



Strathmore University

Law School

**EXAMINING THE BALANCE BETWEEN SAFEGUARDING THE PROTECTION OF
REFUGEE RIGHTS AND COMBATING TERRORISM IN KENYA**

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DECLARATION

I ABDI SALAHUDIN BASHIR, 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.

Signed: 

Date: April 15, 2025

This dissertation has been submitted with my approval for examination as university supervisor.

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Date: April 15, 2025

ABSTRACT

Kenya has been home to a significant population of refugees fleeing from war-torn Somalia, which in recent years has been going through climate emergencies. Kenyan authorities have taken a securitization approach on refugee issues, whereby it is alleged that refugee camps in Kenya are breed for the thriving of terrorism. There have been various subsequent terror attacks in the Country since Kenya's military has been deployed in Somalia to aid with the fight against the Al-Shabaab terror group. Since then, there have been the Westgate Mall attack, the Garissa University attack, and the Dusit D2 Hotel attacks, which all caught the nation by surprise. The Kenyan authorities alleged the organization of this attacks to have been taking place in refugee camps.

The ministry of interior and national coordination had launched "Operation Usalama Watch," a security response to these terror attacks in the neighborhoods of Eastleigh and Mombasa, which are dominated by ethnic Somali groups. The ethnic group includes Somali refugees, Somali Kenyans, and a minor group of paperless Somali nationals. The security operation has failed to initially draw distinction amongst the group, and all have been treated the same, including the Somali Kenyans.

The securitization of refugee issues has led to serious problems in violating national and international laws on protecting refugee rights, of which Kenya is a party. This research first aims to shed light on the repressive nature of the government counter-terrorism measures such as the "Operation Usalama Watch" and how it violates human rights and the refugee rights. Secondly, the research aims to show the harm of securitization of issues of refugees and other minority groups. Finally, the research will recommend on how the government could adopt more efficient counter-terrorism measures.

LIST OF LEGAL INSTRUMENTS

a) Domestic legal instruments

The Refugees Act (Act No 13 of 2006).

The Constitution of Kenya (2010).

b) International legal instruments & Regional instruments

Convention against torture and other cruel, inhuman or degrading treatment or punishment, 10 December 1984, 1465, UNTS 24841.

Convention relating to the Status of Refugee, 28 July 1951, 189 UNTS 137.

Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"), 1001 U.N.T.S. 45.

LIST OF CASES

Kenya national commission on Human rights & another vs Attorney General (Petition 2027 of 2016) eKLR

Refugee Consortium of Kenya & another vs Attorney General & 2 others (2015) eKLR

Kituo Cha Sheria & others vs. Attorney General (2013) eKLR

Charles Muturi Macharia & 6 others vs Standard Group & 4 others (2017) eKLR

LIST OF ABBREVIATIONS

COK: Constitution of Kenya

UNCAT: United Nations convention against torture

UNHCR: Office of the United Nations High Commissioner for refugees

ATPU: Anti-terror police unit

OAU: The Organization of African Unity

CHAPTER 1: INTRODUCTION

1.1 Background

It is argued that there have been two main policies in the history of asylum in Africa: the openness policy and the restrictive policy¹. The openness policy is when refugees are allowed to freely settle in the host country and intermingle with the host communities.² They could stay in whatever place of their choice and could work at any place; this was possible because in the late 1980s and post-independence, the migrants were viewed as freedom fighters and warriors who were fighting against oppressive and racist regimes³. Later on, countries developed restrictive policies, whereby they established camps for the refugees to settle, and their movement was restricted mainly because of national interest policies.⁴ Kenya was not different anymore after numerous terror attacks in the country, and the government has designed a harsh policy in curbing allegations of linking refugees residing in Kenya with the Somali-based terror group.

In 2010, Kenya put military at the Somali border and this move has escalated tension between Al-Shabaab terror groups in control of the neighboring regions and the Kenyan military.⁵ As a strategy of pushback, the Al-Shabaab has done several attacks on the border military and within the Dadaab camp, whereby a number of military personnel have lost their lives while others nursed severe injuries on grenade attacks by the terror group⁶. This has led to a decision by the government to fight Al-Shabaab in their house, which meant the deployment of Kenyan military in Somalia to aid with the total war against Al-Shabaab.⁷ Since Kenya's invasion and occupation of military in Somalia, the Kenya has been drawn into the US strategy of "global war on terror"

¹ Freudenthaler E, 'Refugee rights in Kenya between theory and practice', 12(23) Wiener Zeitschrift für kritische Afrikastudien 23, 2012,109.

² Freudenthaler E, 'Refugee rights in Kenya between theory and practice',108.

³ Freudenthaler E, 'Refugee rights in Kenya between theory and practice', 109.

⁴ Freudenthaler E, 'Refugee rights in Kenya between theory and practice', 109.

⁵ Wakub c, Nyagah T, Mwangi J, and Attree L, 'Inside kenya's war on terror: breaking the cycle of violence in Garissa' Saferworld, 2.

⁶ <https://www.saferworld-global.org/long-reads/inside-kenyaas-war-on-terror-breaking-the-cycle-of-violence-in-garissa#Endnotes> on 8 Feb 2017.

⁷ Wakub c, Nyagah T, Mwangi J, and Attree L, 'Inside kenya's war on terror: breaking the cycle of violence in Garissa' 3.

⁸ Wakub c, Nyagah T, Mwangi J, and Attree L, 'Inside kenya's war on terror: breaking the cycle of violence in Garissa', 8.

and has been receiving the most foreign military aid in East Africa.⁸ Al-Shabaab has retaliated this with a deadly wave of terror attacks in the northeastern part of the country and the capital city, Nairobi, where they targeted shopping malls and higher learning institutions.⁹ These attacks included the globally televised deadly attack on Westgate Mall in 2013, the Garissa University attack in 2015, and the Dusit D2 Hotel in 2019¹⁰.

In 2015, as response to curb these attacks, the government promised the closure of the Dadaab and the Kakuma refugee camps; and it assured that afterwards Kenya would change for good.¹¹ It was concerning for the government to draw the connection between the terror attacks and almost 550,000 refugees in the country without solid evidence. The Kenyan government, through the ministry of interior and national coordination, launched “Operation Usalama Watch” in April 2014. This was a security program that saw the deployment of 5,000 officers in the neighborhoods of Eastleigh and was targeted to ensure all refugees have been moved from urban areas to the refugee camps.¹²

These directives by the government have violated Article 39 of the Constitution¹³, read together with Article 26 of the 1951 Refugee Convention, which obligates Kenya to accord refugees the freedom of movement and the choice to choose the area of their residence or the free movement of the Kenyan territory. In *Kituo Cha Sheria & others vs. Attorney General* (2013) eKLR, the Court stated that where national security is cited as a reason to take certain restrictive measures on the enjoyment of fundamental rights, the state bears the burden of showing the presence of any person or activity is a direct threat and hence disrupts the security in the urban area¹⁴. The Court disallowed broad generalization, stating that it is not acceptable for the state tarring group

⁸ Brankamp H, and Gluck z, ‘Kenya should stop treating refugees as potential terrorists’ London School of Economics, 4th January 2023. <<https://blogs.lse.ac.uk/africaatlse/2023/01/04/kenya-should-stop-treating-refugees-as-potential-terrorist/>>

⁹ Brankamp H, and Gluck z, ‘Kenya should stop treating refugees as potential terrorists’ London School of Economics, 4th January 2023.

¹⁰ Brankamp H, and Gluck z, ‘Kenya should stop treating refugees as potential terrorists’ London School of Economics, 4th January 2023.

¹¹ Brankamp H, and Gluck z, ‘Kenya should stop treating refugees as potential terrorists’ London School of Economics, 4th January 2023.

¹² Amnesty International, ‘Kenya: Somalis scapegoated in counter-terror crackdown’ 23rd May 2014. <<https://www.amnesty.org/en/latest/press-release/2014/05/kenya-somalis-scapegoated-counter-terror-crackdown/>>

¹³ Article 39, *Constitution of Kenya* (2010).

¹⁴ *Kituo cha Sheria & others vs Attorney General* (2013) eKLR, para 87.

of people with a broad brush on criminality issues due to the rampant grenade attacks¹⁵. The same position has been reaffirmed in *Refugee Consortium of Kenya & another vs Attorney General & 2 others* (2015) eKLR, where the Court held that the state has not provided any evidence showing that relocation of refugees from urban areas would solve the security challenges facing the country; hence, the limitation is not justified since there is no rational connection between the purpose of the operation and the infringement of the refugee rights¹⁶.

The government of Kenya has also made a statement that intends to close down the Dadaab and Kakuma refugee camps, sending back the refugees to their home country.¹⁷ However, this closure threatens the right of refugees to non-refoulement provided under Article 33 of the 1951 Convention relating to the status of refugees as well as article 3 of the Convention Against Torture, which Kenya acceded to.¹⁸ The principle and its implications have also been discussed in the Kenyan case, *Kenya National Commission on Human Rights & Another vs Attorney General* (Petition 2027 of 2016), eKLR.

This research aims to show the repressive nature and how “Operation Usalama Wach” violated the human rights and international laws on the rights of refugees. The research also shows the harm of securitization of the issues of refugees and other minority groups. The research concludes with suggestions on how the government could adopt more efficient counter-terrorism measures which are not in contravention with human rights.

1.2 Statement of the Research Problem

Kenya has been receiving refugees from the East African region after many states have broken into civil wars; it has been a safe haven for refugees from the region. The government has tried many phases in receiving these refugees. Initially, people were received and welcomed to the country with the fewest regulations, whereby after screening they could reside in the urban

¹⁵ *Kituo cha Sheria & others vs Attorney General* (2013) eKLR, para 87.

¹⁶ *Refugee Consortium of Kenya & another vs Attorney general & 2 others* (2015) eKLR, para 26.

¹⁷ Lindley A, ‘Between a protracted and a crisis situation: policy responses to Somali refugees in Kenya’, 30 *Refugee Survey quarterly* 4, 2011.

¹⁸ Article 3, *Convention against torture and other cruel, inhuman or degrading treatment or punishment*, 10 December 1984, 1465, UNTS 24841.

areas.¹⁹ Later on, many countries were facing civil wars at the same time, such as South Sudan and Somalia; thus, the number of refugees who sought protection from Kenya became overwhelming, and the government had to monitor them.²⁰ The Kenyan government gave land to UNHCR to establish the two biggest refugee camps in the continent (Dadaab and Kaakuma).

Kenya has started experiencing troubles, which are based on the increasing number of refugees received without being regulated. The major worry of Kenya has been terror attacks, which were carried out by Al-Shabaab, a terrorist militia based in Somalia.²¹ The government believed the attacks were organized within Eastleigh, a neighborhood that was populated by refugees and undocumented people from Somalia, as well as other Kenyan nationals of Somali ethnic groups. The government, through “Operation Usalama Watch,” has sorted to curb terrorism and in its wild allegation that refugees were part of the organization of the attacks; the security program had targeted them. Therefore, the overreaching problem is whether the approach taken by the government to generally allege refugees being part of the attacks, and hence taking a securitization approach towards their issues, was justifiable and reasonable based on the existing legal framework.

1.3 Research Objectives

The main objective of this study is to draw a balance between protection of refugee rights and counterterrorism measures in Kenya without compromising either of the two. Therefore, the specific objectives of the research include:

- (i) To examine the domestic legal framework on protection of refugee rights.
- (ii) To investigate the international and regional legal framework on the protection of refugee rights.
- (iii) To assess the counter-terrorism measures in place and possible violation of refugee and human rights as well as their efficiency.

¹⁹ Elema Q, ‘The nexus between national security concerns and protection of refugee rights: A case study of Kenya’, Unpublished LLM Thesis, University Of Nairobi, Nairobi, 2019, 51.

²⁰ Elema Q, ‘The nexus between national security concerns and protection of refugee rights: A case study of Kenya’, Unpublished LLM Thesis, University Of Nairobi, Nairobi, 2019, 48.

²¹ Brankamp H, and Gluck z, ‘Kenya should stop treating refugees as potential terrorists’ London School of Economics, 4th January 2023.

- (iv) Recommend possible ways of combating terrorism without infringing on refugee rights and human rights.

1.4 Research Questions

Based on the objectives outlined above, this study is based on the following research questions:

- (i) What is the domestic legal framework in place on the protection of refugee rights?
- (ii) What is the international and regional legal framework in place on protection of refugee rights?
- (iii) Whether and to what extent are policies formulated by the government to combat terrorism fair, justifiable, lawful and efficient in Kenya?
- (iv) Based on the findings, what measures can the government put in place to protect refugee rights while at the same time combating terrorism?

1.5 Research Hypothesis:

1. The Government is more concerned with protecting its national interest in adopting counterterrorism measures than giving protection to refugees. However, there should be a balance between protection of rights of refugees and the counterterrorism measures adopted by the Government.

1.6 Significance of the Research

Kenya, a major refugee hosting nation in Africa, faces a complex challenge in balancing its responsibility to safeguard the rights of refugees under international law with the imperative to protect its national security interests. This research investigates this critical tension. By examining the potential security risks associated with refugee inflows alongside the root causes of terrorism highlighted by Third World Security Theory, this research aims to develop propose recommendations that fosters both refugee protection and national security in Kenya. The research therefore makes valuable insights for policymakers and stakeholders navigating this multifaceted issue.

1.7 Theoretical Framework

This research proposes a theoretical framework that acknowledges the balancing of refugee rights and counterterrorism; hence, it is to be guided by realist theory and the theory of third-world security.

1.7.1 Realist Theory

Morgenthau one of the most important theorists of international relations and the founder of the realist school of thought positioned power and national interest at the center of his theoretical thinking.²² He views that, at the heart of national interest is the state's survival which is a thing the realist theory rests on.²³ The realist theory argues that humans are inherently selfish, greedy and self-pursuing.²⁴ The theory depicts a case where the states pursue self-interests as they are also the main actors in the international system.²⁵

The theory prioritizes the national interest concern over issues such as protection of refugee rights and human rights. While Morgenthau's theory argues power and survival of a state at the core of national interest, his critics believe the two alone does not determine national interest hence due consideration to be given the history and specific context of the state²⁶. Additionally, it is not all states that seek survival, more powerful states seek expansion, influence and glory in foreign policies while less powerful state's main goal would be survival and Morgenthau's work does not draw this distinction²⁷.

A major threat in international relations emphasizes the international system's anarchic nature, with states prioritizing national security in a never-ending struggle for power and survival.²⁸ Refugees can be viewed through this perspective as a possible security concern, with

²² Trifunović D and Ćurčić M, 'National interest in security science: a realist perspective', 3(22) national security and the future, 2021, 77.

²³ Trifunović D and Ćurčić M, 'National interest in security science: a realist perspective', 77.

²⁴ Elema Q, 'The nexus between national security concerns and protection of refugee rights: A case study of Kenya', Unpublished LLM Thesis, University Of Nairobi, Nairobi, 2019, 20.

²⁵ Elema Q, 'The nexus between national security concerns and protection of refugee rights: A case study of Kenya', Unpublished LLM Thesis, University Of Nairobi, Nairobi, 2019, 20.

²⁶ Trifunović D and Ćurčić M, 'National interest in security science: a realist perspective', 80.

²⁷ Trifunović D and Ćurčić M, 'National interest in security science: a realist perspective', 80.

²⁸ Ray A, 'International relations: a critique of the realist theories', 30(2) Indiana international center quarterly, 2003, 112.

significant inflows putting a burden on resources, weakening societal cohesiveness, and generating opportunities for terrorist infiltration.²⁹

The relevance of the realist theory to this study lies in its emphasis of national interest as a core interest of the state. Realism provides lens to understand the securitization approach adopted by countries such Kenya on refugee matters. From a realist perspective measures such as containment policies and policing of urban refugees could be seen as rational and legitimate response to perceived security threats even if the compromise human rights.

1.7.2 Theory of Third World Security

Mohammed Ayoob main proponent of the third world security theory, have been instrumental in articulating the nuances of the third world countries, where in his views during the cold war, the third world countries faced internal conflicts rather than external such as civil wars and tribal conflicts.³⁰ It was noted that during the cold war most of the world conflicts occurred in third-world, this showed their vulnerability in nature as they lacked capacity to deal with the internal problems hence relying on foreign assistances.³¹

The theory of third world security shows that third world countries such as Kenya face internal security threats when hence aiming to secure their national interest from within and from its neighbors in the region.³² Kenya's security policies are weak and vulnerable in hosting refugees from the region and securing its national securities.³³ The theory seeks to contribute to a more comprehensive and humane approach towards managing the refugee crisis while simultaneously addressing the underlying factors that fuel terrorism. Some critics of the theory contend that it

²⁹ Elema Q, 'The nexus between national security concerns and protection of refugee rights: A case study of Kenya', Unpublished LLM Thesis, University Of Nairobi, Nairobi, 2019, 20.

³⁰ Acharya A, 'the periphery as the core: the third world and security studies', Center for International and Strategic studies, occasional paper number 28, 1995, 4.
< <https://yorkspace.library.yorku.ca/server/api/core/bitstreams/dfcd8934-38f5-4063-9c79-58e80d6a1daa/content> >
on March 1995.

³¹ Acharya A, 'the periphery as the core: the third world and security studies', 6.

³² Elema Q, 'The nexus between national security concerns and protection of refugee rights: A case study of Kenya', Unpublished LLM Thesis, University Of Nairobi, Nairobi, 2019, 20.

³³ Elema Q, 'The nexus between national security concerns and protection of refugee rights: A case study of Kenya', Unpublished LLM Thesis, University Of Nairobi, Nairobi, 2019, 20.

over focuses on internal factors potentially neglecting the significant impact of external influences such as foreign superpowers fundings to one of parties to a conflict.

The theory is relevant to this study as the internal challenges highlighted by it such as, ethnic tensions, governance issues and socio-economic inequalities complicates the balancing of protection of refugee rights and combating terrorism in Kenya. Counter-terrorism measures such as the Usalama watch operation believed to be targeting specific ethnic group could lead to further internal divisions, hence fueling internal conflicts.

1.8 Literature Review

Lindley, in her work, tries to understand the relation between governance structures, internal conflicts in Somalia, and the displacement of large populations of refugees. Through data and other research statistics she examined, she found that after the two decades of instability due to governance failure and conflict, a huge population of people were displaced to Dollo Ado in Ethiopia and Dadaab in Kenya, and the number trebled from 2006 to 2011 to over half a million³⁴. Government policies were formulated to try to contain the refugees in the camps and not freely move in the cities due to their rising number and the occurrences linked to them that were a threat to the national interest³⁵.

However, the refugees wanted to experience city life so that they could build their lives again by getting education for their children as well as access to health facilities³⁶. Most of the refugees were getting assistance from their relatives who had already relocated abroad and were well established. UNHCR which is tasked with the protection and aid to refugees, has been under the criticism of refugees, NGOs and civil society actors by adopting soft diplomacy in the face hard violations of human rights³⁷.

The containment measures and the restrictive policies not only affect refugees' mobility and access to basic rights but also create environment where state actors could exploit their

³⁴ Lindley A, 'Between a protracted and a crisis situation: policy responses to Somali refugees in Kenya', 15.

³⁵ Balakian S, 'Money is your government': Refugees, mobility and unstable documents in Kenya's Operation Usalama watch' 59(2) African Studies Review, 2016, 90.

³⁶ Lindley A, 'Between a protracted and a crisis situation: policy responses to Somali refugees in Kenya', 20.

³⁷ Lindley A, 'Between a protracted and a crisis situation: policy responses to Somali refugees in Kenya', 22.

vulnerability as discussed by Balakian. She argues in her paper that the process of checking the identity of the people living Eastleigh and screening was abused in that the police have turned the process to extort money from refugees³⁸. She argues that even the secretary of interior, Ole Lenku, has stated that they are aware of people fraudulently obtaining the Kenyan Identification for purposes of international travels.³⁹ In the interviews conducted, her interviewees informed her that for you to evade screening to be deported you had to pose as adolescent or present to the police a student ID⁴⁰. People could adopt their own means even if it was to pay bribes to evade either deportation or to be taken to refugee camps.

The misuse of screening practices under the guise of national security brings into question how the concept of national interest is interpreted. Timothy argues that the term national interest is ambiguous and vague, and its meaning will depend on what context it is used in. In his work he establishes that all the countries including Kenya intend to secure their national interest, in addition he outlines that both protection of refugee rights and combating of terrorism are national interests of Kenya.⁴¹ For him the two notions are both interests because Kenya has an international obligation to host refugees and also has the domestic obligation to protect its citizens and provide security.⁴²

While previous study shows the effects of governance failures, the impact of restrictive refugee policies and national security measures taken by Kenya, they often treat these issues separately. What remains unexplored is Kenya's duty to reconcile its obligation of protecting refugee rights and combating terrorism. This research seeks to study what the reconciliation of the two issues means for the rights and safety of refugees.

³⁸ Balakian S, 'Money is your government': Refugees, mobility and unstable documents in Kenya's Operation Usalama watch, 104.

³⁹ Balakian S, 'Money is your government': Refugees, mobility and unstable documents in Kenya's Operation Usalama watch, 97.

⁴⁰ Balakian S, 'Money is your government': Refugees, mobility and unstable documents in Kenya's Operation Usalama watch, 99.

⁴¹ Timothy N, 'The impact of national interest of host states on refugee rights: A case study of Kenya', Unpublished LLM Thesis, University of Nairobi, Nairobi, 2021.

⁴² Timothy N, 'The impact of national interest of host states on refugee rights: A case study of Kenya', Unpublished LLM Thesis, University of Nairobi, Nairobi, 2021.

1.81 Gaps in the literature review

Most of the research that has been done, and the above literature review shows the influx of refugees has been a problem for Kenya, where the state has constantly alleged the existence of a threat to the country's security posed by the refugees. The existing literature does not show how we can reconcile the two competing interests on both ends. The contribution of this research is that it aims propose an approach that ensure counter-terrorism goal is achieved without violating refugee rights. It shows that the state can ensure both interests are met.

1.9 Research Methodology

This study employs doctrinal legal research to investigate how to strike a balance between protecting refugee rights and combating terrorism in Kenya. This strategy is centered on the examination and interpretation of relevant legal sources in order to understand the current legal framework and identify potential conflicts or areas for improvement. As a primary source this study analyzes firstly the Kenyan Constitution, in particular the provisions regarding fundamental rights, national security, and international obligations of Kenya. Secondly, legislation works on Kenyan laws pertaining to national security, refugees, and counterterrorism.

Thirdly, international treaties and instruments, such as the UN Global Counter-Terrorism Strategy, the 1951 Refugee Convention, and any pertinent human rights conventions that Kenya has ratified. Finally, the research examines significant decisions made regarding refugee rights and counterterrorism measures by Kenyan courts and international tribunals. The research relies on secondary sources such as academic journals, and books where scholarly publications on refugee law, counterterrorism and their relation in the Kenyan context will be reviewed. The research examines working papers and reports of UNHCR, Kenyan government agencies, NGOs and legal experts on refugee protection and counterterrorism.

1.10 Limitation

This study is limited to refugee rights, national interest of Kenya and responses by the Kenyan government; hence it is not universally applicable to other countries. However, there could be suggested policies in combating terrorism that this study recommends, maybe borrowed by other

countries. Furthermore, a purely doctrinal approach may not fully capture the lived experiences of refugees, or the practical challenges faced by law enforcement.

1.11 Chapter Breakdown

Chapter 1:

This chapter outlines the background of the study, statement of the research problem, research questions, research hypothesis, the objectives, the theoretical framework, literature review, the research methodology, the limitations, significance of the study and an introduction to the study.

Chapter 2:

This chapter investigates the Kenyan legal framework on the protection of refugee rights. The provisions of the constitution of Kenya as well as the Refugee Act 2021 are analyzed.

Chapter 3:

This chapter analyzes the international and regional legal framework on the protection of refugee rights. The 1951 convention on the status of refugees and the 1969 OAU convention governing the specific aspect of refugees problems in Africa is critically examined.

Chapter 4:

This chapter examines the government policies such as “Operation Usalam Watch” in combating terrorism and protecting the national interest to see the effectiveness of the security features put in place. The chapter also assesses the fairness and the justification of the security operation.

Chapter 5:

The chapter summarizes the key findings of the research and makes recommendations on how the government could come up with more efficient counter terrorism measures.

CHAPTER 2: LEGAL FRAMEWORK FOR PROTECTION OF REFUGEE RIGHTS IN KENYA

2.1 Introduction

The legal framework underpinning the protection of refugees is guided by the Constitution of Kenya 2010 and various pieces of legislations enacted by the parliament of Kenya concerning refugee matters.

This chapter critically analyses the domestic legal framework on the protection of refugees in Kenya. Firstly, the author examines the provisions of the constitution applicable to the protection of refugee rights. Secondly, the author analyzes the Refugees Act (Act No 10 of 2021) and its coherence with the constitution of Kenya. Thirdly, the author examines the limitation of the refugee rights with a focus on Kenyan Jurisprudence. The chapter ends with a conclusion.

2.2 The Constitution of Kenya and the Protection of Refugee Rights

The refugees are entitled to the protection of the constitution and the bill of rights.⁴³ They are entitled to protections such as personal liberty provided by Article 29 of the Constitution of Kenya 2010. The article establishes the right to freedom and security of the person which includes the refugee person.⁴⁴ the protection provided under the article is against arbitrary detention, torture, violence from the public or private sources and deprivation of personal freedom⁴⁵. Article 43 establishes economic and social rights, applicable to the refugees as well, where it establishes that every person has the right to the highest attainable standard of health, accessible and adequate housing, reasonable standards of sanitation, adequate food of acceptable quality, clean and safe water in adequate quantity, social security and education⁴⁶. The current state of refugees at the camps where the government has insisted all refugees in urban centers to move to, will not meet the above required constitutional standard and the government of Kenya should be held accountable for its obligations towards the refugees⁴⁷.

⁴³ *Refugee Consortium of Kenya & another vs Attorney general & 2 others* (2015) eKLR

⁴⁴ Article 29, *Constitution of Kenya* (2010).

⁴⁵ Article 29, *Constitution of Kenya* (2010).

⁴⁶ Article 43, *Constitution of Kenya* (2010).

⁴⁷ Mwaluko J, 'Policy framework for refugee management in Kenya: An assessment of challenges, gaps, and options,' Unpublished Dissertation, Strathmore University, Nairobi, 2022, 20.

In the *Kituo cha Sheria* case, the Court held that refugees are part of the vulnerable persons recognized by the Constitution of Kenya 2010 since they are forced to flee their homes.⁴⁸ Special protection is accorded to the refugee children because they are firstly vulnerable as refugees and secondly vulnerable because they are children and depend on adults.⁴⁹ Article 53 (2) of the Constitution establishes the principle of the best interest of the child⁵⁰. The Children Act 2022 of Kenya further binds judicial bodies, administrative institutions and any other persons making decision on matters affecting children to have in mind the best interest of the child.⁵¹ The governmental directive to return refugees in urban areas to refugee camps was found not to have considered best interest of the children hence disrupting their lives by separating them from their families.⁵²

The violations of the refugee rights are now said to be constitutional questions before the Kenyan courts because of the adoption of the guiding conventions by the state⁵³. The courts are required to constitutionally uphold the refugee rights as they are tasked with the protection of the bill of rights in the constitution and they do not have to wait for constitutional reference for the protection of the refugee rights⁵⁴. The Refugee Act should ensure the recognition of the refugee rights in the laws of Kenya and shall accord deserving protection⁵⁵. The constitution of Kenya does not define a person to be of any specific class; the definition does not distinguish citizens, aliens and refugees, in the constitution a person includes, group of persons, corporates or incorporates⁵⁶. The definition is too wide hence groups such as a refugee or group of refugees will find themselves. These means that the rights provided by the constitution should be enjoyed by the Kenyan citizens as well as the refugees and any other persons.

⁴⁸ *Kituo cha Sheria & others vs Attorney General* (2013) eKLR.

⁴⁹ *Refugee Consortium of Kenya & another vs Attorney general & 2 others* (2015) eKLR

⁵⁰ Article 53(2), *Constitution of Kenya* (2010).

⁵¹ Section 8, *The children Act* (Act No 29 of 2022).

⁵² *Refugee Consortium of Kenya & another vs Attorney general & 2 others* (2015) eKLR

⁵³ Article 2(5)(6), *Constitution of Kenya* (2010).

⁵⁴ Muigua K, 'Protecting Refugee Rights in Kenya: Utilizing international refugee instruments, the Refugee Act 2006 and the Constitution of Kenya as catalysts,' 17.

⁵⁵ Muigua K, 'Protecting Refugee Rights in Kenya: Utilizing international refugee instruments, the Refugee Act 2006 and the Constitution of Kenya as catalysts,' 17.

⁵⁶ Article 20, *Constitution of Kenya* (2010).

2.2.1 Constitutional Limitation of Rights:

The purpose of limiting rights within the constitution is to strike a balance between national interest and individual rights, because it could be viewed that the constitution is overprotective of rights of people⁵⁷. Ideally, limitation of the rights is captured in either one article limiting all the rights or a clause within the constitution limiting a specific right.⁵⁸ In the Kenyan constitution general limitation of the rights within the constitution are found in Article 24 which lists grounds for limiting the human rights⁵⁹. The aim for limiting rights could be said to be man to co-exist peacefully within the society hence no man is an island meaning independent from his fellow men.

In **Charles Muturi Macharia & 6 others vs Standard Group & 4 others**; the court finds that:

“[77] After carefully considering **Article 24 of the Constitution** and the above cases, we find that the test to be applied to determine whether a right can be limited under Article 24 of the Constitution, is the ‘**reasonable and justifiable test**’, that must not be conducted mechanically. Instead, the Court must, on a case-by-case basis, examine the facts before it, and conduct a balancing exercise, to determine whether the limitation of the right is reasonable and justifiable in an open and democratic society. The insertion of the word ‘including’ in Article 24 also indicates that the factors to consider while conducting the balancing act are not exhaustive but a guide as to the main factors to be taken into account in that consideration”.⁶⁰

The court made an observation that, the two step threshold to be made in limitation of rights are that to firstly find whether the right is limited by a statute, this is due to, there can be no limitation of constitutional right if there is no statute to the effect of that limitation or by the constitution itself⁶¹. Secondly, it has to be established whether the limitation imposed is reasonable and justifiable in an open democratic society, having regard to equality, human dignity and freedom as well as having in mind the contents of Article 24 of the constitution which are not exhaustive⁶².

⁵⁷ Odhiambo B, ‘The limitation of rights under the Kenyan Constitution’, Unpublished LLM thesis, University of Pretoria, Pretoria, 2015, 9.

⁵⁸ Odhiambo B, ‘The limitation of rights under the Kenyan Constitution’, Unpublished LLM thesis, University of Pretoria, Pretoria, 2015, 9.

⁵⁹ Article 24, *Constitution of Kenya* (2010).

⁶⁰ *Charles Muturi Macharia & 6 others vs Standard Group & 4 others* (2017) eKLR

⁶¹ *Charles Muturi Macharia & 6 others vs Standard Group & 4 others* (2017) eKLR

⁶² *Charles Muturi Macharia & 6 others vs Standard Group & 4 others* (2017) eKLR

Kenya's minister of interior and coordination through gazette notice 1927 dated 17th March 2014, has given a directive that all refugees residing in urban areas to move back to designated area which are the refugee camps and additionally all the urban refugee registration centers were to be closed. Around 4th April 2014 the government has launched an internal security operation called the 'Usalama Watch Operation', executed by national police service, which its main aim was to flush out Al-Shabaab adherents, aliens and possible arms used in terror attacks, the main area of target was Eastleigh in Nairobi and its environs which the government believed was hide outs for illegal immigrants⁶³.

Those affected by these security operations among them were legally registered refugees which were also arrested to enforce the directive given through the gazette notice 1927 dated 17th March 2014, which was on the return of refugees to the designated areas. A petition dated 30th July was made to the High court of Kenya to balance the issues of national security concerns and the rights of refugee minors by the Refugee Consortium of Kenya (RCK)⁶⁴. RCK is non-governmental organization which is devoted to protecting rights of refugees, internally displaced persons, asylum seekers and other forced immigrants in Kenya and East African Region.

The High Court of Kenya in *Refugee Consortium of Kenya & another vs Attorney general & 2 others* found that the best interest of the refugee minors was not considered in carrying out the operation⁶⁵. While the operation was implemented, families had been separated where mothers of minors were detained in Kasarani Stadium for verification and later transferred to the refugee camps leaving behind their children. The court further finds that the petitioners have succeeded to show that the implementation of the directive did not consider the interest of minors to have been of 'paramount importance' and hence their rights to parental care, education and to be protected from neglect had been violated⁶⁶.

⁶³ *Refugee Consortium of Kenya & another vs Attorney general & 2 others* (2015) eKLR

⁶⁴ *Refugee Consortium of Kenya & another vs Attorney general & 2 others* (2015) eKLR

⁶⁵ *Refugee Consortium of Kenya & another vs Attorney general & 2 others* (2015) eKLR

⁶⁶ *Refugee Consortium of Kenya & another vs Attorney general & 2 others* (2015) eKLR

In the assessment of whether the Directive could be justified under Article 24 of the constitution of Kenya, the court draws inspiration from the decision in *Kituo cha Sheria & others vs Attorney General* (2013) eKLR, in which the court finds:

“(w)here national security is cited as a reason for imposing any restrictive measures on the enjoyment of fundamental rights, it is incumbent upon the State to demonstrate that in the circumstances, such as the present case, a specific person’s presence or activity in the urban areas is causing danger to the County and that his or her encampment would alleviate the menace. It is not enough to say that the operation is inevitable due to recent grenade attacks in the urban areas and tarring a group of people known as refugees with a broad brush of criminality as a basis of a policy is inconsistent with the values that underlie an open and democratic society based on human dignity, equality and freedom. A real connection must be established between the affected persons and the danger to national security posed and how the indiscriminate removal of all the urban refugees would alleviate the insecurity threats in those areas. Another factor, connected to the first one is the element of proportionality. The danger and suffering bound to be suffered by the individuals and the intended results ought to be squared.”⁶⁷

The court in refugee consortium of *Kenya vs Attorney General*, agrees with the decision in Kituo case and further states that the State has not sufficiently proved that there is a clear nexus between lawfully registered and law abiding refugees and security challenges in the country.⁶⁸ In addition the state has not sufficiently evidenced that containing the refugees in camps would better the security challenge in the country and the court further notes that lessons from recent terror attacks terrorist may not be part of the refugee community contrary to popular though in public court⁶⁹. In that regard it is the finding of the Court that the Government Directive in limitation of the petitioners’ rights is not justified under Article 24 of the constitution as no rational connection between the aim of the Directive and limitation of the rights have been established by the state.

⁶⁷ *Kituo cha Sheria & others vs Attorney General* (2013) eKLR

⁶⁸ *Kituo cha Sheria & others vs Attorney General* (2013) eKLR

⁶⁹ *Kituo cha Sheria & others vs Attorney General* (2013) eKLR

2.3 The Refugees Act 2021

The refugees act 2021 repealed the refugee act of 2006. Before 2006, there were no legislation enacted on refugee affairs, thus the legal framework applicable was the other immigration related laws such as the Immigration and Alien restriction Acts Cap 172 and 173 respectively (both now repealed)⁷⁰. Two decades later after the reception of the refugees and due to civil advocacy on the refugee matters, the Parliament in November 2006, decided to enact laws guiding on management of refugees in the country and later in December the president assented to the bill the Refugee Act 2006⁷¹. Later there has been policy shifts towards local integration and this was due to Kenya signing of the Global Compact on Refugees and its Comprehensive Response Framework (CRRF) in 2017.⁷² Also in the same period Kenya hosted and signed the Intergovernmental Authority on Development (IGAD) summit that adopted the ‘Nairobi Declaration and Action Plan on Durable Solutions for Somali refugees, and all this regional and international commitment led to Kenya reviewing its refugee laws leading to the enactment of the Refugee Act 2021⁷³. The act has tried to move from the encampment policy and hence adopting more integration and economically favorable policies for the refugees.

The 2006 Refugee Act was enacted to enhance a national interest agenda and this is seen by the curtailment of freedom of movement , it was an offence for refugee persons to be found outside the camps and they should get permits for movement from the camp officers.⁷⁴ This affected the abilities of refugee person to conduct activities outside the camps, it limited professionals of refugee origin in various fields to conduct work-related activities outside the camp to make a living.⁷⁵ The provision also deterred business activities and trading of the refugee people with the host communities hence undermining positive contributors to our growing economies. It is true that the provisions of the act is concerned with furthering stability and security in the urban areas

⁷⁰ Mwaluko J, ‘Policy framework for refugee management in Kenya: An assessment of challenges, gaps, and options,’ Unpublished Dissertation, Strathmore University, Nairobi, 2022, 20.

⁷¹ Mwaluko J, ‘Policy framework for refugee management in Kenya: An assessment of challenges, gaps, and options,’ Unpublished Dissertation, Strathmore University, Nairobi, 2022, 21.

⁷² McAteer B, Amado P, Krisciunaite A and Owiso M, ‘Somali Refugees in Kenya: Increasing camp-urban mobility’, International Institute for Environment and Development, working paper IIED 2023, 12. <https://www.iied.org/22186iied>

⁷³ McAteer B, Amado P, Krisciunaite A and Owiso M, ‘Somali Refugees in Kenya: Increasing camp-urban mobility’ 12.

⁷⁴ Section 17, *The Refugees Act* (Act No 13 of 2006).

⁷⁵ Atero T, ‘Protecting refugees: A critical analysis of Kenya Refugee Act 2006’, Unpublished LLM thesis, University of Nairobi, Nairobi, 2010,73.

as refugees alleged to be a threat to the security, however the provisions of the act should balance its aim with the Kenya's international obligation in protection of the refugee rights.

Section 28 (5) of the Refugee Act 2021 establishes the right to work for the refugees and take part in gainful employments hence advancing the economic inclusion of the refugees⁷⁶. This provision is one of the progressive steps by the legislation on refugee affairs concerned with the inclusion and economic empowerment of the refugee communities. Section 28 (4) of the act provides for the right to access documentation which includes business permits, licenses and movement passes⁷⁷. The provision further contributes to the economic inclusion of the refugees by ensuring their access to the business permits for trading activities. Section 28 (7) elevates the refugee identity card to the level of an alien card to ensure that with such identification cards the refugee communities would be able to access both public and private services.

The Refugee Act 2021 limits the freedom of movement. Under section 31(4) the Act requires every refugee or asylum seeker who wishes to change their area of residence to notify the Commissioner and the Section also emphasizes refugees to be confined within the designated area which are the camps⁷⁸. The section could be viewed as contravening the Constitution which grants every person in Kenya including refugees the freedom of movement under article 39⁷⁹. The issue of limited mobility is a hindrance to the economic advancement of refugees in the camp and in the urban centers, since the refugee act has restricted the movement of refugees under the Refugee Act 2021 through the encampment policy⁸⁰. There are arbitrary arrest of refugees, police harassments and abusive inspections in urban cities since they are required in the designated areas⁸¹.

⁷⁶ Maloba E and Merve S, 'Refugee policy in the Horn of Africa: What can development partners learn from Kenya's policy change?' Florence School of Transnational Governance, policy paper issue 10/2024, 6, <https://cadmus.eui.eu/bitstream/handle/1814/76761/STG_PB_2024_10.pdf?sequence=1&isAllowed=y> on April 2024.

⁷⁷ Maloba E and Merve S, 'Refugee policy in the Horn of Africa: What can development partners learn from Kenya's policy change?', 6.

⁷⁸ Section 31(4), *The Refugees Act* (Act No 10 of 2021).

⁷⁹ Article 39, *Constitution of Kenya* (2010).

⁸⁰ Owiso M, 'Incoherent policies and contradictory priorities in Kenya', *Forced Migration Review*, FMR 70, 2022, 73. <https://media.proquest.com/media/hms/PFT/1/OqIGP?_s=gVzSPcDgTvArL4JnFoJrgUrjgiA%3D> on September 2022.

⁸¹ Owiso M, 'Incoherent policies and contradictory priorities in Kenya', *Forced Migration Review*, FMR 70, 2022, 73.

2.4 Conclusion

Kenya has codified laws guiding on refugee matters through the successive legislations; the Refugees Act 2006 and 2021. Earlier years, the Kenyan laws were restrictive and even provided clearly for the encampment policies curtailing the movement of refugees, but later due to global and regional commitments the government has made efforts to locally integrate the refugees. For a long time the country has adopted harsh policies against refugees citing for national interest and public safety concerns, but after civil rights groups advocacies and decisions from Kenyan courts the government is seen to enhance the rights of refugee by locally integrating them and also according to them protections.

CHAPTER THREE: REGIONAL AND INTERNATIONAL FRAMEWORK ON PROTECTION OF REFUGEE RIGHTS

3.1 Introduction

This chapter examines key international and regional legal instruments establishing legal framework for the protection of refugee rights. This includes the 1951 Convention relating to the status of refugees and the 1969 OAU Convention on the specific problems of Refugees in Africa focusing on the rights they confer on refugees as well as the obligations imposed on states. A key focus is given to foundational principles such as the non-refoulment and equality in examination of the protection of refugee rights.

3.2 The 1951 Convention relating to the status of refugees

The 1951 Convention relating to the status of refugees stands as a cornerstone of international protection of refugee rights, establishment of fundamental rights and principles concerning refugee protection. The establishment of this convention began through the process of the UN General Assembly Resolution 8 (1), of 12 February 1946 and came to conclusion with the adoption of the treaty on 28th July 1951⁸². The convention came out of the realization that the issue of refugee protection was not an individual or specific state obligation but rather required an international cooperation between all states⁸³.

Under Article 1A (1) of the 1951 convention it has tried to give a comprehensive definition of who a refugee is by codifying all definitions of other international instruments that has concerned themselves with the protection of refugees before the establishment of the 1951 convention⁸⁴.

The convention defines a refugee person in Article 1A (2) as;

⁸² Janmyr M, 'the 1951 Refugee Convention and non-signatory states: charting a research agenda' 33 International Journal of Refugee Law 2, 2021, 192.

⁸³ Janmyr M, 'the 1951 Refugee Convention and non-signatory states: charting a research agenda' 192.

⁸⁴ Anjichi T, 'protecting refugees, a critical analysis of the Kenyan refugee act 2006', Unpublished LLM thesis, University of Nairobi, Nairobi, 2010. 36.

“As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is out-side the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”⁸⁵

If the above definition is analyzed, it would be evident that the convention has provided for time limitation and geographical relevance for the definition of refugees hence making it difficult to contextualize the requirements of the convention in other parts of the world⁸⁶.

Later, the 1967 protocol relating to the status of refugees has universalized the definition of refugee status hence leading to a whole shift from the Eurocentric approach towards an inclusionary definition applicable to all refugees irrespective of their localities⁸⁷. The protocol has amended the 1951 convention removing the limitation due to time and geographical location, hence ensuring a solution for people with a cause of flight beyond the 1951 situation in Europe to seek and lodge application of the status of refugees⁸⁸.

The 1951 Convention relating to the status of refugees establishes various refugee rights. Article 3 prohibits discrimination against refugees based on race, religion or country of origin and requires equal treatment.⁸⁹ Further the Convention establishes a right to economically empower refugees where it obligates refugees to receive the most favorable treatment accorded to nationals in wage earning employment.⁹⁰ Refugees can also move freely within the territory of the host nation and can decide where to reside subject to regulations applicable to aliens generally.⁹¹ Under the Convention the states are obligated to cooperate with UNHCR to exercise

⁸⁵ Article 1 (A), *Convention relating to the Status of Refugee*, 28 July 1951, 189 UNTS 137.

⁸⁶ Janmyr M, ‘the 1951 Refugee Convention and non-signatory states: charting a research agenda’ 194.

⁸⁷ Janmyr M, ‘the 1951 Refugee Convention and non-signatory states: charting a research agenda’ 194.

⁸⁸ Anjichi T, ‘protecting refugees, a critical analysis of the Kenyan refugee act 2006’, Unpublished LLM thesis, University of Nairobi, Nairobi, 2010. 38.

⁸⁹ Article 3, *Convention relating to the Status of Refugee*.

⁹⁰ Article 17, *Convention relating to the Status of Refugee*.

⁹¹ Article 26, *Convention relating to the Status of Refugee*.

its function in supervising the application of the convention as well as issuance of identity and travel documents to refugees.⁹²

The 1951 convention cease to apply to individuals who, after reasonable consideration, are found change in their circumstances by re-availing themselves to countries of their nationality for protection or taking up a host or other country's citizenship where they are enjoying comprehensive protection⁹³. The cessation clauses in the convention which are likely declaratory leads to the acknowledgment that international refugee protections are not required leading to the withdrawal of refugee status halting the applicability of rights and benefits that comes with the refugee status⁹⁴.

There is also the exclusionary clause of the convention that excludes certain individuals who have committed heinous crimes from qualifying for refugee status and international protection under the convention. Article 1F of the 1951 convention states that the convention shall not apply to; any person who have committed crimes against peace, war crime or a crime against humanity as defined by international instruments, has committed a serious non-political crime outside the country of refuge prior to his admission as refugee in the country and has been guilty of acts contrary with the purposes and the principles of the united nations⁹⁵. However, refugees who commit serious crimes within the country of refugees are not subjected to the exclusionary clause, but they will be subjected to the criminal procedures of the host country as well as Articles 32 and 33 of the convention that requires the return of refugees if there are reasonable grounds to believe that they are danger to the host country⁹⁶.

⁹² Article 35, *Convention relating to the Status of Refugee*.

⁹³ Anjichi T, 'protecting refugees, a critical analysis of the Kenyan refugee act 2006', Unpublished LLM thesis, University of Nairobi, Nairobi, 2010. 38.

⁹⁴ Anjichi T, 'protecting refugees, a critical analysis of the Kenyan refugee act 2006', Unpublished LLM thesis, University of Nairobi, Nairobi, 2010. 39.

⁹⁵ Article 1(f), *Convention relating to the Status of Refugee*.

⁹⁶ Anjichi T, 'protecting refugees, a critical analysis of the Kenyan refugee act 2006', Unpublished LLM thesis, University of Nairobi, Nairobi, 2010. 39.

3.3 1969 OAU Convention on the specific problems of Refugees in Africa

The time the 1951 Convention was being drafted only four African Countries were independent; Liberia, Ethiopia, Egypt and Libya and it is only Egypt that has sent a delegation to the conference while all other members who undertook the drafting of the conference were mostly from Europe, America and the Pacific⁹⁷. There was a widely consensus that the 1951 convention was protecting a European notion of refugee affairs, and it lost some contextualization for the African refugees who were mostly displaced due to wars for liberation in the continent as well as civil strife in some countries. It is with that view that the African head of states and government decided to find a way in addressing the specific circumstances in the increasing number of refugees in Africa⁹⁸. The Organization of African Unity, now the African Union resolved to adopting the 1969 OAU Convention on the specific problems of refugees in Africa with the need to alleviating the suffering of refugees and the need to take a humanitarian approach in resolving the African refugee issues⁹⁹.

States are prohibited to reject asylum seekers at borders and expelling them to territories where they are persecuted or feel their lives endangered¹⁰⁰. The Convention emphasizes the return of the refugees to be voluntary, hence emphasizes the importance of consent in repatriation process¹⁰¹. Refugees are entitled to equal treatment without discrimination based on race, religion, nationality or any other grounds¹⁰². States are encouraged to consider the granting of asylum as a peaceful humanitarian act which is reflective of the African hospitality.¹⁰³ They are also obligated to internationally cooperate to alleviate the burden of hosting refugees.¹⁰⁴

⁹⁷ Maluwa T and Katz A, 'Who is a Refugee?: 25 years of domestic implementation and judicial interpretation of the 1969 OAU and 1951 UN refugee conventions in Post Apartheid-South Africa' 27 *Indiana Journal of Global Legal Studies* 2, 2020, 136.

⁹⁸ Maluwa T and Katz A, 'Who is a Refugee?: 25 years of domestic implementation and judicial interpretation of the 1969 OAU and 1951 UN refugee conventions in Post Apartheid-South Africa', 139.

⁹⁹ Anjichi T, 'protecting refugees, a critical analysis of the Kenyan refugee act 2006', Unpublished LLM thesis, University of Nairobi, Nairobi, 2010, 49.

¹⁰⁰ Article 2, *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, 1001 U.N.T.S. 45.

¹⁰¹ Article 5, *Convention Governing the Specific Aspects of Refugee Problems in Africa*.

¹⁰² Article 4, *Convention Governing the Specific Aspects of Refugee Problems in Africa*.

¹⁰³ Article 2, *Convention Governing the Specific Aspects of Refugee Problems in Africa*.

¹⁰⁴ Article 2, *Convention Governing the Specific Aspects of Refugee Problems in Africa*.

However, the convention does not expressly provide for supervisory bodies that could be tasked with its implementation¹⁰⁵. These supervisory bodies would have been tasked with tracking the implementation rates of countries party to the convention and addressing issues and concerns raised by individuals on the disregards of the principles of the convention¹⁰⁶. In contrary, the convention mentions in passing, bodies such as the African court and the African Commission on Human and people's rights to act as quasi-supervisory bodies and through their work these two bodies have been able to address some issues of the convention¹⁰⁷.

The convention requires that the grant of asylum to refugees should be considered as a peaceful and humanitarian act and should not be considered by any member state of the contrary¹⁰⁸. The convention also obligates the refugees to avoid any activities that hinder the peace and security of the host countries as well as activities that might affect the humanitarian nature of the camps and settlements¹⁰⁹.

3.4 Non-refoulment Principle:

After the Second World War, many people found themselves stateless and helpless since they moved from their countries of origin, these people needed protection from being returned to countries they could be persecuted hence the UN adopted the 1951 refugee convention in protection of these people¹¹⁰. The principle is established under article 33 of the Geneva convention which states, "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion"¹¹¹. The article establishes the absolute nature of the obligation bestowed on

¹⁰⁵ Sharpe M, 'the supervision (or not), of the 1969 OAU Refugee Convention' 31 International journal of refugee law 2, 2019, 268.

¹⁰⁶ Sharpe M, 'the supervision (or not), of the 1969 OAU Refugee Convention' 263.

¹⁰⁷ Sharpe M, 'the supervision (or not), of the 1969 OAU Refugee Convention' 270.

¹⁰⁸ Anjichi T, 'protecting refugees, a critical analysis of the Kenyan refugee act 2006', Unpublished LLM thesis, University of Nairobi, Nairobi, 2010. 51.

¹⁰⁹ Anjichi T, 'protecting refugees, a critical analysis of the Kenyan refugee act 2006', Unpublished LLM thesis, University of Nairobi, Nairobi, 2010. 51.

¹¹⁰ Qureshi A, 'Principle of non-refoulment, its relevance and exceptions, a critical analysis' 2 Dialogue Social Science Review 5, 2024, 45.

¹¹¹ Article 33, *Convention relating to the Status of Refugee*.

the host communities on issues of returning the refugees¹¹². The convention and in particular the principle of non-refoulment has become a protection for the many refugees in Europe post-World War II¹¹³.

The convention regulates the non-refoulment principle as an international legal rule that applies to all states which are party to the convention hence leading the codification of the principle as an international law principle¹¹⁴. Other Human Rights legal documents such as have borrowed this principle to curb the torture and other elements of inhumane treatment by banning the return of individuals to places where they are likely to face persecution or abuse of other human rights¹¹⁵. Through the codification of the principle as an international law legal rule would lead to the global applicability of the principle in refugee matters. In Europe to bypass the principle in order to avoid mass in flow of refugees the doctrine of “*third safe country*” is usually evoked. This doctrine requires that refugees who are not coming from their origin nation to be returned to the third country they have passed through if they are not likely to face persecution in that state but the convention and in particular the principle of non-refoulment prohibits the criminal punishment of refugees¹¹⁶.

3.5 Equality Principle:

Through the discussion of this principle the author intends to establish the distinction of the various rights accorded to the refugees, aliens (third-country nationals) and the citizens of the host country. Apparently, all the beneficiaries of protection by international law in Europe are supposed to enjoy the same protection irrespective of their status such as being refugees, people with subsidiary protection or a third-country nationals¹¹⁷. Subject to the right to freedom of movement, the Geneva convention establishes that all the contracting parties to accord the refugees to choose their place of residence¹¹⁸. There was a debate in Europe whether the same

¹¹² Furramani E, ‘the principle of “non-refoulment” and its evolution in the jurisprudence of the European Court of Humanrights’ 2(3) Academic Journal of Interdisciplinary Studies, 2022, 110.

¹¹³ Qureshi A, ‘Principle of non-refoulment, its relevance and exceptions, a critical analysis’, 45.

¹¹⁴ Qureshi A, ‘Principle of non-refoulment, its relevance and exceptions, a critical analysis’, 46.

¹¹⁵ Qureshi A, ‘Principle of non-refoulment, its relevance and exceptions, a critical analysis’, 46.

¹¹⁶ Furramani E, ‘the principle of “non-refoulment” and its evolution in the jurisprudence of the European Court of Humanrights’, 109.

¹¹⁷ Carlier J and Lebeouf L, ‘choice of residence for refugees and subsidiary protection beneficiaries; variations on the equality principle: Alo and Osso’ Common Market Law Review 54, 2017, 636.

¹¹⁸ Carlier J and Lebeouf L, ‘choice of residence for refugees and subsidiary protection beneficiaries; variations on the equality principle: Alo and Osso’, 635.

could be accorded to people with subsidiary protections who are not covered by the Geneva convention. It is a settled precedent that the aim of the EU, if carefully analyzing the qualification directives recitals, is to provide a uniform protection status.¹¹⁹ The recitals underline that in principle the refugees and the persons with subsidiary protection should enjoy the same rights.¹²⁰

In the context of Kenya, the first incidence where the principle of equality is established is the Constitution of Kenya which does not define who a person is, in specific terms hence extending the applicability of various constitutional provisions to person with refugee status in an equal manner with the rest of Kenyans¹²¹. The bill of rights in that regard applies equally and provides uniform protection for all sorts of people under Kenya's jurisdiction.

3.6 Conclusion

In conclusion, the chapter has explored the foundational principles and the international and regional protection of refugee rights. A key focus has been given to the 1951 Convention relating to the status of refugees and the 1969 OAU Convention on the specific problems of refugees in Africa. Central to the discussion was the principle of non-refoulement which prohibits the expulsion and return of refugees to territories where their lives are endangered. It is codified under Article 33 of the 1951 Convention relating to the status of refugees. The principle of equality also provided by both conventions has been extensively discussed showing the obligation of equal treatments on refugee matters. Collectively, both legal instruments establish normative frameworks for refugee protection, ensuring the balance of state sovereignty with the international and regional obligation of dignified and humane treatment of refugees.

¹¹⁹ Carlier J and Lebeouf L, 'choice of residence for refugees and subsidiary protection beneficiaries; variations on the equality principle: Alo and Osso' *Common Market Law Review* 54, 2017, 633.

¹²⁰ Carlier J and Lebeouf L, 'choice of residence for refugees and subsidiary protection beneficiaries; variations on the equality principle: Alo and Osso' *Common Market Law Review* 54, 2017, 633.

¹²¹ Muigua K, 'Protecting Refugee Rights in Kenya: Utilizing international refugee instruments, the Refugee Act 2006 and the Constitution of Kenya as catalysts,' 17.

CHAPTER 4: STRATEGIES USED BY KENYAN SECURITY AGENCIES TO COMBAT TERRORISM AND THE ATTENDANT VIOLATION ON REFUGEE RIGHTS

4.1 Introduction

This chapter explores the various strategies employed by the Kenyan security agencies in combatting terrorism with a particular focus on how these measures intersect with protection of refugee rights. It critically examines the counter terrorism measures showing its effectiveness. The chapter further discusses the impacts of these measures and their violations on refugee rights. A key focus is given to the violations highlighted in the case of Kituo cha Sheria & others vs Attorney General showing the tension between national security and the protection of refugees.

4.2 Strategies Employed by the security Agencies in Combating terrorism

Kenya has adopted a range of counterterrorism strategies, as documented through a study by scholars such as Sandra Makayoto, Dr. Steven Handa, and Dr. Peter Wafula Wekesa on members of various human rights organizations and security agencies, such as the national police service as well as the Kenyan defense forces, and concluded the following strategies have been employed by the Kenyan securities in combating terrorism¹²²:

- (i) Arrests, Prosecutions and detentions
- (ii) Enactment of an anti-terrorism Act
- (iii) Monitoring financial transactions and regulating the Media
- (iv) Multiagency Approach
- (v) Public education
- (vi) Screening, erection of patrols and impromptu raiding of houses¹²³

¹²² Makoyoto S, Handa S, & Wekesa P, 'The effectiveness of various security agencies' counterterrorism strategies in addressing human rights violations in Kenya between 1998 and 2020' 4(3) International Journal of advanced multidisciplinary research and studies, 2024, 234.

¹²³ Magogo S, 'The effectiveness of counterterrorism strategies in Kenya: A case study of Eastleigh location, Nairobi County', Unpublished LLM thesis, University of Nairobi, Nairobi, 2012, 33.

In another study that targeted security organs, senate and national assembly members tasked with legislation and civil society members have identified, arrests, prosecution, and detentions were identified as one of the common strategies used as counter-terrorism measures by 53% of the individuals who have undertaken a survey to assess the effectiveness and the human rights violations of the counter-terrorism measures by the Kenyan security agencies¹²⁴. A further 63% of the people have agreed that the said measures were not effective; this shows a critical gap between the implementation of the measures and their efficacy on the ground¹²⁵.

Intelligence services and criminal investigations have served as preventive measures in curbing terrorist attacks since they get prior intelligence reports on the conducts of the terrorist groups¹²⁶. In addition, there has been a clear distinction between security agencies, which has assisted with the confusion in the overlap of the roles of the security agencies.¹²⁷ This strategy could also help with cooperation among the different agencies tasked with combating terrorism. Additionally, other key strategies identified were the adoption of technology to enhance security in Eastleigh and the screening of passengers on the main roads leading to Eastleigh and its environs¹²⁸.

In one of the studies conducted, a huge number of respondents (65.2%) believed that the strategies employed by the Kenyan security agencies were not effective¹²⁹. A minor number, at almost 16%, have said that the strategies were effective, and they have faith in the organs conducting it¹³⁰. Many civil society groups and human rights organizations have also shared their constructive criticism on the strategies employed by the government, arguing that some of the

¹²⁴ Mutungi S, and Mulu F, 'Counter-terrorism measures and human rights protection in Kenya', 4(5) International Journal of Current Aspects, 2021, 79.

¹²⁵ Makayoto S, 'Perspectives on security agencies' counterterrorism strategies and safeguards for human rights in Kenya (1998-2020)' Published LLM thesis, Kenyatta University, Nairobi, 2024, 87.

¹²⁶ Mutungi S, and Mulu F, 'Counter-terrorism measures and human rights protection in Kenya', 79.

¹²⁷ Kibusia J and Musya j, 'Combatting terrorism in Kenya: dialogue with determinants of adoption in the multi-agency approach to security', 7(1) Jumuga Journal of education, oral studies and human sciences, 2024, 2.

¹²⁸ Magogo S, 'The effectiveness of counterterrorism strategies in Kenya: A case study of Eastleigh location, Nairobi County.' Unpublished LLM thesis, University of Nairobi, Nairobi, 2012, 33.

¹²⁹ Makoyoto S, Handa S, & Wekesa P, 'The effectiveness of various security agencies' counterterrorism strategies in addressing human rights violations in Kenya between 1998 and 2020', 234.

¹³⁰ Warfa A, Farah S and Ali M, 'Citizen's perceptions on the effectiveness on the counter terrorism mechanisms used by the government: a case of Northeastern Region, Kenya', 3(3) European Journal of Social Sciences Studies, 2018, 56.

strategies have been conducted in a way that is a threat to civil liberties and basic human rights as well as affecting community relations in the country¹³¹.

There is a need for the Kenyan government to strategize because of the gap shown by the research on the thoughts of the public on the efficacy of the strategies¹³². A major issue that is raised by human rights advocates is that the alleged or suspected of terror are not fairly treated by government agencies, and there is a need for these agencies to have conversations with such organizations and ensure that the basic essence of human dignity is observed while handling suspects¹³³.

These counter terrorism measures such as arbitrary arrests and detentions violates personal liberty, freedom and security of the person established by Article 29 of the Constitution of Kenya¹³⁴. Further directives to contain the refugees in the camps is in violation of freedom of movement as well as Article 43 that contains the social and economic rights of the constitution¹³⁵. Article 43 states that every person has the right to the highest attainable standard of health, accessible and adequate housing, reasonable standards of sanitation, adequate food of acceptable quality, clean and safe water in adequate quantity, social security and education¹³⁶. The current state of refugees at the camps where the government has insisted all refugees in urban centers to move to, will not meet the above required constitutional standard and the government of Kenya should be held accountable for its obligations towards the refugees¹³⁷.

Moreover, while intelligence services and technological surveillance have been heralded as preventive tools, the government's overwhelming reliance on securitizing particular geographic areas, notably Eastleigh and the refugee camps raises grave concerns about racial and ethnic profiling. It is my position that these tactics have deepened mistrust between refugee

¹³¹ Mutungi S, and Mulu F, 'Counter-terrorism measures and human rights protection in Kenya', 80.

¹³² Makoyoto S, Handa S, & Wekesa P, 'The effectiveness of various security agencies' counterterrorism strategies in addressing human rights violations in Kenya between 1998 and 2020', 235.

¹³³ Makoyoto S, Handa S, & Wekesa P, 'The effectiveness of various security agencies' counterterrorism strategies in addressing human rights violations in Kenya between 1998 and 2020', 234.

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¹³⁶ Article 43, *Constitution of Kenya* (2010).

¹³⁷ Mwaluko J, 'Policy framework for refugee management in Kenya: An assessment of challenges, gaps, and options,' Unpublished Dissertation, Strathmore University, Nairobi, 2022, 20.

communities and state authorities, undermining the very security objectives they seek to achieve. The over-securitization of spaces associated with Somali refugees, coupled with arbitrary raids and blanket detentions, creates a hostile environment that fosters alienation rather than cooperation.

4.3 How the Government has Employed Counterterrorism Measures in Regard to Refugees

The northeastern part of Kenya has always been linked with security issues starting with the Shifta Wars during the regime of Jomo Kenyatta.¹³⁸ The Kenyan government has strategically placed the Dadaab refugee camp at the border with Somalia and in the northeastern region which had always heightened security.¹³⁹ The linking of the Somali refugees with the terror group is due to strategic position of the Dadaab camp at the border with Somalia since the terror group is also based in Somalia.¹⁴⁰ The government has often linked terror activities and proliferation of firearms to the country with the Dadaab camp hence heavily securitizing the camp to curb such activities.¹⁴¹

The Kenyan government have decided to invade and carry out military occupation of regions controlled by Al-Shabaab in Somalia since the Somali government was not stable enough to fight the terror group.¹⁴² Al-Shabaab has retaliated this with a deadly wave of terror attacks in the northeastern part of the country and the capital city, Nairobi, where they targeted shopping malls and higher learning institutions.¹⁴³ The government of Kenya has issued a directive to relocate all urban refugees in an aim to curb terror attacks through the Usalama Watch operation.¹⁴⁴ The operation have been viewed to target vulnerable group of Somali refugees which saw arbitrary

¹³⁸ Ikanda F, Muhamad A, & Kuhnt J, 'Refugee securitization and the challenges of formal integration: Case of Somali refugees in Kenya and Ethiopia', 7.

¹³⁹ Brankamp H, and Gluck z, 'Kenya should stop treating refugees as potential terrorists' London School of Economics, 4th January 2023.

¹⁴⁰ Ikanda F, Muhamad A, & Kuhnt J, 'Refugee securitization and the challenges of formal integration: Case of Somali refugees in Kenya and Ethiopia', 10.

¹⁴¹ Ikanda F, Muhamad A, & Kuhnt J, 'Refugee securitization and the challenges of formal integration: Case of Somali refugees in Kenya and Ethiopia', 10.

¹⁴² Brankamp H, and Gluck z, 'Kenya should stop treating refugees as potential terrorists' London School of Economics, 4th January 2023.

¹⁴³ Brankamp H, and Gluck z, 'Kenya should stop treating refugees as potential terrorists' London School of Economics, 4th January 2023.

¹⁴⁴ Amnesty International, 'Kenya: Somalis scapegoated in counter-terror crackdown' 23rd May 2014.

arrests and detentions in holding facilities as they waited to be transferred to the refugee camps.¹⁴⁵

4.4 Violation of Refugees' Rights by the Strategies Adopted by the Kenyan Government in Addressing Terrorism

In the *Kituo Case 2013*, the High Court of Kenya examined the legality of a government directive to relocate all urban refugees to the refugee camp. The directive restricted the freedom of movement established under article 39 of the Constitution of Kenya, as well the court observed that it threatens the freedom of movement hence any limitation to right must comply with Article 24 of CoK.¹⁴⁶ The Court found that the directive violated the right to fair administrative action in that individual circumstances have not been considered while relocating the urban refugees, hence families with children being affected as they are separated from their parents.¹⁴⁷ To that effect the Court terms the directive as discriminatory and arbitrary in nature.¹⁴⁸ Children under Article 53(2) of the CoK deserves their best interest to be considered in any decision making or legislative organ, hence any directives that does not consider this interest is unconstitutional to that effect.¹⁴⁹ The right of children such as family life and parental care have affected as well as their right to education where the separation led to many children dropping out of school due to lack of means.¹⁵⁰

Additionally, due to this directive many Somali refugees have been a prey for the Kenyan police, as far as bribes are concerned, to ease the movement of refugees from the camps to the capital city (Nairobi)¹⁵¹. Those who are fleeing from Somalia are also expected to carry extra cash to pay to the police for access, and those who do not comply are arbitrarily detained in crowded cells that lack basic amenities or even forced back to Somalia¹⁵². Many community and Muslim leaders have publicly criticized the law enforcement body, stating that they are targeting the Somali refugees, who are Muslims and minority populations that are vulnerable to receiving western validation¹⁵³. The ousting of this community and the Muslim minority can lead to anger and frustration with the government, hence falling for extremism since they feel left out.

¹⁴⁵ Amnesty International, 'Kenya: Somalis scapegoated in counter-terror crackdown' 23rd May 2014.

¹⁴⁶ *Kituo cha Sheria & others vs Attorney General* (2013) eKLR

¹⁴⁷ *Kituo cha Sheria & others vs Attorney General* (2013) eKLR

¹⁴⁸ *Kituo cha Sheria & others vs Attorney General* (2013) eKLR

¹⁴⁹ *Refugee Consortium of Kenya & another vs Attorney general & 2 others* (2015) eKLR

¹⁵⁰ *Refugee Consortium of Kenya & another vs Attorney general & 2 others* (2015) eKLR

¹⁵¹ Mwangi O, 'Corruption human rights violations, and counter terrorism policies in Kenya', in Romaniuk S, Grice F, Irrera D, & Webb S (eds), *The Palgrave handbook of global counterterrorism policy*, Palgrave Macmillan, London, 2017, 1048.

¹⁵² Mwangi O, 'Corruption, human rights violations, and counterterrorism policies in Kenya', 1048.

¹⁵³ Mwangi O, 'Corruption, human rights violations, and counterterrorism policies in Kenya', 1048.

4.5 Conclusion:

Due to the securitization approach the country has taken in the integration of the refugee community, this has led to possible profiling, the creation of negative perceptions about the refugees, and discrimination for them to get essential governmental services. Despite the country having adopted sound strategies as counterterrorism measures, however, they have proved to be in violation of basic human rights. It is a popular opinion that the strategies adopted by the government have not been effective. There is a need to reevaluate the strategies and adopt a multi-stakeholder approach in designing counterterrorism measures while the contributions of international human rights organizations are respected.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter seeks to conclude on the study done regarding the balance between protection of refugee rights and combating terrorism in Kenya. Earlier chapters have keenly analyzed the domestic and international legal frameworks governing the protection of refugee rights to clearly show Kenya's obligation in protection of refugee rights. The work has also examined the effectiveness of the countermeasure strategies adopted by Kenya in combating terrorism as well as their violation on human rights. This chapter concludes the study in providing recommendations to the government in designing countermeasures that are human rights complaint.

5.2 Conclusion

This study has shown Kenya's obligation under international laws, in particular under the 1951 Convention. The international refugee laws form part of Kenyan laws under the 2010 constitution due to Article 2(6), which provides those treaties ratified by Kenya form part of the Kenyan law. The 1951 refugee convention relating to the status of refugees grants extensive rights such as shelter, security, and freedom of movement. It grants them the right to decide to reside wherever they want in the host countries subject to regulations applicable to aliens generally. It also gives them protection from return to home countries where they fear persecution under the non-refoulment principle.

The Kenyan Constitution is also very comprehensive in establishing rights under the Bill of Rights. It has also been established through this research that the Bill of Rights is applicable to all persons in Kenya, including the refugees, since the constitution does not define a person to exclude anyone. In chapter two, this research has been undertaken to investigate the domestic legal framework of the refugees. It has shown the applicable laws, such as the constitution of Kenya and the 2021 Refugee Act. The chapter has further shown the current integration of

refugees, where the government is taking steps to economically empower them. Tensions to securities refugees matters are actually fading away with time as of the status quo.

This positive integration is due to Kenya's policy shifts towards local integration, and it is because of its signing of the Global Compact on Refugees and its Comprehensive Response Framework (CRRF) in 2017. Also in the same period, Kenya has hosted and signed the Intergovernmental Authority on Development (IGAD) summit that adopted the 'Nairobi Declaration and Action Plan on Durable Solutions for Somali refugees. These international and local policies have shaped Kenya's view of refugee matters.

This research in Chapter 3 keenly analyzed the international legal framework of refugee rights. The 1951 Refugee Convention was discussed, showing its initial goals of western refugee protectionism, as viewed by many scholars. Later on, Africa drafted the 1969 OAU refugee convention in order to cater for an African need in protection of the refugees. Kenya is party to both conventions.

In Chapter 4, the study discussed the counterterrorism measures employed by Kenya, as well as the violations of refugees' rights implicated in counterterrorism. Violations such as arbitrary arrests, detentions, harassment, and corruption that affected the refugees has been discussed.

5.3 Recommendations

1. **Review and Repeal of Discriminatory Directives:** The directive mandating the relocation of urban refugees to camps should be repealed in its entirety. It has been demonstrated to be both unconstitutional and counterproductive. Any future policies affecting refugee movement and residence must be based on individual assessments, conducted through transparent, fair administrative processes, and compliant with both Article 24 of the Constitution and international refugee law.
2. **Strengthen Refugee Legal Protections and Access to Justice:** Refugees must be afforded effective legal remedies against human rights violations perpetrated under the guise of

counterterrorism. This requires enhanced funding and institutional support for legal aid organizations such as Kituo cha Sheria and Refugee Consortium of Kenya. Additionally, the government should establish independent complaint mechanisms within the National Police Service to investigate abuses against refugees.

3. Adopt a multi-stakeholder approach: In the discussion of the formulation of counterterrorism measures, the government should consider the views of the human rights organizations so that such policies are in line with best practices.
4. Human rights training for security enforcement agencies: the government should consider taking through their security agents human rights training sessions so that their conduct is in conformity with the protection of these rights.
5. Community-based approach: The government should consider the economic empowerment of the refugee so that they are not drawn into violent extremism. Also, the government should adopt measures that can lead to cohesion and integration of the refugees so that they don't feel discriminated against.
6. Establish oversight measures: this would enable an oversight body to keep track of the effectiveness of the counterterrorism measures as well as their implications on human and refugee rights.
7. Engage refugee communities; the government should foster an open dialogue with the refugee community to hear their concerns. They should be included in the implementations of the counterterrorism measures in order to build trust amongst the Kenyan communities and fight against violent extremism.

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