressing the refugee burden. This theory is then supported by the game theory which displays the effectiveness of cooperation theory. The theory of neo-liberalism is the other theory discussed in support of international cooperation and its use can be viewed in the case study discussed.

Chapter Three of this paper is a case study. It analyses the EU-Turkey Statement that is instrumental in showing how burden-sharing can be carried out. It details how the Syrian refugee crisis had an impact on Turkey's laws its relation with the EU. This Agreement is a guide on how to incorporate a burden-sharing principle. This case study also displays the costs of hosting refugees on a host country and the effects of refugee migration on neighbouring countries. The relation between Turkey and the EU is instrumental in analysing a burden-sharing framework and answers the paper's question on effectiveness and implementation. It will be an analysis of the concept of responsibility and burden-sharing.

Chapter Four will be the exposition of the findings obtained from the research on the theories and case study. It will relate the Kenyan refugee framework to Turkey's refugee framework. This chapter also presents the proposal on how Kenya and the EAC can carry out responsibility and burden-sharing. It ties the entire chapter together with the objectives and hypothesis of the dissertation.

Chapter Five is the final chapter. This chapter is a culmination of the research and will summarise the entire dissertation. It will also be an evaluation of the research questions and the findings. This chapter will also provide for recommendations of the study on burden-sharing as an effective solution within the EAC.

CHAPTER 2: THEORETICAL FRAMEWORK AND METHODOLOGY

2.1 Introduction to the principle of burden-sharing

Kenya is a signatory to the Refugee Convention²⁶ and hosts a large number of refugees. There have been attempts to close down the refugee camps in the past. These past developments are indicators of the Kenyan government's need for an improved and efficient way to respond to refugee influx. This paper proposes the principle of burden-sharing as the solution to lessening the burden attached to host countries of refugees.

The notion of burden-sharing first came into existence after World War I, under the League of Nations which was called upon to deal with successive waves of refugees. It was further developed and strengthened after World War II through continuous action undertaken by the United Nations to address numerous refugee situations in all regions of the world.²⁷ In the context of refugees, burden-sharing is “the principle through which the diverse costs of granting asylum assumed by the host state are more equitably divided among a greater number of states”.²⁸ Despite the fact that there is broad agreement by states on the principle of burden and responsibility sharing, they do not constitute binding obligations on states. In fact, international law, by custom or treaty, does not include a duty to engage in burden-sharing.²⁹ This means that burden and responsibility sharing of refugees is purely on a discretionary basis.

The legal basis for the principle of burden-sharing arises from the Preamble to the 1951 Refugee Convention³⁰. It states that the United Nations recognized that international cooperation could lessen the burden placed by the granting of asylum.³¹ The 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of the Refugee Problem in Africa states that through the spirit of African solidarity and

²⁶ *Convention relating to the status of refugees.*

²⁷ Weis P, ‘The Travaux Préparatoires Analysed with a Commentary’ *The Refugee Convention, 1951*, 1995, 1, <https://www.unhcr.org/4ca34be29.pdf> on 20 February 2019.

²⁸ Gibney M & Hansen R, ‘Immigration and Asylum: From 1900 to the Present’, ABC-Clio, Santa Barbra, 2005, 56-57.

²⁹ Goodwin-Gill G, ‘*The Refugee in International Law*’, 2 ed Clarendon Press, Oxford, 1996.

³⁰ *Convention relating to the status of refugees.*

³¹ Preamble, *Convention relating to refugee status.*

international cooperation, member states can appeal directly to other member states for assistance when they find difficulty in continuing to grant asylum .”³²

The 1995 European Council Resolution on Burden-Sharing with regard to the admission and residence of displaced persons has also referred to the need for international solidarity and burden-sharing. It was agreed that the burden in connection with admission and residence of displaced persons could be shared on a balanced basis in a spirit of solidarity taking into account the contribution being made by each member state to prevent or resolve the crisis and economic, social and political factors which may affect admission capacity of displaced persons.³³

The rationale and need behind responsibility and burden sharing has also been elaborated on by the Executive Committee of the UNHCR programme. A mass influx places unduly heavy burdens on certain countries. A satisfactory solution of a problem, international in scope and nature, cannot be achieved without international co-operation. It reiterates that States should, within the framework of international solidarity and burden-sharing, take all necessary measures to assist, at their request, States which have admitted asylum-seekers in large-scale influx situations. Such action should be taken bilaterally or multilaterally at the regional or at the universal levels and in co-operation with UNHCR, as appropriate.³⁴

Previously, there has been some burden-sharing efforts by African states although limited. In the 1960s, Tanzania made a decision to resettle Rwandan refugees from Zaire. Burkina Faso also had short-lived resettlement programmes in 2000-2002.³⁵ This proves that the principle of burden-sharing has worked before and can be effective in the EAC.

Moreover, primary responsibility for protecting and assisting refugees lies with the host countries under international law terms. This is made clear by the scrupulous observation of the principle of non-refoulement. The principle of non-refoulement prohibits the expulsion or return of a refugee in any manner whatsoever to the frontiers of territories where his life

³² Article 2 (4), *Convention governing the specific aspects of refugee problems in Africa*.

³³ Resolution 4, *Council Resolution of the European Union*, 25 September 1995.

³⁴ UNHCR, *Protection of Asylum Seekers in Situations of Large- Scale Influx*, No. 22 (XXXII), Executive Committee on the International Protection of Refugees, 1981.

³⁵ Milner J, *Refugees, the State and Politics of Asylum in Africa*, Palgrave Macmillan, United Kingdom, 2009, 40.

or freedom would be threatened.³⁶ This prohibition is a principle of customary international law. Consequently, it is binding on all states in the international system.³⁷ States are under a negative obligation not to contribute to harm but not, strictly speaking, under a stringent positive obligation to assist.³⁸ This means that states have a duty to offer, at minimum, temporary protection to refugees entering their territory.

As a result, there is an uneven distribution of refugees between countries with “some countries bearing a disproportionate share of the refugee burden, while others bear little or none of these responsibilities”.³⁹

Suhrke stated that, “in refugee matters, the logic of burden-sharing starts from the premise that helping refugees is a jointly held moral duty and obligation under international law.”⁴⁰ Therefore, the shouldering of the responsibility of opening up borders to refugees and providing asylum between states should be put on equal footing as the principle of non-refoulement.

2.2 Theory of cooperation

The principle of burden-sharing has been codified in international statutes and elaborated upon by governments and scholars. This principle is drawn from different theories that have the same aim. The aim of this principle is to minimize negative outcomes of hosting refugees. For this reason, the theory of cooperation postulates international solidarity and cooperation as stated in international conventions.

Before governments existed, the state of nature was dominated by the problem of selfish individuals who competed on such ruthless terms that life was “solitary, poor, nasty, brutish

³⁶ Article 33(1), *1951 Convention Relating to the Status of Refugees*.

³⁷ Goodwin-Gill G, ‘*The Refugee in International Law*’, 2 ed Clarendon Press, Oxford, 1996, 167.

³⁸ Ferracioli L, ‘The appeal and danger of a new refugee convention’ 40 *Social Theory and Practice* 1, 2014, 129.

³⁹ Rutinwa B, ‘The End of Asylum? The Changing Nature of Refugee Policies in Africa’ UNHCR, Working Paper No. 5, 1999, 6 <https://www.unhcr.org/research/working/3ae6a0c34/end-asylum-changing-nature-refugee-policies-africa-bonaventure-rutinwa.html> on 20 February 2019.

⁴⁰ Suhrke A, ‘Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action’ 11 *Journal of Refugee Studies*, 4, 1998, 396.

and short”.⁴¹ Today, nations interact without central authority. The requirements for the emergence of cooperation have relevance to many of the central issues of international politics including the security dilemma.⁴²

Cooperation has been defined as occurring when actors adjust their behaviour to the actual or anticipated preferences of others, through a process of policy coordination.⁴³ Policy coordination in turn implies that the policies of each state have been adjusted to reduce their negative consequences for the other states.⁴⁴ Therefore, each actor should direct his behaviour towards a certain common goal for the actualization of a certain gain or reward. The anticipation of a reward is what leads to the policy adjustments of each actor. Consequentially, cooperation is actualized through goal-directed behaviour that entails mutual policy adjustments so that all sides end better off than they would otherwise be.

In the international arena, cooperation can be tacit, negotiated or imposed.⁴⁵ Tacit cooperation is when cooperation occurs without communication or explicit agreement. This is recognizable in the current burden-sharing principle whereby there is no explicit agreement of how to carry out responsibility and burden-sharing. Negotiated cooperation is when there is an explicit bargaining process as is common and can be seen in international relations literature. Imposed cooperation is when the stronger party in a relationship forces the other party to alter its policies. The stronger party can also adjust its own policies and attempt to realize mutual gains.

Following economic reasoning, it is posited that states act rationally to increase the net benefits they receive.⁴⁶ In the *Evolution of Cooperation*, Axelrod assumes that states seek to maximize their utility.⁴⁷ But in an anarchic world, maximizing absolute gains is best achieved by following a strategy of reciprocity.⁴⁸ A strategy of reciprocity says that there is a human need to want to give something back when something is received. Due to cheating

⁴¹ Hobbes T, *Leviathan*, England, 165, 100.

⁴² Axelrod R, *The evolution of cooperation*, Basic Books, United States, 2006, 13.

⁴³ Deutsch M, *A theory of cooperation and conflict*, Human Relations 2, United States, 1949.

⁴⁴ Milner H, ‘International Theories of Cooperation among Nations: Strength and Weaknesses’ 44 3 Cambridge University Press, 1992, 2

⁴⁵ Young O, *International Cooperation*, Cornell University Press, Ithaca and London, 1989, 87-96.

⁴⁶ Milner, ‘International Theories of Cooperation among Nations: Strength and Weaknesses’, 470.

⁴⁷ Axelrod, *The evolution of cooperation*, 13.

⁴⁸ Milner, ‘International Theories of Cooperation among Nations: Strength and Weaknesses’, 470.

and the inability to sanction, the optimal way to achieve absolute gains is by using a Tit-for-Tat (T-f-T) approach to induce mutual cooperation.⁴⁹ Axelrod and Keohane argue that cooperative behaviour may be more likely when states pursue a strategy of reciprocity, because they know they will be punished for defecting and rewarded for cooperating.⁵⁰ Cooperation becomes possible when there is a threat of punishment for deflections and the possibility of this is from game theory.

2.2 Game theory

Game theory is also known as interactive decision theory. It studies the behaviour of decision makers in situations of strategic interdependence. The founders of game theory were John Von Neumann and Oskar Morgenstern. Game theory and realism are generally compatible. They are both rational and strategic. The Prisoner's Dilemma game is used to show how game theory relates to the theory of cooperation. The Prisoner's Dilemma (PD) was first described in the 1950s. The ideal prisoner's dilemma involves a pair of delinquents who are arrested and placed in separate rooms. A choice is given to each: confess or stay silent. The best outcome is that both disclose nothing and go free. However, since neither knows what the other will do, keeping quiet becomes precarious. If one informs on the other and the other does not, the informer gets a lighter sentence while the quiet partner suffers. In a single instance of the PD, the best strategy is to inform on your partner for a lesser sentence. Nonetheless if the game repeats over and over, the optimal strategy changes.⁵¹

The game allows the players to achieve mutual gains from cooperation, but it also allows for the possibility that one player will exploit the other, or the possibility that neither will cooperate. As in most realistic situations, the players do not have strictly opposing interests.⁵² Cooperation in the Prisoner's Dilemma is displayed as tacit cooperation, evolving gradually with convergence of expectations. For game theorists, the key elements associated with reciprocity are sanctioning and iteration.

The relatability of this theory can be seen in that international cooperation when it comes to responsibility and burden-sharing is simply suggested. There is no negotiated agreement or

⁴⁹ Milner, 'International Theories of Cooperation among Nations: Strength and Weaknesses', 470.

⁵⁰ Milner, 'International Theories of Cooperation among Nations: Strength and Weaknesses', 470.

⁵¹ Axelrod, *The evolution of cooperation*, 7-13.

⁵² Axelrod, *The evolution of cooperation*, 7.

framework that binds States to cooperate thus no sanctions. The steady increase of refugees since World War II demands a reassessment of how to deal with the responsibilities that come with admittance of refugees and asylum seekers in a State. Considering this steady increase over a long period of time shows the process of repetition in dealing with refugees especially in Kenya. Each repetition of the process of wanting to shut down Daadab refugee complex is a single iteration. Therefore, reappraisal of this situation is needed. It is up to States to work towards a mutual goal of lessening the burden of refugees and share these responsibilities.

The postulation of this theory is applicable to allow room for Kenya to cooperate with other EAC member states in order to achieve an almost balanced distribution of gains. This can also see to the improvement of the general welfare of refugees and asylum seekers a well.

2.3 Neoliberalism theory

The theory of neoliberalism also supports the cooperation theory. Neoliberals argue that anarchy allows for various structures of interaction between states.⁵³ Neoliberals do agree with proponents of neorealism that states are rational egoists that seek to advance self-interests.⁵⁴ Secondly, neoliberals have a more positive outlook on cooperation than neorealist. Neoliberals agree that cooperation is difficult to achieve but stress the important role of institutions in both achieving and maintain cooperation.⁵⁵

Neoliberals focus more on the international political economy and environment in their studies, whereas neorealist focus on studying international security.⁵⁶ Neoliberals have a more optimistic outlook, emphasizing the important role of institutions in achieving and preserving cooperation. Keohane and Martin state that institutions can provide information, reduce transaction costs, make commitments more credible, establish focal points for coordination and in general facilitate the operation of reciprocity.⁵⁷ This supports this

⁵³ Axelrod R and Keohane R, 'Achieving cooperation under anarchy: Strategies and institutions' 38 *World Politics* 1, 1985, 226-254.

⁵⁴ Keohane R and Martin L, 'The Promise of Institutional Theory', 20 *International Security* 1, 1995, 39-51.

⁵⁵ Jervis R, 'Realism, Neoliberalism, and Cooperation', 24 *International Security* 1, 1999, 53.

⁵⁶ Jervis, 'Realism, Neoliberalism, and Cooperation', 45-46.

⁵⁷ Keohane and Martin, 'The Promise of Institutional Theory', 42.

dissertation on creation of regional blocs in order to implement the principle of burden-sharing.

Neoliberalism has contributed to the theory about international politics by explaining the importance on non-state actors in the international system, the possibilities for achieving cooperation and developing common interests. However, it is not without criticism. The main criticism of neoliberalism is that it is considered too optimistic when it comes to its claim that institutions are important actors as states themselves.

2.4 Research methodology

This dissertation makes use of qualitative research methodology. The qualitative research methodology approach applied has been interpretivism. Interpretivism, also known as interpretivist, involves integrating human interest into a study. Accordingly, there is the assumption by interpretive researchers that access to reality is only through social constructions such as language, consciousness, shared meanings and instruments.⁵⁸ Willis defines interpretivism as an approach implemented by the researcher for the purpose of synthesizing facts which are derived mainly from secondary sources and which are qualitative in nature.⁵⁹ He observes that one of the characteristics of interpretivism is that these facts are abstract in nature and governed by non-tangible factors such as economic, social or cultural factors. Therefore for the purpose of this research, the researcher chose the interpretivist approach because of the abstract, non-quantifiable variables such as incorporating social and political factors of a country versus that of individuals when coming up with a working burden-sharing and responsibility sharing approach to the refugee situation as these are parts of the objectives of the dissertation.

The qualitative research design made use of books, journal articles, newspapers, working papers and reports. The researcher encountered some challenges and problems while conducting the research for this dissertation. The first challenge was that there lacks an expansive framework on burden and responsibility sharing of refugees. Owing to its non-compulsory nature, not many states have carried out burden-sharing and there is limited discourse of the same. Another challenge related to this methodology used was the fact that

⁵⁸ Myers M, *Qualitative research in business and management*, Sage Publications Limited, California, 2008.

⁵⁹ Willis J, *Foundations of qualitative research: Interpretive and critical approaches*, Sage Publications Limited, United States, 2007.

interpretivist approach means that the achievements of the dissertation can be deemed to be biased because the connections made in the research are on the basis of the analytical and judgment skills of the researcher.

CHAPTER 3: A STUDY ON THE EU-TURKEY AGREEMENT

3.1 Approach to the use of a burden-sharing framework

The principle of burden-sharing is a nonbinding principle that has existed since the World War I epoch. It was brought up as a means of redress to host countries hosting a large number of refugees. This principle calls upon cooperation among states. The theory of cooperation posited that states have to enter into a negotiated cooperation in order to maximize their gains. Game theory illustrated the importance of cooperation and neoliberalism displays the profits that a country achieves under cooperation. This raises the question on whether burden-sharing has been used in the past and why it has not.

Burden and responsibility-sharing is a central principle of international responses to refugee crises. More than often, collective and cooperative responses to mass movements of people have been failed massively. For example, in 2014 and 2015, large numbers of asylum seekers from and through the Middle East and North Africa migrated to Europe. During this period as well, there were significant movements of Central Americans into the United States through Mexico. In addition, millions of Syrians moved to neighbouring countries and people from Bangladesh and Myanmar moved to other South East Asian countries. The total number of refugees and displaced persons reached record levels not seen since the end of World War II.

Host countries have had different reactions which include resettlement and other countries openly refusing to accept asylum-seekers. Although the number of donors has increased in recent years to include non-traditional sources of funding, including members of the Gulf Cooperation Council and private sector businesses, the funding has not kept pace with the demonstrated need for resources.⁸⁶ The principle of burden and responsibility-sharing is important because the costs accompanying protection and assistance to refugees are shared unequally among states. Unequal sharing of costs is because refugee movements are uneven globally due to morally arbitrary reasons. Neighbouring countries to the countries of origin of refugees tend to be host countries.

⁸⁶ Martin S, Davis R, Benton G and Waliyany Z, 'International responsibility-sharing for refugees' Global Knowledge Partnership on Migration and Development, Working Paper 32, 2018, 1 https://www.knomad.org/sites/default/files/2018-03/KNOMAD%20WP_International%20Responsibility-Sharing%20for%20Refugees.pdf on 3 Oct 2019.

In refugee matters, the logic of burden-sharing starts from the premise that helping refugees is a jointly held moral duty and obligation under international law. By institutionalizing the sharing in accordance with agreed principles of equity, states can discharge these obligations in a manner that simultaneously promotes national interest.⁸⁷ Organized sharing means more predictable responses, greater international order, and lower transaction cost during a refugee/migration emergency all of which are goods that states value, and which they seek to obtain through organized international cooperation.⁸⁸

This dissertation has focused on the Turkey-Syria refugee crisis as a case study on the principle of burden-sharing. This is primarily due to the fact that Turkey negotiated a cooperation with the European Union to stem the influx of refugees. This makes it possible to analyse the impact of refugee migration on a regional bloc level between a country and a regional bloc. Turkey's refugee situation also highlights how burden-sharing has not been used successfully as a viable solution to address the refugee increase. Lastly, the situation in Turkey can be broken down to mirror Kenya's response and handling of refugees.

3.2 The Syrian civil war and its impact on Turkey

Turkey's refugee policy is best analysed flowing from the Syrian civil war. The Syrian civil war and the refugee protection crisis will demonstrate how the non-existence of a systemic approach to refugee burden-sharing under a global leadership and a global institutional framework promoting a universal perspective makes it difficult to achieve effective, long-term, durable solutions.⁸⁹

Syria has witnessed an ongoing civil war beginning in 2011 that has led to the displacement of nearly half of the Syrian population, creating more than 5.6 million refugees, 6.6 million internally displaced persons and 13.1 million in need in Syria.⁹⁰ A majority of the Syrian refugees reside within the region staying in neighbouring countries like Turkey, Jordan and Lebanon.⁹¹ The magnitude of the impact of the Syrian civil war and the number of people

⁸⁷ Martin S, Davis R, Benton G and Waliany Z, 'International responsibility-sharing for refugees' 6.

⁸⁸ Suhrke, 'Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action', 398.

⁸⁹ Kale B, 'The limits of an international burden-sharing approach: The Syrian refugee protection crisis and its consequences on Turkey's refugee policy' XXII *Perceptions Journal of International Affairs* 4, 2017, 55-84.

⁹⁰ <https://www.unhcr.org/syria-emergency.html> on 11 November 2019.

⁹¹ <https://www.unhcr.org/syria-emergency.html> on 11 November 2019.

affected makes it a concern in the region. Turkey adopted an “open door policy” since the beginning of the Syrian civil war in 2011. The reason for this policy was Turkey’s adoption of the neoliberal approach to foreign policy that utilized foreign policy activism, trade, humanitarian aid and soft power capabilities.

The neoliberal approach to trade and economic relations promoted a liberal visa policy with Turkey’s neighbours aimed at achieving increased economic, political and social interactions. This liberal visa policy however, contradicted the European Union’s approach of strict border controls and the implementation of the Schengen negative list by an accession country. However, as Turkey’s EU accession was perceived to be a long-term objective, divergence from accession goals on visa policy was seen as possible or even dismissible.⁹²

Another reason for Turkey’s open door policy was due to Turkey’s international commitments arising from the 1951 Refugee Convention⁹³. Turkey has maintained a geographical limitation on the 1951 Refugee Convention according to Turkey’s new Law on Foreigners and International Protection (LFIP).⁹⁴ This means that refugees and asylum seekers moving from outside Europe are considered as conditional refugees. Turkey’s implementation of the 1951 Refugee Convention is that the processed and granted refugee applications from non-European refugees are settled in other partner countries. The UNHCR and to some certain extent the International Organization for Migration (IOM) are involved in this resettlement.

According to the new Turkish law cited above, Syrians can be considered as “conditional refugees” or non-European refugees. The Turkish government assumed that the crisis in Syria would be immediately resolved and thus did not develop a long term plan on Syrians crossing the Turkish border. On 29 April 2011, the Turkish government witnessed the first group of 250 Syrian villagers fleeing the war into Hatay province in Southern Turkey and declared that they were prepared to host the small groups crossing the border.⁹⁵ The numbers gradually increased and led to the establishment of the first refugee camp overseen by the

⁹² Kale B, ‘Turkey’s transforming visa policy: Integration or divergence with the EU?’ Barcelona CIDOB Publications, 2011.

⁹³ *Convention relating to the status of refugees.*

⁹⁴ Turkey: Law No. 6458 of 2013 on Foreigners and International Protection, 29 October 2016.

⁹⁵ Kale, ‘The limits of an international burden-sharing approach, 11.

Disaster and Emergency Management Presidency. During these initial stages, the Turkish government did not have a priority to seek for international burden-sharing.⁹⁶ The reasons for this were: Turkey assumed that the relocation was temporary and international assistance would require sharing sensitive information or opening camps to international organizations.⁹⁷

3.3 Turkey-European Union agreement

As of July 2019, the number of Syrians increased in Turkey. 108,732 foreigners were accommodated in eleven temporary accommodation centres in eight provinces. In addition, 3,514,016 temporary protection holders have been living outside the temporary accommodation centers registered by the Turkish Directorate General of Migration Management (DGMM).¹⁰¹ Turkey's refugee framework had spill over effects from the influx that had an impact on the EU. The high number of refugees crossing into EU borders caused member states to react with panic and despair with some closing their borders and others demanding an end to the free movement of persons in the Schengen system.¹⁰² The EU had to formulate a solution that would help prevent the influx of refugees into their borders. This led to the EU-Turkey agreement.

The EU therefore began a process of discussions with Turkey on how to address the migration crisis in 2015. On 18 March, 2016 they signed an agreement.¹⁰³ The main aim of this agreement was to stem the influx of refugees into Europe. It was agreed upon that all new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 would be returned to Turkey.¹⁰⁴ Following this action, for every Syrian being returned to Turkey from Greek islands, another Syrian would be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria¹⁰⁵. Turkey also committed itself to taking necessary measures to prevent the opening of illegal land and sea migration routes from

⁹⁶ Kale, 'The limits of an international burden-sharing approach, 11.

⁹⁷ Kale, 'The limits of an international burden-sharing approach, 11.

¹⁰¹ <https://translate.google.com/translate?hl=en&sl=tr&u=https://www.goc.gov.tr/gecici-korumamiz-altindaki-suriyeliler&prev=search> on 11 November 2019.

¹⁰² Kale, 'The limits of an international burden-sharing approach, 13.

¹⁰³ *EU-Turkey Statement*, 18 March 2016.

¹⁰⁴ *EU-Turkey Statement*.

¹⁰⁵ *EU-Turkey Statement*.

Turkey to the EU. This would be done in adherence to EU and international law. These measures would protect refugees from exploitation as they are a vulnerable group. The EU also agreed on giving financial aid of three billion euros under the Facility for Refugees in Turkey as funding for projects for the benefit of persons under temporary protection.¹⁰⁶ The EU Facility for Refugees in Turkey is a program adopted to aid the European Council in assistance of giving Syrian refugees in Turkey financial aid. Additionally, the EU had agreed to speed up the visa liberalisation of Turkish citizens travelling to the EU and re-energise Turkey's accession process.

This agreement led to a number of achievements in solving the migration crisis. There was a decline in the daily average of irregular crossings from Turkey to Europe falling from 1,794 to 80 since the activation of the agreement.¹⁰⁷ 1.5 million vulnerable refugees benefited from monthly cash transfers through the Facility for Refugees in Turkey. Among these numbers, 470,000 refugee minors had access to formal education.¹⁰⁸ The resettlement of Syrian refugees under the One-for-One mechanism of the EU-Turkey Statement was also successful as more than 21,000 Syrian refugees in need of protection were resettled to EU member states.¹⁰⁹

3.4 Effectiveness of the burden-sharing principle as opposed to conventional voluntary aid

Foreign aid is the transfer of concessional resources from one government to another government, nongovernmental organization or international organization to promote short or long-term beneficial change in the recipient country.¹¹⁰ Foreign economic assistance really began in the wake of World War II with US aid to Greece and Turkey.¹¹¹ By early 2015, the cost of the Turkish state hosting and assisting refugees had reached more than 5

¹⁰⁶ *EU-Turkey Statement*.

¹⁰⁷ European Commission, *Turkey 2018 Report*, 17 April 2018, 46.

¹⁰⁸ Atlantic Council, *EU-Turkey relations and the migration conundrum: Where does the EU-Turkey Statement stand after three years?* 5 May 2019.

¹⁰⁹ Atlantic Council, *EU-Turkey relations and the migration conundrum: Where does the EU-Turkey Statement stand after three years?*

¹¹⁰ Lancaster C, 'Sixty years of foreign aid: What have we learned?' 64 *International Journal* 3, 2009, 1.

¹¹¹ Lancaster, 'Sixty years of foreign aid: What have we learned?', 1.

billion dollars of which the international community covered some 3 percent.¹¹² This contribution is outstanding on its own, however with such a contribution one wonders why foreign aid has not yet delivered economic success and human development.

In the analyses of the effectiveness of voluntary aid, the motivations and incentives faced by all involved are often overlooked or assumed to be benevolent. In many cases, it is presumed that the individuals involved put aside their own interests and act in the best interests of the developing countries.¹¹³ This implies that donor countries or aid agencies are unbiased in their decisions to donate. Contrary to this assumption, the aid process entails various layers of self-interested actors. The resultant effect of this is that those involved in the aid process may fail to facilitate coordination and cooperation that is necessary to achieve development similar to the outcome of the Prisoners Dilemma in game theory when the prisoners do not cooperate.

Incentives play a big role in shaping the outcome of foreign aid. Donor agencies can be multilateral or bilateral. These agencies often have many different objectives for foreign aid such as rewarding allies, promoting donor country exports or maximizing budgets.¹¹⁴ The purposes of giving aid usually differ from country to country and change over time. These multiple objectives may work against each other and in effect weaken each other leading to the aid inefficiently serving the multiple goals well. The donor incentives may also be misaligned with the recipient country's development goals leading to adoption of ineffective policies hence failure of the foreign aid.

Another problem is posed with the conventional voluntary foreign aid. There is a possibility that donors and recipients fail to have adequate knowledge to achieve development goals.¹¹⁵ This is the central problem to social coordination identified by Hayek.¹¹⁶ The 'knowledge problem'¹¹⁷ is identified as the decentralization of knowledge faced by every society. The success of foreign aid involves coordination from both the donors and recipients. Donors

¹¹² İçduygu A, 'Syrian refugees in Turkey: The long road ahead' Migration Policy Institute, 2015, 5 - [file:///C:/Users/lucym/Downloads/TCM-Protection-Syria%20\(1\).pdf](file:///C:/Users/lucym/Downloads/TCM-Protection-Syria%20(1).pdf) on 16 December 2019.

¹¹³ Williamson C, 'Exploring the failure of foreign aid: The role of incentives and information' Springer, 2009, 3.

¹¹⁴ Williamson, 'Exploring the failure of foreign aid, 7.

¹¹⁵ Williamson, 'Exploring the failure of foreign aid, 10.

¹¹⁶ Hayek F, 'The use of knowledge in society' American Economic Review, 1945, 35.

¹¹⁷ Williamson, 'Exploring the failure of foreign aid, 11.

may have the best intentions but may be unable to coordinate successful foreign aid policy due to a lack of information and the inability to tap into local knowledge.¹¹⁸ Similarly, the recipient countries may fail to sufficiently figure out the exact needs of the people they intend to assist and how the needs can be met.¹¹⁹ Hayek therefore provides an insight as to why centrally planned, top-down approaches such as foreign aid will never be able to solve economic problems due to an inability to collect the necessary knowledge.

These challenges facing conventional voluntary aid pose the need for a better suited approach to aid. The burden-sharing principle responds to the challenges posed. With a burden-sharing framework, consenting states enter into a binding agreement. This agreement clearly stipulates all the parties and their interests as can be seen with the EU-Turkey Agreement. A burden-sharing framework is also tailored to a specific goal for example the EU-Turkey Agreement main aim was to stem the influx of refugees. The action plan is thus formulated around this aim. The solutions to addressing the refugee influx are also carefully considered and formulated through extensive research and is always constantly reviewed. An example of this is how the EU and Turkey have meetings with all the relevant stakeholders to review the progress of the Agreement. The burden-sharing principle when adopted is therefore superior to foreign aid as it encompasses various factors and the needs of refugees altogether.

3.5 Implications of the EU-Turkey Agreement and its link to the Kenyan situation

The EU-Turkey deal is not devoid of criticisms. The agreement had a measurable impact on official, registered migration but did little to curb irregular, unofficial, unregistered immigration. In 2015, UNHCR and IOM registered about 1.1 million new arrivals to Europe and yet 1.7 million asylum claims were lodged, suggesting that 600,000 people found their way into Europe through covert means.¹²⁰ Turkey received six billion euros in total from the

¹¹⁸ Williamson C, 'Exploring the failure of foreign aid, 14.

¹¹⁹ Williamson C, 'Exploring the failure of foreign aid, 15.

¹²⁰ Siegfried K, 'The hidden failure of Europe's migration policy billions' The New Humanitarian, 16 September 2016 http://www.thenewhumanitarian.org/analysis/2016/09/16/hidden-failure-europe-s-migration-policy-billions?utm_source=IRIN%20-%20the%20inside%20story%20on%20emergencies&utm_campaign=e9395161ce-RSS_EMAIL_ENGLISH_ALL&utm_medium=email&utm_term=0_d842d98289-e9395161ce-15757289 on 5 December 2019.

Commission which is less than the twelve billion euros that had already been spent by Turkey on technical, administrative and social burdens of Syrian refugees.¹²¹ The deal is also influenced by Turkey-EU relations and accession deals which has had an impact on the success of the agreement.

However, this relation between Turkey and the EU is effective in proving that cooperation in governance of migration can be productive. The Turkey refugee situation relates to Kenya, albeit not similar, in that both countries are top refugee hosting countries in their own respect. Turkey's policy and laws on Syrian refugees and their status affords them temporary protection which is similar to Kenya's refugee laws. The increase of refugees increases the burden on the both countries, administrative and social costs.

The relation between Turkey and the EU is also a key reference on how bilateral and multilateral agreements can be effective in solving the refugee crisis across various sectors. Turkey's refugee situation also indicates the impact of a host country's policy on neighbouring countries. This further strengthens the proposition that cooperation through a burden-sharing framework can best resolve a refugee crisis. Drawing from this case study, the next chapter will focus on how to implement a burden-sharing framework through use of a regional bloc and posit it on a Kenya – EAC relation.

¹²¹ Elitok S, 'Three years on: An evaluation of the EU-Turkey Refugee Deal' Migration Research Centre at KOC University, April 2019, 5 https://mirekoc.ku.edu.tr/wp-content/uploads/2019/04/Mirekoc_Elitok_2019_Report_ThreeYearsOn-AnEvaluationOfTheEU-TurkeyRefugeeDeal.pdf on 5 December 2019.

CHAPTER 4: AN ANALYSIS OF THE BURDEN-SHARING PRINCIPLE

Thus far, the flow of this research paper has led to the breakdown of the findings. There was an introduction to the burden-sharing principle. An analysis of the building block of this concept led to the theory of cooperation. The theory of cooperation proved that the best results are achieved through mutual cooperation of parties. To prove the existence of cooperation within a framework the EU and Turkey refugee agreement was used as a case study. It displayed that a region can be affected by a refugee influx and not just a singular host country. At this stage, this chapter shall link the case study to the Kenyan refugee situation. This chapter will also capture how to implement a burden-sharing framework within the Eastern Africa region. It will also summarize the limitations and challenges of a burden-sharing framework.

4.1 The current Kenyan refugee regime

Kenya is a party to the 1951 Convention¹²⁷ and the 1967 Protocol¹²⁸. The 1969 OAU Convention¹²⁹ has also been ratified by Kenya. The Refugees Act 2006 came into force in 2007 affirming Kenya's commitments to international refugee conventions and set out the treatment and rights of refugees and asylum-seekers. The Department of Refugee Affairs (DRA) was established by the Refugees Act. The DRA received and processed applications for refugee status. This was however disbanded in 2016 due to the government's intention to close Daadab and Kakuma refugee camps. The DRA was then replaced by the Refugee Affairs Secretariat (RAS). The RAS took up the mandate of the DRA with amendments to the Refugee Act 2006 being made in order to anchor it legally.

There are two classes of refugees recognised by the Refugees Act. These are statutory and prima facie refugees. A statutory refugee is defined as a person who fears being persecuted for reasons of race, religion, sex, nationality, membership of a particular social group or political opinion by the country of his nationality.¹³⁰ A prima facie refugee status is

¹²⁷ *Convention relating to the status of refugees*, 28 July 1951. Kenya acceded to this treaty on 16 May 1966.

¹²⁸ *Protocol relating to the status of refugees*, 31 January 1967. Kenya acceded to this treaty on 13 Nov 1981.

¹²⁹ *Convention governing the specific aspects of refugee problems in Africa*, 10 September 1969. Kenya acceded to this treaty on 23 June 1992.

¹³⁰ Section 3(1), *Refugees Act* (No. 13 of 2006).

conferred by the Cabinet Secretary for Interior and Coordination of National Government. A prima facie refugee is a person who is compelled to leave his place of habitual residence owing to external aggression, occupation, foreign domination or events seriously disturbing public order in any part or whole of his country of origin or nationality and seeks refuge in another country.¹³¹ A recent example is the declaration of South Sudanese refugees as prima facie refugees in 2014 and the revocation of this declaration in 2016 for Somali refugees.¹³²

Under the Refugees Act, asylum-seekers or refugees are issued with identity documents¹³³ which is proof of legal presence of the bearer. This protects the bearer from harassment, extortion and violence from security officials. A refugee can transition from refugee status to citizenship through naturalization. This is enshrined in the Constitution and is stated that one may apply to be registered as a citizen if he/she has been a lawful resident in Kenya for a continuous period of at least seven years and satisfies the conditions prescribed by an Act of Parliament.¹³⁴ The Kenyan Citizenship and Immigration Act prescribes matters relating to citizenship.¹³⁵

The 2010 Constitution confers for every person the right to freedom of movement.¹³⁶ This freedom includes the right to enter, remain in and reside anywhere in Kenya.¹³⁷ The Refugees Act contradicts this provision. Kenya's encampment policy is grounded in section 16 of the Refugees Act and 17. A movement pass has to be issued for refugees wishing to travel outside the designated camps. The non-refoulement principle, which is an international obligation preventing the return of refugees to conditions of persecution, protects refugees from repatriation. As per the Refugees Act, revocation of refugee status may be issued by the Commissioner leading to expulsion on the grounds of national security or public order.¹³⁸

¹³¹ Section 3(2), *Refugees Act* (No. 13 of 2006).

¹³² Library of Congress, *Refugee Law and Policy: Kenya*, 21 June 2016.

¹³³ Section 32, *Refugees Act* (No. 13 of 2006).

¹³⁴ Article 15(2), *Constitution of Kenya* (2010).

¹³⁵ *Kenya Citizenship and Immigration Act* (No. 12 of 2011).

¹³⁶ Article 39, *Constitution of Kenya* (2010).

¹³⁷ Article 39 (3), *Constitution of Kenya* (2010)

¹³⁸ Section 21, *Refugees Act* (No. 13 of 2006).

4.2 The EU-Turkey burden-sharing framework

As stated above Turkey adopted an “open door policy” to refugees. This adoption was due to its neoliberal approach to foreign policy activism, trade, and humanitarian aid. Turkey also has international commitments that arise from the 1951 Refugee Convention albeit this has a geographical limitation. Kenya has a similar international commitment as it is a party to the 1951 Refugee Convention and other conventions stated above and in Chapter One. Turkey legislated provisions on classes of refugees. The new Law on Foreigners and International Protection provides for Syrian refugees to be considered as “conditional refugees” or non-European refugees. With the massive increase of Syrian refugees, the Turkish government placed them under temporary protection status.

Burden-sharing is an effective solution that caters for the national and refugee interests. This agreement is an answer to how effective the burden-sharing principle is as compared to conventional and discretionary voluntary aid. This agreement covered a range of strategies to stem the migration crisis happening in Turkey. A burden-sharing framework has to be a negotiated cooperation among agreed countries. Therefore, lessons can be drawn from the EU-Turkey Statement on what can be encompassed in a burden-sharing framework.

4.3 A burden-sharing proposal for Kenya and the EAC

Hosting refugees in a country means that there will be several ramifications. These consequences have an impact on a country’s economy, environment, socio-political factors and peace and security.¹³⁹ With regard to economic impact, large refugee populations mean that the host country has to make structural adjustment programmes such as food and energy demands. These programmes need to be implemented in line with global human standards and dignity. An influx of refugees impacts the environment through an imbalance of uncontrolled environments. This is because refugees require access to land, water, fuel and food which are scarce natural resources that require sustainable regeneration. Notably, refugees migrate with different linguistics, cultures, religions and ethnicity. This exacerbates social tensions with the local communities of the host country.

Large refugee populations also have serious implications on the peace and security of a region. Evidence of this is the Kenyan government’s claims that Daadab camp was a

¹³⁹ Schuck P, ‘Refugee burden-sharing: A modest proposal’ Yale Law School, 1997.

recruitment ground for al-Shabaab militants. An effective burden-sharing proposal should effectively address these aforementioned sectors. This is because the cooperation theory posits that policy coordination addresses, adjusts and reduces the negative consequences for other states.¹⁴⁰ Through policy coordination, the EAC can unitize and address the impacts of the presence of large refugee population on the host countries and reduce the burden. This part therefore deals with the question of how burden-sharing can be implemented within the EAC by Kenya.

Schuck proposes that a proportional burden-sharing system should achieve four main objectives. It has to maximize resources available for protection, observe human rights principles, respect political constraints such as state sovereignty and self-interest and have administrative simplicity.¹⁴¹ A review of the EU-Turkey agreement mirrors this proposition. The EU-Turkey Statement reflected that both parties had self-interest embedded in the agreement and that all respected the principle of sovereignty. The EU-Turkey Statement also recognized and made use of the already existing refugee framework in Turkey such as the Facility for Refugees to disburse financial aid received from the EU to assist the refugees. It ensured that the framework would be administratively simple. The EU-Turkey Statement also ensured that both parties adhered to EU and international law standards in resettling refugees and protecting them.

4.3.1 Proposed agreement between Kenya and the EAC

For implementation of burden-sharing to work in Kenya and the EAC the first step would be to prepare an agreement. This would be agreed upon by the member states. The aim of this prepared agreement would be for parties to address the needs of refugees and host communities. This agreement would be subject to already existing regional treaties. One such treaty is the Treaty establishing the EAC with original partner states being Kenya, Uganda and Tanzania.¹⁴² One of the reasons for establishment of the EAC was for strengthening and integration within the East African region. The objectives of the Community are aimed at developing policies and programmes to widen and deepen

¹⁴⁰ Milner, 'International Theories of Cooperation among Nations, 469.

¹⁴¹ Schuck, 'Refugee burden-sharing, 30.

¹⁴² Article 3, *Treaty for the establishment of the East African Community*, 1999.

cooperation among the Partner States in political, economic, social and cultural fields as well as security affairs for their mutual benefit.¹⁴³

The costs of hosting refugees as seen above have an impact on political, economic, social and cultural aspects as discussed above and are within the confines of the Community. One of the fundamental principles that govern the achievement of the objectives of the Community is cooperation for mutual benefit.¹⁴⁴ The Council is an organ established by the Treaty for the Establishment of the East African Community that has the power to make policy decisions for the efficient and harmonious functioning and development of the Community.¹⁴⁵ Therefore, the policy agreement on addressing refugee migration and increase would be reviewed by the Council. This would be a multilateral agreement involving the three partner states.

The agreement would also entail the scope of operation including movement of persons. The Treaty provides for the partner states to adopt measures to achieve the free movement of persons, labour and services and to ensure the enjoyment of the right of establishment and residence of their citizens within the Community.¹⁴⁶ Therefore, this agreement would adhere to the present conventions and it is within the ambit of cooperation within the Community.

4.3.2 Mode of operation of the EAC with regard to refugees

The Treaty for the Establishment of the East African Community provides for establishment of common mechanisms for the management of refugees by Partner States in the promotion and maintenance of security.¹⁴⁷ Little or nothing more has been done to bring this commitment into effect.¹⁴⁸ With respect to the 1969 OAU Refugee Convention¹⁴⁹, member states of the EAC are signatories. The OAU Refugee Convention notes the need for an essentially humanitarian approach towards solving the problem of refugees.

¹⁴³ Article 5, *Treaty for the establishment of the East African Community*.

¹⁴⁴ Article 6(f), *Treaty for the establishment of the East African Community*.

¹⁴⁵ Article 14(3) (a), *Treaty for the establishment of the East African Community*.

¹⁴⁶ Article 104(1), *Treaty for the establishment of the East African Community*.

¹⁴⁷ Article 124(5) (h), *Treaty for the establishment of the East African Community*.

¹⁴⁸ Esom K, 'The East African Community and the refugee question' Society for International Development.

¹⁴⁹ *Convention governing the specific aspects of refugee problems in Africa*.

The EAC and the UNHCR have also previously agreed to collaborate in the promotion of the rights of refugees including the protection of forcibly displaced and regulatory regimes affecting the movement of persons, immigration and refugee management.¹⁵⁰ Therefore, the EAC operates within the UNHCR guidelines. The burden-sharing agreement would be well suited to address EAC's commitment in the Treaty for the Establishment of the East African Community to manage refugees.

4.3.3 Suitability of the burden-sharing principle to the EAC region

According to Global Trends survey in 2018, the total number of refugees and people living in refugee-like situations were 4,586,814.¹⁵¹ Conflicts within the neighbouring regions such as in the Democratic Republic of Congo and within the EAC member states such as South Sudan present a concern for refugee management and protection. Almost all, apart from Tanzania, members of EAC have also experienced violent conflicts leading to the displacement of persons including internal displacement. Rwanda faced the 1994 Genocide, Kenya faced the 2007 post-election violence, in Northern Uganda there was the Lord's Resistance Army insurgency and South Sudan still faces an ongoing civil conflict dating back to 2013.

Despite previous and ongoing conflict circumstances, EAC members have been pivotal in refugee management and protection for example Kenya's management and hosting as detailed in this dissertation. The administration of the existing refugee framework by EAC individual member states is however proving to be complex and dynamic in today's refugee crisis reality. The international community has failed in its support role to meet the immediate and long-term humanitarian needs of refugees and host communities. The responsibility therefore falls upon the member states to mobilize cooperation for the effective management of refugees and address refugee needs. EAC members would best implement a burden-sharing framework as they possess the knowledge arising from hosting refugees and experiencing conflict. This places them at an advantage position in addressing refugee needs as they do not face the "knowledge problem".

¹⁵⁰ East African Community Secretariat, *EAC, UNHCR to collaborate in protection of refugees*, 22 March 2017.

¹⁵¹ UNHCR Global Trends 2018, 74.

The EAC can also borrow a leaf from the sixteen state Economic Community of West African States (ECOWAS) free movement of persons protocol. ECOWAS has adopted practical steps to address the issues of refugees within their community. West African countries established ECOWAS with the aim that their economic union would be strengthened through free movement of persons, goods and capital¹⁵². The member states then adopted a Protocol¹⁵³ relating to Free Movement of Persons, Residence and Establishment¹⁵⁴ where community citizens can reside freely and safely in community member states. These provide a solution for refugees originating from a country within ECOWAS who eventually end up residing in another country within ECOWAS. This move provides for local integration of refugees and secured residence and work entitlements for West African refugees while allowing them to retain their original nationality.

This initiative by ECOWAS proves that regional response to refugee needs have a likelihood of success in the EAC.

4.3.4 Appraisal of the success and failures of previous burden-sharing frameworks.

The EU considers the EU-Turkey Statement an overwhelming success. The objectives of the EU-Turkey Statement included deepening EU-Turkey relations, addressing the migration crisis and ending irregular migration from Turkey to the EU. Some of these objectives were not clearly defined and therefore assessment of whether the goals set in the EU-Turkey Statement have been met is proving to be difficult.¹⁵⁵ For example, if it is to be assumed that ending irregular migration should mean achievement of zero rate, then this objective has not been achieved. The lesson learnt from this case is the importance of operationalizing or quantifying vague terms such as “deepening”. The problem with operationalizing terms on the other hand, is that concrete definition of terms makes the timelines more likely to be not met and failures easy to identify. This is because of the variety of external and internal factors –political or economic- that may affect the country’s ability to meet its requirements.

¹⁵² *Treaty establishing the economic community of West African states*, 28 May 1975.

¹⁵³ *Protocol relating to free movement of persons, residence and establishment*, 1 January 1979.

¹⁵⁴ *Four supplementary protocols for the implementation of the free movement protocol*, 2 May 1990.

¹⁵⁵ Reslow N, ‘An overwhelming success? Reconsidering the EU-Turkey Statement’ EUSA International Biennial Conference, Denver, 9 May 2019, 12.

The European Court of Auditors also identified problems with access to data. These included lack of up-to-date demographic information and a lack of cooperation of Turkish authorities.¹⁵⁶ This necessitates that all relevant stakeholders in a burden-sharing framework should be in constant communication and offer assistance where required. In conclusion, the parties to the burden-sharing agreement have the power to dictate how they can best address the needs of refugees and host communities while alleviating the burden on the countries.

¹⁵⁶ Reslow N, 'An overwhelming success? Reconsidering the EU-Turkey Statement', 13.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Conclusions

Based on the discussion above, it is affirmed that burden-sharing is an international principle that is instrumental in addressing current refugee and host country's needs. It is a fundamental principle that divides diverse costs of hosting refugees among a number of states. The UN and AU through various conventions provide for it. Kenya acceded to the conventions¹⁵⁷ and is a member of the EAC where all member states are party states to the AU. Previous responses to the handling of refugees have proven that this principle has received little effort in its adoption and implementation.

5.1.1 Reasons why burden-sharing has not been used as a viable method.

The reason for the lack of adoption and embrace by the international community of this principle is because it is not a binding principle. This is due to the fact states have little obligation to assist when it comes to addressing refugee needs. Aid given to host countries is also based on incentives by the donor state. Efforts by the Kenyan government from 2013 displayed the burden host countries face when accommodating refugees. Kenya severally attempted to close the Daadab camp citing security concerns and great costs but faced criticism from the international community and human rights organization. This raised the question of whether there was a better solution to addressing the needs of refugees and host communities in line with international law and human rights.

5.1.2 Effectiveness of the burden-sharing principle.

This paper proposes burden-sharing as an effective response to refugee needs. Burden-sharing entails division of costs among a number of states. For this reason, it is the proposition of this dissertation that burden-sharing should be considered in Kenya and by the EAC. This requires negotiated cooperation by EAC member states to increase net benefits of this framework and address refugee crises. The game theory proved that better benefits are received when states cooperate to realize the mutual goal of lessening the burden of hosting refugees. Burden-sharing is effective in delivering goal oriented outcomes. This

¹⁵⁷ *Convention relating to the status of refugees, Protocol relating to the status of refugees and the Convention governing the specific aspects of refugee problems in Africa.*

is because its sole formulation is to address the needs of refugees and host communities thus delivering better results as opposed to conventional foreign aid. Burden-sharing ensures a commitment by the parties involved and therefore does not fall into the risk that incentives formulate the outcome.

An analysis of the EU-Turkey Statement displayed the benefits of burden-sharing such as refugees benefitting from cash transfers and resettlement of refugees. The EU-Turkey Statement was an agreement crafted by the two parties after Turkey's response to the Syrian refugee crisis and the toll effect of Turkey's open door policy to its neighbours. This EU-Turkey Statement was also a key reference to how bilateral and multilateral agreements can be effective in solving the refugee crisis.

5.1.3 Adoption and implementation of the burden-sharing principle.

Following this discussion, the paper also considered how Kenya could adopt and implement burden-sharing with the EAC. It is affirmed that for burden-sharing to be effective, there needs to be a negotiated agreement detailing the scope of cooperation. This agreement would be subject to the EAC treaties and mode of operation as it requires integration of the agreement within the EAC framework. The EAC Treaty¹⁵⁸ provides for collaboration of member states in the promotion of refugee rights and management. Inference could also be drawn from the ECOWAS Free Movement Protocols¹⁵⁹ on how burden-sharing could be adopted and also showed that burden-sharing is not alien to African states. Lessons were also drawn from the EU-Turkey Statement on how to draw an agreement and assess goal achievement which included the operationalizing of certain terms.

5.2 Proposed recommendations.

- ❖ RAS to conduct research and compile data on costs of hosting refugees.

In Kenya, the Refugee Affairs Secretariat represents the Kenyan government and are in charge of registration and documentation of refugees. The RAS should work hand in hand with the UNHCR to conduct extensive research and compile refugee data in order to ascertain the diverse costs of hosting refugees in Kenya. This record and report will be up-to-date and essential in engaging discussions with the EAC as there will be a better

¹⁵⁸ *Treaty for the establishment of the East African Community.*

¹⁵⁹ *Protocol relating to free movement of persons, residence and establishment.*

understanding of Kenya's position with regard to refugees and propose on how the EAC may share this burden.

- ❖ Kenyan government to engage the EAC in adopting a burden-sharing proposal.

A key component of burden-sharing is mutual cooperation and agreement. Therefore, the Kenyan government should propose to the EAC Council to call for discussions from other members and to hold discussions on burden-sharing during the Council meeting. This is in line with the UNHCR and EAC meeting to collaborate in protection of refugees held on 22 March 2017. For this reason, the UNHCR can co-chair these meetings.

- ❖ Kenyan government to propose integration and resettlement of refugees in EAC.

Having conducted research through the RAS, the Kenyan government should propose various ways of sharing the burden. Borrowing a leaf from ECOWAS, one of the propositions should be integration of refugees from member states allowing free movement within the EAC. In Kenya, the RAS can facilitate this process. Another proposed burden-sharing should be the resettlement of refugees to member states of the EAC. This should be based upon the size of the host country and situation of the country at that present moment. Instrumental to this proposition would be the member states agreed contribution in aiming to solve conflicts of the country of origin of the refugees.

- ❖ EAC Council to come up with a directive on burden-sharing.

Based on the decision at the Council meeting, the Council should give a directive on burden-sharing and member states that accept the proposal to sign the understanding. This will ensure that the burden-sharing principle is binding and there will be stipulated consequences on noncompliance.

- ❖ Acceding parties to the burden-sharing proposal to have annual reviews.

An assessment of the effectiveness of the proposal is essential. These reviews will aid goal actualization and also provide for a review of the proposal where it would be considered as ineffective.

5.3 Conclusion

In conclusion, it is clear that the burden-sharing principle is an effective solution to the refugee crisis. Its implementation requires the cooperation among a number of states. For

this reason, its provisions should be clear and give specific roles to the parties. It can be implemented without need for disbanding the already set institutional organization of parties. It requires complete cooperation from involved parties in order to work efficiently.

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