

REFUGEES A THREAT TO NATIONAL SECURITY:
CASE STUDY KENYA

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072407

A DISSERTATION SUBMITTED IN PARTIAL
FULFILLMENT OF THE REQUIREMENTS FOR THE
AWARD OF THE DEGREE OF BACHELOR OF LAW
[LLB] OF STRATHMORE UNIVERSITY.

MARCH 2016

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March 2016

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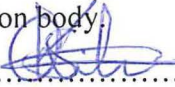
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ACKNOWLEDGEMENTS

I thank God for His grace and mercy that has sustained me through my entire research process. I also wish to express my sincere gratitude to my parents for their support and encouragement. Special thanks to my supervisor Ms. Mukami Wangai for her advice, guidance and suggestions throughout the project.

DISSERTATION DECLARATION FORM

This research project is my original work and has not been presented to any other examination body.

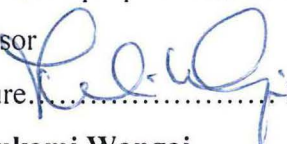
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Declaration by the Supervisor

This research proposal has been submitted for my approval as Strathmore Law School supervisor

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ABSTRACT

The main aim of this research is to investigate whether refugees pose a threat to the national security of Kenya. The objects of the study were: to investigate whether refugees portend any security threats in Kenya, to establish for policy recommendation whether screening measures currently in place are able to separate criminals that do not deserve international protection at Kenyan borders, airports and sea entry points and to determine whether drastic government measures to deter hosting of criminal elements among refugees has had any consequences on genuine refugees. The target population of the research consisted of: refugees, government officials and host communities. This study employed secondary data, with data retrieved from various databases such as Hein Online, JSTOR and Lexis Nexis. Analysis of the media reports and statutes on refugees and national security in Kenya was also used. The study recommends that Kenya has an obligation of providing security to its citizens and also to protect the physical security of refugees living in its camps. There is therefore the need to strike a balance between obeying international obligations and that of protecting national interests.

LIST OF ABBREVIATIONS

IRIN Intergrated Information Regional Networks

UNHCR United Nations High Commissioner for Refugee

OAU Organisation of African Unity

UN United Nations

CHAPTER ONE

1.1 INTRODUCTION TO THE STUDY.

The first thing that one thinks of when national security is mentioned is the safety of the state's citizens. If those people are not safe from any threat, especially from other nationals coming into their country then it is most certainly not a secure country.¹

Kenya has been home to thousands of refugees from neighbouring countries like South Sudan, Somalia and Uganda during the dictatorial rule of Iddi Amin. However, the Daadab 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 Daadab refugee camps has put pressure on the Kenya government on the need to obey the International Law by continually hosting refugees and that of protecting its national interests as regarding its national security.²

Dadaab is the world's largest refugee camp and is located in Garissa County, it houses 355,709 registered refugees, 95% of whom are Somalis who fled the country due to conflicts and drought. The number of refugees is, however, thought to be around 500,000.

For the decades that Somalia has been without a functioning government, life for the populations of Garissa, Mandera and Wajir Counties has been turned upside down. The residents of the three counties, who are largely of Somali ethnicity, have seen many lives and property lost to criminals from Somalia. These criminals sometimes stage cross-border attacks. Other times they operate from refugee camps and use them as a cover. In the early 1990s, the Kenyan Government stopped setting up a refugee camp on the outskirts of Mandera town, after criminals started robbery and killing sprees targeting the locals. The story has been the same in Wajir and Garissa Counties. Despite paying a heavy price for standing by the people of Somali, the returns for Kenya have always been bitter. Every time Kenya has toyed

¹ Simon Bell, *Why Refugees Are a Threat to National Security*, 2012, at www.academia.edu.

² Kirui P and Mwaruvie J, 'The Dilemma of Hosting Refugees: A Focus on the Insecurity in North Eastern Kenya.' *International Journal of Business and Social Science*, 3 (2012), 161-162.

with closing the refugee camps in its North Eastern region, the strongest opposition has come from international agencies.

Amnesty International has joined the UN and others in urging Kenya to halt its plans to close the world's largest refugee complex, arguing that forcing the 350,000 Somalis in Dadaab to return home would put their lives at risk and breach international law. Kenya ordered the closure of the camp last week after members of the Somali Islamist group al-Shabaab attacked Garissa University College on 2 April, killing 148 people.

Although the Kenyan government has long viewed Dadaab as a breeding ground for al-Shabaab and often called for it to be shut, it has become increasingly blunt in the aftermath of Garissa and the 2013 attack on the Westgate shopping centre. Last Saturday, the country's deputy president, William Ruto, said Kenya would now change "the way America changed after 9/11", adding: "We have asked the UN high commissioner for refugees (UNHCR) to relocate the refugees in three months". Ruto said that if the UN failed, "we shall relocate them ourselves". The UNHCR has described the plan as abrupt and warned that it would have "extreme humanitarian and practical consequences". On Thursday, Amnesty also called on Kenya to reconsider the decision and honour its responsibility to protect those within its borders. If refugees are sent back to [Somalia], they risk human rights abuses, such as rape and killings, as well as extortion. *Amnesty* "The attack in Garissa underlined the need for the Kenyan government to better guarantee the security of its population," said Muthoni Wanyeki, the group's regional director for east Africa, the Horn and the Great Lakes. "But this must not be done by putting at risk people Kenya is duty-bound to protect." Amnesty says that Somalia's government simply does not have enough control over many parts of the country. "General violence and insecurity persists and residents have frequently been subject to both indiscriminate and targeted attacks," it said in a statement. "If refugees are sent back to these areas, they risk human rights abuses, such as rape and killings, as well as extortion."

But the tragedy is that if Kenya were to listen to the opposing forces, refugees would stay in Kenya for eternity. The first refugees started trickling into Kenya twenty two years ago. Today, the situation in Somalia is far better. Except for the challenges posed by Al-Shabaab

terrorists, the rest of the country is close to normalcy. What remains is for the central government and several self-declared states to bring back regularity to their nation.

As the people of Somalia work out how best to bring back normality, it is time for Kenya to start questioning the continued hosting of Somali refugees. At one time, Kenya has to decide that it is over and the refugees have to go back home. That the time is now.³

1.2 STATEMENT OF THE PROBLEM

Terrorist attacks are one of the most critical problems facing Kenya's national security today. A series of terrorist incidents have occurred in Kenya since August 1998 resulting in a number of deaths. The most recent attack was that on Garissa University where at least 147 people, mostly students, were killed in an assault by Al-Shaabab militants.⁴ The Westgate attack underscored the continued risk of large scale acts of terrorism in Kenya.⁵ In September 2013 Kenya experienced one of the worst terrorist atrocities ever perpetrated on her soil. The gunmen who attacked the Westgate mall on that awful Saturday morning killed at least 67 people and wounded many more.⁶

Kenya has been one of only two Sub-Saharan African countries (the other being Tanzania) to be directly targeted by the current wave of global terrorism. In 1998, Kenya, along with Tanzania, suffered terrorist attacks that collectively killed over 250 people and injured nearly 5,000 others, mostly Kenyans (Muendo 2003). Then in 2002, another terrorist attack in Kenya killed 13 people and injured 80 (Daily Nation, November 29, 2002).⁷ The unfavourable reason for this is due to a combination of geographic, regional, historical, political, economic and socio cultural factors. The direct causes of terrorist attacks in Kenya in the past have been: (1) its close ties with Israel and western countries, especially the US, (2) its vibrant coastal beach tourism industry that threatens local Islamic culture and, (3) the perception that the

³ 'Jibril Adan: *Refugees camps a security threat and must be closed.*' Standard Media News, 10 October 2013 www.standardmedia.co.ke on 5 March 2015.

⁴ <http://kenyastockholm.com/2015/04/08/uhuru-kenyatta-has-failed-to-tame-insecurity-in-kenya-part-3> on April 8, 2015.

⁵ Australian Department of Foreign Affairs and Trade, 13 February 2015 www.smartraveller.gov.au/zw-cgi/view/Advice/Kenya on 5 March 2015.

⁶ <http://www.mashada.com/blogs/p/119385/a-year-later-confusion-still-reigns-over-westgate> on 21 September 2014

⁷ Otiso KM, 'Kenya in the Crosshairs of Global Terrorism'. 1 Kenya Studies Review Journal, 1 (2009), 108, para 1.

country's predominantly Christian population is an obstacle to the Islamisation of Eastern Africa.⁸

Another major reason is the oppression and injustice, which is shouldered by Muslims, especially the Somalis. This is because they are deprived of government services and are subjected to all forms of discrimination and persecution. They are deprived of identity cards, education opportunities and the basic public services. These are issues in the public domain and documented by various commissions including the Truth Justice and Reconciliation Commission. So, when young men graduate from high school, they do not get proof of identity cards so as to go to university. That is why they escape to Somalia, thinking that Somalia is their original home country where they belong, after which they come back home to Kenya a ticking bomb because of the injustice that was done against them. Even for those who get a national identity card, their patriotism is questioned, and thus have to pay bribes to live in their own country.

When Kenya closed her Somali border in December 2006 as a security concern following the Islamic insurgency and Al – Shabaab threats, the then U.S.A Ambassador to Kenya, Michael Rannerberger had this to say: -

“The United States appreciates Kenya’s efforts to care for the refugees in Dadaab. The U.S. government also understands that Kenya needs to ensure the security of citizens of North Eastern Province (now County) and control its borders. As a contracting party to the 1969 OAU convention on Refugees however, Kenya is obliged to allow Somalis to cross the border to seek asylum.”⁹

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

⁸ Otiso KM, 'Kenya in the Crosshairs of Global Terrorism', 111, para 2.

⁹<http://www.simbanews.com> on 10 December, 2010.

Kenya's North Eastern Region.¹⁰ Kenyatta on this matter maintained that Kenya would not concede any of its territory to Somalia.¹¹ To date, the Government of Kenya views the Somalis (especially refugees) with suspicion hoping to seal any possibility of renewed insecurity.

The reason refugees have always been associated with insecurity is because they are always perceived to be in possession of illicit firearms or propagate its proliferation. 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 as part of a broader, complex pattern of state failure and communal violence afflicting much of the horn of Africa.¹⁴ It is therefore clear that government officials in Africa are caught between their genuine concern for the refugees and their wish to honour international agreements to provide asylum, and the increasingly hostile grassroots response from their own impoverished people in refugee affected areas.¹⁵ In an attempt to promote security, the Kenya government has previously closed down refugee camps near urban centres and stressed on the need for refugees to stay within their designated camps. The challenge however is that in both of Kenya's official refugee camps – Dadaab and Kakuma – over 200,000 Sudanese, Ethiopians, Somalis and central African refugees are subjected to armed violence on a daily basis. According to reports issued by the Intergrated Regional Information Networks (IRIN), there is

¹⁰Rono J, "Kenya Foreign Policy" Africa Foreign Policies, Stephen Wright(ed.) (Colorado: Westview Press,1999),105.

¹¹Orwa K, "Foreign Relations and International Co-operation", Ministry of Information and Broadcasting (ed.), Kenya: An Official Handbook (Nairobi: Colourprint,1988),308.

¹²Security Research and Information Centre-SRIC, Kamenju J, Singo M, and Wairagu F, 2003, Terrorized Citizens: Profiling Small Arms and Insecurity in the North rift Region of Kenya, 83.

¹³ Security Research and Information Centre-SRIC, Kamenju J, Singo M, and Wairagu F, 2003, Terrorized Citizens: Profiling Small Arms and Insecurity in the North rift Region of Kenya, 83.

¹⁴Haro, Guyo. O.Godana J. Doyo and John G McPeak, Linkages between Community, Environmental and Conflict Management: Experiences from Northern Kenya .Conference report, Ithaca,(New York: Cornell University,2003),3.

¹⁵ B.E Harrfelt Bond, Imposing Aid Emergency Assistance to Refugees, (Nairobi: Oxford, 1986),15.

a “very strong possibility” that the camps are being used to traffic arms: there have been shooting incidents in the camps and it is also very easy for people to move around with arms on the Kenya – Somali border.¹⁶

Of late the major security threat to Kenya particularly in Dadaab region of North Eastern is that issued by the Al Shaabab. Al Shaabab is a terrorist organization alleged to have links with Al Qaeda and has been issuing a litany of threats, ranging from mounting attacks on Kenyan soil to imposing Sharia laws in the North Eastern Region.¹⁷ Al Shaabab is a remnant of the Islamic Courts Union, crushed by Ethiopian forces during the 2006 invasion of Somalia.¹⁸ They have severally crossed the border killing Kenyans and accusing the Kenyan government of interfering with Somalia’s affairs.¹⁹ The most recent kidnappings of humanitarian aid workers and tourists by the Al Shabaab prompted the Kenya government to declare war on Al Shabaab whom it accuses of a spate of killings and kidnappings in the Kenyan soils.²⁰

Besides Al-Shabaab threats, the other security threat troubling Kenya and linked to Somalia is the piracy threat.²¹ This new tactic of hijacking ships and other sea vessels is threatening business and general voyage particularly in the Indian Ocean. The Kenyan Government, the International police and other navies from many countries have been trying to combat this emerging sea crime. Somali pirates have been the most linked with these illegal activities though it is possible that the network is larger than is thought.

Security issues are a matter of concern in the region especially given the fact that Somalis are both in Kenya and Somalia. The ever increasing influx of refugees suggest the danger this poses to Kenya since the extremists groups are likely to find their way into Kenya in the name of being civilians or refugees. The Kenya security agents are concerned that the fighting in

¹⁶B.E Harrfelt Bond, *Imposing Aid Emergency Assistance to Refugees*, (Nairobi: Oxford, 1986),15.

¹⁷‘Nation Reporter and Agencies: Security fears stall Dadaab expansion’ The Daily Nation, 13 April 2011 <http://www.nation.co.ke> on 25 February 2015.

¹⁸‘Lilian Ahianga: Our Territory is under attack on Four Fronts and there is Danger it could get Worse’ The Sunday Standard, 10 May 2009 <http://www.standardmedia.co.ke> on 25 February 2015.

¹⁹‘Lilian Ahianga: Our Territory is under attack on Four Fronts and there is Danger it could get Worse’ The Sunday Standard, 10 May 2009 <http://www.standardmedia.co.ke> on 25 February 2015.

²⁰‘Galgalo Bocha: Security alert over Al-Shaabab man’ The Daily Nation, June 8 2010 <http://www.nation.co.ke> on 24 February 2015.

²¹‘AFP: Kenya declares war on Al Shabaab’ The Daily Nation, October 15 2011 <http://www.nation.co.ke> on 24 February 2015.

Somalia will lead to a large influx of refugees into the country who might pose a security risk in the country by proliferating weapons through the porous border.²² The security issue in North Eastern province is therefore a major problem and this research will be aimed at establishing whether refugee settlement in the region play a role in propagating security problems in Kenya.

1.3 JUSTIFICATION TO THE STUDY

The study is justified by the policy recommendation on refugees and their implications on national security in Kenya and the fact that there has been minimal objective research on refugees posing a threat to national security in Kenya.

1.4 STATEMENT OF OBJECTIVES

The general objective is to examine the relationship between refugees and national security threats in Kenya. Specific objectives are:

1. To investigate whether refugees portend any security threats in Kenya.
2. To establish for policy recommendation whether screening measures currently in place are able to separate criminals that do not deserve international protection at Kenyan borders, airports and sea entry points.
3. To determine whether drastic government measures to deter hosting of criminal elements among refugees has had any consequences on genuine refugees.

1.5 RESEARCH QUESTIONS

From the aforementioned research objectives, the following research questions can be stated:

- Do refugees portend any security threat to Kenya and if so to what extent?

²²Reuters: Somali pirates seize Panama-flagged vessel as 24 killed in battle' The Daily Nation, June 3 2010 <http://www.nation.co.ke> on 24 February 2015.

- Have there been any incidents of refugees granted asylum and later involved in any activity that threatens national security?
- Have any government measures used to deter hosting of criminal elements among refugees had any consequences on genuine refugees?

1.6 LITERATURE REVIEW

This section reviews the literature about the subject in question. Specifically in this case it looks at what security threats refugees portend to Kenya. State security threats here are confined mainly to terrorism and small arms proliferation as related to Kenya.

Wainright and Ward in *Asylum and Security*, a paper published by the Information centre about Asylum and Refugees explored the question of the links the media and politicians have made between asylum and terrorism.²³ Their findings inform part of this study and are as follows: That newspapers concur in reports that inadequacies in the asylum system have heightened terrorists threat in the UK with an example of 2003 so-called ricin-plot and the murder of a policeman in Manchester in which case the individual who was convicted the these crimes had been refused asylum but had remained in the country. The other finding is that most of the individuals who attempted to detonate bombs on 21st July 2005 entered UK through the asylum system and were granted refugee status or indefinite leave to remain but in contrast three of the men who carried out the 7th July bombings were born in Britain. Finally, the fact that asylum seekers are subjected to more stringent controls than other categories of migrants has led to Refugee Action to conclude that ‘a would be terrorist’ is unlikely to choose a route of entry that immediately brings them to the attention of the authorities, that requires fingerprinting and carries the risk of being detained’.²⁴ This conclusion on the question of the link between asylum and security informs this research to come up with an objective conclusion on the links between asylum and national security strategy in Kenya.

Mathew Gibney’s *Security and the Ethics of Asylum after 11th September* raises issues for this research that calls for gap-filling. He gives the reasons for the rise of debates of insecurity emanating from asylum as the bombings of the World Trade Centre in 1993 in New York by Islamic extremists one of who had an asylum decision pending and the attacks of September

²³ Sophie Wain Wright and Kim Ward, *Asylum and Security*, (2006) at www.icar.org.uk/annual_report_2006-07.

²⁴ Sophie Wain Wright and Kim Ward, *Asylum and Security*, (2006) at www.icar.org.uk/annual_report_2006-07.

11th 2001 by foreigners on visitor and student visas. These attacks culminated a range of new restrictive laws and policies across western states and particularly in US according to Gibney. Gibney further concludes the following: that refugees generally constitute more of a threat than an asset; that the dangers posed by asylum seekers are arguably more diverse than before and that there is need for international cooperation to deal with these new security risks.²⁵ This research seeks to dispute or concur with this conclusion by Gibney on insecurity posed by asylum.

Baylis National Security and Political Asylum explores the fact that since September 11, 2001, the United States has made significant changes in its political asylum policy restricting access to asylum for many applicants in the name of the war against terror.²⁶ She concludes that by comparison with international norms, European practices and practical experience with U.S. asylum system, the security strategy implemented in U.S. asylum policy since September 11th appears at best to fail to promote and at worst to risk undermining the human security goals for which the international political asylum system was founded.²⁷ Thus she disputes the fact that states such as the U.S. have adjusted their asylum policies in the wake of September 11th to deter terrorists exploitation of international asylum protection laws to gain entry is an exercise that aims to protect human security. It is against this that the research will search for objective findings of which the scale should tilt the balance: national security at the expense of asylum protection or vice versa specifically Kenya's national security strategy. This research also intends to fill the gap analyzing the actual security threats that refugees portend to a country, the case of Kenya since these researchers have merely implied that states face national security threats from refugees without pointing out in which form.

1.7 THEORETICAL FRAMEWORK

This research will be guided by the realist's theory of security. Realism as a theory of both national and international security traces its roots from such early ancient traditional thinkers as Thucydides, Machiavelli, and Rousseau. As a reaction to the failures of idealist thinking in interwar period it gained support and was advanced by such realists as E.H.Carr and Hans

²⁵ Gibney M, Security and the ethics of Asylum after 11 September (Cambridge University press,2002) as quoted in JefHusmans "Migrant as security problem: dangers of as related to securitizing societal issues" (London,1995) p.13

²⁶ The Ford Institute for Human Security, Baylis Elena, 2006, National Security and Political Asylum National, 1.

²⁷ The Ford Institute for Human Security, Baylis Elena, 2006, National Security and Political Asylum National, 1.

Morgenthau. Realists contrast sharply on interpretation of different approaches to control and management of national and global insecurity when compared with liberal and human security theorists.

Realist theory posits that human nature is brutish, greedy and selfish. Individuals only look after their personal interests. This theory assumes that the International system is primarily anarchic as there is no central authority, nor an arbitrator. As a result, states must protect their national security and the needs of citizens by any means necessary.

For success of deterrence, in this research context avoiding hosting criminal elements disguising as genuine asylum seekers, realists rely on such key assumptions about deterrence method of achieving state security as: Decision makers are rational and always want to avoid resorting to war through alternative methods. This is exemplified by the Security Council meetings both at national and international level where security technocrats explore the different options available concerning security threats to a state. Rational decision makers will not take aggression against nuclear states. Such states pose a far greater and devastating threat. Although this is contrasted with the Cuban missile crisis between U.S and Ruuse nuclear weapons against each other. A successful intervention by rational decision makers can be possible if the aggressor-threat is significant and large. In this study the threat asylum seekers have been subjectively reported to portent to national security of states cannot be overstated thus it is the intent of this study to advocate for strict measures in deterring threats to national security posed by criminal elements exploiting international protection of asylum seekers.

Compared to realists' approach, liberalists theorists adopt a soft stance on national security issues which if taken within the context of this research would have no problem with UNHCR screening the asylum seekers and refugees in need of international protection in Kenya. Thus viewed from a liberal perspective the research deviates from allowing the interest of a non state actor operating in Kenya to dictate the terms of determining who to enter the territory of Kenya at the expense of state security interests.

Viewed within the context of the research it is clear that human theorists on the other hand would fit well within the realm of the security needs of an asylum seeker whose political,

social, and even environment freedoms are in jeopardy but realists would counter that it is at the expense of national security.

Clearly based on the other three theories of security, human and liberal theory this research seeks to focus on realism as its core. National security interest cannot be sacrificed at the trade off with the international norms and cooperation.

1.8 RESEARCH DESIGN AND METHODOLOGY

This section in the research will deal with the actual gathering, systematically ordering, and analyzing of the data to be used in the study. The section will capture how the research will be designed, how the researcher will collect the data, what data collection tools are to be used, and how the findings will be presented. Both secondary and primary data will be collected.

In this case the research will be analyzing the relationship between refugees and national security strategy in Kenya.

As the researcher I will consult literature on the subject under study from books and internet sources as a secondary data. I intend to retrieve my data from various databases such as Hein Online, JSTOR and Lexis Nexis. Analysis of the media reports and statutes on refugees and national security in Kenya will also be studied.

1.9 LIMITATIONS

The possible limitations to this research are:

- Adoption and revision of laws

1.10 DEFINITION OF TERMS

1.10.1 Refugee

States Parties to the 1951 Convention and/or the 1967 Optional Protocol have incorporated the Convention's definition of a refugee into their domestic law.. States that are also party to the Cartagena Declaration or the 1969 OAU Convention have also incorporated those instruments' broader definition of a refugee, recognizing individuals fleeing generalized violence and other breakdowns of public order.

1.10.2 National security

It means freedom from threats to the core values of a state.²⁸ In cold war periods it was looked at within the context of military terms. Looked differently for the nation to be secure the territorial integrity of the state, its sovereignty, its population, its culture and its economic prosperity should be deemed safe from destruction or major damage.²⁹

²⁸ Baylis John and Steve Smith *The Globalization of World Politics*, (2011) Oxford university press p.255

²⁹ Salmon Trevor and Mark Imber, *Issues In International Relations*(2008) Routledgep.74

CHAPTER TWO

2.1 CONCEPT OF REFUGEES

Traditionally, refugees were primarily viewed as victims of insecurity but scholars today view them as a core security problem. Generally, they are seen as threat to security rather than a humanitarian issue.³⁰

Kenya has seen a huge influx of refugees over the recent years owing to the political instability experienced in her neighbouring states more especially in the Horn of Africa. The Al-Shabaab insurgency in Somalia has seen Kenya give refuge to countless men, women and children who cross its borders daily to escape from the war in Somalia. For example, when Said Barre was overthrown the inflow of refugees into Kenya was not due to Al Shabaab insurgents. It is important to note here that the flow of refugees into Kenya has been steady and consistent over the last few decades. These refugees, who were traditionally conceived and presented as humanitarian issues, are now increasingly viewed as security threats. The issue that arises here is whether the refugees pose a threat to national security in Kenya.³¹

2.2 LEGAL FRAMEWORK FOR REFUGEE PROTECTION IN KENYA

Kenya is a signatory to a number of conventions and treaties dealing with the issue of refugees and their protection. The conventions and treaties have now been fully domesticated with section 16 of the Refugees Act which is to the effect that every recognized refugee and every member of his family living in Kenya shall be entitled to the rights and be subject to the obligations contained in the international conventions to which Kenya is party.³²

Furthermore, according to Articles 2(5) and 2(6) of the Constitution of Kenya 2010, all international conventions that have been ratified by Kenya now form part of Kenyan law.

³⁰ Mogire E, *Victims as Insecurity Threats: Refugee Impact on Host State, Security in Africa*, Ashgate Publishing Company, England, 2011, 17.

³¹ Mogire E, 'Refugee Realities: Refugee Rights versus State Security in Kenya and Tanzania, Transformation' 26 *An International Journal of Holistic Mission Studies*, January 1 (2009) 15-29

³² Section 16 (a) Refugees Act (Act No. 13 of 2006)

The Constitution of Kenya 2010 also offers protections to refugees with regards to Chapter IV which guarantees the fundamental rights and freedoms of the individual. Refugees face numerous difficulties and their human rights are often breached. Most refugees in Kenya live in terrible conditions in refugee camps where food, water, sanitation and shelter are not adequately provided. Refugees are often times not allowed into Kenya.

The Refugees Act 2006 was assented to on 30th December 2006,³³ an Act of Parliament to make provision for the recognition, protection and management of refugees and connected purposes.³⁴ The Act lays down the institutional and legal framework for the recognition, protection and management of refugees. The Act established various offices and institutions which include a Department of Refugee Affairs³⁵ and the Office of Commissioner for Refugee Affairs³⁶, the Refugee Appeal Board³⁷ and the Refugees Affairs Committee.³⁸ The Act lays down provisions relating to recognition of refugees, asserts the principle of non-refoulement³⁹ and codifies the rights and duties of refugees in Kenya.⁴⁰ and it is mandated to coordinate activities and programmes relating to refugees.⁴¹ The Office of the Commissioner for Refugee Affairs, an office in the public service is created via section 7(1). This Commissioner for Refugee Affairs shall be the head of the Department of Refugee Affairs.

Section 11 makes provision for refugees entering Kenya whether lawfully or otherwise. If they wish to remain in Kenya as refugees they are to make their intentions known by

³³ Refugees Act no. 13 of 2006. The Refugee Bill had been published in 2003 and was awaiting enactment. The date of commencement of this Act is by notice.

³⁴ Preamble – Refugees Act (Act No. 13 of 2006)

³⁵ Section 6 (1), Refugees Act (Act No. 13 of 2006)

³⁶ Section 7, Refugees Act (Act No.13 of 2006)

³⁷ Section 9, Refugees Act (Act No. 13 of 2006)

³⁸ Section 8, Refugees Act (Act No. 13 of 2006)

³⁹Section 11, Refugees Act (Act No. 13 of 2006)

⁴⁰ Sections 18, Refugees Act (Act No. 13 of 2006)

⁴¹ Section 6 (1) & (2), Refugees Act (Act No. 13 of 2006)

appearing before the Commissioner personally immediately upon entry into Kenya.⁴² The mere illegal entry shall not cause a person to be declared a prohibited immigrant, detained or penalised in any way except in cases where he fails to report to the Commissioner as provided in section 11(1). This section will in the writer's view save refugees from the ordeal they go through in the hands of Kenya police and the criminal justice system.

Despite the high influx of refugees in the country, Kenya has largely pursued an open door policy by allowing a free flow of refugees in the country. This is a policy that is characterised by the liberal admission of refugees who are then awarded full socio-economic rights and are only repatriated to their countries when conditions are conducive. Thus many migrants are accorded refugee status without the scrutiny that they would undergo under the UN Convention and Protocol and other international instruments that govern refugees.⁴³

2.3 THE PRINCIPLE OF NON-REFOULEMENT

The principle of non-refoulement which is found in section 18 of the Refugee Act 2006 provides:

No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or subjected to any similar measure if, as a result of such refusing, expulsion, return or other measure, such person is compelled to return to or remain in a country where-

- (a) the person may be subject to persecution on account of race, religion, nationality membership of a particular social group or political opinion; or
- (b) the person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of that country.

Prohibition of forced return of a refugee is called non-refoulement and is one of the most fundamental principles in international law. This principle is laid out in Article 33 of the

⁴² Section 11, Refugees Act (Act No. 13 of 2006)

⁴³ Protecting Refugee Rights in Kenya, ICJ (K) 1998, 47

Convention relating to the Status of Refugees (Refugee Convention). It is to the effect that no 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 or membership of a particular social group or political opinion.

Article 31 of the Refugee Convention provides that refugees should not be penalised for having entered the country illegally or if they have come directly from a place where they were in danger and have made themselves known to the authorities. This is now reflected by section 11 of the Refugees Act. Kenya seems to have finally complied with international law through the enactment of the Refugees Act 2006 and in particular section 11 and section 18, further buttressed by the passage of the Constitution of Kenya 2010.

This means that the principles of international law regarding non-refoulement and non penalization of asylum seekers are now part of the law of Kenya. Refugees should enjoy these rights that were previously unavailable to them.

Kenya has taken the step of incorporating the bulk of international law on refugees by specifically adopting the conventions and principles in respect thereof and codifying them into law through the Refugee Act. The legal position in Kenya is that treaties and International Conventions that have been ratified now form part of Kenyan law.

Having been made part of the law of Kenya they still have to pass one more test. They must not be in conflict with the Constitution of Kenya.

Thus the Refugee Act as enacted should not be in conflict with the Constitution. Any provision that would be found to be in conflict with the Constitution would be void to the extent of the inconsistency. Similarly any convention or treaty or part thereof adopted by the Refugees Act which contravenes the Kenyan Constitution would be void to the extent of the inconsistency.

The rights envisaged in the Universal Declaration of Human Rights have already found expression in Chapter IV of the Kenyan Constitution. Every refugee in Kenya is thus entitled to enjoy both the rights envisaged in the international refugee instruments and also the rights enshrined in the Constitution of Kenya.

The rights enshrined in the Constitution of Kenya should thus be enjoyed by Kenyans and other persons including refugees. Refugees are thus entitled to personal liberty as envisaged in Article 29 of the Constitution. They shall not be held in slavery or servitude (Article 30);

Refugees shall not be subject to torture or to inhuman or degrading punishment or other treatment (Article 29(d) and (f)). Refugees should not be subjected to the search of their persons or property except with their own consent (Article 31). When refugees are charged in court with a criminal offence they are entitled to the protections enshrined in Article 49 of the Constitution of Kenya.

They are constitutionally entitled to manifest and propagate their religion or belief in worship, teaching, practise and observance. They are also entitled to establish and maintain at their expense places of education and manage the same.

To the extent that international refugee instruments uphold the rights enshrined in the Constitution of Kenya and that they have been domesticated in the Refugees Act then they are applicable in the Kenyan courts. If the rights enshrined in the Constitution of Kenya are to be strictly applied in relation to refugees then it is arguable that Kenya will in fact be enforcing the principles contained in international refugee instruments

CHAPTER THREE

3.1 REFUGEES AS A THREAT TO NATIONAL SECURITY IN KENYA

3.1.1 National Security

Security is taken to be about the pursuit of freedom from threat and the ability of states and societies to maintain their independent identity and their functional integrity against forces of change which they see as hostile. The bottom line of security is survival, but it also reasonably includes a substantial range of concerns about the conditions of existence. Quite where this range of concerns ceases to merit the urgency of the “security” label which identifies threats as significant enough to warrant emergency action and exceptional measures including the use of force) and becomes part of everyday uncertainties of life is one of the difficulties of the concept’.⁴⁴

The traditional concept of security with the state as the main referent has been up for extensive debate. The realist view of security where it is seen as a “derivative of power”⁴⁵ reduces the complex concept of security to a mere “synonym for power”.⁴⁶ Therefore, the traditional concept of security views the state as the sole protector of its sovereignty and territorial integrity by the use of force and that threats are always military in nature and arise from external sources rather than internal. The realist view on the other hand could be considered relevant during the period of the World Wars, where states seemed to be in a constant struggle for power. However, in the Post-Cold War era, the concept of Security has become much more complex.

With the new concepts of security Post-Cold war, there has been emergence of new threats to national security aside from threats that are of a military nature. Sources of insecurity which can be non-military threats, can be found in the political, economic, social and environmental

⁴⁴ Buzan B, ‘New Patterns of Global Security in the Twenty-first Century’ *International Affairs* (1991), 432-433.

⁴⁵ Buzan B, *People, States and Fear: An Agenda for International Security Studies in the Post- Cold War Era*, Lynne Rienner Publishers, 1983,8

⁴⁶ Buzan B, *People, States and Fear: An Agenda for International Security Studies in the Post- Cold War Era*, Lynne Rienner Publishers, 1983,8

sectors. Buzan set out the sectors of security analysis as follows, 'Political security concerns the organizational stability of states, systems of government and ideologies that give them legitimacy. Economic security concerns access to the resources, finance and markets necessary to sustain acceptable levels of welfare and state power. Societal security concerns the sustainability, within acceptable levels conditions of evolution of traditional patterns of language, culture and religious and national identity and custom.'⁴⁷

As a threat to a country's security refugees pose a political and environmental problem. The 1951 Refugee Convention spells out that a refugee is someone who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country."

Kenya is the country hosting the fourth largest number of refugees in the world, behind Pakistan, Iran and Germany, according to the UNHCR's 2012 annual Global Trends report. The refugees are mainly from South Sudan and Somalia fleeing civil wars due to political strife in their countries. The two refugee camps in Kenya are Kakuma and Daadab. Kakuma camp was first opened in 1992 to accommodate civil war refugees from then-Sudan. But the 18-month civil war that has overcome the four-year-old South Sudan has brought a new flood of refugees. Dadaab has a population of 330,000 people. The Somali refugees who live there either fled the breakout of civil war in Somalia in 1991 or trickled in as the country became a failed state.⁴⁸

Kenya currently hosts over four hundred thousand refugees. In the last two decades it has turned towards a policy of containment in an attempt to confine refugees to its two rural camps, Kakuma and Dadaab. Kenya's tolerance for the ongoing refugee problem which

⁴⁷ Buzan B, *Security: A new Framework for Analysis*, Lynne Rienner Publishers, USA, 1998, 8

⁴⁸ 'Fredrick Nzwili: <http://www.csmonitor.com/World/Africa/2015/0716/Tale-of-two-Kenyan-refugee-camps-raises-concerns-of-prejudice>' on 16 July 2015

peaked in the 1990s due to major conflicts in the region is waning and concurrently issues of national security are growing.

3.2 CAUSES OF REFUGEE INFLUX

3.2.2 Civil Wars in Somalia

The Civil War in Somalia started with resistance to the Siad Barre regime during the 1980s. The Somali Republic gained independence on 1 July 1960. Somalia was formed by the union of British Somaliland and Italian Somaliland, while French Somaliland became Djibouti. A socialist state was established following a coup led by Major General Muhammad Siad Barre. Rebel forces ousted the Barre regime in 1991, but turmoil, factional fighting and anarchy ensued. The Somali National Movement gained control of the north, while in the capital of Mogadishu and most of southern Somalia, the United Somali Congress achieved control. Somalia had been without a stable central government since Dictator Muhammad Siad Barre fled the country in 1991. Somalis use the word burbur ('catastrophe') to describe the period from December 1991 to March 1992, when the country was torn apart by clan-based warfare and factions plundered the remnants of the state and fought for control of rural and urban assets. Four months of fighting in Mogadishu alone in 1991 and 1992 killed an estimated 25,000 people, 1.5 million people fled the country and at least 2 million were internally displaced.⁴⁹

Drought and widespread famine

For the last twenty years, Somalia has been entangled in a civil war amidst the destruction of both its rural and urban economies. The country is now facing widespread famine. The lives of several million people are threatened. The mainstream media casually attributes the famine to a severe drought without examining the broader causes. An atmosphere of lawlessness, gang warfare and anarchy is also upheld as one of the major causes behind the famine.

⁴⁹ Ndege P, Kagwanja M and Odiyo E, 'Refugees in Law and Fact: A Review of the Literature and Research Agenda in Kenya,' *Occasional Paper Series*, 1 (2002), 1

The drought in East Africa is hitting southern Somalia especially hard as aid groups have been attacked or barred by members of the Al Shaabab, an insurgent group linked to Al Qaeda that controls much of the region. Nearly 1 million Somalis have fled the country, while about 3.2 million of those who remain need immediate help.

Hence, people at refugee settlement areas are exceptionally susceptible to famine. Relief aid is sometimes looted by rival groups which make humanitarian assistance additionally difficult.

3.3 The Effects of Refugees on Security

3.3.1 Terrorism

Since Kenya's armed forces invaded Somalia in 2011 in pursuit of the terrorist organisation Al-Shabaab, the country has endured more than 100 terror attacks. Al-Shabaab's latest major attack came on 2 April 2015 when four gunmen entered Garissa University in North Eastern Kenya and murdered nearly 150 students. It was the deadliest attack in Kenya since the 1998 bombing of the US embassy in the capital Nairobi.

Refugee camps often do pose security challenges for host countries. Armed groups throughout the world have used them for recruits, shelter, and food, and it is likely Al-Shabaab does the same. Kenya claims that the mastermind of the Garissa attack had a support network in Dadaab, and the camp is also a trafficking hub for smuggled goods, some of the proceeds of which directly fund Al-Shabaab. One of the perpetrators of the 2013 Westgate Mall attack in Nairobi may have lived for a time in Kakuma, a camp in the northwest that also hosts Somalis.⁵⁰

The attack increased pressure on the government to find a solution to the wave of violence. On 11 April 2015, Deputy President William Ruto demanded that the United Nations remove Kenya's Dadaab refugee camp from the country within three months, continuing a longstanding government practice of blaming domestic insecurity on the country's refugees.

⁵⁰ 'Joshua Meservey : The Insecurity of the World's Largest Refugee Camp' 11 May 2015
<http://tonyblairfaithfoundation.org/religion-geopolitics/commentaries/opinion/insecurity-worlds-largest-refugee-camp>

Dadaab is a sprawling complex of five camps in Kenya's northeast near the border with Somalia. Today it shelters more than 330,000 Somali refugees.

Kenyan authorities are worried that Al-Shabaab derives support from Kenya's refugee community, yet closing Dadaab in this manner would ultimately make Kenya less safe. It would feed the instability inside Somalia that imperils Kenya, and cause further suffering for refugees. Kenya should reconsider its demand for its own sake, as well as that of the refugees and Somalia.

With the situation in Somalia deteriorating by the minute, time is of the essence. No one is feeling the pinch as much as Kenya. An influx of refugees and insecurity, indeed, Kenya is bearing the burden of the failed state in its neighbourhood. But Kenya's inaction could be coming to an end.⁵¹

Al-Shabaab is a militant Islamic group that has fought against the Somali transitional government since 2006. The size of the organization is unknown, but estimates range from 6,000 to 7,000 fighters.⁵²

Kenya's ethnic Somali and Muslim populations mostly live in the North Eastern Region and along the southeastern coast. Although Kenyan citizens, these populations are politically and economically marginalized, making these regions prosperous recruiting grounds for groups like Al-Shabaab and Al-Qaeda. It is well known that Kenya has been used by Al-Qaeda in the past as a point of transit.⁵³

In the context where Kenya has been a victim of terrorism before and is under immense pressure from international actors like the UK and the US to tackle terrorist cells infiltrating the country, one can begin to piece together the present situation of Kenya's reaction to refugees. Kenya's response of repressing refugee populations outside of the camps and closing the border is not supported by the humanitarian agencies but it is a clear response to a perceived crisis and threat to national security. What is not predictable is the allegation that the Kenyan government has launched a program that recruits Somali refugees in Dadaab to return

⁵¹ <http://www.youtube.com/watch?v=xAhrXonRGYQ> on 24 June 2009

⁵² 'Daveed Gartenstein-Ross: The Strategic Challenge of Somalia's Al-Shabaab' *Middle East Quarterly* 16, no. 4 (2009) <http://www.meforum.org/2486/somalia-al-shabaab-strategic-challenge>.

⁵³ Rotberg R, *Battling Terrorism in the Horn of Africa*, World Peace Foundation Brookings Institution Press, 2005, 20.

to Somalia and fight against Al-Shabaab. Testaments from refugees and reports issued by Human Rights Watch and news agencies insist that Kenyan government officials have been sending recruiters into the camp to recruit men to fight in Somalia. The recruits are told that they will be fighting alongside the UN and the US against Al-Shabaab and they are promised financial compensation of four hundred to six hundred dollars. One refugee, Daud (age eighteen), interviewed by Human Rights Watch, said that these recruiters play not only on the refugees' fears of Al-Shabaab but also on their hopes of contributing to the rebuilding of their country. Daud said he was approached and was impressed by the thought of earning such a substantial amount of money. He was driven in a shuttle bus and dumped in a desert outside of Mombasa with other recruits. They were later picked up by Kenyan military and National Youth Service vehicles and led to a training centre. In the interview with Human Rights Watch, Daud said that on the way to the training centre their phones were confiscated and it was revealed to them that they would not be making the amount of money promised. He and a few other recruits then jumped out of the truck and escaped.⁵⁴

3.3.2 Proliferation of Arms and Weapons

When Kenya closed her border with Somalia in December 2006 as a security concern following the Islamic insurgency and Al-Shabaab threats, the then U.S.A Ambassador to Kenya, Michael Ranneberger said that The United States appreciates Kenya's efforts to care for the refugees in Dadaab. The U.S. government also understands that Kenya needs to ensure the security of citizens of Northeastern province and control its borders. As a contracting party to the 1969 OAU Convention on Refugees however, Kenya is obliged to allow Somalis to cross the border to seek asylum. The fear of the state of insecurity in Northeastern province 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 northeastern supported by Mogadishu. This was because of Somalia's claim of an expanded Somalia into Kenya's Northeastern province. Kenyatta on this matter maintained that Kenya would not

⁵⁴ 'Tayler et al: Kenya Recruits Somali Refugees to Fight Islamists Back Home in Somalia'

<http://www.hrw.org/en/news/kenya-recruits-somali-refugees-fight-islamists-back-home-somalia> on 16 November 2009.

concede any of its territory to Somalia. To date, the Government of Kenya views the Somalis (especially refugees) with suspicion hoping to seal any possibility of renewed insecurity.⁵⁵

In an attempt to promote security, the Kenya government has previously closed down refugee camps near urban centres and stress on the need of refugees staying within their designated camps. The challenge however is that in both of Kenya's official refugee camps; Dadaab and Kakuma – over 200,000 Sudanese, Ethiopians, Somalis and central African refugees are subjected to armed violence on a daily basis. According to reports issued by the IRIN, there is a 'very strong possibility' that the camps are being used to traffic arms: there have been shooting incidents in the camps. It is easy for people to move around with arms on the Kenya –Somali border.

⁵⁵ Loescher Gil and Loescher A D, *The Global Refugee Crisis: A Reference Handbook (Contemporary World Issues)* Oxford, London, 1994, 7

CHAPTER FOUR

4.0 RECOMMENDATIONS AND CONCLUSIONS

4.1 Conclusion

This study began by posing the problem statement whether refugees are a threat to the national security of Kenya. To achieve this, legal frameworks relating to the protection of refugees were presented from international and domestic legal instruments. The principle of non-refoulement which entails a state's duty and responsibility not to return a person to place of persecution was found to be violated when the state claims that its national security was under threat. The study further looked into the issue of refugees and national security strategy in Kenya. This entailed examining Kenya's domestic laws governing admission of asylum seekers. It was found that such laws require Kenya to protect asylum seekers and exclude individuals that have committed crimes against peace, war crimes or crimes against humanity. In accessing Kenya's national security strategy, the study critically examined the government's national security strategy in relation to refugee influx and if such a strategy violated the principle of non refoulement or whether the asylum seekers are a threat to Kenya's national security while pretending to be in need of international protection. The study found out that some asylum seekers were economic migrants and were a threat to Kenya's human security. Therefore it was clear that the government of Kenya needs an efficient national security strategy in relation to asylum.

4.2 Recommendations to the UNHCR

There is a need for the UNHCR to expand its activities to cover not only the legal protection of refugees but also the protection of the physical security of refugees in prolonged refugee situations. This study recommends the following to the UNHCR:

- 1) While the Kenyan government has cited refugee camps to being the place where radicalization and terror attacks are planned, the study recommends that the UNHCR and international community should avoid putting refugees in camps and promote ways of returning refugees in their home countries by providing more durable solutions.

- 2) The international community should also give more funds to the UNHCR, in order for the UNHCR to enable the majority of refugees living in Kenyan camps to start micro-projects to be productive. This would diminish violence as refugees would not stay inactive all day long and lose their human dignity.
- 3) Ensure that no weapon should be allowed in the camps, and that camps must remain demilitarized.

4.3 Recommendations to the Government of Kenya

The government of Kenya has an obligation of providing security to its citizens and also to protect the physical security of refugees living in its camps. There is therefore the need of striking a balance between obeying international obligations and that of protecting national interests.

The study recommends the government to:

- 1) Create new accommodation centers with greater flexibility for people who present on going security concerns or require intensive social support in urban or regional hub locations for ease of service delivery, better oversight and reduced cost. The recommendations, if adopted, would create a more humane and cost effective approach to dealing with undocumented asylum seekers who cross the Kenyan border illegally than the current practice of universal detention. This would also allow the government to control entry into Kenya without penalizing genuine asylum seekers for exercising their basic right to seek protection from persecution.
- 2) There is need for Kenya to ensure that its refugee regime is grounded in fundamental human rights values. The principal barrier to the realization of a rights-based Asylum System is the national security strategy, which informs Kenya asylum policymaking

These measures will also ensure that Kenya adheres to all international conventions which it has voluntarily signed; quickly and correctly identifies those who are refugees and grants them protection consistent with UNHCR policies and guidelines; protects Kenyans from any security concerns posed by refugees and asylum seekers.

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