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Refugee Rights in Kenya.

A comparative legal analysis of theory and practice.

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1. Introduction

1.1. Introductory notes

The flight of Somalis and Ethiopians towards Kenya has currently been present in the media. One of the most pressing issues in these articles concerning refugees is the lack of space in Kenya's refugee camps and the general overwhelming of the government and humanitarian organizations. While the challenges that asylum seekers and refugees present to the host countries are widely discussed, relatively little concern is given to the rights of refugees once they have entered the country. However, this is not only true for the news, but also for policy making and legal responses on refugee influx - despite the fact that most refugees in Kenya have lived in the country for several years. Therefore, the aim of this thesis is not to analyze the period of flight or arrival, but to focus on the living conditions of refugees in Kenya.

The approach the paper takes is rights-based, i.e. it will compare the rights that refugees are legally guaranteed to their factual situation. The thesis is based upon the assumption that there is a discrepancy between the rights that refugees are entitled to through international norms and domestic laws, and the rights that they can indeed enjoy in Kenya. In order to validate the hypothesis, several rights were chosen to compare their theoretical and practical implementation in the country.

In the first section, the subject matter will be positioned in its historical and legal dimensions. Kenya's role as a refugee receiving country will be examined, with a focus on the historical developments that led to today's situation. This is considered vital for an understanding of the problematic of the lack of implementation, because it was a gradual development to restrict the rights of asylum seekers and refugees and to narrow down the liberties they can in fact enjoy.

The second section forms the main part of the thesis. It concentrates on some selected groups of rights that were judged most important by the refugees interviewed. For every one of these groups, the international and national legal norms will be explained, before discussing in more detail the situation on the

ground. The aim here is to find out if a gap does indeed exist, and which rights violations were and are committed. Further, strategies of refugees to counteract the lack of legal clarity and violations will be presented shortly.

The last part is an attempt to answer the obvious question that arises: Why is it that this gap exists and refugees cannot live in Kenya with all the rights that they are theoretically guaranteed? As it is impossible to give a full answer, some key elements will be examined from a legal angle.

1.2. Refugees in Kenya: an overview

Kenya plays an important role as a refugee receiving country in East Africa. Due to its relative stability and the geographic position - surrounded by countries with insecure regimes, sharing border with Somalia, Ethiopia, Sudan, Uganda and Tanzania - it has been granting access to asylum seekers since independence. All of the neighbouring countries, with the exception of Tanzania, have generated immense forced migrations into Kenya. In 2009, the country hosted more than 350.000 refugees, which makes it the sixth largest hosting country in the world in terms of the total numbers of refugees on its territory.¹ The refugee population has increased over the last few years, mainly as a result of the continuous influx of asylum seekers from Somalia together with a lack of durable solutions. The security situation in Somalia has been deteriorating continuously, so that today Somalis constitute the third largest refugee group in the world - and their prime destination is Kenya.² Somali refugees account for the vast majority of displaced persons in Kenya with about 250.000 people, followed by Ethiopians and Sudanese. Further countries of origin are Uganda, Rwanda and Congo-Kinshasa and, albeit less, Eritrea and Burundi.³

Although there is a steady arrival of new asylum seekers, the majority are old cases, i.e. refugees that have lived in the country for many years, often decades.⁴ This phenomenon can be explained by the lack of durable solutions and the therefore generated protracted situation. In practice, refugees have three possible long-term

¹ UNHCR (2010a): 2009 Global Trends. Refugees, asylum seekers, returnees, internally displaced and stateless people. Geneva: UNHCR.

² UNHCR 2010a: 9.

³ USCRI (2010): World Refugee Survey. Kenya.

⁴ UNHCR: Analysis of Refugee Protection Capacity. Kenya. April 2005.

solutions: they either go back to their country of origin, move on to a third country or they can integrate in the host community of their first country of asylum. The United Nations High Commissioner for Refugees (UNHCR) summarizes these three prospects as durable solutions and calls them *voluntary repatriation*, *(third country) resettlement* and *local integration*. Ideally, they are used complementary to the respective situations - refugees, for whom it is safe to go back, shall repatriate. For UNHCR and probably most refugees, and without a doubt for the host countries, this would be their preferred option but the security situation often hinders the return. Others shall receive the scarce places for resettlement available and move on to a third country - unfortunately, this option is not only expensive, but with the current political climate, there are only a few countries that accept refugees from Kenya. This makes third country resettlement available to only a small percentage of mostly better-educated refugees,⁵ while the majority is obliged to stay in their first country of asylum. Hence, for most the only option is local integration.⁶ “Integration” is a widely discussed concept, and it is regularly instrumentalized to indicate that migrants or “foreigners” are not willing to assimilate into “the” society of the host country. This term must therefore be employed with caution and considering the implications it entails - in the context of long-term solutions for refugees it has been defined by UNHCR as “the process by which the refugee is assimilated into the social and economic life of a new national community.”⁷ As this definition is neither precise nor practical, other authors have tried to find better descriptions. For example, Bulcha contrasts integration with “marginalisation”⁸ and Harrell-Bond analyzes integration as “a situation in which host and refugee communities are able to co-exist, sharing the same resources - both economic and social - with no greater mutual conflict than that which exists within the host community”.⁹ All of these definitions can merely be an approximation to the term - as for the rights-based approach that this thesis takes, factors such as the right to

⁵ Kuhlman, Tom: Organized versus spontaneous settlement of refugees in Africa. In: Howard Adelman/John Sorenson (1994): African Refugees. Development Aid and Repatriation. Boulder: Westview Press: 117.

⁶ UNHCR (2009a): Global Appeal 2010-2011. Finding durable solutions. Geneva: UNHCR.

⁷ Kuhlman 1994: 119.

⁸ Bulcha, Mekuria (1988): Flight and Integration: Causes of Mass Exodus from Ethiopia and Problems of Integration in the Sudan. Uppsala: Scandinavian Institute of African Studies: 86.

⁹ Harrell-Bond, Barbara (1986): Imposing aid: Emergency relief to refugees. Oxford: Oxford University Press: 7.

work, to choose the place of residence and to have equal access to educational and medical facilities represent the option of local integration.

But this option of local integration has come under threat: While the first refugees to arrive in independent African States were allowed to integrate locally by being given land, work permits and the respective nationality quite easily, along with the possibility for many to return,¹⁰ the last few decades have witnessed a change: “[T]here is hesitancy about accepting refugees for settlement and integration and an increased propensity to view refugees as only temporary settlers.”¹¹ This perception of refugees as being in the country for only a certain period of time is also true for Kenya, even though the facts do not support this idea, as some people have lived in the country for up to 20 years without having integrated locally.¹²

For the majority of refugees in Kenya, neither resettlement nor repatriation is possible. As most refugees in Kenya originate from Somalia, they have no real possibility to return due to the ongoing conflict and civil war. Hence, the two options available to them are resettlement and local integration. About 5000 refugees are resettled out of Kenya to third countries each year, mainly to North America. Yet this relatively large number of people is insignificant in comparison to the percentage of refugees that live in Kenya at the moment.¹³

For Sudanese refugees, who mainly originate from Southern Sudan, voluntary repatriation was and is a viable option: in 2005, the Naivasha Peace Agreement was signed between the central government of Sudan and the rebels in the South, which led to a significant amelioration of the security situation in Southern Sudan.¹⁴ Therefore, repatriation was pursued for refugees from Southern Sudan in the last few years. However, they are the exception that proves the rule: the majority of refugees have to stay in Kenya without any possibilities of leaving the country.

“Local integration in Kenya is currently not viewed as an option for significant numbers of refugees and indeed is contrary to government policy.”¹⁵ In fact, refugees are not only not encouraged to integrate into Kenyan society but even

¹⁰ Stein, Barry: Durable solutions for developing country refugees. In: International Migration Review, 1986, 20/74: 265.

¹¹ Stein 1986: 266.

¹² Interview with a refugee from Uganda, 20.07.2010

¹³ UNHCR 2005: 6.

¹⁴ Tull, Denis M.: Sudan after the Naivasha Peace Agreement. No Champagne Yet. In: Stiftung Wirtschaft und Politik Comments 2005, 3.

¹⁵ UNHCR 2005 : 48.

hindered through limitations such as the encampment policy followed by the government, the difficulty or even impossibility to obtain work permits and other obstacles in everyday life due to their refugee status.

Thus, the majority of refugees in Kenya live there for several years, without any real hope to repatriate or resettle in a third country. As a consequence, it is all the more important to focus on the living conditions and the rights of people living in Kenya as refugees.

Refugees in Kenya are required to live in refugee camps.¹⁶ Few refugees have the official authorization to leave the camp areas to live in different parts of the country - however, a lot of towns in Kenya increasingly host refugees who do not, for various reasons, live in the designated areas. Estimates go up to 100.000 documented and undocumented refugees in Nairobi alone.¹⁷

1.3. Methodology

The thesis is based on a comparison of the international and domestic legal framework with the factual legal situation of refugees in Kenya. It is assumed that there is a difference between the law in the books and the law on the ground - between theory and practice. In order to find that discrepancy, I analyze the rights relevant for the lives of asylum seekers and refugees. The methodology “statutory interpretation” is employed in order to find out how the legal situation is supposed to be.¹⁸ Interpretation of legal documents is the most important methodology of law, as its aim is to determine the content. This method follows a clear structure on its process to gain knowledge. The first step is literal interpretation, which determines the ordinary meaning of the phrase or word at question. If this does not give a clear and unmistakable meaning, systematic interpretation is employed, which considers the context of the document. The third step is historical interpretation that takes into account the historical context of the norm. In case of remaining doubts and questions on the meaning of the norm, teleological interpretation is the final step, which considers the object and purpose of the

¹⁶ The Refugee Act. Republic of Kenya: 2006: Art. 25 lit f.

¹⁷ Pavanello, Sara/Elhawary, Samir/Pantuliano, Sara (2010): Hidden and exposed: Urban refugees in Nairobi, Kenya. HPG Working Paper. London: Overseas Development Institute: 7.

¹⁸ Jacobi, Christoph Alexander (2008): Methodenlehre und Normwirkung. Die Normwirkung als Maßstab der Rechtsgewinnung. Baden-Baden: Nomos: 344.

document.¹⁹ This method is also determined in international law: in order to identify the content of an international norm, firstly, the ordinary meaning is considered through literal interpretation, secondly the context of the text is considered, and finally, the object and purpose of the document are taken into account.²⁰

After the legal interpretation of several basic rights, I compare these rights to the realities of refugee lives in Kenya. Here, not only text interpretation of theoretical texts and research findings is used, but also the two methods of expert interviews and participant observation. In this case, experts are people who possess specific knowledge about social facts and expert interviews are the method to access this knowledge.²¹ It is not the person itself that is of interest for the interviewer, but the aim of the interview is to generate the knowledge that they possess. Expert interviews are usually non- or semi-standardized, i.e. they use a guideline of flexible questions depending on the interviewee.²²

The main findings of this paper are based on semi-structured interviews with several experts on the legal situation of refugees.²³ The interview guideline consisted of five key questions that, apart from small modifications due to new findings, remained the same throughout the research process. The questions were aimed at testing and adjusting the working hypotheses. In the course of the interview, often new questions and follow-up questions were asked depending on the background of the interview partner and the emphasis they made. Nine interviews, which each took around one hour, were held in summer 2010 in Kenya. Five interviews were conducted in Nairobi between July and August and four in Kakuma refugee camp in September. Every interview partner except one accepted the use of a tape recorder.

¹⁹ Jacobi (2008): 344ff.

²⁰ Vienna Convention on the Law of Treaties. UN: 1969: Art. 31.

²¹ Gläser, Jochen/Laudel, Grit (2004): Experteninterviews und qualitative Inhaltsanalyse. Wiesbaden: VS Verlag für Sozialwissenschaften: 10. The original says: Experten sind „Menschen, die ein besonderes Wissen über soziale Sachverhalte besitzen, und Experteninterviews sind eine Methode, dieses Wissen zu erschließen.“

²² Gläser/Laudel (2004): 13.

²³ Hopf, Christel: Qualitative Interviews. Ein Überblick. In: Uwe Flick/Ernst von Kardoff/Ines Steinke (2008): Qualitative Forschung. Hamburg: Rowohlt: 349ff.

The interview partners in Nairobi consisted of a lawyer working with a Kenyan organization for refugee rights - *Kituo cha Sheria*, a lawyer from UNHCR Nairobi, a university professor of law at Moi University, the head of the *Nairobi Archdiocese Refugee Assistance Programme* (NARAP), an organization offering self-help education to urban refugees since the 1980s and the District Officer of Eastleigh, a district in Nairobi, populated mainly by Somali immigrants and refugees. At the beginning of September, I received the permission to conduct research in Kakuma refugee camp in the northwest of Kenya, where I spent several days on research in and around the camp. The interviews were conducted with the Protection Officer of UNHCR, with a lawyer from a Kenyan NGO working on refugee rights, the *Refugee Consortium of Kenya* (RCK), a public officer from the *Department of Refugee Affairs* (DRA) responsible for the first registration of asylum seekers and a journalist from the refugee community, the editor of the Kakuma News Reflector (KANERE).

As mentioned above, other than interviews, participant observations²⁴ were used. Participant observation is a method of data collection during which observation is “carried out when the researcher is playing an established participant role in the scene studied.”²⁵ These observations were recorded in writing and later interpreted alongside the expert interviews.

In Nairobi, I conducted participant observation, informal conversations and interviews with refugees from Somalia, Sudan, DR Congo and Uganda. Most of the time, I spent the day with either one or several urban refugees, visiting their homes, accompanying them to the DRA and UNHCR, or joining diverse daily tasks. Also in Kakuma, apart from the expert interviews, several conversations with aid agency staff and refugees were held and recorded for a better understanding of the situation of refugees.

1.4. The legal background

Before analyzing certain refugee rights in regard to their implementation and practice, this section provides the theoretical background of the legal situation of refugees and introduces the relevant international and national instruments. The

²⁴ Brüsemeister, Thomas (2000): *Qualitative Forschung*. Wiesbaden: Westdeutscher Verlag.

²⁵ Atkinson, Paul/Hammersley, Martyn: *Ethnography and participant observation*. In: Norman Denzin/Yvonna Lincoln (1994): *Handbook of qualitative research*. London/New Delhi: 248.

international protection regime that has developed over the past decades finds itself in between the principle of State sovereignty and humanitarian concerns. Today, its importance cannot be overestimated, as national governments seem to focus more on their sovereignty by preventing asylum seekers from reaching their territory and limiting their rights to protection than on providing refugees with the necessary protection.²⁶

The basic international refugee rights are to be found in refugee and human rights law, namely the *Refugee Convention and Protocol*, the *Convention of the former Organisation of African Unity (OAU)* and the *International Bill on Human Rights*. They are all part of international law, which has certain peculiarities compared to domestic law, above all its lack of enforcement mechanism. One definitional element of law is its enforcement through a responsible organ of the legal system. But the branches of international law relevant for refugee rights do not have a central power to address in case of the breach of an international norm. Instead, the consequences depend on the sanctions of States and international organisations. International human rights law is thus fundamentally political, as there is no court with universal jurisdiction which can be addressed if refugee rights are not met. In this case, the particular State is being punished by political sanctions.²⁷

1.4.1. International landscape for refugee law

Kenya has signed and ratified the fundamental refugee Conventions and treaties, albeit with certain reservations. Reservations are part of the process of the making of an international treaty: they give contracting States the opportunity to exclude or modify the legal effect of certain provisions of the treaty that they do not wish to apply. On the one hand, it constitutes a reduction of the treaty and its scope, but on the other hand, it is necessary to get as many States as possible to sign.²⁸

Rules and provisions from international law do not automatically become part of Kenya's legal structure. Kenya "inherited from Britain a dualist concept whereby

²⁶ Goodwin-Gill, Guy (2007): *The refugee in international law*. Oxford: Oxford University Press: v.

²⁷ Darcy, James (1997): *Human rights and international legal standards: what do relief workers need to know?* Relief and Rehabilitation Network, Paper No. 19. London: Overseas Development Institute: 13; Hafner, Gerhard et al (2008): *Einführung in die internationalen Grundlagen des Rechts*.

Einführung in das Völkerrecht. Wien: Universität Wien: 9ff.

²⁸ Hafner et al 2008: 19.

international law is considered a separate and distinct system from domestic law”.²⁹ In order to be applicable for Kenya, international rights have to be made part of the domestic legal framework - this has been done with the above mentioned treaties.³⁰ Therefore, all the rights guaranteed by international legal instruments and approved of by the State of Kenya are part of the national legislation and can be enjoyed by all persons in the national territory, hence including refugees.

Whenever talking about refugee rights, the first instrument mentioned is the 1951 *Convention relating to the Status of Refugees* (Refugee Convention), which, together with its 1967 *Protocol relating to the Status of Refugees*, stands “at the centre of the international refugee protection regime”.³¹ It was designed after the crisis of forced migration during the Second World War in order to establish common standards regarding the treatment of refugees. It was the first legal instrument that defined the term “refugee” and spelled out the rights and duties attached to it. It gave the contracting States guidelines on the treatment of refugees and asylum seekers and answered questions concerning the right to work, social security or the expulsion of refugees.³² The actors of the *Refugee Convention* are States: it is the host governments that are responsible for the protection of refugees on their territory, while the role of UNHCR is to maintain a “watching brief”³³ - it intervenes when it becomes necessary to protect refugees and their rights. Kenya became a party of the *Refugee Convention* in 1966, with reservations to some provisions.³⁴ Today, it still remains the cornerstone of international refugee law, and has been the basis for many regional and national refugee rights instruments.

The 1967 *Protocol relating to the Status of Refugees* (Protocol), to which Kenya acceded in 1981, refers to the *Refugee Convention* and is seen as a complement to it.³⁵ The big accomplishment of the *Protocol* was to universalize the “refugee”

²⁹ International Committee of the Red Cross: International humanitarian law. National implementation. Kenya. 2010.

³⁰ Muigua, Kariuki: Protecting refugee rights in Kenya: Utilising International Refugee Instruments, the Refugee Act 2006 and the Constitution of Kenya as catalysts. 2010: 70.

³¹ Durieux, Jean-François/McAdam, Jane: Non-Refoulement through Time : The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies. In: International Journal of Refugee Law, 2004, 16/1: 5.

³² UNHCR (2007): The 1951 Refugee Convention. Questions and Answers. Geneva: UNHCR: 4ff.

³³ UNHCR 2007: 8.

³⁴ Kenya maintains reservations on the Articles 8, 9, 17, 24 and 25.

³⁵ UNHCR 2007: 3.

concept so that the majority of displaced persons were no longer neglected protection.

The *Refugee Convention* and its *Protocol* are universal instruments: the intention was to conceptualize them in order to be applicable in all countries worldwide. But there are also regional Conventions and treaties, designed to cover the specific characteristics and interests of individual regions of the world. For Africa, this aim was realized through the 1969 *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (OAU Convention). Its basis is the *Refugee Convention* and *Protocol* and it explicitly refers to them in the Preamble.³⁶ To take a step further, it adapts the global concepts to the African reality, where it was mostly masses of people fleeing political unrest and discriminatory regimes, a phenomenon not experienced to that extent in the West.³⁷

*“[T]he Convention was clearly a landmark event for refugee law and policy when it entered the scene in 1969. Its revolutionary character lay principally in the new and specific concepts it brought into play.”*³⁸ These include, for example, the extended refugee definition and the concept of burden-sharing, which gives African States the possibility to directly appeal to another State in order to help them in case they are overwhelmed by the numbers of asylum seekers.³⁹

As mentioned above, international treaties need to be made part of domestic law in order to be applicable in Kenya. The *Refugee Act* was the first national legislation to do so. Talks about domestic refugee law had begun as early as the 1990s, but until 2006, the legal system lacked the specific category of “refugee”. Instead of having a document regulating refugee rights, they were simply referred to as “non-nationals” and subsumed under two broader aliens legislations. Therefore, the *Refugee Act* was a necessary and long-awaited step which formally integrated the UN *Refugee Convention* and the OAU *Convention* into Kenyan law.⁴⁰ From this time on, all the rights laid down in the described Conventions were part of Kenyan law: “every

³⁶ Convention Governing the Specific Aspects of Refugee Problems in Africa. OAU: 1969.

³⁷ Okoth-Obbo, George: Thirty years on: a legal review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa. In: *Refugee Survey Quarterly*, 20/1, 2001: 105.

³⁸ Okoth-Obbo 2001: 88.

³⁹ Convention Governing the Specific Aspects of Refugee Problems in Africa: Art. II (4).

⁴⁰ Wakahiu, Judy: An introduction to international, regional and national refugee law and protection: Practical challenges in international relations and globalization. Lecture by Judy Wakahiu at The Jesuit Hekima Peace College, Nairobi Kenya on 13th March, 2007: 10.

*recognized refugee and every member of his family living in Kenya shall be entitled to the rights and duties and be subject to the obligations contained in the international conventions to which Kenya is party.”*⁴¹

One of the main achievements of the Act is the establishment of a *Department of Refugee Affairs*, which is in charge of administrative matters relating to refugees and asylum seekers. Finally, a government department has taken the responsibility for refugees instead of relying on UNHCR and its partners. However, the *Refugee Act* is not implemented fully yet, but the theoretical foundation has been made.

1.4.2. Who is a “refugee”?

We come across the terms “refugee” and “asylum seeker” on a nearly daily basis, as they are frequently employed on the news or in papers, sometimes without further reflection. As this thesis writes about refugee rights and the title itself contains the word refugee, it is inevitable to take a closer look at this term before using it. In this chapter, a legal approach is taken in order to find a suitable definition, the contextualisation of the term will be examined in chapter 3.1.

It was the *Refugee Convention* in 1951 that defined the term refugee for the first time in international law and this refugee definition was since then employed not only to define refugees internationally, but it was also adopted from many States into their national legislation.⁴²

Article 1 of the *Refugee Convention* applies the term refugee to the following persons:

*“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 outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”*⁴³

The problem that remains is how to interpret the main terms in this clause: “As a result of its great impact, virtually every word of the core phrase of the refugee

⁴¹ The Refugee Act: Art. 16 (1) lit a.

⁴² Steinbock, Daniel: The refugee definition as law: issues of interpretation. In: Frances Nicholson/Patrick Twomey (1999): *Refugee Rights and Realities. Evolving International Concepts and Regimes*. Cambridge: Cambridge University Press: 13.

⁴³ Convention relating to the Status of Refugees. UN: 1951: Art. 1.

definition has been subject to interpretative dispute.”⁴⁴ There are no definite answers on how to interpret “race”, “well-founded fear” or “membership of a particular social group”.

One of the debates concerning the *Convention*’s definition of “refugee” is whether the term is only applicable for individuals or also for group situations. Normally, each asylum seeker shall be processed individually before their refugee status will be determined. However, in Kenya, as in most African countries today, forced migrants often arrive in large numbers, which makes individual determination administratively difficult if not impossible. To answer this question, there are different opinions: while some argue that the refugee definition does not apply to refugee determination on a group basis, but only to individuals and therefore has little relevance for African refugees today,⁴⁵ others claim that the individual character of the definition does not exclude group situations.⁴⁶ Whenever there is a debate about the meaning of a legal document, the method of interpretation is used in order to identify the objective content and the intended meaning of the contracting partners or legislator. For legal interpretation, different steps have to be taken and a distinctive feature for international law is the use of the *travaux préparatoires*. These preparatory works are drafts of the treaty and protocols of the meetings. Only in case questions still remain, historical interpretation through the *travaux préparatoires* is taken into consideration.⁴⁷ In case of determining the refugee status on a group basis, these historical documents support the latter point of view that the status may be granted in group situations.

The *Protocol* from 1967 refers to the *Refugee Convention* and is seen as a complement to it. It has widened the definition of a refugee - this extension of the *Refugee Convention* was a necessary step that UNHCR and a number of recently decolonized States had been lobbying for, as the *Convention* contains a time and space limit: only people who had fled their countries before 1951 in Europe fell under the scope of the *Convention*.⁴⁸ Before this amelioration, the majority of

⁴⁴ Steinbock 1999: 14.

⁴⁵ Okoth-Obbo 2001: 117.

⁴⁶ Jackson, Ivor (1999): The refugee concept in group situations. The Hague/London/Boston: Martinus Nijhoff Publishers: 473.

⁴⁷ Hafner et al 2008: 22f.

⁴⁸ Davies, Sara: Redundant or essential? How politics shaped the outcome of the 1967 Protocol. In: International Journal of Refugee Law, 2007, 19/ 4 : 703.

people fleeing their country of origin for the reasons stated in the *Refugee Convention* did not fall under the term “refugee” and were therefore not eligible for protection. The *Protocol* explicitly adopts the definition of the *Refugee Convention*, by eliminating the following parts: “As a result of events occurring before 1 January 1951” and geographical limitations.

When designing the *Protocol*, it was agreed upon that a change of the definition was needed, but the extent of it was widely discussed. The removal of time and geographical limitations was important, but not enough for some authors: “A problem remains with the refugee definition as its focus on political persecution has been at the cost of assisting and protecting larger numbers of people fleeing generalized situations of violence and abuse.”⁴⁹

The term “refugee” was further broadened in 1969 by the *OAU Convention Governing the Specific Aspects of Refugees Problems in Africa*, to which Kenya became a party in 1992.⁵⁰ The most celebrated feature of the *OAU Convention* was the so-called “expanded” refugee definition, which was influenced by a debate on colonial and minority-rule territories. As the definition provided by the UN in its *Convention* and *Protocol* did not cover the predominant situation in Africa of people fleeing from civil wars and abuse of human rights, these people were not considered refugees and therefore lacked assistance.⁵¹

In the first paragraph of Article 1 of the *OAU Convention*, the term “refugee” is defined by exactly the same wording as it is to be found in the *Refugee Convention*. The second paragraph goes on as follows:

“The term ‘Refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”

The Kenyan *Refugee Act* of 2006 also refers to the UN *Refugee Convention*, the *Protocol* and the *OAU Convention* and adopts their definitions. Concerning the term

⁴⁹ Davies 2007: 728.

⁵⁰ Halperin, Liv (2003): The physical security of refugees in Kenyan camps: Legal and human rights implications. The Fletcher School: Master of Arts in Law and Diplomacy Thesis: 25.

⁵¹ Okoth-Obbo 2001: 111f.

“refugee”, this Act on the one hand englobes the meaning of “statutory refugee” combined with the prevalent definition, and on the other hand it introduces a new concept on refugees, called *prima facie* refugee. This will be discussed in length later, in chapter 4.

2. The historical background

This chapter examines the evolution of asylum in Africa in the post-independence era in order to embed the legal situation of refugees in its historical context. As Kenya is not unique in the way asylum policies were developed, this chapter considers the main factors leading to the situation of asylum seekers in the whole of Sub-Saharan Africa before taking a deeper look at the development of the treatment of refugees in Kenya.

2.1. Asylum in Africa

Most States in Africa have long served as model countries concerning asylum and the commitment to protection and durable solutions for refugees. It is argued that there are two main periods regarding refugee policies in post-independence Africa: during the first period there was an era of openness towards forced migrants, even described as a “golden age” of asylum in Africa, while the second marked a shift in the nature of asylum with more restrictions imposed and a less generous attitude.⁵²

During the first period, this is to say after colonialism until the late 1980s, many African States were characterized by similar features regarding the situation of refugees. These include: a liberal refugee definition, a commitment to asylum and the principle of *non-refoulement*, the effort to find durable solutions and a general respect for refugee rights.⁵³

During this time, the majority of forced migrants came from countries still fighting against colonialism or racist regimes, like apartheid South Africa. Therefore, the OAU used an extended definition of “refugee” in its *Convention*,⁵⁴ in order to include these migrants and entitle them to protection.⁵⁵ With the help of this

⁵² Rutinwa, Bonaventure: The end of asylum? The changing nature of refugee policies in Africa. In: Refugee Survey Quarterly, 2002a, 21/1&2: 12.

⁵³ Rutinwa 2002a: 16.

⁵⁴ Convention Governing the Specific Aspects of Refugee Problems in Africa: Art. I (2).

⁵⁵ Okoth-Obbo, George: Thirty years on: a legal review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa. In: Refugee Survey Quarterly, 2001, 20/1: 111.

newly established and improved legal standard, African countries were very generous in receiving forced migrants and in granting asylum.⁵⁶

The principles of asylum and *non-refoulement*, the prohibition to send back asylum seekers, were mostly respected, with some exceptions such as the expulsion of Rwandan refugees from Uganda.⁵⁷

Resettlement to third countries, together with the possibility to integrate locally, provided a good basis for durable solutions. From the 1970s onwards, Tanzania, often cited as a good example for the African hospitality towards refugees, offered naturalization and even land to refugees.⁵⁸ As for refugee rights such as the freedom of movement, the rights to work, education and security rights, they were in general upheld and respected.⁵⁹

This openness of the receiving governments and also host communities towards refugees had different reasons. While some authors explain it by the “traditional hospitality” of African societies,⁶⁰ this explanation is rejected by others and considered as oversimplified.⁶¹ Another explanation takes into account the specific nature of the refugees of that time: most came from independence or anti-apartheid struggles and were seen as freedom fighters, which - together with the ideologies of that time being anti-colonialism and pan-Africanism - provided the basis for an open approach towards asylum seekers.

Furthermore, many governments offered to resettle refugees in their countries. The *OAU Convention* includes a provision for inter-African burden sharing⁶²: as the majority of refugees were found in Southern Africa, the Great Lakes region and at the Horn of Africa, some countries dealt with very high numbers of refugees, while others witnessed little or no influx. This led to an uneven distribution of the

⁵⁶ Crisp, Jeff (2000): Africa's refugees: patterns, problems and policy challenges. New Issues in Refugee Research, Working Paper No. 28. Geneva: UNHCR: 4.

⁵⁷ Pirouet, Louise: Refugees in and from Uganda in the Post Colonial Period. In: Holger Bernt Hansen/Mark Twaddle: Uganda Now Between decay and development. London: James Currey.

⁵⁸ Chaulia, Sreeram Sundar: The politics of refugee hosting in Tanzania: From open door to unsustainability, insecurity and receding reception. In: Journal of Refugee Studies, 2003, 16/2: 154.

⁵⁹ Rutinwa 2002a: 19.

⁶⁰ For example: Zarjevski, Yéfime (1988): A Future Preserved: International Assistance to Refugees. Oxford: Pergamon Press: 102ff.

⁶¹ Milner, James: Golden Age? What Golden Age? A critical history of African asylum policy. Paper presented to the Centre for Refugee Studies, Toronto: York University: 7; Kibreab, Gaim (1985): African Refugees: Reflections on the African Refugee Problem. Trenton/ NJ: Africa World Press.

⁶² Convention Governing the Specific Aspects of Refugee Problems in Africa: Art. II (4).

responsibility for refugees, which tried to be counteracted through resettlement to third countries where there were fewer refugees.⁶³

The 1980s and early 1990s marked a shift in the asylum practices of many countries in that the institution of asylum declined. In practice, this meant a retreat from the openness towards refugees: instead of granting asylum, it was now often preferred to create so-called “safe zones” in the country of origin in order to prevent the income of refugees.⁶⁴ Especially during the refugee crisis after the Rwanda genocide, zones under the protection of the United Nations were established for civilians in order to make them stay in Rwanda. The construction of “safe zones” was, and still is, highly controversial and stands on dubious legal grounds.⁶⁵

Furthermore, one of the main principles in refugee protection was breached by the expulsion of refugees and rejection at the border. Both increased since the early 1990s, when refugees in several countries had to return to their countries of origin before it was secure enough for them to return. There were incidents of whole buses packed with foreigners who were being deported back to their respective country.⁶⁶ This meant a step backwards away from durable solutions such as resettlement in a third country or local integration and towards a focus on repatriation at the earliest moment.

The increase of restrictive policies was also reflected in the standard of treatment: the rights to work and education were limited and the possibilities to obtain land were often abolished.⁶⁷ The reasons for this change of attitude and treatment of refugees in Africa include different factors. One is a major increase in numbers: while during the first decades after independence, moderate flows of refugees arrived in the countries of asylum, the 1980s and 1990s witnessed unexpected and larger groups of forced migrants seeking asylum. Different emergency situations that generated refugee flows coincided, such as the Great Lakes refugee crisis. Over two million Rwandan asylum seekers fled to neighbouring countries within a

⁶³ Rutinwa 2002a: 18.

⁶⁴ Rutinwa 2002a: 20f.

⁶⁵ For further reading: Rutinwa, Bonaventure: Beyond durable solutions: An appraisal of the new proposals for prevention and solution of refugee crises in the Great Lakes Region. In: *Journal of Refugee Studies*, 1996, 9/3: 312-325.

⁶⁶ Rutinwa 2002a: 24ff.

⁶⁷ Rutinwa 2002a: 26f.

few weeks - the situation peaked in April 1994 when around 250.000 people fled to Tanzania in only one day.⁶⁸ This has not been witnessed before, and the receiving countries were overwhelmed by the sheer magnitude of refugees. As a result, most countries turned towards the above mentioned measures: border closure, expulsion and restrictive policies.

Another possible explanation lies in the different nature of refugees: it was no longer people fleeing repressive colonialist or racist regimes, but asylum seekers began to come from independent countries. This led to the question of inter-State relations, as some host countries were careful not to disturb the diplomatic relationships with the countries of origin by taking in their nationals as refugees.

Another aspect of this period was a growth in xenophobia, which led to a predominantly negative attitude towards refugees in some of the host communities.⁶⁹ An interesting observation here is the concurrence of the growing xenophobia and the democratization processes of many African States:

“Coincidentally, these xenophobic sentiments have emerged at a time when most of Africa is democratizing and governments are compelled to take into account public opinion in formulating various policies. The result has been the adoption of anti-refugee platforms by political parties which result in anti-refugee policies and actions by governments.”⁷⁰

The impact of diminishing burden sharing and growing ignorance by the international community should not be underestimated either, as western donors were getting more and more reluctant in funding development projects, thus including funds for refugees.⁷¹ These, together with the austerity measures imposed by the *International Monetary Fund*, limited the resources of the host countries to deal with refugees.⁷²

Some, like Milner, challenge the pronounced dichotomy between “golden age” and the end of asylum altogether.⁷³ While he agrees that there was a shift in refugee

⁶⁸ Rutinwa 2002a: 28.

⁶⁹ Sisulu, Lindiwe (1998): Key note address at the International Conference “Refugees in the new South Africa”. Quoted after Rutinwa 2002a: 31.

⁷⁰ Rutinwa 2002a: 13.

⁷¹ Chaulia 2003: 160f., Milner 2004: 16.

⁷² Rutinwa 2002a: 13.

⁷³ Milner 2004

treatment towards a less generous granting of asylum, he rejects the idea of a “golden age”, as, according to his argumentation, asylum policies were always motivated by political and strategic considerations. This period is thus not the result of “traditional African hospitality”:

“A closer reading of Africa’s asylum history would, however, appear to suggest that issues of national security, domestic politics and international relations have always played a more significant role in the articulation of national asylum policies.”⁷⁴

To conclude, in order to understand the development of asylum in Africa it is necessary to reflect upon the two main periods of refugee treatment, but not to idealize the beginning of asylum politics. The treatment of refugees always reflects a multitude of factors: historically, the main reasons for more restrictive asylum policies and a decrease in the rights that refugees actually enjoyed can be found in the magnitude of the refugee flows, diminishing funds, the different nature of the asylum seekers and the growing xenophobia in many African countries that developed in the late 1980s.

2.2. Asylum in Kenya

After the historical context of refugee protection in Africa, now a closer look will be taken on the evolution of the asylum system in post-independence Kenya.

2.2.1 After colonialism: a State-run asylum system

Kenya has had a long history of receiving refugees from neighbouring countries, even before it gained its independence in 1963.⁷⁵ However, the main income of asylum seekers started afterwards. Due to its relative stability and geographic position, being surrounded by instable and repressive regimes, it has remained the prime destination for many asylum seekers.⁷⁶

⁷⁴ Milner 2004: 10.

⁷⁵ Wilkin, David: Refugees and British Administrative Policy in Northern Kenya, 1936-1938. In: African Affairs, 1980, 79/317: 510-530.

⁷⁶ Abuya, Edwin: Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective. In: International Journal of Refugee Law, 2007, 19/1: 54.

From the first decade until the late 1980s, it was mostly refugees from Uganda who came to Kenya, at first fleeing Idi Amin's and then Milton Obote's regime. The reception of these refugees did not cause substantial difficulties to Kenyan authorities, because their number was relatively low and many had relatives living near the border, which made integration easier. Additionally, they began returning to Uganda after the overthrow of Obote in 1985.⁷⁷

The end of the 1980s marked the arrival of heterogeneous refugee groups and a rise in the number of refugees, which led to the collapse of the administrative system and caused a shift in asylum policies and the rights that refugees enjoyed.⁷⁸

Until 1991, refugees were administered by the State: it was the Government of Kenya through the *Ministry of Home Affairs* that realized its responsibility towards asylum seekers and refugees by administering their claims. At that time, refugees were not yet a specific legal category in domestic law. Although Kenya is a signatory to the relevant international refugee frameworks, its Constitution makes it necessary to implement these provisions into national law in order to be applicable. This implementation had not been done until 2006, but refugees were rather subsumed under the *Immigration Act*⁷⁹ and the *Aliens Restriction Act*.⁸⁰

Foreigners who entered the country to seek asylum, were required to go to a Reception Centre in Thika, a town near Nairobi. There, their asylum interview was conducted. The Reception Centre also contained the capacity to house up to five hundred asylum seekers. The Refugee Status Determination (RSD) process took about three months and contained three steps.⁸¹ Firstly, a questionnaire had to be filled out, where asylum seekers explained the reasons of their flight. The next step was an interview with an officer of the Ministry, during which the applicants again told their story orally. Finally, a security test was conducted: if the applicants had so far been successful, Kenya's intelligence agency examined their cases in order to sort out criminals, spies and potential security threats to the

⁷⁷ Abuya 2007: 57.

⁷⁸ Hyndman/Nylund 1998: 24ff.

⁷⁹ The Immigration Act. Republic of Kenya: 1984.

⁸⁰ The Aliens Restriction Act. Republic of Kenya: 1985.

⁸¹ Skari, Tala/Girardet, Edward: Urban Refugees: Out of the Public Eye. In: Refugees, 1985, 23: 15. Quoted after Abuya 2007: 66.

country. If then a person was declared a refugee by the Ministry, he or she obtained an ID card and was allowed to stay in Kenya.⁸²

Additionally, UNHCR in Nairobi conducted interviews with persons who were not able to go to Thika. Moreover, it sometimes provided complementary protection to asylum seekers who had been rejected by the Government. UNHCR declared them “Mandate refugees”, which describes a person “who meets the criteria of the UNHCR Statute”⁸³, but had not been accepted by the host State as a refugee. The legal classification of these “Mandate refugees” was and is not clear, and will be further discussed in chapter 3.3.

The protection offered by the government and the rights that refugees were able to enjoy were, to a certain extent, in accordance with international refugee and human rights law.

One of the cornerstones of refugee law is the principle of *non-refoulement*, which prohibits States from expelling recognized refugees and deporting them back to their country of origin.⁸⁴ Although Kenya was a signatory to the *Refugee Convention*, in which this principle was first laid down, it had not yet implemented it into its domestic legal framework until 2006, and so was not obliged to observe it. But some legal experts of the time⁸⁵ claimed that the principle of *non-refoulement* had become a part of customary international law. Customary law is a source of international law, defined as “evidence of a general practice accepted as law”.⁸⁶ It derives from the practice of an international legal personality, i.e. mostly States, together with the opinion, that this practice is legally required (*opinio iuris*).⁸⁷

According to some, this is applicable for the *non-refoulement* principle: “[T]his principle has evolved from a basic humanitarian duty into a general principle of

⁸² Abuya 2007: 65ff.

⁸³ UNHCR (1992): Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees. Geneva: UNHCR: 4.

⁸⁴ Convention relating to the Status of Refugees: Art. 33 (1).

⁸⁵ Goldman, Robert/Scott, Martin: International legal standards relating to the rights of aliens and refugees and United States Immigration Law. In: Human Rights Quarterly, 1983, 5/3: 302-326; Goodwin-Gill, Guy (1978): International law and the movement of persons between states. Oxford: Clarendon Press.

⁸⁶ Art. 38 (1) lit b of the Statute of the International Court of Justice, quoted after Hafner et al 2008: 31.

⁸⁷ Hafner et al 2008: 32f.

international law that binds all States, even in the absence of an express treaty obligation”.⁸⁸

The question whether Kenya respected this rule is debatable: some authors⁸⁹ claim that the government did indeed deport refugees in the early 1980s, especially back to Uganda. Others⁹⁰ reject this allegation as not substantiated and argue that Kenya did not *refoule* refugees. The upholding of the principle of *non-refoulement* was due mainly to financial constraints and the fact that refugees were not a priority to government policies. One article even goes so far as to say: “what may appear to be an open migration policy may be nothing more than the inability of the government to effect any control over [its refugees]”.⁹¹

Refugees were allowed to move freely within the country and to choose their place of residence, which also gave them the possibility to integrate into the host community. As for working, refugees had the right to gain employment and were encouraged to be self-reliant. This encouragement, however, was not provided by the government but rather by the aid agencies, churches and UNHCR. And the theoretical right to work did not mean that refugees found access to the labour market easily: on the contrary, the overwhelming majority of refugees were not working - at least not documented and thus not in the formal economy - but relied on social assistance by aid agencies.⁹² As an example, a research conducted in 1984 found out that only “one percent of the refugees found employment”.⁹³

Refugee children had access to primary education and, in addition, language courses and vocational trainings were offered by churches. Some agencies also provided scholarships and financial aid in order to help underprivileged students to continue their studies. Children thus enjoyed the right to education, but only a small number had effective access to educational institutions due to financial

⁸⁸ Goldman/Scott 1983: 315.

⁸⁹ Juma, Monica (2000): The politics of humanitarian assistance: State, non-state actors and displacement in Kenya and Uganda (1989-1998). Oxford: unpublished doctoral thesis: 132. Quoted after Abuya 2007: 81.

⁹⁰ Abuya 2007: 81

⁹¹ Animesh, Ghoshal/Crowley, Thomas: Refugees and immigrants: A human rights dilemma. In: Human Rights Quarterly, 1983, 5/3: 347.

⁹² Abuya 2007: 72ff.

⁹³ Skari/Girardet 1985: 14.

constraints.⁹⁴ Hence, Kenya allowed refugees to go to school, but did not provide enough affordable facilities.

It can be summarized that during the first decades after independence, Kenya fulfilled its international responsibility as an asylum State to a certain extent. It conducted the RSD process and granted various fundamental rights to forced migrants.

2.2.2. The 1990s: the crash of the protection system

During the late 1980s, the security situation in several countries surrounding Kenya aggravated which led to the increase of uncommonly high numbers of asylum seekers. The largest proportion of refugees originated from Somalia. In 1991, the Somali president, Siad Barre, was overthrown and the following months witnessed the beginning of the ongoing power struggles in the country.⁹⁵ Somalia, which had been under Barre's rule for more than two decades, collapsed after a resistance movement had claimed power and the fighting grew into a civil war that is still continuing today.⁹⁶

This led to the flight of thousands of people heading for Kenya, an average of 800 to 2000 Somalis coming into the country each day.⁹⁷ Since then, Somalis constitute the highest number of refugees in Kenya.

In the same year, Ethiopia's president, Haile Mariam Mengistu, was ousted and several members of the military, students and civilians fled to Kenya.⁹⁸ Furthermore, the civil war in Southern Sudan was still raging, causing a high percentage of Internally Displaced Persons and thousands coming to Kenya. A well-known example are the "walking boys", a group of several thousands of children and young (mostly) men who started walking away from the internal war in Sudan until they arrived in Kakuma refugee camp several years later. The numerous

⁹⁴ Abuya 2007: 75f.

⁹⁵ Heyer, Sonja: Bedingungen von Staatsbildung und Staatszerfall in Somalia. Überlegungen zu einer Theorie des temporären Staates. In: Welttrends. Zeitschrift für Internationale Politik, 1997, 14: 89.

⁹⁶ Heyer 1997: 90ff.

⁹⁷ Kirkby, John et al: UNHCR's Cross Border Operation in Somalia: The value of quick impact projects for refugee resettlement. In: Journal of Refugee Studies, 1997, 10/2: 181.

⁹⁸ Hyndman/Nylund 1998: 24.

internal conflicts resulted in an unexpected rise in asylum seekers, as these statistics show:

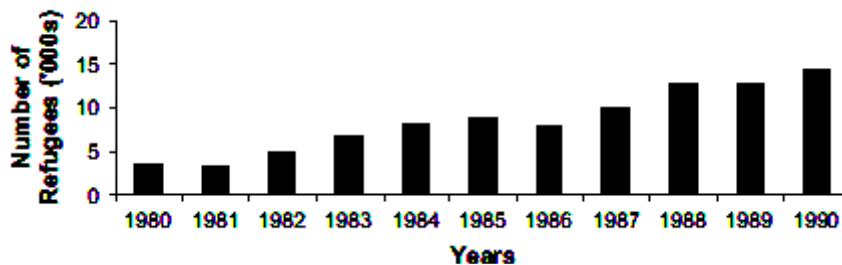


Figure 1: The number of refugees in Kenya, 1980-1990⁹⁹

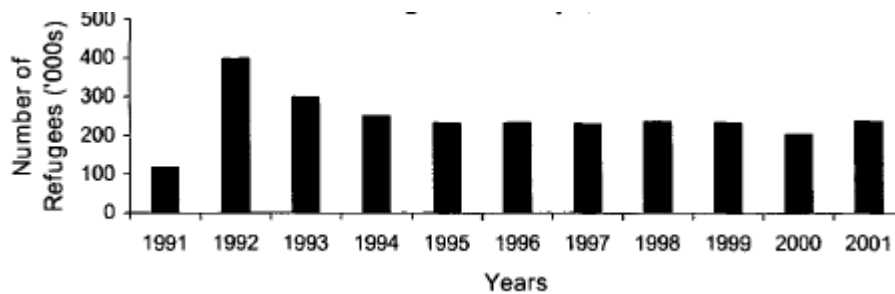


Figure 2: The number of refugees in Kenya, 1991-2001¹⁰⁰

The country had never before experienced such an income of immigrants: “In summary, by 1991 Kenya, which had previously hosted some 15,000 refugees, was playing host to some 130,000 refugees – an increment of more than eight fold. Just over a year later this figure had shot to almost 400,000.”¹⁰¹

The rising numbers caused the total collapse of the Refugee Status Determination and protection system in 1992: while before that, each claim had been processed individually through one-on-one interviews, by then, this was made impossible. Instead of the costly solution of hiring more personnel in Thika and modifying the now inadequate registration and determination process, the government stopped exercising its responsibility towards asylum seekers and asked UNHCR for help. So, it was UNHCR who took over the responsibility for conducting RSD.

⁹⁹ Abuya 2007: 57.

¹⁰⁰ Abuya, Edwin: United Nations High Commissioner for Refugees and Status Determination Imtaxaan in Kenya: An empirical Survey. In: Journal of African Law, 2004, 48/2: 191.

¹⁰¹ Abuya 2007: 84.

The UNHCR Office stepped in this protection gap by deciding to grant asylum seekers refugee status on a *prima facie* basis in order to process asylum claims no longer on an individual but on a group basis.¹⁰²

Another measure of the Kenyan government, apart from suspending the individual status determination, was the creation of refugee camps. This decision was built on the belief that it was necessary for refugees in order to be able to administer them, get the attention of the international community and to raise the now needed additional funds. Therefore, the government provided land for the creation of four camp complexes. The first was created around the coastal area of Mombasa, because Somali asylum seekers began arriving by boat at the coast of the Indian Ocean. Other camps were established around Dadaab, which also were mostly for Somalis. There was another camp near Mandera, a border town next to Ethiopia and Somalia, mainly for Ethiopian and Somali refugees. And finally in Kakuma, a small town near the Sudanese border, a camp was built to host the majority of Sudanese refugees.¹⁰³

The Government of Kenya provided the land for establishing the camps but did not take any additional responsibility: it was left to UNHCR to administer the camps. Together with the creation of these camps, a new policy required refugees to stay in the “designated areas” and not to leave them: “In the bureaucratic jargon of the post-1991 refugee regime in Kenya, refugees *have* to reside in camps ‘until a durable solution is found’.”¹⁰⁴

In 1995, just three years after the establishment of the camps, the government decided to close the ones surrounding the coast and in Mandera, giving the explanation that many refugees there were engaged in illegal economic activities. The refugees residing in these areas were relocated to Dadaab and Kakuma with the help of UNHCR.¹⁰⁵ This decision was heavily criticized: there is no doubt that the forced relocation into remote and unfamiliar regions had negative if not traumatic effects on a large number of these refugees.¹⁰⁶ Concluding, since the mid-1990s, there have now been two main camp complexes where refugees are obliged to stay - including certain exceptions discussed later.

¹⁰² See more on the *prima facie* refugee status in chapter 4.

¹⁰³ Verdirame, Guglielmo: Human Rights and Refugees: The Case of Kenya. In: Journal of Refugee Studies, 1999, 12/1: 56f.

¹⁰⁴ Verdirame 1999: 57.

¹⁰⁵ Verdirame 1999: 69ff.

¹⁰⁶ Interview with Father Eugene Birrer, 27.07.2010

A further consequence of the changing situation was the promotion of voluntary repatriation of refugees. In 1992, the Government under President Daniel arap Moi announced that Somali refugees had to go back to their country and asked UNHCR to organize the return.¹⁰⁷ This was conducted through the “Cross-Border Operation”, during which UNHCR created an area around the Kenya-Somali border, where refugees were provided protection and assistance, similar to the concept of “safe zones”.¹⁰⁸ The aim of this operation was to “promote a process of voluntary repatriation and to avert new refugee influxes”.¹⁰⁹

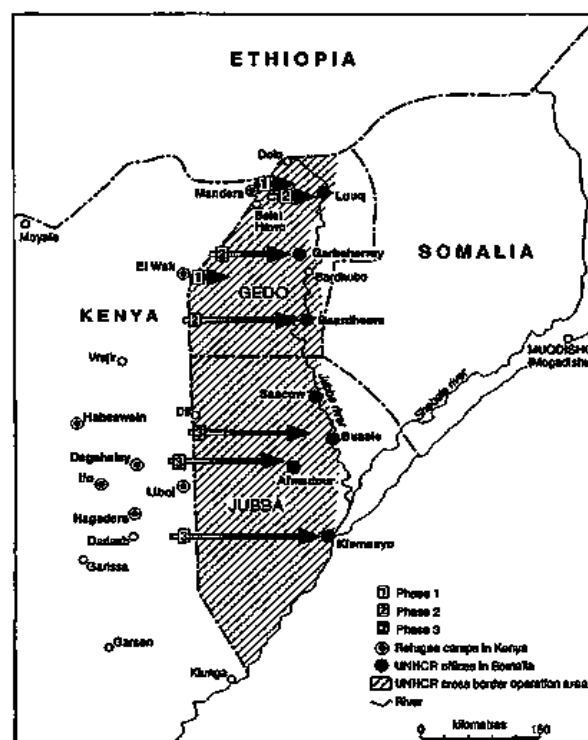


Figure 3: The ‘Cross-Border Operation’ between Kenya and Somali¹¹⁰

To summarize, the 1990s meant a major shift in Kenya’s refugee policy. It was no longer the government that was responsible for refugee protection but this obligation was handed over to UNHCR. Refugee camps were created and asylum seekers and refugees were now obliged to stay in these camps. Repatriation was encouraged, for example for Somali refugees through the creation of “safe zones” by UNHCR.

¹⁰⁷ Hyndman/Nylund 1998: 24ff.

¹⁰⁸ Kirkby et al 1997: 182ff.

¹⁰⁹ Crisp, Jeff: A state of insecurity: the political economy of violence in refugee-populated areas of Kenya. Working Paper No. 16. New Issues in Refugee Research. Geneva: UNHCR: 17.

¹¹⁰ Kirkby et al 1997: 183.

The reasons for this shift are for one, as laid down, the fast increase in the numbers of displaced persons and, accordingly, the surge in asylum claims. Another explanation is Kenya's declining economy and the diminishing funds for asylum procedures which were exacerbated by the Structural Adjustment Programs imposed by the *World Bank* and the *International Monetary Fund*.¹¹¹ The 1990s also saw a rise in xenophobic attitudes and anti-refugee discourse from the highest political leaders.

To put it positively, these measures were aimed at upholding the principles of asylum and *non-refoulement*, but they therefore sacrificed other, previously guaranteed liberties and rights of refugees.¹¹²

¹¹¹ Abuya 2007: 85f.

¹¹² Crisp 1999: 18.

3. Refugee Rights in Kenya today

3.1. An overview

Most refugees in Kenya have lived in the country for many years if not decades and will probably stay for some time to come. The refugee situation in Kenya can thus be called a “protracted situation”. This means that refugees have lived in exile for more than five years without any immediate prospect of finding a durable solution to their plight by means of voluntary repatriation, local integration, or resettlement.¹¹³ That is why this paper focuses on the living conditions and the rights of refugees after arriving in Kenya rather than on the flight, the problems of getting in or the resettlement process.

The subsequent chapters are divided chronologically following the steps a forced migrant faces in Kenya: at first, a look into the principle of *non-refoulement* will be taken as it provides the basis for the stay in the host country without being expelled. Secondly, the RSD process will be discussed, as obtaining refugee status is required in order to be able to exercise other rights. And then, after having arrived in the country, for most the typical concern is the question where to live, which gives rise to discuss at length the issues of employment and the right to work, elaborating the similarities and differences between refugees living in camps and urban refugees. Finally, problems such as security and police harassment will be discussed shortly.

The choice of the mentioned rights is mostly based on the field work carried out. Before going to Kenya, I had a very clear idea of which rights I considered important for refugees - for example, I thought it essential to receive the official refugee status. But in the course of the interviews and participant observations, both experts and refugees seemed to have a different prioritization, such as the desire to work or problems with the police due to IDs. I therefore adapted my hypotheses in order to present those rights which have been considered as being most important by the people involved.

¹¹³ Crisp, Jeff (2003): No solutions in sight: the problem of protracted refugee situations in Africa. New Issues in Refugee Research. Working Paper No. 72. Geneva: UNHCR.

Each chapter will begin with the theoretical analysis of the respective right and Kenya's international and national obligation, before comparing the theory with the practice, and thus see if refugees do indeed enjoy these rights today. The aim is to verify the assumed discrepancy between the law in the books and the actual legal situation.

3.1.1. The contextualization of the term "refugee"

One interviewee in Kakuma noticed: "Before I came to Kenya, I was all sorts of things. The moment I crossed the border, suddenly all I was, was a refugee."¹¹⁴

The use of the term „refugee“ is inevitable in this paper, which makes it all the more important to be aware of the connotations it invokes. Refugees are often represented as victims, as helpless and vulnerable - one explanation is that this image is useful for agencies and organizations to generate funds. It is assumed that to portray refugees as a group desperately in need of international assistance, donors will be less reluctant to finance a project. This representation can be observed more generally in the development discourse and the stereotypes adhered to the opposition between "merciful helpers" and "thankful receivers".¹¹⁵

"Contrary to what I believed in Uganda [before being expelled], a refugee is not just a person who has been displaced and has lost all or most of his possessions. A refugee is in fact more akin to a child: helpless, devoid of initiative, somebody on whom any kind of charity can be practised, in short, a totally malleable creature."¹¹⁶

Related to this construction is the idea that refugee populations are a homogenous group with equal needs and concerns, disregarding the endless differences in age, country of origin, gender, education, etc.¹¹⁷ Unlike in earlier decades, when refugees were sometimes equalled with "freedom fighters", today, there exists a dichotomy between "good" and "bad" refugees. "While images of the 'good' refugee who is starving and helpless may motivate people to become helpers, there

¹¹⁴ Conversation with a refugee at Kakuma, September 2010

¹¹⁵ For example in Gomes, Bea de Abreu Fialho/Maral-Hanak, Irmi/Schicho, Walter (2006): Entwicklungszusammenarbeit. Akteure, Handlungsmuster und Interessen. Wien: Mandelbaum.

¹¹⁶ Mamdani, Mahmood (1973): From citizen to refugee: Ugandan Asians come to Britain. London: Frances Pinter: 7.

¹¹⁷ Harrell-Bond, Barbara: Can Humanitarian Work with Refugees be Humane? In: Human Rights Quarterly, 2002, 24/1: 56f.

is an alternative stereotype of ‘bad’ refugees as thankless, ungrateful, cheating, conniving, aggressive, demanding, manipulative, and even dangerous persons (...).¹¹⁸ This can be observed in Kenya as well, where refugees are on the one hand treated as victims who need help in form of food distributions and the like, but are on the other hand obligated to stay in remote parts of the country, hindered to enter the job market or, in the case of Somali refugees, even prevented from entering the country.

Thus, the term refugee is highly essentialist and constructed - this thesis will not deconstruct this concept, but will rather be aware of its implication and use a rights-based approach defining refugees as everyone seeking asylum.¹¹⁹

Another notion that needs to be examined shortly is the way gender is interpreted in regards to refugees. Although worldwide the majority of forced migrants are female, refugees are usually perceived as male, while women are a subcategory mostly only mentioned when discussing special needs and vulnerabilities.¹²⁰ The last years have seen improvements, as for example gender-based reasons for flight have been acknowledged, so that a woman escaping forced marriage or female genital mutilation now has the right to receive refugee status.¹²¹

Similar to development circles, where a feminist critique of the essentialization of “Third World women” has resulted in a more critical approach towards gender in development, discussions among Refugee Studies have led to the deconstruction of “refugee women” as a fight against the victimization and generalization of this category.

3.1.2. Internally Displaced Persons

Not always do those who are forced to flee cross an international border - they are then not considered asylum seekers or refugees but Internally Displaced Persons

¹¹⁸ Harrell-Bond 2002: 58.

¹¹⁹ Legally, there is a strict distinction between asylum seekers and refugees, as somebody can only be called „refugee“ through receiving the official status after RSD. This distinction will be observed in this paper when writing about the legal category, e.g. the section on RSD or right to work, but not when the two terms can be used interchangeably.

¹²⁰ Foote, Victoria: Refugee Women as a Particular Social Group: A Reconsideration. In: *Refuge*, 1994, 14/7: 8.

¹²¹ Cisse, Bernadette Passade: International Law Sources Applicable to Female Genital Mutilation: A Guide to Adjudicators of Refugee Claims Based on a Fear of Female Genital Mutilation. In: *Columbia Journal of Transnational Law*, 1997, 35: 429-451.

(IDP). They have become a growing concern to the international community, foremost because there are more IDPs than refugees worldwide, especially in Africa, and due to the vague legal framework that applies to them.¹²² IDPs often face very similar problems to refugees, but lack the assistance of organizations that refugees enjoy - for example, no single UN agency is responsible for IDPs. In Somalia and Sudan, the countries of origin for most refugees in Kenya, there are by far more IDPs there than refugees in Kenya.¹²³

However, as this paper takes a right-based approach and compares the framework for refugees, IDPs will be excluded from the analysis, as it would open another important but misplaced discussion.

3.2. The fundamental principle of “Non-Refoulement”

Before elaborating on civil rights for asylum seekers and refugees, the right not to be expelled when persecuted has to be examined. *Non-refoulement* is the first step towards protection for persecuted persons, because it forbids States to return asylum seekers without an assessment of their case. After laying down the State’s obligation regarding this principle, it will be examined whether asylum seekers and refugees do indeed enjoy this right in Kenya.

3.2.1. Kenya’s obligation

For refugees, in order to find protection, it is fundamental that they are not returned or expelled to any country where they might be persecuted, foremost the country that they have fled from in the first place. This right is called the principle of *non-refoulement*,¹²⁴ prominently laid down in the *UN Refugee Convention*:

*“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.”*¹²⁵

¹²² Vincent, Marc: The UN and IDPs: improving the system or side-stepping the issue? In: Humanitarian Exchange Magazine, 2002, 19.

¹²³ Internal Displacement Monitoring Centre: Countries. Somalia; Sudan. 2011.

¹²⁴ The term derives from *refouler*, French for “to force back” or “to push back”.

¹²⁵ Convention relating to the Status of Refugees: Art. 33 (1).

This principle is the cornerstone of refugee rights and a rule clearly designed to benefit refugees, as it offers the right to stay in the country of arrival without fear of being sent back to the dangers they fled from.

The applicability of this principle is further enhanced by the popular opinion that *non-refoulement* has in fact become an integral part of customary international law.¹²⁶ Additionally, this opinion was strengthened by the fact that State practice in the last half-century has shown a strong commitment not to return refugees, based on international law.¹²⁷

The wording of the above cited paragraph is quite self-explanatory; it only needs further interpretation on some aspects. For example, the question whether it only applies to refugees already within the territory of the country of asylum or if it also states an obligation of non-rejection of an asylum seeker at the border: in short, if there is a duty to admit an asylum seeker or not. The majority of countries follows the concept of an obligation and has recognized that *non-refoulement* starts the moment the asylum seeker presents him- or herself for entry. This means that “the concept now encompasses both non-return and non-rejection”¹²⁸ at the border and “implies at least temporary admission to determine an individual’s status”.¹²⁹ The temporary admission, in order to conduct the Refugee Status Determination, is vital as a person may otherwise be sent back awaiting persecution and a possibly life-endangering situation. This is an important assertion, as it means that *non-refoulement* offers not only protection for recognized refugees, but also for everybody seeking asylum, at least until their Status Determination Process is completed.

Another question sometimes raised is if *non-refoulement* has to be strictly adhered to even in the case of a large-scale influx which may constitute a threat to the administration, economy and environment of the country of asylum. The answer is yes: even if a sudden arrival of large movements of asylum seekers threatens to overwhelm the capacity of the host country, rejection or expulsion are not permitted. This implies that *non-refoulement* is not only applicable to individuals but also to a large group of persons. The most prominent case of a sudden influx of large numbers of asylum seekers in Africa and the question whether the

¹²⁶ Customary law originates from the constant practice of countries and the belief that this practice is legally required, see above.

¹²⁷ Goodwin-Gill 2007: 211ff.

¹²⁸ Goodwin-Gill 2007: 208.

¹²⁹ Goodwin-Gill 2007: 215.

surrounding countries had to admit them or not was the Great Lakes refugee crisis after the Rwanda genocide. In the aftermath of the genocide, Tanzania and Zaire expelled thousands of asylum seekers, mostly due to valid security problems. Noteworthy is the explanation of these countries: both countries did not argue against the applicability of the principle of *non-refoulement* in a mass influx situation, but rather denied violating the law and justified the expulsions by stating that the people who had been expelled were not genuine refugees but illegal aliens.¹³⁰ The *OAU Convention* also contains the principle of *non-refoulement* in Article II.¹³¹ The provision of this *Convention* goes a step further than the UN *Convention*, as the *non-refoulement* principle of the UN *Convention* is accompanied by an exception: expulsion is not prohibited if an individual refugee is a danger to the security or to the community of the country of asylum.¹³² There is no such limitation in the *Convention* of the African Union, which is why the provision is considered an “absolute” prohibition of *refoulement*.¹³³ Moreover, the *OAU Convention* expressly forbids rejection at the border, thus enhancing the right of asylum seekers to have their status determined.

Historically, Kenya has only recently integrated the principle of *non-refoulement* into its domestic framework as recently as 2006, with the *Refugee Act*. As a dualist State, it was not bound by any international Convention before. However, there is a strong consensus that the principle of *non-refoulement* had already been established as part of international customary law - that is law that was generated by consistent and widely accepted State practice and the belief that this practice is legally required. Arguments supporting this point of view draw on a number of regional instruments, soft laws and various domestic frameworks embodying *non-refoulement*. Further, State practice since the establishment of this rule and the argumentation whenever a State did in fact *refoule* refugees are in favour of the

¹³⁰ Goodwin-Gill 2007: 229ff.

¹³¹ Convention Governing the Specific Aspects of Refugee Problems in Africa: Art. II (3): “No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened (...).”

¹³² Convention relating to the Status of Refugees: Art. 33 (2): “The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”

¹³³ Okoth-Obbo 2001: 89f.

idea of *non-refoulement* as part of international customary law.¹³⁴ Others dismiss this opinion as being “wishful thinking”¹³⁵ and argue that there is not enough evidence of State practice to support this view. This discussion is in fact vital, as it defines whether or not Kenya was obliged to adhere to this principle and thus, whether forcibly returning refugees constituted a breach of international law before the enactment of the *Refugee Act* in 2006. As incidents of *refoulement* have in fact taken place before, this legal ambiguity was not helpful, on the contrary: a judicial controversy concerning such a fundamental refugee right furthers a situation of legal insecurity instead of presenting a strong voice against the endangering of lives.

Today, the *Refugee Act* prohibits *refoulement* and even broadens the *Refugee Convention* definition, stating that:

*“No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or to subjected any similar measures, if [...] the person may be subjected to persecution on account of race, religion, nationality, membership of a particular social group or political opinion or the person’s life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of that country.”*¹³⁶

This should answer several questions: The Act finally makes this principle applicable in Kenya and puts an end to the discussion whether it is embedded in customary law or not. Every person has the right to be admitted in order to conduct their status, which means that not only refugees, but also asylum seekers are protected from being *refouled*. That is the reason why the wording has been widely praised – it guarantees legal security and offers wide protection to people fleeing into Kenya.¹³⁷

3.2.2. *Refoulement* of Somali refugees?

Incidents of *refoulement* in Kenya have been reported for many years, mostly by humanitarian agencies, international NGOs and national newspapers. Academic

¹³⁴ Goodwin-Gill 2007: 208ff.

¹³⁵ Abuya 2007: 83f.

¹³⁶ The Refugee Act: Art. 18.

¹³⁷ Muigua 2010: 67

literature has been reluctant to pick up this subject, thus the following descriptions are based mostly on NGO reports and further on some of the interviews conducted.

During the 1970s and 1980s, the so-called “golden age” of asylum, Kenya, as the majority of African countries, upheld the main principles of asylum, including *non-refoulement*. However, during this period, there have been some incidents reported, such as the case of a pick-up of around 2.500 Ugandan refugees who were taken at night by the police and deported over the border back to Uganda.¹³⁸ Still, there were not many incidents of *refoulement* in general - this is often explained by the government’s open policy towards asylum seekers. Another explanation may be the Kenyan government’s limited resources in regards to immigration and refugees.

The 1990s marked the beginning of a globally stricter regime towards forced migrants. This was also clearly visible in terms of *refoulement* as, for example, in the year 1996 alone, more than twenty countries expelled refugees from their territories.¹³⁹ An example is the Great Lakes refugee crisis after the Rwandan genocide, when Tanzania ordered “all Rwandan refugees” to leave the territory as part of the *Operesheni Rudisha Wakimbizi*, which did indeed constitute forced repatriation and, thus, a breach of the *non-refoulement* principle.¹⁴⁰ In Kenya, the shift towards a more restrictive treatment of asylum seekers and refugees coincided with the arrival in large numbers, and the collapse of the asylum system and its shift towards UN responsibility.

One measure, which was heavily criticized internationally, was Kenya’s closure of the border with Somalia in January 2007. The background for this decision was the invasion of Ethiopian troops into Somalia in support of the Transitional Federal Government of Somalia. A spread of the Somali conflict by fighters entering Kenya was feared, therefore endangering Kenya’s national security. Kenya’s then Foreign Minister Raphael Tuju said that the country was “not able to ascertain whether

¹³⁸ Juma, Monica (2000): The Politics of Humanitarian Assistance: State, Non-State Actors and Displacement

in Kenya and Uganda (1989-1998). Unpublished Doctor of Philosophy Thesis: University of Oxford: 132. quoted after Abuya 2007: 81.

¹³⁹ Whitaker, Beth Elise (2002): Changing priorities in refugee protection: the Rwandan repatriation from Tanzania. New Issues in Refugee Research. Working Paper No. 53. Geneva: UNHCR: 330.

¹⁴⁰ Whitaker 2002: 330ff.

these people [Somali immigrants] are genuine refugees or fighters and therefore it's best that they remain in Somalia."¹⁴¹ Since then, hundreds of Somali asylum seekers have been either hindered from entering or, more frequently, sent back to Somalia.

To close a border in order to prevent the arrival of refugees violates the principle of *non-refoulement*: as laid down above, rejection of asylum seekers at the frontier is already considered as violating the principle of not returning a person to a place of possible danger. Border closures automatically reject all possible asylum seekers at the frontier and place them at risk of further persecution, thus violating this principle.¹⁴² Especially at the beginning of the closure, many Somalis were hindered from entering Kenya. But the 680 km border is hard to control and today, this measure does not effectively prevent the entrance of Somali asylum seekers, as alone in 2008 around 60.000 new arrivals crossed the border.¹⁴³

The reason for the closure given by the government was their concern with national security. It is indeed valid to expel a refugee due to his or her threat to the security of the country of asylum. But this is a measure only applicable for individual refugees after a fair process in which the individual is examined, thus it is not possible before an asylum procedure has taken place.¹⁴⁴ But the border closure denies access to a fair asylum process. As neither a RSD process took place nor did the closure regard specific individuals, concerns for national security were hence not a valid reason for border closure.

The impact of the closing was foremost a decline in the upholding of human rights, arbitrary police arrest and numerous incidents of *refoulement*. As for today, Somali citizens continue to cross the border - not at established border points, but rather seeking alternative entry points in order to avoid security personnel, often paying smugglers to help cross the border. Once in Kenya, the new arrivals are sometimes taken by the police and forced to pay a bribe or else taken to prison and often deported back to Somalia. This is in fact so endemic that smugglers often include

¹⁴¹ Quoted after Human Rights Watch 2009: 12.

¹⁴² Amnesty International (2007): Kenya. Denied refuge. The effect of the closure of the Kenya/Somali border on thousands of Somali asylum seekers and refugees. London: amnesty international: 7ff.

¹⁴³ Human Rights Watch 2009: 1.

¹⁴⁴ Amnesty International 2007: 8.

the bribes to be paid as part of their fees.¹⁴⁵ Together with the Somali border, the UNHCR run Refugee Centre of Liboi was closed, so that now, asylum seekers have to make all the way of more than 100 km to the Dadaab camps in order to claim refugee status - and are not provided with assistance in the border area. This, again, increases their vulnerability of attacks and police harassment and has the side-effect that they are not documented at the earliest, in turn enhancing a phenomenon the Kenyan government tries to overcome - “illegal immigration”.

One incident of *refoulement* in connection with the closure is well documented: At the day of the border closure in 2007, around 400 people were forced to return to Somalia. They had been waiting at the Refugee Centre of Liboi, when Kenyan police ordered them into a truck and drove to the Somali side of the border to an unknown place, where they were left without any further thoughts about humanitarian assistance or the reasons for their flight.¹⁴⁶

The *Refugee Act* came into operation at the beginning of 2007, and the closure and the following incidents of forcible expulsion or return happened earlier the same year, hence violating Kenya’s national and international obligations regarding *non-refoulement*.

Apart from the border closure, which still continues today, every year incidents of forcible return are reported, mostly about Somali immigrants. Refugees in Kenya are in general not allowed to move freely across the country but obliged to stay in refugee camps or ask for a *Movement Pass* in order to travel from one place to another.¹⁴⁷ But often, the police ignore the *Movement Pass* of refugees and threaten them with forced removal or arrest them in order to extort bribes.¹⁴⁸

There have been numerous cases of people being subsequently sent back to their countries of origin without further procedure as to whether they are recognized refugees. Sometimes, ignoring their refugee status, these refugees are charged with unlawful entry or presence. But more often, the police simply send back individuals they consider illegal immigrants.

¹⁴⁵ Human Rights Watch 2009: 21f.

¹⁴⁶ Amnesty International 2007: 3f.

¹⁴⁷ For more see the chapter on „Freedom of Movement“

¹⁴⁸ Amnesty International (2010): From life without peace to peace without life. The treatment of Somali refugees and asylum seekers in Kenya.

An example is the story of a 26-year old asylum seeker who arrived in Nairobi and got an *Appointment Slip* from UNHCR for the RSD process. Unfortunately, he was stopped by police officers, who tore his letter into pieces, and charged him with illegal entry. In court, where he was not represented by a lawyer and did not follow the proceedings very well due to language problems, he was sentenced to a fine and repatriation to his country of nationality. The court did not assess his claims that he was in fact a refugee. Fortunately for him, while in prison waiting to be sent back, a refugee rights advocate heard of his case and helped him.¹⁴⁹

Another example occurred in July 2008, when around 70 Somali refugees were stopped by the police and detained for ten days in a prison in Garissa, a town near the Somali border. They were later picked up by the police and driven to Somalia, told to get out of the pick-up and not to return.¹⁵⁰ Those were just two examples that happened to be reported to international or Kenyan NGOs and therefore became public. But there exist estimates that say that these reports are only the tip of the iceberg and *refoulement* happens on a regular basis.¹⁵¹

One reason lies in the change of refugee policy through the *Refugee Act* in 2006, implemented in 2007. Before this Act, refugees were not addressed legally as a special category but fell under class M immigrants according to the *Immigration Act* of 1967. Today, the *Immigration Act* is still in place, but not valid for refugee-specific issues. The *Immigration Act* punishes “unlawful entry” into Kenya with a fine and repatriation.¹⁵² But the *Refugee Act* explicitly prohibits punishment for illegal entry when asylum is claimed.¹⁵³ The knowledge about refugee rights in general and the new Act in specific is not yet widespread among the Kenyan police and justice personnel. “In general, the Courts in Kenya do not appreciate refugee matters; often they decide to return a refugee without further investigating when

¹⁴⁹ Njamwitha, George: The legal dilemmas facing refugees. In: Refugees Insights. Newsletter of the Refugee Consortium of Kenya, July-September 2005: 3ff.

¹⁵⁰ Human Rights Watch 2009: 18.

¹⁵¹ Human Rights Watch 2009: 17.

¹⁵² Amnesty International 2010: 6.

¹⁵³ Section 11 paragraph 3 of the Refugee Act: “no person claiming to be a refugee within the meaning of section 3 (1) shall merely, by reason of illegal entry be declared a prohibited immigrant, detained or penalized in any way” and section 13: “no proceedings shall be instituted against any person or any member of his family in respect of his unlawful presence within Kenya - (a) if such a person has made a bona fide application under section 11 for recognition as a refugee, until a decision has been made on the application and, where appropriate, such person has had an opportunity to exhaust his right of appeal under that section: or (b) if such person has become a refugee.”

someone is charged with unlawful presence.”¹⁵⁴ Recently, in February 2010, two decisions of the High Court of Kenya were pronounced which quashed the conviction of refugees travelling from Kakuma to Nairobi unlawfully and therefore, making a statement in favour of the *Refugee Act* and denouncing the attempted *refoulement* of those refugees.¹⁵⁵

In a nutshell, there have been positive developments in Kenya to prevent the *refoulement* of refugees, namely the implementation of the principle in the *Refugee Act* and a strengthened application of this rule. At the same time, numerous cases of *refoulement* have been reported, especially of Somali refugees in connection with the border closure in 2007. The concerns about a spread of violence and the Somali conflict over the border into Kenya were legitimate, but the measure of border closure was neither in line with international and national refugee law nor effective in regards to national security, as Kenya’s Minister of Immigration, Otieno Kachwang, stated: “The border closure has not achieved what it was intended for”.¹⁵⁶

One interviewee concluded to doubt that many incidents of *refoulement* happen in Kenya today, mostly because of the costs and logistics it involves: “*Refoulement* is costly and if the refugees are left in the country, it’s the UNHCR that takes care and not the Government, so it does not make sense to deport refugees.”¹⁵⁷ Thus, it can be said, that incidents of *refoulement* do indeed take place, especially in border areas and at a higher risk for Somali refugees, but not on a large scale. However, every single case that leads to the persecution of an asylum seeker or refugee is a breach of this life-saving right.

¹⁵⁴ Interview with Linet Opiyo, UNHCR Nairobi, 13.08. 2010

¹⁵⁵ Republic of Kenya in the High Court of Kenya in Nakuru: Criminal Revision No. 205 of 2010 and Criminal Revision No. 58 of 2010.

¹⁵⁶ Quoted after Human Rights Watch 2009: 13.

¹⁵⁷ Interview with Edwin Abuya, 10.07.2010

3.3. From “asylum seeker” to “refugee”: the Refugee Status Determination Process

A person seeking refuge has to undergo a procedure - the Refugee Status Determination Process (RSD) - in order to determine whether this person falls under the legal definition of “refugee” and is eligible to protection. The status of a refugee is vital for a number of civil and economic rights, such as for the right to work, to apply for resettlement and for protection from *non-refoulement*. In many European countries, the steps of getting the status often take several years and are full of legal hurdles - this development is also seen in Kenya. There are two RSD procedures in place: individual RSD and *prima facie*. The process laid down here describes the individual status determination process - in Kenya, Somali and Darfurian asylum seekers undergo a more rapid *prima facie* process which will be examined further down, in chapter 4. After presenting the different steps of the process, several problems inherent to RSD will be discussed.

3.3.1. RSD in Kenya

International refugee and human rights law do not regulate the principles of RSD or the duration of the process. Therefore, it is upon every State to decide its own procedure. In Kenya, the RSD used to be processed by an Eligibility Committee headed by the Kenyan Government. They conducted interviews with the individual asylum seeker and decided whether he or she fell under the legal category of “refugee”. A formal procedure for determination had not been established but the Committee took interviews on an individual basis and assessed the cases with regards to the *Immigration Act* and the 1951 *Convention Relating to the Status of Refugees*.¹⁵⁸ In 1991, due to the rapid increase in numbers of asylum seekers and the limited resources allocated to refugees,¹⁵⁹ the governmental RSD programme broke down and UNHCR stepped in. They began to process asylum claims and still do so today. Under the *Refugee Act*, the Government of Kenya is responsible for RSD through the Commissioner for Refugee Affairs, who shall help the Committee

¹⁵⁸ Abuya 2004: 187f.

¹⁵⁹ See above 2.2.1.

and “receive and process applications for refugee status”.¹⁶⁰ Until now, this task has not yet been resumed by the Government.

Today, the RSD is processed both in Nairobi and the two camp complexes by UNHCR on the basis of the UN *Refugee Convention* and the OAU *Convention*. After entering the country, the asylum seekers have to present themselves at UNHCR and ask for an interview - the majority apply for the status determination in one of the camps. In Kakuma, new arrivals have to present themselves at the *Department of Refugee Affairs* which will transfer them to UNHCR. UNHCR can then declare a person a “Mandate refugee” - but as it is not a State and, hence, does not have the sovereignty to declare someone a refugee, the legal status could be challenged. This results in the problem of ID issued by UNHCR, as will be shown further down in chapter 3.6.

There are different procedures depending on the country of origin: Somali and Darfurians are granted *prima facie* refugee status, Eritreans and Ogadens from Ethiopia are subject to a fast track procedure as they are almost always considered refugees. Southern Sudanese refugees have a very low acceptance rate and generally come to Kenya to flee poverty or lack of educational opportunities, which do not fall under the *Convention* definition. Therefore, there is also an accelerated process for Southern Sudanese, where the claimant is usually immediately rejected or offered full individual RSD. All other nationalities automatically undergo individual RSD.

UNHCR Nairobi operates in the neighbourhood of Westlands, where huge numbers of people arrive every day early in the morning in order to register. They are registered and questioned by a UN officer and usually directly transferred to either Dadaab or Kakuma camp. If they wish to stay in Nairobi, they have to sign that they can provide for themselves independently from UN help and receive an *Appointment Slip* (also known as *Appointment Letter*), a document that indicates the date of the registration. At the time of research, in August 2010, the earliest date available was March 2012 (hence one and a half years).¹⁶¹ After registration, the applicants come back at the indicated date and are questioned about “their bio data, date of the entry into Kenya, country of origin, family situation, former

¹⁶⁰ The Refugee Act 2006: Art. 7 (2) lit g.

¹⁶¹ Interview with a Registration Officer at UNHCR Nairobi, 13. 08. 2010

work, their fingerprint to ensure that nobody tries to come back under another name once rejected, their dependents are all written down on a form and a photograph.”¹⁶². If literate, they write down their life stories and why they were compelled to leave their countries of origin. They then receive a *Registration Letter* and are once again asked to come back in order to conduct the RSD interview. In the interview, the asylum seekers describe their lives, the reasons for the flight, the way they entered Kenya etc. The Eligibility Officer, who conducts the interview, often with the help of a translator, then gives a recommendation on how to decide the case. The recommendation is generally accepted by the Protection Officer who is responsible for the decision. In case the applicant is rejected, they receive a form letter stating the decision and reasons for the rejection, and that the applicant has the right to make a written appeal within 30 days of notification. The reasons for the negative decision are highly cursory and general, such as “lack of credibility”, “inconsistency” and “lack of well-founded fear” - this makes it difficult to appeal. On appeal, the decision will be made by a different Protection Officer: it is either reversed or confirmed, sometimes with a second interview beforehand. If reversed, the asylum seeker is given refugee status and a *Mandate Letter*. If the decision is confirmed and the case thus rejected, the asylum seekers have the possibility to “request a reopening” of the case, which is seldom approved, otherwise they have to leave the country within 30 days.

3.3.2. Justice delayed is justice denied

“The process for RSD can take quite a long time, unfortunately, because of the limited resources that we have and the huge number of new arrivals that we’re getting, who require full RSD.”¹⁶³

There is no internationally binding refugee or human rights instrument that prescribes a time limit for the RSD process, neither does Kenyan law. The UNHCR Handbook requests its officers to process RSD claims “in the most timely and efficient manner possible”,¹⁶⁴ the time between the date of registration until the

¹⁶² Interview with an Eligibility Officer at UNHCR Nairobi, 13. 08. 2010

¹⁶³ Interview with Jeffrey Savage, UNHCR Kakuma, 09. 09. 2010

¹⁶⁴ UNHCR (2003a): Procedural Standards for Refugee Status Determination Under UNHCR's Mandate. Geneva: UNHCR: 1-2.

RSD interview should not exceed six months,¹⁶⁵ and a decision should be reached within two months after the interview.¹⁶⁶ This requirement is not met by UNHCR itself. In an empirical study conducted on RSD in Kenya, about 70% of the claimants interviewed complained about the delay between their first contact with UNHCR until the final decision.¹⁶⁷ It mostly takes several years of waiting until a decision is reached, or even longer if the decision is negative and an appeal is made.



Picture 1: Illustration from an artist at Kakuma refugee camp¹⁶⁸

In Kakuma, during the month of August 2010, UNHCR finalized over 100 decisions, yet during that same time, over 200 new asylum seekers arrived. Therefore, the backlog is quite substantial: “Right now, we just finished all of the 2007 cases, so it’s at least two years.”¹⁶⁹ The situation is similar at UNHCR Nairobi.

There are rare cases for which the process is fastened, for example for high-insecurity-cases or victims of trauma. In 2001, a group of Ethiopian students fleeing into Kenya went on hunger strike after delay in the RSD, requesting the assessment of their cases in order to complete their studies. The incident was being widely

¹⁶⁵ UNHCR 2003a: 3-29.

¹⁶⁶ UNHCR 2003a: 4-20.

¹⁶⁷ Abuya 2004: 194.

¹⁶⁸ Kanere: Refugee Status Determination: Justice Delayed is...Typical? In: Kakuma News Reflector - A Refugee Free Press, 2009b, 1/3.

¹⁶⁹ Interview with Jeffrey Savage, UNHCR Kakuma, 09. 09. 2010

reported and the students were guaranteed a timely procedure.¹⁷⁰ These are, however, exceptions to the rule of prolonged procedures.

Essentially, the reasons behind the backlog are financial restraints of UNHCR. For years, the organization experienced a shortfall of income, which forced them, among other measures, to cut back on staff.¹⁷¹ However, it should be remembered that it is not actually UNHCR that is responsible for RSD and that the Government of Kenya does not yet meet its legal obligations. Several steps towards a greater responsibility of the *Department of Refugee Affairs* have been taken - hopefully, the process will be shifted to the DRA within the next years.¹⁷²

During the years of waiting, due to lack of recognized documentation, many asylum seekers remain vulnerable to arrest, police harassment and deportation as illegal aliens.¹⁷³ Therefore, the old legal saying “justice delayed is justice denied” does have its true core in this case.

3.3.3. The option of appeal

If the decision from the Status Determination is negative, the asylum seeker is not considered a genuine refugee. He or she will receive a written letter of rejection stating in ambiguous terms the reasons for rejection, for example: “Upon consideration of your application for registration as a refugee in Kenya, we regret to inform you that your case was rejected for substantial material inconsistencies and in particular your claim was found incredible with respect to your background, reasons for flight and available country of origin information. Further, your claim did not satisfy the [R]efugee [C]onvention criteria.”¹⁷⁴

The effects of such generalized terms cannot be underestimated: in order to file an appeal, the applicant has to state the reasons as to why his or her case does indeed fit the refugee definition. How can he or she challenge the decision if it is not clear why the claim was found incredible in the first place? Further, legal assistance is

¹⁷⁰ Abuya 2004: 197f.

¹⁷¹ Jamal, Arafat (2000): Minimum Standards and Essential Needs in a Protracted Refugee Situation: A Review of the UNHCR Programme in Kakuma, Kenya. Geneva: UNHCR: 4.

¹⁷² Interview with an Officer from the DRA Kakuma, 09. 09. 2010

¹⁷³ Refugee Consortium of Kenya: Forum: UNHCR refugee status determination: The Kenyan experience. Report presented at the UNHCR Executive Committee Meetings in Geneva, October 2005: 2.

¹⁷⁴ Abuya 2004: 199.

normally expensive and scarce in the camps - RCK and *Kituo cha Sheria* have begun to step into this protection gap. And apart from legal considerations: being essentially called a liar often has a negative effect on asylum seekers already battling trauma.

The claimant can then file a written appeal within 30 days. The time limit is quite restrictive. However, it is not exercised strictly.¹⁷⁵ Here again, the presence of legal counselling through NGOs is vital.

For the appeal, the applicant may be interviewed again depending on whether the application is based on new evidence or on a procedural error. The appeal has to be processed by a different officer than the one who decided in the first instance. This is essential in safeguarding an independent evaluation of the case. Yet, this may seem difficult in a camp setting with a limited amount of personnel who work and live closely together. Here again, resources and more personnel are required to fill this gap.

To put it in a nutshell, it is the State that is legally responsible to carry out Status Determination, but this task has been taken up by UNHCR due to Kenya's failure in the 1990s to guarantee RSD. International and Kenyan law fail to set a clear framework for RSD, which makes the process vulnerable to budget constraints. These financial limits are mostly responsible for many of the flaws in the process, such as a delay in the assessment of the claims which includes long waiting times during which the person is restricted in several rights. Also, it may cause a difficult situation for the asylum seeker in case the decision is negative after years of living in Kenya. It is in the interest of all parties involved (asylum seekers, country of asylum, UN, NGOs, country of origin, etc.) to fasten the process.

Another problem is the lack of explanation in case of a negative decision and consequently, the difficulty to file a successful appeal. Here, legal counselling is necessary in order for asylum seekers to enjoy their full rights. The importance for a fair and fast RSD process is evident as the applicant otherwise may not receive the refugee status and be sent back to the country of origin: "The determination of

¹⁷⁵ Interview with an Eligibility Officer at UNHCR Nairobi, 13. 08. 2010

refugee status has potentially profound implications for the life and security of the individuals concerned.”¹⁷⁶

3.4. Freedom to move and choose a place of residence

By analyzing the basic human- and refugee rights instruments together with national law, this chapter addresses the issue whether refugees have the right to free movement in Kenya. Further, it compares the factual situation of refugees’ lives in camps and urban centres to answer the question whether or not these rights can be exercised in practice.

3.4.1. The freedom of movement as a human right

The exercise of the freedom of movement and choice of residence cannot be overestimated - for example, a court decision on this right argues that the liberty to move within States is a prerequisite for the enjoyment of any other human right.¹⁷⁷

The freedom to move within a State and to choose a place of residence is one of the most basic human rights and thus protected by numerous treaties and agreements. Internationally, first evidence of this right is found in the *Universal Declaration of Human Rights (UDHR)*, agreed upon in 1948, which states in Article 13 (1) that “everyone has the right to freedom of movement and residence within the borders of each State”.¹⁷⁸ The *International Covenant on Civil and Political Rights (ICCPR)* was, together with the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, an elaboration of the *Universal Declaration of Human Rights*, with the aim to expand international human rights and implement them better through the therefore established Human Rights Committee. Today, the ICCPR is the treaty fundamental for the freedom of movement within States.¹⁷⁹

¹⁷⁶ UNHCR 2003a: 1-1.

¹⁷⁷ *Aptheker vs. Secretary of State* (1964) 378 US 992, cited after Beyani, Chaloka 2000: 3: “Freedom of movement, at home and abroad, is important for job and business opportunities - for cultural, political and social activities - for all the commingling which a gregarious (person) enjoys.”

¹⁷⁸ *Universal Declaration of Human Rights*. UN: 1948: Art. 13 (1).

¹⁷⁹ Beyani, Chaloka (2000): *Human Rights Standards and the Free Movement of People within States*. Oxford: Oxford University Press: 7.

It provides the right to liberty of movement and freedom to choose his or her residence in Article 12, stating in paragraph 1:

“Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”¹⁸⁰

In analyzing this phrase, it can first be noted that the Covenant uses the term “liberty of movement”. Liberty, in a general sense, is “the right of an individual to be free from restrictions or encroachments subject only to those provided by the law”.¹⁸¹ Liberty is a strong term to employ - this enhances the view that everyone is guaranteed free movement and it may only be restricted under exceptional circumstances.

Article 12 includes the condition of “lawfully within the territory”, thus makes lawful entry or presence the first condition for free movement. The question whether someone is lawfully in a country is regulated by domestic law - as refugees obtain per se a regulated status, they automatically fall under this category.

The right to free movement of the ICCPR includes an explicit limitation in paragraph 3:

“The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.”¹⁸²

There are thus three conditions for a restriction: firstly, the restriction has to be provided for by law, secondly, it has to be necessary to protect national security, public order, public health or morals, or the rights and freedoms of others and finally, it has to be consistent with other rights in the Covenant.

The question as to what is meant by “law” is a very wide and philosophical one. In this context, the first condition “provided by law” initially refers to domestic law, in our case Kenyan law. Kenyan domestic law has to make a specific regulation on the limitation of the freedom of movement of refugees in order to restrict it. As this would allow subjective restrictions by the respective State, which includes thus the danger of arbitration, domestic law itself is not enough to proclaim a

¹⁸⁰ International Covenant on Civil and Political Rights. UN: 1966: Art. 12 (1).

¹⁸¹ Beyani 2000: 8.

¹⁸² International Covenant on Civil and Political Rights: Art. 12 (3).

restriction. Instead, human rights jurisprudence “requires that the meaning of the term ‘laws’ must be sought in the context of an international treaty rather than in domestic law of a State party and attaches certain conditions on the quality of the domestic laws concerned.”¹⁸³

The second condition is based on the concept of State sovereignty: a State can restrict internal movement and residence on the basis of his public interests. Public interest causes include national security, public order, public health or morals - as these terms, especially “public order” and “public morals”, are vulnerable to extensive interpretation, it is necessary that, in case they are employed, the restrictions must be proportionate to the public interest in danger. The restriction must be “necessary” to prevent the threat on the public interest, by weighing the severity of the security concerns against the established limitations.¹⁸⁴

Thirdly, the restrictions must be consistent with other rights in the ICCPR. The common interpretation of this phrase argues that a limitation of the liberty of movement “ought not to negate the ability to enjoy other rights contained in the Covenant because of the interplay between those rights and freedom of movement.”¹⁸⁵ Thus, a limitation of the freedom of movement must still allow a person, also a refugee, to enjoy other rights such as the right to privacy, to freedom of speech and association or the right to a fair trial.

To summarize, in order to limit the freedom of movement for refugees based on the ICCPR, not only does international law have to include this possibility, it must also be proportionate and be pronounced and the limitation has to provide that all other rights of the Covenant are still guaranteed - these provisions assure that such a restriction is only possible as a rare exception and the right to move freely is the norm.

3.4.2. The freedom of movement for refugees

The ICCPR is a human rights instrument and therefore regulates the freedom of movement for every human being. As explained above, human rights directly apply to refugees, which means that the freedom of movement from the ICCPR has to be

¹⁸³ Beyani 2000: 9.

¹⁸⁴ Human Rights Watch (2002): Hidden in plain view. Refugees living without protection in Nairobi and Kampala. New York: Human Rights Watch: 154f.

¹⁸⁵ Beyani 2000: 11.

guaranteed for refugees, as it is for any other person.¹⁸⁶ However, the liberty to move and reside freely has also been determined specifically for refugees by the *Convention Relating to the Status of Refugees* in Article 26:

“Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.”

Although reservations for this Article are not forbidden and indeed widespread, the Government of Kenya has not made any reservations in this regard.¹⁸⁷ Hence, this Article is fully applicable to refugees in Kenya.

The *Refugee Convention* also includes restrictions on the freedom of movement which can be classified into three categories.¹⁸⁸ The first limitation is provided for by Article 9, which allows the State to take provisional measures essential to the national security “in time of war or other grave and exceptional circumstances.”¹⁸⁹ This limitation requires a complex procedure including the proclamation and notice of war, the proportionality of the limitation and the connection of the measure to national security. Furthermore, it only refers to asylum seekers and not to regularized refugees.¹⁹⁰

The second category restricts the movement for persons entering the country unlawfully, as expressed in Article 31.¹⁹¹ Asylum seekers who enter or stay in the country of asylum unlawfully may then be restricted from free movement. Again, this limitation refers to asylum seekers only and does not apply to refugees, as their status has already been regularized. Hence, these two categories cannot be used as an argument for limiting refugees’ free movement.

¹⁸⁶ UN Human Rights Committee: CCPR General Comment No. 15: The Position of Aliens Under the Covenant. 11. April 1986: paragraph 2: “Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.” and paragraph 7: “Aliens...have the right to liberty of movement and free choice of residence”.

¹⁸⁷ US Committee on Refugees and Immigrants: World Refugee Survey 2007. Kenya. 11. April 2007.

¹⁸⁸ Beyani 2000: 111.

¹⁸⁹ Convention relating to the Status of Refugees: Art. 9: “Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.”

¹⁹⁰ Beyani 2000: 111.

¹⁹¹ Convention relating to the Status of Refugees: Art. 31 (2): „The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. (...)”

Thirdly and most commonly, persons who have already been granted the refugee status can also be restricted from moving freely and choosing their place of residence. This limitation is inherent in Article 26 of the *Refugee Convention*. Article 26 explicitly refers to refugees “lawfully in its territory”. In various Articles, the *Refugee Convention* distinguishes between refugees “lawfully in”, refugees “lawfully staying” and refugees without additional provisions. These are highly discussed expressions. According to Durieux and McAdam, “it appears that the differing terminology is intentional and depends to a large extent on which rights carry financial or social responsibilities or multilateral implications for the host State.”¹⁹² For example, the right to self-employment or the question of expulsion are linked to lawful presence, while the rights to social security, labour protection or association are guaranteed only to “refugees lawfully staying”. The differentiation indicates that lawful presence is in accordance with the law, while “lawfully staying” exceeds refugees “lawfully in”, because these refugees have had a certain time of residence in the country of asylum.¹⁹³ But this discrepancy is not entirely solved and questions on interpretation remain.¹⁹⁴ However, in a note on the interpretation of these terms by UNHCR, the authors conclude that “‘lawful stay’ means a permitted, regularized stay of some duration”.¹⁹⁵ This applies to the vast majority of refugees in Kenya: they are permitted, regularized and most have been living in the country for several years.

Thus, refugees in Kenya have the same freedom to move and choose their place of residence as other non-nationals. As there is no regulation on the general limitation on the freedom of movement applicable to all aliens in the same circumstances, refugees obtain the right to move freely in Kenya.¹⁹⁶

A look at the new Kenyan Constitution, promulgated in August 2010, further enlightens the debate on the applicability of this right on refugees. While discussions surrounding the referendum on the matter focused mainly on land rights, abortion and Islamic law,¹⁹⁷ there was also a significant change regarding the freedom of movement in Kenya. In the previous Constitution, it said: “No

¹⁹² Durieux/McAdam 2004: 14

¹⁹³ Durieux/Mc Adam 2004: 15; UNHCR 1988: 5f.

¹⁹⁴ UNHCR: “Lawfully Staying”: A Note on Interpretation. 3 May 1988: 9.

¹⁹⁵ UNHCR 1988: 5.

¹⁹⁶ Human Rights Watch 2002: 151.

¹⁹⁷ Cheserek, Edwin et al: AIC, NCKK join catholic opposition. In: The Standard, 7. April 2010.

citizen of Kenya shall be deprived of his freedom of movement (...),¹⁹⁸ with a very long list of provisions allowing for restrictions. Noteworthy is the limitation to “citizen”, thus, refugees were not automatically included in the freedom of movement under constitutional law. The new Constitution changed this provision to one short Article, stating: “*Every person has the right to freedom of movement.*”¹⁹⁹ Therefore, in literally interpreting this Article, refugees are included in the wording of “every person”, which guarantees them free movement within Kenya. This issue was raised during one interview with a UNHCR lawyer, who agreed with this interpretation but said that the High Court will have to determine its definite interpretation, which is going to be requested by UNHCR after the implementation of the new Constitution.²⁰⁰

Kenya has also signed and ratified the *OAU Convention Governing the Specific Aspects of Refugee Problems* which does not contain a specific provision relating to the freedom of movement. Member States are merely obliged “to receive refugees and to secure the settlement of those refugees”²⁰¹ provided that the location of the settlements is safe.²⁰² As the *Convention* is silent on any further qualification, it cannot be used as an instrument against the restriction on the liberty to move freely: “In principle, however, restrictions which may be applied generally to limit the movement and residence of refugees as a matter of safe location are permissible.”²⁰³

Another reason for a restriction is established in a peculiar stipulation not found in any other instrument regulating refugee law internationally. By far the most controversial provision of the *OAU Convention* is the *Prohibition of subversive activities*. It prohibits refugees from “*subversive activities against any Member State of the OAU*” and “*any activity likely to cause tension between Member*

¹⁹⁸ The Constitution of Kenya. As Amended to 2008. Republic of Kenya: 1963: Art. 81 (1): „No citizen of Kenya shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Kenya, the right to reside in any part of Kenya, the right to enter Kenya, the right to leave Kenya and immunity from expulsion from Kenya.”

¹⁹⁹ The Constitution of Kenya. Republic of Kenya: 2010: Art. 39: “Every person has the right to freedom of movement. Every person has the right to leave Kenya. Every citizen has the right to enter, remain in and reside anywhere in Kenya.”

²⁰⁰ Interview with Linet Opiyo, UNHCR Nairobi, 13.08. 2010

²⁰¹ Convention Governing the Specific Aspects of Refugee Problems in Africa: Art. II (1).

²⁰² Convention Governing the Specific Aspects of Refugee Problems in Africa: Art. II (6): “For reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin.”

²⁰³ Beyani 2000: 121.

States, any in particular by use of arms, through the press, or the radio".²⁰⁴ As the language of this Article is quite imprecise, the interpretation of the regulation varies. Indeed, a study undertaken by the *Lawyer's Committee for Human Rights* states that "what is most striking is the double standard operated by Governments everywhere. Whether or not a host government restricts the political activities of refugees depends almost entirely on its own alignments and preferences."²⁰⁵

The idea behind this prohibition was to avoid tension between States that accept refugees from another State, but its negative effects cannot be denied: That the refugee, whose flight might even be the result of his or her political activity, is only allowed to stay in the receiving country if passive and silent on political matters of the country of origin.²⁰⁶

In a nutshell, States can restrict the free movement of refugees justified by the prohibition of subversive activities. However, a restriction can only be permitted for particular individual refugees; furthermore, there must be evidence for the subversive activity and proportionality between the alleged activity and the measure to restrict the movement.²⁰⁷

International refugee law does indeed allow for a restriction on the free movement of refugees, but human rights law clearly provides everyone with the right to free movement and choice of residence. Further, the new Kenyan Constitution guarantees both refugees and asylum seekers the right to free movement.

3.4.3. The encampment policy

The Kenyan *Refugee Act* does not include a specific regulation regarding the freedom of movement but refers to international law, thus, guaranteeing the

²⁰⁴ Convention Governing the Specific Aspects of Refugee Problems in Africa: Art. III: "1. Every refugee has duties to the country in which he finds himself, which require in particular that he conforms with its laws and regulations as well as with measures taken for the maintenance of public order. He shall also abstain from any subversive activities against any Member State of the OAU. 2. Signatory States undertake to prohibit refugees residing in their respective territories from attacking any State Member of the OAU, by any activity likely to cause tension between Member States, any in particular by use of arms, through the press, or by radio."

²⁰⁵ Lawyer's Committee for Human Rights (1995): *African Exodus. Refugee Crisis, Human Rights and the 1969 OAU Convention*. New York: Lawyer's Committee for Human Rights: 94, cited after Okoth-Obbo 2001: 132.

²⁰⁶ Bakwesegha, Chris: *Forced Migration in Africa and the OAU Convention*. In: Howard Adelman/John Sorenson (1994): *African Refugees: Development Aid and Repatriation*. Westview/York: Lanes Press: 11.

²⁰⁷ Beyani 2000: 122.

liberty to move and choose a place of residence for refugees.²⁰⁸ However, from the early 1990s on, refugees were required to stay in camps - this regulation had not been pronounced in domestic law but started as a new government policy. Being heavily criticized by numerous humanitarian organizations, the government nevertheless did not step away from the already carried out encampment policy, but rather endorsed it and secured it on the national level through the *Refugee Act*. The Act includes a regulation on refugee camps: *“The Minister may, by notice in the Gazette, in consultation with the host community, designate places and areas in Kenya to be refugee camps.”*²⁰⁹ Furthermore, there are sanctions for refugees who leave the camp: *“Any person who resides without authority outside the designated areas (...), commits an offence and shall on conviction be liable to a fine (...) or to imprisonment (...), or to both such fine and imprisonment.”*²¹⁰

On the one hand, the *Refugee Act* claims to be consistent with international refugee law and includes the rights of the *Refugee Convention*, but on the other hand it requires refugees to stay in specific areas and not to choose their place of residence freely. The question is whether this is a contradiction or whether camps and the obligation of refugees to stay in them are consistent with the right to free movement. Before answering this question, it is important to take a closer look at the situation of refugee camps in Kenya as the term “refugee camp” itself includes rather different conceptions of human settlements who often significantly vary in size, structure, political character and possibility of free movement.²¹¹

The question whether international law and refugee camps are compatible or not has not authoritatively been answered yet. There is a strong voice of international refugee law experts who argue that the temporary restriction to designated areas does not violate the *Refugee Convention* in the case of a mass influx or a similar situation of emergency.²¹² The foundation for this approach is found in a

²⁰⁸ The Refugee Act: Art. 16 (1) lit a: “Subject to this Act, every recognized refugee and every member of his family in Kenya - shall be entitled to the rights and be subject to the obligations contained in the international conventions to which Kenya is party”

²⁰⁹ The Refugee Act: Art. 16 (2) lit b.

²¹⁰ The Refugee Act: Art. 25 lit f: „Any person who resides without authority outside the designated areas specified under section 15(2), commits an offence and shall on conviction be liable to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment.“

²¹¹ Crisp, Jeff/Jacobsen, Karen: Refugee camps reconsidered. In: *Forced Migration Review*, 1998, 3: 27.

²¹² Goodwin-Gill 2007: 465

commentary on the *Refugee Convention* which states in a footnote that “[t]he provision of Article 26 would also not conflict with the special situation where [refugees] have to be accommodated in special camps or in special areas even if this does not apply to aliens generally.”²¹³ For Kenya, I doubt that today’s refugee situation is a “special situation”. Considering that the mass influx of refugees in the 1990s may have constituted such a situation and indeed allowed for the set up of camps and the restriction of movement, this measure has to be only temporary and conditional upon the special situation, in this case the sudden mass influx.²¹⁴ As for today, there is a high number of refugees in Kenya and a steady arrival of asylum seekers, but a large number of the camp populations are made up of people who have been living in Kenya for several years. Hence, a special situation is not given, but the situation has been the same for years, so even according to the Commentary on the *Refugee Convention*, the confinement of refugees to designated areas in Kenya is not consistent with its international obligations. Other authors²¹⁵ base their argumentation upon the ICCPR and its non-discriminatory approach on the freedom of movement. Remembering the three conditions for the limitation, which are the provision of the restriction by law, the necessity to protect public interests and the consistency with other rights of the Covenant, the restriction to designated areas can be dismissed as violating these requirements: although the *Refugee Act* now provides a domestic legal ground for the restriction, the ICCPR does not differentiate between refugees and other aliens, but even affirms their non-discrimination regarding the right to free movement. Therefore, the requirement of refugees but not the rest of the non-nationals in Kenya to reside in camps is not consistent with other provisions of the Covenant.

Although the legal framework is vague, many governments and even international agencies seem to prefer encampment over open settlement.²¹⁶ The reasons for the construction of camps are multifold. Some argue along the lines of what may be best for refugees and state that there are “practical advantages from the standpoints of service delivery, accountability, identification of individuals,

²¹³ Robinson, Nehemiah: Convention Relating to the Status of Stateless Persons. Its history and interpretation. Paper presented at the World Jewish Congress 1955. 1997: 49, note 181.

²¹⁴ Goodwin-Gill 2007: 465.

²¹⁵ Human Rights Watch 2002: 152f., Refugee Consortium of Kenya 2006: 1.

²¹⁶ Black, Richard: Putting refugees in camps. In: Forced Migration Review, 1998a, 2: 5.

physical access, cost effectiveness of the relief operations and monitoring of both the refugees' status and received assistance".²¹⁷ Refugees would, if able to choose where to settle, often prefer to live in camp-like structures and around points of aid delivery anyway. Further, camps would permit refugees to continue living in their own communities and provide them with better economic conditions than having to settle on their own, and in turn decreasing the crime rate among asylum seekers and refugees. If these reasons which argue along the best interest of refugees are correct, then why not let refugees decide where to live? These arguments are thus not based on evidence but dismissed by many as xenophobic prejudices.²¹⁸

The argument of the effectiveness of assistance and status determination is a valid concern, however it would only be applicable in the first months of a refugee influx as later on refugees should be encouraged to be self sufficient instead of a continued dependency on aid. Another, maybe more important reason for encampment policies is the influence of donors: "Refugee policy in the South has been largely driven by the demands of donors and humanitarian organizations."²¹⁹ Most humanitarian organizations, foremost UNHCR and refugee agencies, discourage encampment policies theoretically and do not stop to speak out against them. Nevertheless, it is not their responsibility or mandate to decide where refugees should settle²²⁰ and as many host governments do prefer encampment because of a perceived threat to national security by self settled refugees, the humanitarian community often considers camps as inevitable and does not present alternatives but rather works along these policies and supports the implementation and organization of camps.²²¹ The "positive" effect of refugee camps for host governments and humanitarian organizations is not only their proclaimed better assistance for refugees but also an increase in donor funding: camps are clearly visible to the international community. Also, presenting refugees as helpless and dependent on aid may create more funds than presenting the far more complex reality of diverse types of settlement and refugees.²²²

²¹⁷ Van Damme, Wim: Do refugees belong in camps? Experiences from Goma and Guinea. In: *The Lancet*, 1995, 346/8979: 360f., quoted after Black 1998a: 5.

²¹⁸ Kuhlman 1994: 122ff.

²¹⁹ Harrell-Bond, Barbara: Camps: Literature review. In: *Forced Migration Review*, 1998, No. 2: 22.

²²⁰ Black 1998a: 5.

²²¹ Black, Richard: Refugee camps not really reconsidered: a reply to Crisp and Jacobsen. In: *Forced Migration Review*, 1998b, 3: 31.

²²² Harrell-Bond 1998: 22.

The confinement to camps affects both the lives of refugees and those of the host communities, i.e. the local populations living around or near refugee camps. For refugees, the strong dependency on foreign aid has already been discussed. The situation of confinement, combined with the quasi-impossibility for refugees to be employed formally leads to a high degree of dependency on the humanitarian organizations managing the camp. Being dependent on food rations, firewood, medical treatment or primary education, refugees cannot become self sufficient, and are thus discouraged to sustain themselves economically. The limitation of free movement deprives refugees of their social and economic networks, again increasing their dependency. Nevertheless, I strongly denounce the idea of refugees in camps as being passive, sitting around helplessly and waiting for their food rations. On the contrary, visiting Kakuma camp, I was astonished by the busyness of the place, where various shops sell clothes and items of everyday use next to a hairdressing studio, children go to read in the refugee run library, journalists are meeting to discuss the next edition of their local newspaper and telephone bureaus offer international phone calls. But this is due to the initiative of the people having to live in the camp, and not because but despite the external circumstances.

Local integration into the host community, one of the three long-term solutions for protracted refugee situations, is hindered through the encampment policy. Indeed, the encampment leads to the establishment of parallel services for refugees in the camps and the local populations, often poorer than some refugees, which in return generates hostility.²²³ This is a valid concern in Kenya and has been addressed by UNHCR policy which now offers similar services, e.g. free medical treatment or schooling, to non-refugees living around the camps.²²⁴

Although security is often raised as an argument in favour of camps, the security situation in many camps, including Kakuma and especially Dadaab, is appalling.²²⁵ Examples from other camp situations also show a possible militarization of camps: well known is the refugee crisis after the Rwanda genocide, where camps were heavily militarized and often controlled by the *génocidaires* who used them as a

²²³ Harrell-Bond 1998: 22.

²²⁴ Interview with an Officer from the DRA Kakuma, 09.09.2010

²²⁵ Halperin 2003: 7ff.

recruiting basis and lead attacks into Rwanda.²²⁶ Particularly at risk are protracted refugee situations without a long-term perspective for the refugees in the camps.²²⁷ This is the case for the Kenyan camps, yet militarization is not considered as a major problem compared to other security risks. Further, environmental concerns are often raised in regards to camps: in Kenya, both camp complexes are highly overcrowded and put a strain on local resources, e.g. firewood.²²⁸

The two camp complexes in Kenya can be described as artificial and overcrowded environments in remote areas of the country, where refugees are theoretically enclosed in the restricted camps. The Dadaab camp complex near the Somali border in Northeast Kenya, the world's largest refugee camp, comprehends three separate camps - Dagahaley, Ifo and Hagadera - and is home to mostly Somali refugees. It is highly overcrowded, which results in the sporadic relocation of refugees to Kakuma camp,²²⁹ situated in the Turkana region next to Kakuma town in the north of the country hosting mainly Sudanese and Ethiopian refugees. Both regions are in very remote areas and can be described as the "periphery" of Kenya.²³⁰ They have long been neglected by the Kenyan government, which results in a poor quality of available public services. The areas are semi-arid, thus farming or agricultural activities are difficult if not impossible and keeping cattle, as the majority of the local populations does, is not an option in the camps.²³¹ Therefore, the dependency on humanitarian organizations for food, daily necessities, but also medical care, education or employment opportunities is very high.²³² Although both camp complexes are located on the countryside of Kenya, they are characterized by certain urban features in regard to the population density, the economic

²²⁶ Black 1998a: 5.

²²⁷ Mousa, Leila: Flüchtlingslager als Dauereinrichtungen. Wenn der Schutzraum zum Konflikt Raum wird. In: *Wissenschaft & Frieden*, 2008, 2: 29.

²²⁸ Black 1998a: 4.

²²⁹ Barasa, Lucas (2009): 12.000 refugees to be moved. In: *Daily Nation*, 6. August 2009.

²³⁰ Pérouse de Montclos, Marc-Antoine/Kagwanja, Peter Mwangi: Refugee camps or cities? The socio-economics of the Dadaab and Kakuma camps in northern Kenya. In: *Journal of Refugee Studies*, 2002, 13/2: 207.

²³¹ Verdirame 1999: 61f.

²³² RCK 2006: 1.

dynamic including international trade networks and its cosmopolitan character. Thus, “il évoque plutôt une sorte de ghetto urbain en milieu rural”.²³³



Figure 4: Refugee camps in Kenya²³⁴

Legally responsible for both camps is the Government of Kenya, yet the administration of the camps is left to UNHCR and its implementing partners. An implementing partner is an organization that implements programs on behalf of UNHCR which also provides it with funding.²³⁵ These include, among others, CARE, *Deutsche Gesellschaft für Internationale Zusammenarbeit* (GIZ), the *National Council of Churches of Kenya* (NCCK) and the *Refugee Consortium of Kenya* (RCK) which cover different branches, from food distribution to health care, education or environmental programs.²³⁶

Today, the *Department of Refugee Affairs* has taken steps towards a greater responsibility for refugees: asylum seekers entering Kenya have to register at the DRA before applying for the Status Determination at UNHCR, and the *Movement*

²³³ Pérouse de Montclos, Marc-Antoine: Marges urbaines et migrations forcées: les réfugiés à l'épreuve des camps en Afrique de l'Est. In: Autrepart, 2008, 45: 195.

²³⁴ Hyndman/Nylund 1998 : 25.

²³⁵ UNHCR 2005: 10.

²³⁶ UNHCR 2005: 11f.

Pass is issued jointly by the DRA and UNHCR. But the government does not play a major role yet as, for example, the DRA in Kakuma only employs four workers.²³⁷

According to the *OAU Convention*, refugees should be settled “at a reasonable distance” from their countries of origin,²³⁸ which UNHCR identified as a minimum of 50 kilometres. Both camps adhere to this rule as they are situated approximately at 100km from the respective border. Furthermore, UNHCR constitutes that the camp population should not exceed 20.000 refugees, however, all camps in Kenya host a considerably larger number.²³⁹

As for freedom of movement, the official policy of the government of Kenya is that the refugee camps are ‘closed’. Refugees are not allowed to settle elsewhere or even travel in and out of the camps without permission. If an asylum seeker directly arrives at one of the camps, he or she has to stay in the camp, unless provided with a *Movement Pass*. Asylum seekers who arrive in Nairobi are pre-registered by the UNHCR office in town, but are expected to move on to one of the camps within 30 days. They are provided with a *Movement Pass* for their time in Nairobi, but no further assistance is given to them before arrival at a camp.²⁴⁰ Once in the camp, they are screened, registered and their status is determined. From then on, they are not allowed to move outside the camp. This does not include the immediate surroundings of the camp, thus refugees can move freely between the three camp complexes and Dadaab town and similarly between Kakuma camp and Kakuma town.²⁴¹ If a refugee wants to travel further, he or she needs the permission, which is realized through a *Movement Pass*, a time-limited document including the bio data and a digital picture of the refugee. In theory, it should be the government that allows refugees to move,²⁴² but for now, the pass is a document co-signed by the DRA and UNHCR that allows the refugee to travel outside the camp.²⁴³ In Dadaab and Kakuma, there are different procedures for a refugee to gain access to this document.

²³⁷ Interview with an Officer from the DRA Kakuma, 09.09.2010

²³⁸ Convention Governing the Specific Aspects of Refugee Problems in Africa: Art. II (6).

²³⁹ UNHCR 2005: 23

²⁴⁰ UNHCR 2005: 16ff.

²⁴¹ UNHCR 2005: 31.

²⁴² The Refugee Act: Art. 17 lit f : “There shall be a refugee camp officer, for every refugee camp whose functions shall be to issue movement passes to refugees wishing to travel outside the camps”

²⁴³ Interview with Jeffrey Savage, UNHCR Kakuma, 09.09.2010

In Kakuma, the refugee has to give the reason for his or her wish to travel, then UNHCR prepares the document and co-signs it with the DRA. The reasons are foremost medical, educational or family visits.²⁴⁴ The duration of the travel is mostly between 15 days and three months for medical and personal reasons, and one year for education.²⁴⁵ The process of getting the *Movement Pass* usually takes around three weeks and the acceptance rate is very high. “Rejection comes when there is maybe somebody has no definite reason as why he wants to travel. Because everybody...most refugees here never want to stay in the camp.”²⁴⁶

In Dadaab, it is much more difficult to obtain the *Movement Pass*. The overwhelming majority of refugees in Dadaab are from Somalia, which made the government decide for reasons of security and in fear of terrorism to introduce a more stringent and complicated procedure.²⁴⁷ In January 2010, a Security Committee was implemented which consists of the Kenyan Government through the *Ministry for Probation, Registration and Internal Security*, the *Ministry of Immigration* through the DRA, the Kenyan Police, the Criminal Investigation Department, National Intelligence Security Service and the Kenyan Army, and also UNHCR and RCK. A refugee who wants to travel has to apply personally before the Security Committee for the *Movement Pass*, and acceptance rates are lower than in Kakuma. UNHCR still speaks out strongly against this procedure: “We thought it was a bad idea to make refugees stand in front of a room full of police and say why they wanted to go visit their relatives.”²⁴⁸

There is no explanation for the differences in procedure between Dadaab and Kakuma, but only the perceived fear of terrorism and illegal immigration from Somalia. Thus, discrimination is taking place concerning the treatment of asylum seekers and refugees from different regions, dividing them by the point of entry and, ultimately, according to their national or ethnic origin. The impossibility to find a fair and righteous explanation for the inequalities in obtaining a *Movement*

²⁴⁴ Human Rights Watch (2009): *From Horror to Hopelessness. Kenya’s Forgotten Somali Refugee Crisis*. New York: Human Rights Watch: 45: The criteria for a valid reason to obtain a *Movement Pass* “have been developed on an ad hoc basis over time, are not prescribed by law or regulation, and are not available in written form.”

²⁴⁵ Interview with Jeffrey Savage, UNHCR Kakuma, 09.09.2010

²⁴⁶ Interview with RCK Kakuma, 08.09.2010

²⁴⁷ Human Rights Watch (2010): “Welcome to Kenya.” *Police abuse of Somali refugees*. New York: Human Rights Watch: 71ff.

²⁴⁸ Interview with Jeffrey Savage, UNHCR Kakuma, 09.09.2010

Pass further shows how the argument of security is used to justify the restriction of a basic human right - freedom of movement and choice of residence - for refugees. Still, there are a number of refugees travelling and living outside the camp without authorization, mostly due to long waiting periods for passes, especially around holidays, and unreasonably restrictive durations which make some overstay the time limit of their pass.²⁴⁹ But the *Movement Pass* is essential, because in case the police control a refugee who does not have the permission to leave the camp, the refugee will be returned to a camp involuntarily or even charged with unlawful entry and presence in Kenya and often asked for a bribe.²⁵⁰ Sometimes, the police are not aware of the document and do not accept the pass.²⁵¹ The denial of recognition of the *Movement Pass* may in some cases even be intentional, as the incidence of one District Commissioner near Dadaab shows: he instructed the personnel not to allow any refugee to move out of the camp and to ignore their passes in order to prevent refugee movement at all.²⁵²

To summarize, refugees in Kenya are required to live in camps although the legal basis for this type of settlement remains vague and is, according to my interpretation of the *Refugee Convention* and the ICCPR in comparison with the *Refugee Act*, contradicting the right to free movement. Encampment is favoured not only by Kenya, but by the majority of African countries. Still, “the policy of organized settlement has not been a success: most refugees in Africa are spontaneously settled (...). There are two possible reasons: either governments and UNHCR are unable to accommodate the refugees or the latter are unwilling to be accommodated in settlements earmarked for them.”²⁵³ This development towards narrowing down refugees’ and asylum seekers’ right to free movement can also be observed in Europe, for example in Austria, where a law amendment binds asylum seekers to stay in a housing complex for 120 hours and broadens the time-limit of arrest awaiting repatriation up to ten months.²⁵⁴

²⁴⁹ UNHCR 2005: 32.

²⁵⁰ UNHCR 2005: 33.

²⁵¹ Interview with Father Eugene Birrer, 27.07.2010

²⁵² Interview with Jeffrey Savage, UNHCR Kakuma, 09.09.2010

²⁵³ Kuhlman 1994: 124.

²⁵⁴ UNHCR: UNHCR-Analyse des Entwurfs einer Novelle zum Asylgesetz 2005 und zum Fremdenpolizeigesetz 2005. Oktober 2010b. Wien: UNHCR.; Agenda Asyl: Offener Brief an die Mitglieder des Ausschusses für innere Angelegenheiten zum geplanten Fremdenrechtspaket. 1. April 2011.

During the research process, every interview I took concluded with the question what the interviewee would change in regards to refugee rights if he or she had the chance to. The overwhelming majority started with the freedom of movement, together with a better implementation of the right to work. “If I could change anything, it would be: let these people just live among the community. Get rid of the refugee camps.”²⁵⁵

This should finish the argumentation about camps and make a standpoint enhancing the right of refugees to decide themselves where to live.

3.4.4. Urban refugees: a neglected reality

Despite the aim of the Kenyan government to restrict refugees to camps, a vast number of registered and unregistered refugees live among the urban populations of Kenya’s major towns. The main point of attraction is Nairobi, where a number of 50.000 to 100.000 urban refugees are estimated. They live throughout the city, with a high concentration of Somali and Ethiopian immigrants in the neighbourhood of Eastleigh.²⁵⁶

The legal status of these refugees regarding their stay in town differs. Before elaborating, it has to be stated that the question of the legal situations of urban refugees is not clear. Even in carrying out the expert interviews, differing and contradicting explanations were given when asked about the legality of their stay. While some deny the presence of refugees in towns altogether, another major opinion stated was that all refugees belong into camps and that everyone in town lives there illegally. This point of view is not right, however, the legality of urban refugees varies and often, asylum seekers and refugees in urban areas do not know themselves what their status entails.²⁵⁷

In theory, the vast majority of refugees in Kenya is supposed to live in refugee camps. But there are certain administrative exceptions to the encampment policy. Firstly, refugees can obtain a *Movement Pass* that allows them to stay in Nairobi for a precise duration of time - mostly only some weeks or months, the maximum being one year for educational purposes - but they have to return to the camps after

²⁵⁵ Interview with Jeffrey Savage, UNHCR Kakuma, 09.09.2010

²⁵⁶ Pavanello, /Elhawary, /Pantuliano 2010: 7.

²⁵⁷ Interviews with urban refugees in Nairobi, July/August 2010

their medical treatment or educational program. Furthermore, refugees undergoing interviews for resettlement in a third country are also issued a *Movement Pass* for the duration of this process.²⁵⁸ A small amount of urban refugees have been registered by the Government before the construction of camps in 1992 and have so far not been requested to live in a camp, and can therefore live as documented “Mandate refugees” in town.

Finally, refugees arriving in Nairobi can either proceed to a camp or state that they prefer to stay in town. This is possible under one condition: they have to sign that they can and will provide for themselves in Nairobi and are “economically self-sufficient”. Previously, refugees had to prove that they could provide for themselves, but nowadays they only have to sign a form stating that they are economically self-sufficient, thus relinquishing humanitarian assistance.²⁵⁹ This means that, while in the refugee camps numerous humanitarian organizations assist camp residents, urban refugees are not entitled to assistance from UNHCR. This is in fact contravening UNHCR mandate, as its main goal is to support refugees not to assist only those refugees who conform to restrictive national policies. UNHCR just recently revised its urban policy worldwide and took a step back from the idea that urban refugees are an irregular exception and towards “the principle that the rights of refugees and UNHCR’s mandated responsibilities towards them are not affected by their location, the means whereby they arrived in an urban area or their status (or lack thereof) in national legislation.”²⁶⁰ Still for today, material assistance is not provided, but legal help and livelihood questions are more and more being addressed by Kenyan humanitarian organizations.

If the person decided to stay in town, the RSD process at UNHCR Nairobi usually takes several months, if not years, while in the camps it is often processed much faster. For example, a Somali asylum seeker addressing UNHCR Nairobi in August 2010 will get an appointment for the Status Determination in March 2012.²⁶¹ In the meantime, these asylum seekers are issued with an *Appointment Letter* guaranteeing temporary legal status - but it is often not recognized by the

²⁵⁸ Pavanello, /Elhawary, /Pantuliano 2010: 13.

²⁵⁹ Interview with a Registration Officer at UNHCR Nairobi, 13.08.2010

²⁶⁰ UNHCR: UNHCR policy on refugee protection and solutions in urban areas. September 2009b: 3.

²⁶¹ Interview with a Registration Officer at UNHCR Nairobi, 13.08.2010

police.²⁶² Others are not aware of the process or fear they might be deported if rejected, further the cost of travelling to the UNHCR Office in Westlands and the length of the process make immigrants opt not to register. Many also leave the camp with a *Movement Pass*, but overstay the allowed duration and thus continue to live undocumented. The vast majority of refugees in town live there undocumented without falling into one of the categories of exceptions to encampment. Most of them are aware of their precarious status and the risk and vulnerability that it entails, mainly police harassment and possible prosecution.²⁶³

The lack of clear policy and information regarding the legal status of urban refugees leads to a high amount of vulnerability and insecurity in many aspects of daily life including employment, education, health care or encounters with the police. Furthermore, assistance to refugees is provided only by a few churches or humanitarian programs, while the bulk of foreign aid is used for refugees in the camps. Still, many refugees choose to live in the city rather than a camp, despite the mentioned hindrances. Urbanization and the movement of people towards urban centres are global phenomena and the various reasons motivating people worldwide can also be found among the individual reasons for the choices of refugees in Kenya. Alongside this trend, there are some specific factors encouraging refugees to live in town instead of camps: “security threats, lack of adequate education and medical services, limited livelihood opportunities and harsh climatic conditions. In terms of security, refugees in Nairobi, particularly women, were concerned about the level of sexual violence and killings in the camps, particularly in Dadaab.”²⁶⁴ Security was often mentioned as one of the reasons by Ethiopian and Congolese refugees, of whom some said that the very people that they fled from are in the camps trying to find them: “The people who killed your family and the parents are in Kakuma, in the camp.”²⁶⁵ Further, it was stated by the Nairobi based Kenyan NGO *Kituo cha Sheria*: “Some refugees fear for their security from the government of the country they fled from: Especially Ethiopians, the government follows some to Kenya, abducts them and takes them

²⁶² Pavanello/Elhawary/Pantuliano 2010: 17: “Appointment Letters in theory provide temporary legal status, but they do not explicitly state that the holder is protected until the vetting procedure has concluded.”

²⁶³ Interviews with urban refugees in Nairobi, July/August 2010

²⁶⁴ Pavanello/ Elhawary/Pantuliano 2010: 14.

²⁶⁵ Interview with an urban refugee from DRC, 24.07.2010

back. And for Somalis, some fear that they are followed by Al-Shabaab.”²⁶⁶²⁶⁷ Apart from security, for many educational opportunities and better possibilities to engage in the informal economy and business are factors that influence the choice to stay in town. Also, refugees arriving from urban areas often prefer to live in town rather than in a rural camp.²⁶⁸

Urban refugees face several challenges differing from those in camps. Firstly, the lack of humanitarian assistance is striking. Refugees are in general not allowed to be employed as will be discussed in detail further down. Poverty is a major problem for many urban refugees,²⁶⁹ but this phenomenon is not limited to refugees, as urban poverty is a general and growing concern in Kenya.²⁷⁰ Many refugees therefore turn to the informal economy and make a living by running businesses or engaging in casual labour, called *jua kali*. Another form of income are remittances from relatives living abroad, and also community help programs. While many of them are struggling to survive economically, others have turned their businesses into great success, as is true for the neighbourhood of Eastleigh which has only recently become a flourishing commercial centre in Nairobi due mostly to refugees’ and other immigrants’ informal labour.²⁷¹ Thus, urban refugees are often not an economic burden for the city but manage to be self-sufficient and contribute positively to the economy.

Apart from economic survival, urban refugees are coping with further challenges due to their intransparent legal status. Government officials do not welcome refugees to urban centres, on the contrary. Kenya’s Vice President and Minister of Home Affairs threatened urban refugees in 2004: “I am asking all refugees to report to the camps and those that will be found to be in the city and other urban places without authorization will be treated like any other illegal aliens. . . The

²⁶⁶ Interview with Kituo cha Sheria, 12.08.2010

²⁶⁷ Al-Shabaab is an islamist group and one of the major parties in the Somali civil war. It also works outside of Somalia, for example it declared itself responsible for the July 2010 Kampala bombings. More on Al-Shabaab: Gartenstein-Ross, Daveed: The Strategic Challenge of Somalia’s Al-Shabaab. Dimensions of Jihad. In: Middle East Quarterly, 2009, 16/4: 25-36.

²⁶⁸ Pavanello/ Elhawary/Pantuliano 2010: 14.

²⁶⁹ Interviews with urban refugees in Nairobi, July/August 2010

²⁷⁰ Odhiambo, Walter/Manda, Damiano Kulundu: Urban poverty and labour force participation in Kenya. Paper to be presented at the World Bank Urban Research Symposium, Washington D.C., December 15-17, 2003.

²⁷¹ Campbell, Elizabeth: Urban refugees in Nairobi: Problems of protection, mechanisms of survival, and possibilities for integration. In: Journal of Refugee Studies, 2006, 19/3: 402f.

government will soon mount a crackdown on these illegal aliens with a view to flushing them out.”²⁷² This was not an empty threat as police swoops and harassment of refugees are a common problem, regardless of their documentation or legality of stay. Police officers are often unaware of refugee documentation, and the belief that all refugees in town are residing illegally is wide-spread.²⁷³ They routinely stop refugees or other immigrants and do not agree to release them unless a bribe is paid.²⁷⁴ Bribery is often a major revenue for police officers and refugees are prone to harassment, mostly as a result of their vulnerable legal status. Police officers frequently stop refugees coming or leaving UNHCR or NGO offices and patrol in refugee neighbourhoods, such as Eastleigh, sometimes organizing big crackdowns. Refugees are arrested arbitrarily, while their *Movement Pass* or *Appointment Letter* is ignored: “Sometimes when they arrest the refugees who have the documents, they just throw out the document, throw it away and take them to the police station and then to court.”²⁷⁵

Refugees will not be detained or, if arrested will be released as soon as a certain amount of money is paid. “For some police officers, refugees are seen as a mean to enrich themselves. They just arrest and ask for a bribe. Refugees are seen to have money, as if they are paid by UNHCR.”²⁷⁶ Usually, if detained, the person tries to contact a friend or family member who then tries to raise the money often with the help of the refugee community. “Because of the frequency of these incidents, bribe payments represent a large portion of a refugee’s income.”²⁷⁷ The problem of police harassment was confirmed by every refugee interviewed in Nairobi.

During the period of research in Nairobi, larger crackdowns were organized, aiming primarily at Somali refugees and justified by national security concerns after the Kampala bombings in July.²⁷⁸ Some refugees were detained, taken to court or simply sent back to the camps.²⁷⁹

²⁷² Campbell 2006: 401.

²⁷³ Pavanello/ Elhawary/Pantuliano 2010: 17.

²⁷⁴ HRW 2002: 42ff.

²⁷⁵ Interview with Kituo cha Sheria, 12.08. 2010

²⁷⁶ Interview with Kituo cha Sheria, 12.08.2010

²⁷⁷ Pavanello/ Elhawary/Pantuliano 2010: 20.

²⁷⁸ The July 2010 Kampala bomb attacks were suicide bombings at two restaurants in Kampala carried out by the Somali group Al-Shabaab. More: Nzau, Mumo: Counter-terrorism in the Greater Horn of Africa 2004-2010: Revisiting the Somalia Question. In: Journal of Language, Technology & Entrepreneurship in Africa, 2010, 2/2: 164.

²⁷⁹ Interviews with Linet Opiyo, UNHCR Nairobi, 13.08. 2010 and with Kituo cha Sheria, 12.08. 2010

To conclude, theory and practice overlap and contradict each other regarding the freedom of movement for refugees in Kenya. While international law guarantees refugees to move freely and choose their places of residence, the Government policy, established through the *Refugee Act*, restricts refugees to stay in camps. This, in turn, is contradicted by numerous refugees, who are mobile and enjoy their freedom of movement despite the discouragements it entails, such as police harassment, the lack of material assistance and their precarious legal status. Urban refugees prove the undeniable mobility of refugees and the ability of many to sustain themselves independently without the help of humanitarian organizations. They can be used as an example to promote a broader understanding of free movement in order to guarantee everyone the enjoyment of this right.

3.5. Employment of refugees

„Mgeni siku mbili, ya tatu mpe jembe“²⁸⁰

The possibility to work and earn your own livelihood was mentioned as one of their major concerns by all refugees and asylum seekers interviewed. Employment is important on a number of levels: working is a means of survival, it makes refugees economically independent and thus reduces costs for aid agencies and the Government, it helps improving language skills and acquiring new qualifications, which in turn increases the sense of dignity and self-esteem and, last but not least, working contributes to the growth of the national economy. This is why UNHCR refers to the social and economic independence through access to the labour market and wage-earning opportunities as one of its main objectives.²⁸¹

After describing the international and Kenyan provisions regarding refugees' and asylum seekers' right to work, a closer look will be taken at the situation of employment in Nairobi and the camps, mainly Kakuma, and the strategies employed by the individuals in order to overcome the shortcomings of the Government policies.

²⁸⁰ “Treat your guest as a guest for two days, the third day give him a hoe.” Swahili Proverb initially advising against exceeded hospitality.

²⁸¹ Edwards, Alice: Human Rights, Refugees and the Right “to enjoy” Asylum. In: International Journal of Refugee Law, 2005, 17/2: 320.

3.5.1. Are refugees and asylum seekers entitled to a right to work?

To answer this question, a look at the *Refugee Convention*, the *Universal Declaration of Human Rights* (UDHR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) states a big “Yes” for refugees and a smaller “Maybe” for asylum seekers. The right to work and free choice of employment was first recognized in the UDHR,²⁸² and later legally entrenched in the ICESCR, which states in Article 6: “*Everyone has the right to work (...)*”.²⁸³²⁸⁴ The question is whether these instruments apply only to nationals or to refugees and asylum seekers alike. A plain reading of the Article suggests that they do apply, and Article 2(2) reinforces a non-discriminatory basis for the application of its rights.²⁸⁵ However, Article 2(3) allows developing countries to limit the economic rights of its non-nationals: “*Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.*” Initially, the purpose of this Article was to end economic domination of non-nationals exercised during colonial times, but today it can be easily interpreted as a possible restriction on the right to work for refugees. To avoid this unplanned limitation, it needs to be interpreted narrowly.²⁸⁶ Therefore, under international human rights law, refugees and asylum seekers are both entitled to the right to work.

The *Refugee Convention* regulates the right to work for refugees and not asylum seekers, and dedicates Chapter III to Gainful Employment describing wage-earning employment, self-employment and liberal professions. States are obligated to “*accord to refugees lawfully staying in their territory the most favourable*

²⁸² Art. 23 (1) of the UDHR: “Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.”

²⁸³ Art. 6 of the ICESCR: “(1) The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

(2) The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.”

²⁸⁴ Edwards 2005: 324.

²⁸⁵ Art. 2 (2) of the ICESCR: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

²⁸⁶ Edwards 2005: 325.

treatment”²⁸⁷ that they accord to other nationals of foreign countries. This means that refugees are not granted access the labour market on the same terms as nationals, but the *Convention* rather refers to national law in regard to employment for other non-nationals. It declares further that any restrictive measures on employment for refugees shall not be imposed after three years of residence in the country. For this provision, the Government of Kenya has made a reservation stating that restrictions are allowed until four years of residence.²⁸⁸ Another reservation was made for paragraph 3: Kenya does not have to give “*sympathetic considerations to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals*”. Hence, according to the UDHR, refugees and asylum seekers should enjoy the right to work while the *Convention* enhances this right, with certain restrictions - it nevertheless guarantees refugees and asylum seekers in Kenya the right to work after a maximum period of four years.

That the right for employment is indeed a contested provision proves the *OAU Convention* whose draft contained detailed provisions on employment, self-employment or the liberal professions. And, although a central concern for the inauguration of the *Convention* was the unregulated quality of life for refugees without these regulations, the provisions on employment did not make it into the final version and nothing in respect to a right of work is mentioned in it today.²⁸⁹

As the UN *Refugee Convention* refers to national law, the Kenyan *Refugee Act*, *Immigration Act* and *Aliens Restriction Act* need to be examined for its treatment of aliens. They state that immigrants may have the right to work if they are granted work permits. The *Immigration Act* requests all non-Kenyans to obtain a work permit, otherwise employment is illegal and both the employer and employee are guilty of an offence.²⁹⁰ Therefore, if an immigrant works while owning a work permit, he or she does so legally. This applies to refugees alike: The *Refugee Act*

²⁸⁷ Convention relating to the Status of Refugees: Art. 17 (1): “The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.”

²⁸⁸ USCRI 2010: 4.

²⁸⁹ Okoth-Obbo 2001: 103

²⁹⁰ The Immigration Act: Art. 13 lit f and lit g: “A person who not being a citizen of Kenya, engages in any employment, occupation, trade, business or profession, whether or not for profit or reward, without being authorized to do so by an entry permit, or exempted from this provision by regulations made under this Act; or employs any person (whether or not for reward) whom he knows or has reasonable cause to believe is committing an offence under paragraph (f) by engaging in that employment, is guilty of an offence [...]”

follows international law and allows refugees to work under the same conditions as other non-nationals, thus authorizes refugees to obtain work permits on the same basis as other foreigners, as class M migrants.²⁹¹ Therefore, it requests work permits for refugees in order to be able to work.

To conclude, international human rights and refugee law accord to refugees the right to employment as does the UDHR for asylum seekers albeit with certain restrictions. The *Refugee Act* likewise entitles refugees to the right to engage in wage-earning employment with the same restrictions that are imposed on other non-citizens in Kenya.²⁹²

3.5.2. The situation of employment in the camps: Equal pay for equal work?

Employment in the camp is often hindered by several factors: the sheer lack of formal employment opportunities being one of them. Other than that, refugees are discouraged from leaving the camp as the main area in the camp are covered by UNHCR and its implementing partners and further, the camps are situated in the periphery of Kenya, far from major towns.

After registration, both asylum seekers and refugees are entitled to ration cards, which should theoretically fulfil their needs concerning food and household items, firewood, accommodation, education and medical treatment are free. But most camp residents are not satisfied with the food rations given every 15 days as most run out of it before and also, due to a lack of vitamins.²⁹³ Some also complain that the staples they are given are not what they are used to eating. Humanitarian aid is often planned on the assertion that “the” refugee population are “homogenous, undifferentiated masses”.²⁹⁴ “Donation and distribution of food aid are characterized by the power to label recipients and designate them into a specific category ‘with a categorical prescription of assumed needs’.”²⁹⁵ One refugee told

²⁹¹ The Refugee Act: Art. 16 (4): “Subject to this Act, every refugee and member of his family in Kenya shall, in respect of wage-earning employment, be subject to the same restrictions as are imposed on persons who are not citizens of Kenya.”

²⁹² The Refugee Act: Art. 12 (4).

²⁹³ Jamal 2000: 19f.

²⁹⁴ Harrell-Bond, Barbara: The Experience of Refugees as Recipients of Aid. In: Alistair Ager (1999): Refugees: Perspectives on the Experience of Forced Migration. London/New York: Continuum: 141.

²⁹⁵ Jaji, Rosemary (2009): Refugee women and the experiences of local integration in Nairobi, Kenya. Bayreuth University: Dissertation: 145f.

the story of a food supplement in the food rations, a new product called “Mix me”, which is said to be very nutritious and people were told they should use it with every meal. But most were suspicious and did not take it - it was however accounted for in the daily need of calories.²⁹⁶ Therefore, and as agriculture is not feasible in either Kakuma or Dadaab, many choose to sell a part of their rations in order to obtain different kinds food and other items.

The idea of food distribution essentially derives from an emergency treatment of a situation with the premise to save lives, but it is not at all adequate for a protracted situation like the one of long-term residents as it is in Kenyan camps. Nevertheless, food distribution and humanitarian assistance have been continued for two decades now. It is not only costly for the agencies but also counterproductive for the refugees: most express a strong wish to work instead of being rendered dependent on something they cannot even choose from.²⁹⁷ This is the same phenomenon for the restrictions on the freedom of movement through confinement to camps: while in an emergency phase, it can be argued to be beneficial for both asylum seekers and organizations to register, distribute aid and organize the inflow locally, the situation is now protracted and still this emergency concept has been in place for about 20 years.

Although refugees are thus discouraged from becoming economically self-sufficient, most find ways around the restrictive employment policies. Many agencies in the camps employ refugees, especially high qualified ones, for example as teachers, interpreters, supervisors, or drivers.²⁹⁸ But there is a catch with this idea: the people employed are not considered “employed”, but rather “incentive workers”. Incentive essentially stands for “work for food”; it is not a legal category but was coined by aid agencies. This implies that many international organizations, instead of paying salaries, entitle refugee workers only to “incentives” and thus, incentive workers are not included and protected under the *Labour Act*. Most do not have work contracts or they have monthly contracts which are renewed endlessly, even though according to labour laws, a regular employment contract has to be established within six month in order to prevent exploitation of

²⁹⁶ Interview with a refugee, Kakuma, 10.09.2010

²⁹⁷ Jamal 2000: 8f.

²⁹⁸ Kanere: Are Refugees Entitled to Equal Pay for Equal Work? In: Kakuma News Reflector- A Refugee Free Press, 2009a, 1/2, 2009: 2.

workers.²⁹⁹ While Kenyans, most from the host community living around the camp, and other foreigners, who all do basically the same work, are paid regular salaries - for example around 15.000-20.000 KSh for teachers - camp residents, irrespective of their qualification or individual experience, get only 3.000-4.400 KSh.³⁰⁰ This amount is not enough to cater for daily needs, and although the commodity prices at the markets in the camps have increased, the payments have not been adjusted for years. It has also been voiced by incentive workers that their payment is often delayed, sometimes for months, while contracted labourers are almost always paid on time.³⁰¹ This inequality in payment and labour rights is often a source for frustration, but as other work opportunities are scarce, refugees compete for the available incentive jobs - being employed unfairly and insecurely is in general preferred to being dependent on handouts.

When asked for the reasons for the inequality in payment, the answers given by the agencies vary. One line of argument is that refugees and asylum seekers are entitled to ration cards and can thus get basic services for free and do not need the salary to pay for it.³⁰² This reason is misleading, as Kenyans living around the camp can and do access similar services, for example medical treatment and education, in order to minimize tension between the host community and the refugee population. UNHCR has referred to budget constraints when asked for a justification in the differences in salaries, but the constraints do not prevent them from paying regular salaries to Kenyan workers and other foreign staff. The fear that the creation of regular jobs would lead to the host community's demanding them can also be dismissed as the job will then be given to the person professionally most qualified, who may be a refugee or a Kenyan citizen.³⁰³ Another justification for incentives instead of work contracts and salaries lies in the idea that refugees and asylum seekers are working for their own "refugee community" offering their services, e.g. teaching, to fellow refugees. But most teachers,

²⁹⁹ Interview with RCK Kakuma, 08.09.2010

³⁰⁰ According an interview with a refugee in Kakuma, 10.09.2010. (Around 150-200 Euro and 30-44 Euro.)

³⁰¹ Kanere 2009 2.

³⁰² Kanere 2009: 2.

³⁰³ Interview with RCK Kakuma, 08.09.2010

nurses, doctors, etc. around the world work for their fellow citizens, further, most do not identify as being part of a so-called “refugee community”.³⁰⁴

An office of the *Refugee Consortium of Kenya* (RCK) has recently been established in Kakuma camp and their lawyers began to advocate on behalf of refugees and asylum seekers for equal payment. In the expert interview carried out, it was argued: “We have to admit, the agencies engage refugees in our day to day work as a source of cheap labour. And as a source of cheap labour, we don’t follow the normal legal procedures in this country.”³⁰⁵ So, in order to follow the law and enhance refugee rights, the agencies should lobby for work permits for the camp residents they want to employ and give them a regulated position with all the benefits, such as health care, leave and equal pay. To conclude, it shall not be forgotten that it is not agencies that can guarantee refugees and asylum seekers the right to work but the Government of Kenya. As it is very difficult for camp residents to make a living and agencies are in need of qualified staff, e.g. interpreters, the idea to employ refugees benefits both parties. There is, however, no valid justification in the differences in payment and legal security.

As incentive work is limited and agriculture not an option because of natural constraints, the informal economy plays a vital role not only for urban refugees, but also in the camps. It has already been mentioned that some refugees can not use all of the food given to them, not due to a lack of need but the differences in diet.³⁰⁶ Food is cultural, and if the traditional staples are not provided by humanitarian assistance, people find measures to access them. Thus, the food and other items the refugees are given are sold, not only to fellow camp residents, but also to the surrounding areas, sometimes even abroad to the countries of origin. The items purchased vary, including daily items such as vegetables, injera, clothes, shoes, meat, milk, kerosene, matches, etc.³⁰⁷

Flourishing businesses for many refugees are the markets in the camps. In Dadaab, it is mostly Somali refugees who established businesses with networks extending up to Somalia and Nairobi, the largest being Hagadera market. The competition with Kenyan businesses is intense - one strategy of the camp businesses is to buy large

³⁰⁴ Harrell-Bond, Barbara/Verdirame, Guglielmo (2005): *Rights in exile: Janus-faces humanitarianism*. New York: Berghahn Books: 221.

³⁰⁵ Interview with RCK Kakuma, 08.09.2010

³⁰⁶ Jamal 2000: 19.

³⁰⁷ Pérouse de Montclos/Kagwanja 2002: 212.

quantities of goods from Kenyan wholesalers, then adapting these goods to the often not well-off refugees and selling small packages, e.g. single tea bags and cigarettes or smaller pieces of meat.



Picture 2: Hagadera market, Dadaab³⁰⁸

It is also Somali who offer the majority of goods in Kakuma camp often working in cooperatives, where several families share the same stall. There is also an Ethiopian market, where there are more luxurious stalls such as video clubs, hardware stores, an internet café and restaurants.³⁰⁹



Picture 3: Main road in Kakuma with the market³¹⁰

³⁰⁸ Hornberg, Jesper: Business in a refugee camp. 11. May 2011.

³⁰⁹ Pérouse de Montclos/Kagwanja 2002: 214.

³¹⁰ Photo taken from the author in September 2010

The impact of these economic activities on the local communities is a matter of controversy. On the one hand, it can be said to be negative, because refugees consume and sell already scarce products such as firewood. On the other hand, the positive effects include the creation of new jobs also for the Kenyans living around the camps. In Kakuma, for example, Turkana men and women often sell charcoal to refugees and thus take part in the established trade.³¹¹

3.5.3. Employment and livelihoods of urban refugees

Urban refugees often have to struggle with their legal status that allows them to stay outside the camps, so the possibility to work through work permits may seem secondary. But access to employment opportunities is for many a decisive pull factor to move to town instead of a camp, and further, while people living in camps hold ration cards and most services are available locally, urban refugees have to fend for themselves, which indeed constitutes employment and income generation as a major concern.

In order to work in the formal economy, all aliens including asylum seekers and refugees need a work permit.³¹² Work permits for refugees fall under class M, are valid for two years, and cost 50.000 KSh³¹³ which is an immense and unaffordable sum for many. Further, the Ministry of Immigration announced in 2000 that they stopped issuing them due to an increase in forged permits.³¹⁴ Another problem concerning work permits is the RSD process that is carried out by UNHCR: the refugee status that UNHCR declares may not be binding for Kenya as only a State can declare a person to fall under the refugee definition. So, according to one interviewee, only refugees who have arrived before the 1990s holding a status from the Government can obtain work permits.³¹⁵ In fact, no one, neither refugee nor expert on refugees, has ever met anyone with a work permit. There is even a case of a highly qualified Somali refugee with a Master degree who was offered a position as a professor at a University in Nairobi, but was nonetheless denied the work permit.³¹⁶ But in order to work, you need a work permit. As practically none

³¹¹ Pérouse de Montclos/Kagwanja 2002 : 214.

³¹² With the exception of Rwandans, since November 2008.

³¹³ About 500 Euro

³¹⁴ Pavanello/Elhawary/Pantuliano 2010: 20f.

³¹⁵ Interview with Linet Opiyo, UNHCR Nairobi, 13.08.2010

³¹⁶ Interview with Linet Opiyo, UNHCR Nairobi, 13.08.2010

are issued, the possibility to work is denied both to asylum seekers and refugees in the camps and town.

The great majority of urban refugees and asylum seekers therefore engage in the informal economy.³¹⁷ An explicit definition of the informal economy is difficult and not necessary for the purpose. Therefore, in the context of this paper, it refers to self- and non-wage employment. The informal economy comprehends legal and illegal employment activities and is characterized by “labour market insecurity such as low job tenure, absence or weak enforcement of core labour and employment regulations, weak framework for social protection and high levels of employment flexibility.”³¹⁸

To engage in the informal economy, or *jua kali* as it is known in Kenya, is not unusual, on the contrary: experiencing a constant growth, in 2008 around 80% of the total employment in Kenya was in the informal sector.³¹⁹ These results are not surprising considering the sources of livelihoods for urban refugees. The informal economy is principally a survival technique when there are no job opportunities or, as is the case of asylum seekers and refugees, they are hindered through legal obstacles to enter the formal economy.³²⁰

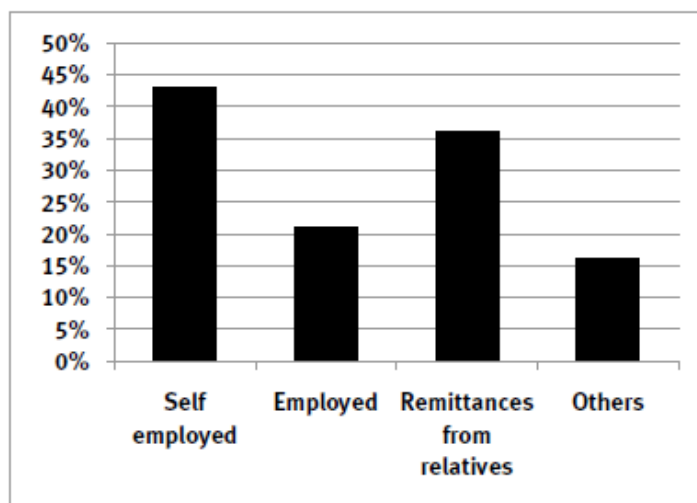


Figure 5: Sources of livelihoods for urban refugees in Kenya³²¹

³¹⁷ Pavanello/Elhawary/Pantuliano 2010: 20f

³¹⁸ Institute of Economic Affairs - Kenya (2010): The Dynamics and Trends of Employment in Kenya. IEA Research Paper. Nairobi: IEA: 16.

³¹⁹ Institute of Economic Affairs - Kenya 2010: 19f.

³²⁰ Campbell 2006: 403.

³²¹ Pavanello/Elhawary/Pantuliano 2010: 21.

The majority of urban refugees are engaged in the informal economy, including work on construction sites, mechanics, shoe shiners, shop attendants, car washers, etc. New arrivals tend to first get work with family or community networks as they have often already established structures and are flexible about paperwork. To work in certain branches may depend on your nationality or kindred group. Some sectors work quite exclusively: hairdressing and tailoring, for instance, are very common among Congolese nationals, Somali often run call centres and internet cafés and a lot of Amhara Ethiopians are engaged in catering and *matatus*.³²² But more often than not, asylum seekers and refugees cooperate and run businesses together, sometimes also with Kenyans; especially to register small businesses, a Kenyan partner is necessary.³²³ Those who have lived in Nairobi for a longer period of time are often self-employed through petty trade, which can be observed in Eastleigh where many Somali migrants and refugees have small roadside stands with fruits and vegetables, or their own stalls selling clothes, fabrics, shoes or electronics. Still other immigrants run their small businesses such as kiosks, telephone and internet cafés, selling the stimulant *mira'a*, beauty salons or *matatus*.³²⁴

Some of the refugee entrepreneurs have become very successful, as it can be observed in Eastleigh where supermarkets and shopping malls like the Garissa Lodge, developed by Somali refugees, are today the hub for trading and shopping in Nairobi.³²⁵ Another example for successful refugees outside the formal economy is the *matatu* industry: These minibuses began as an illegal form of transportation in Nairobi after independence but quickly became the most common mode of travelling, transporting people through Nairobi and all around Kenya and the neighbouring countries. Although the majority of *matatus* are owned by Kenyans, Somalis also own several *matatus* and established their position especially on the routes from Nairobi to the camps in Kakuma and Dadaab, which are in turn used predominantly by refugees.³²⁶

Women and men have equally opened their own businesses or do casual labour - female entrepreneurs are often selling tea and coffee or vegetables on the roadside, and many are in the tailoring business or do laundry in mostly Kenyan

³²² Pavanello/Elhawary/Pantuliano 2010: 21

³²³ US Committee on Refugees and Immigrants: World Refugee Survey 2009. Kenya. 17. June 2009: 3.

³²⁴ Pavanello/Elhawary/Pantuliano 2010: 21f.

³²⁵ Campbell 2006: 403.

³²⁶ Campbell 2006: 404.

households.³²⁷ However, they often have further difficulties with being employed than male refugees and asylum seekers, therefore, some refugee women are part of *Income Generating Projects* offered by NGOs and church based organizations.

None of the urban refugees I interviewed work in the formal sector, but they mostly do casual labour often waiting in the morning to be picked up for construction work or depending on friends calling them for a job; some have a small business and most further depend on aid from churches and aid organizations. One complaint sometimes raised was that Kenyan employers do not like refugee workers. One Ugandan refugee, having lived in Nairobi most of his life and therefore speaking fluent Kiswahili and Sheng,³²⁸ said he sometimes pretended to be Kenyan in order to get a job.³²⁹ In fact, some young men mainly from the Great Lakes Region conceal their refugee status in order to minimize tension with Kenyans and to get ahead at the labour market.³³⁰ Further, refugees denounced the vulnerability at work due to their ambiguous legal status. That accounts for the difference sometimes experienced in payment between asylum seekers and refugees and their Kenyan co-workers as well as the hazard of being laid off without salary. As one refugee put it: “Because [my boss] knows, I can’t do anything.”³³¹

As Figure 5 shows, another source of income for many refugees are remittances. Remittances are funds, mostly money, sent back home by migrants living abroad.³³² About one third of all urban refugees receive and partly depend on remittances, mostly sent from members of their family or close friends in the diaspora. Somali and Sudanese refugees in particular receive remittances in many cases due to the lengthy conflicts in their countries and the therefore established big diaspora communities around the world.³³³ Obviously, it is not possible to state generally

³²⁷ Jaji 2009: 145.

³²⁸ Sheng is an urban, youth sociolect that mixes English, Kiswahili, and further local languages mainly used by young people in Nairobi and around Kenya, after Samper, David Arthur (2002): *Talking Sheng: The role of a hybrid language in the construction of identity and youth culture in Nairobi, Kenya*. University of Pennsylvania: Dissertation.

³²⁹ Interview with a refugee, Nairobi, 20.07.2010

³³⁰ Pavanello/Elhawary/Pantuliano 2010: 27.

³³¹ Interview with a refugee, Nairobi, 20.07.2010

³³² Wimaladharma, Jan et al: *Remittances: the new development finance?* In: *Small Enterprise Development*, 2004, 15/1: 12.

³³³ Jaji 2009: 119.

how these money transfers are used and what role they play in the livelihoods of urban refugees - sometimes they arrive on an ad hoc basis, for example as a start-up capital for a business or when a family member gets sick. Frequently, they arrive on a regular basis such as every month to cover for daily expenses or school fees. They therefore play an important role for the income of refugees and asylum seekers in Kenyan towns.

Asylum seekers and refugees outside the camps are not entitled to food rations or other aid from UNHCR as they have to confirm that they are able to fend for themselves in order not to be confined to a camp. However, even if some refugees experience success in Nairobi, others have great difficulties in sustaining themselves due to the lack of employment - therefore, they can be described as poor.³³⁴ Some churches and NGOs therefore offer food distributions and financial help in case of an illness, for school fees etc. This survival strategy was also mentioned by the urban refugees interviewed: "Every week, I go church, where they give me some money."³³⁵

Formal employment does not play an important role for urban refugees, on the contrary: the majority work in the informal sector and run their own businesses, receive remittances from relatives overseas and humanitarian assistance.

In conclusion, it should again be stated that refugees and asylum seekers, even with the more restrictive regulations of the *Refugee Convention*, do have the right to work after a maximum period of four years in the country. The majority of refugees in Kenya have been in the country for years if not decades, and find themselves in a so-called protracted refugee situation, but nevertheless lack the possibility to engage in the formal labour market. This development is counterproductive for all three possible solutions to a protracted situation - repatriation, resettlement in a third country or local integration.³³⁶ But as it was shown, the frustration over obstacles to engage in employment does not render refugees and asylum seekers helpless: many individual concepts have sprung up to provide economic independence, mostly rooting in the informal economy, both in

³³⁴ Campbell 2006: 405.

³³⁵ Interview with a refugee, Nairobi, 20.07.2010

³³⁶ Jaji 2009: 142.

the camps and towns. Thus, they work around the restrictions placed by the Government and towards their right to employment. The unanswered question to remain is why the restrictions are in place as they have negative consequences for the refugee population, the financial situation of agencies and the economic development of the host country.

3.6. Security, Identity Documents and the Police

The above described rights and their violations have been singled out because of their frequent mention by refugees during the interviews and conversations. The following categories have been mentioned to a lesser extent, but they are nevertheless a concern for many and are connected with other rights. Therefore, they will be described shortly in this chapter.

3.6.1. Is there a right to Security?

Fear for life and well-being is most of the time the trigger for someone to leave the country of origin and make all the way to another country often facing many obstacles and hardships in order to find safety from persecution. Thus, safety is a prime concern for the majority of refugees and also UNHCR states that its first objective is to “ensure safe and dignified asylum for all refugees”.³³⁷ But sometimes the asylum country does not provide security and asylum seekers and refugees must continue their quest for safety.

Security and safety in this section refer to personal security defined in the UNDP Report as security from physical violence, including threats from the State, from other States, from a group of people or individuals.³³⁸ It will first be examined whether there is even a right to physical security for refugees and who is responsible for it to be adhered to, then the various security concerns refugees face in Kenya will be described.

As there is no mentioning of security after the arrival in the country of asylum, international refugee law does not provide for a right to physical safety for

³³⁷ UNHCR: Global Appeal - Kenya 2002, quoted after Halperin 2003: 3.

³³⁸ UN Development Programme (1994): Human Development Report 1994. New dimensions of human security. New York/Oxford: Oxford University Press: 30.

refugees.³³⁹ Halperin argues in her thesis that there are however certain ideas and principles that can be deducted from refugee law which are also applicable to the security for refugees in Kenya. Further, a document adopted by the African Union states that “governments should use their best endeavours to treat refugees recording to the standards established under refugee law. In particular, they should ensure the personal safety of refugees [...]”.³⁴⁰ These arguments do not provide grounds for a legally binding obligation for States to ensure the physical safety for refugees but they remain general values and principles. The *Refugee Act* does not contain a right to physical security, but in the section about “Refugee women and children”, it goes one step further, obliging the Commissioner for Refugee Affairs to “*ensure that specific measures are taken to ensure the safety of refugee women and children [in refugee camps].*”³⁴¹ As a lot of violence and insecurity that occurs is gender-based and thus affects women to a greater extent, this provision is important and helpful. But as the Act has not yet been fully applied and lacks implementation in basic State duties such as the Status Determination, it is difficult to assert in which way the Commissioner is going to ensure the safety and if the measures taken will be effective.

International human rights law provides a better framework for the relevant matter of security, and as shown above, the instruments apply without reservation to refugees and asylum seekers alike. The *Universal Declaration of Human Rights* includes not only a right to life, but a right to security of person,³⁴² that became legally binding through the *International Covenant on Civil and Political Rights* (ICCPR).³⁴³ Further, the *African Charter on Human and Peoples Rights* obligates its signatory States, including Kenya, to entitle every human being “*to respect for his life and the integrity of his person*”,³⁴⁴ and in addition guaranteeing the right to

³³⁹ Mtango, Elly-Elikunda: Military and Armed Attacks on Refugee Camps. In: Gil Loescher/Laila Monahan (1990): *Refugees and International Relations*. New York/Oxford: Oxford University Press: 113.

³⁴⁰ OAU/UNHCR: The Addis Ababa Document on Refugees and Forced Population Displacements in Africa. Symposium on Refugees and Forced Population Displacements in Africa. 10. September 1994: Recommendation Seven, quoted after Halperin 2003: 29.

³⁴¹ The Refugee Act: Art 23 (1).

³⁴² UDHR: Art 3: „Everyone has the right to life, liberty and security of person.”

³⁴³ International Covenant on Civil and Political Rights: Art 9 (1): „Everyone has the right to liberty and security of person [...]” and Art. 6 (1): “Every human being has the inherent right to life [...]”

³⁴⁴ African (Banjul) Charter on Human and People’s Rights. OAU: 1981: Art 4: „Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”

security.³⁴⁵ For children, human rights law explicitly states their right to physical security in other instruments as well.³⁴⁶

Thus, international human rights law includes a right to security, mostly wording it as the right to life, to respect of the integrity of person or simply as the right to personal security. As the addressees of international human rights norms are States, the Republic of Kenya is responsible for the physical security of all individuals within its territory, regardless of citizenship, thus also asylum seekers and refugees.³⁴⁷ However, it applies to freedom from State violence rather than to insecurity from non-State actors and today, the majority of insecurity in Kenya stems from individuals. In the 1990s, Kenyan security forces were the main cause for insecurity for refugees and asylum seekers, as the authorities often chose brutal repressions in order to avoid the Somali conflict from spilling into the region with many refugees, mostly in the camps, dying during these “security operations”. By the end of the 1990s, it was predominantly individual and non-State actors that accounted for the insecure situation.³⁴⁸

During the interviews with urban refugees in Nairobi, insecurity in the camps was raised as one reason for the departure from the camps, especially for refugees originating from DRC and Ethiopia. While there is no official record of violence in the camps and it would probably be impossible to quantify the amount, “incidents involving death and serious injury take place on a daily basis.”³⁴⁹ The forms of insecurity in camps are multifold. In a report on the security situation in Kenyan camps, Jeff Crisp identifies several types of violence against refugees, although they are often overlapping: domestic and community violence, sexual violence, armed robbery, violence within national refugee groups, violence between national refugee groups and violence between refugees and local populations.³⁵⁰

Domestic and community violence describe the fact that much of the violence experienced in Kakuma and Dadaab camps is inflicted upon the residents by their own families or communities.³⁵¹ According to the report, it is common occurrence

³⁴⁵ African (Banjul) Charter on Human and People’s Rights: Art 6: „Every individual shall have the right to liberty and to the security of his person [...]”

³⁴⁶ Halperin 2003: 33ff.

³⁴⁷ Halperin 2003: 49ff.

³⁴⁸ Harrell-Bond/Verdirame 2005: 153ff.

³⁴⁹ Crisp 1999: 3.

³⁵⁰ Crisp 1999: 4ff.

³⁵¹ Crisp 1999: 5.

that women, children and adolescents suffer violence by adults from within their family, although the exact scale of the problem is unknown. The justice system is inadequate to protect them - although the Kenyan justice system is responsible for the camp areas, refugee communities sometimes resort to traditional institutions to settle a conflict, which are in turn violent themselves, as corporal punishment and detention are part of some institutions.³⁵² Also within that category falls the problem that refugees are sometimes recruited to fight in their countries of origin. For example, in 1996, about 500 people were enlisted by the *Sudan People's Liberation Army* (SPLA). Enlistments include forced recruitments, also of children and minors, and often come along with threats, harassment and violence.³⁵³

Sexual violence, especially rape, is highly common in the camp areas. The overwhelming majority is experienced by female refugees, mostly in the bush around the camps while collecting firewood, fetching water or herding goats. It is likely that there is a very high number of unreported cases, as sexual violence is often perceived as a shameful experience and protection mechanisms are not adequate. From the reported incidents, however, it can be extracted that while some were committed by Kenyan police and refugees, the largest number of perpetrators are so-called "bandits".³⁵⁴ The identities of these bandits are not well known - in many cases, they are composed of groups of five to fifteen men, and are, in Dadaab, both local Kenyans, Somali refugees and some Somali militia-members.³⁵⁵ Their regular attacks contribute to a climate of fear and intimidation, increased by the relative impunity they seem to enjoy.³⁵⁶

Armed robbery is predominantly targeted at refugees owning a business or having another source for cash, aid agency facilities, vehicles and *mira'a* traders and is also ascribed to bandits. The robberies take place mostly at night and aim at cash and portable items, such as radios, watches or shoes; and are also ascribed to bandits.

It is not surprising that violence within national refugee groups occurs in the camps: groups that are fighting each other in their country of origin are forced to live together in a limited amount of space. A negative extreme example is the situation of the Goma camps after the Rwandan genocide, where, instead of

³⁵² Verdirame 1999: 62ff.

³⁵³ Harrell-Bond/Verdirame 2005: 173ff.

³⁵⁴ Crisp 1999: 7.

³⁵⁵ Crisp 1999: 7f.

³⁵⁶ Halperin 2003: 14.

providing a safe haven for refugees, the killings continued.³⁵⁷ Violence within national refugee groups often follows security incidents in the country of origin.³⁵⁸ Moreover, marginal disputes between individuals may lead to the outbreak of violence along ethnic or clan lines, as happened in Kakuma in 1997, where a small quarrel between two youths developed into fighting between Sudanese refugees and left many heavily injured. “There is an evident potential for such disputes to escalate into violence of a more generalized nature.”³⁵⁹ Sometimes, the insecurity derives from governmental agents from the country of origin especially affecting Ethiopian refugees, including reported cases of abduction from Ethiopian agents.³⁶⁰ In addition, violence between different nationalities and refugees and the local population happen in and around the camp areas, but on a lesser scale. Other than Kakuma, where there are people with varying cultural backgrounds, in Dadaab, this is not a heavy problem, as refugees and local populations often share the same language and cultures. Although there is said to be a “persistent climate of suspicion” between refugees and the local Turkana, violent clashes are nowadays minimal.³⁶¹

As was seen, many of the above mentioned types of violence are gender-based. The most prominent example and voiced as the major concern by refugee women are rapes.³⁶² They can affect every woman, from young girls to elderly women from all nationalities and clans, and according to some human rights activists, young boys (especially unaccompanied minors) are also vulnerable to experience sexual violence in a Kenyan refugee camp.³⁶³ Before life-fences were planted, rapes used to happen within the camp compounds - especially to women living without husbands, while as nowadays, they mostly take place in the bush surrounding the camps during daytime when women are searching for firewood. This knowledge, together with the scarcity of firewood in the region, was one reason why the GIZ began to distribute firewood to camp residents. Although these measures can be very helpful to the individual, they fight against the symptoms rather than the underlying causes of sexual and gender-based violence (SGBV). In general, SGBV

³⁵⁷ Black 1998a: 5.

³⁵⁸ Halperin 2003: 15.

³⁵⁹ Crisp 1999: 10.

³⁶⁰ Human Rights Watch 2002: 128f.

³⁶¹ Crisp 1999: 12.

³⁶² Refugee Consortium of Kenya (2008): Specific Needs of Women and Children in Dadaab Refugee Camp. An Assessment and Mapping of response during emergencies. Nairobi: RCK: 19ff.

³⁶³ Crisp 1999: 6.

can be seen as a manifestation of traditional gender norms that support “male” superiority and social norms that tolerate or justify violence against “women”. Further, poverty and high levels of crime and conflict in a society increase the likelihood of incidents of gender-based violence.³⁶⁴ Women from minority groups in a camp are more likely to be raped, as Fitzgerald observed in her research: “Rape is a weapon of war, an act of aggression by one clan or subclan against another. Women who are raped are asked first to which clan or subclan they belong.”³⁶⁵ Here, the general insecurity in the camps and the lack of full implementation of the Kenyan legal system through numerous and trustworthy police forces and courts further enhance the insecurity regarding sexual and gender-based violence as perpetrators more often than not go unpunished.³⁶⁶ The protection measures at the camps are not enough, especially as they involve the forthcoming of the affected person, but rape and sexual violence are associated with shame - in fact, sometimes even stigmatizing women who report rape as “rape victims” - and are thus seldom reported. The rapes are mostly perpetrated by bandits, but there are also numerous reports of sexual violence by security forces such as the Kenyan police.³⁶⁷

Measures taken to address these problems include the *Women Victims of Violence Project* (WVV) from UNHCR, which aims at assisting those affected by rape. Although it does include many positive aspects, it has been critiqued for the enhancement of power relations in the camps by designating women as “victims” instead of empowered subjects, as the title of the project already suggests.³⁶⁸

A fact rarely mentioned in literature on insecurity in refugee camps is the violence that emanates from humanitarian organizations and their staff.³⁶⁹ “The inhuman treatment accorded refugees waiting for their asylum cases to be heard or to receive services at the offices of UNHCR or their implementing partners has been

³⁶⁴ Population Council (2008): Sexual and gender based violence in Africa. Literature Review. Nairobi: Population Council: 9.

³⁶⁵ Fitzgerald, Mary Anne: Firewood, Violence Against Women, and Hard Choices in Kenya. In: Refugees International, July 1998.

³⁶⁶ RCK 2008: 21.

³⁶⁷ Harrell-Bond/Verdirame 2005: 143ff.

³⁶⁸ Hyndman, Jennifer (1996): Geographies of displacement: Gender, culture and power in UNHCR refugee camps, Kenya. The University of British Columbia: PhD Thesis: 121ff.

³⁶⁹ For a detailed analysis see: Harrell-Bond, Barbara: Can Humanitarian Work with Refugees be Humane? In: Human Rights Quarterly, 2002, 24/1: 51-85.

so widely reported that it can only be described as normative.”³⁷⁰ Although the camps are legally the responsibility of the Kenyan State, they are administered by humanitarian organizations, which leads to an unequal power relation between humanitarian workers and refugees. Incidents of violence from individual humanitarians have been reported, including the beating of refugees, mostly as a means to control or “discipline” refugees. But there have also been reported cases of collective punishment originating not only from individuals but from agency-based decisions. For example, after a riot and the destruction of an enclosure used for food by refugee youths in Kakuma in 1996, the response of UNHCR was to impose collective punishment with food distributions being suspended for 14 days and incentives not paid. This was a conscious decision, as UNHCR even distributed a memorandum explaining the punishment.³⁷¹ It has to be remembered that the majority of the camp residents are dependent on these food distributions and that it is the judicial system of Kenya that has to be applied, while UNHCR or the implementing partners do not have sovereignty over the camp compounds. One community leader formulated accurately the paternal relationship between some humanitarian workers and refugees: “It is the colonial idea that some individuals are always children and that you have to punish them, however hardly [severely] and indiscriminately, because you need to educate them. After the incident was over and the refugees had re-built the food distribution centre, the people in the UN compound were saying 'The refugees have learnt the lesson, although it was a hard punishment'.”³⁷²

The question whether there is a right to security was answered with human rights law that makes personal security an obligation for States. The situation in Kenyan camps involves numerous violent incidents from different kind of perpetrators, most of them private individuals or bandits, but some from agencies and public services. The State is not directly responsible or accountable for these acts, but it has to be acknowledged that the ignorance vis-à-vis refugees accompanied by the missing implementation of Kenyan law and thus lawlessness in some parts of refugee populated areas and the situation of overcrowded, closed camps offer the

³⁷⁰ Harrell-Bond 2002: 64.

³⁷¹ Verdirame 1999: 64ff.

³⁷² Quoted after Verdirame 1999: 66.

ideal breeding ground for insecurity and in fact are the responsibility of the Kenyan State.

Urban refugees face different obstacles when it comes to personal security, but some are the same as in the camps, such as robberies, rapes and other SGBV and the abduction by agents from the country of origin. In Nairobi, it is well known that Ethiopian “security agents” operate to threaten and abduct foremost politically active refugees and asylum seekers, with one prominent case in 1992 of a murder of a political leader seeking refuge in Nairobi. Insecurity is furthered by poverty and unsafe housing.³⁷³ Other than in the camps, personal insecurity is more often attributed to State officers experienced through arbitrary arrest and the problem of Identity Documents.

3.6.2. Arbitrary Arrest and the problem with Identity Documents

In an expert interview with a lawyer from *Kituo cha Sheria*, he asserted that the majority of cases they have to handle with on a daily basis concerns refugees having been stopped by the police and then charged with unlawful presence.³⁷⁴ According to research conducted on refugees in Eastleigh, robbers and criminal groups posed a great security threat, but the police were named as the main perpetrators of violence in the community.³⁷⁵ As already mentioned in chapter 3.4, the police and their demand for bribes constitute a constant hassle for urban refugees. Police harassment, arbitrary arrest, corruption and violence are a problem for many residents of Nairobi, especially for poor people, not only refugees and immigrants.³⁷⁶ But these groups tend to be more vulnerable against a State force that threatens to send them back in case they do not cooperate. Arbitrary arrest, i.e. the arrest of someone without the likelihood that he or she committed an offence or without proper legal process, is clearly forbidden in international human rights law.³⁷⁷ But there have been numerous cases of the police in Kenya arbitrarily arresting refugees, meaning that they threaten the

³⁷³ Human Rights Watch 2002: 36ff.

³⁷⁴ Interview with Kituo cha Sheria, 12.08.2010

³⁷⁵ Pavanello/Elhawary/Pantuliano 2010: 19.

³⁷⁶ Human Rights Watch 2002: 42ff.

³⁷⁷ For example: Art. 9 of the Universal Declaration of Human Rights: „No one shall be subjected to arbitrary arrest, detention or exile.”

individual with arrest unless a bribe is paid: “the payment of bribes has become the only way of avoiding arbitrary arrest and detention.”³⁷⁸ If arrested, the refugee is taken to the police station where the possibility of a payment leads to the release. Otherwise, a charge will be brought into action, mostly because of unlawful presence in the country. Reported incidents exist numerously, an estimate from UNHCR stated about 2.300 in 2001, although they admitted that UNHCR is often not informed³⁷⁹ - but hardly ever a lawsuit is brought against the police for unlawful arrest.³⁸⁰ These incidents involve a big crackdown against Rwandan aliens in July and August 1997 - the police usually arrived in the middle of the night at the homes of refugees, checking identities, collecting bribes and taking some to the police station.³⁸¹ In this case, the refugees were not released and after weeks in prison, most were obliged to get into buses and drive to Kakuma camp.³⁸² Other big “swoops” include the arrest of over 600 people, predominantly Somali and Ethiopians from Eastleigh, after the 1998 US embassy bombing in Nairobi in the following year,³⁸³³⁸⁴ and a group arrest in 2002, when about 800 refugees, mostly from poor slum areas in Nairobi, were detained for days without indictment at the Kasarani and Gigiri Police Stations in Nairobi.³⁸⁵ Also, after the Kampala bombing in July 2010, additional arrests of predominantly Somali refugees took place in Nairobi and elsewhere, under the premise of national security.³⁸⁶ Individuals are affected in the same way. In neighbourhoods such as Eastleigh, where it is known that many refugees live, police are said to routinely stop people, ask for their ID and then take them to the next police station. More likely to be stopped are Somali refugees,³⁸⁷ while Congolese or Ugandan try to blend into the Kenyan urban population of Nairobi through clothes, style and talking Swahili as much as possible.³⁸⁸

³⁷⁸ Verdirame 1999: 61.

³⁷⁹ Human Rights Watch 2002: 46.

³⁸⁰ Harrell-Bond/Verdirame 2005: 167.

³⁸¹ Verdirame 1999: 73f.

³⁸² Interview with Father Eugene Birrer, 27.07.2010

³⁸³ Campbell 2006: 401.

³⁸⁴ At the 7th August 1998, the US Embassy in Nairobi was attacked by a bomb ascribed to Al Quaida, which killed several hundred people, mostly Kenyan nationals working at office buildings around the Embassy. See for example: Shinn, David: Fighting terrorism in East Africa and the Horn. In: Foreign Service Journal, September 2004: 36-42.

³⁸⁵ Human Rights Watch 2002: 49.

³⁸⁶ Interview with Linet Opiyo, UNHCR Nairobi, 13.08.2010

³⁸⁷ Interview with Father Eugene Birrer, 27.07.2010

³⁸⁸ Pavanello/Elhawary/Pantuliano 2010: 27.

One reason for the chronic police harassment and arbitrary arrest is a strong ignorance of refugee rights and of the new *Refugee Act* among the police force.³⁸⁹ One of UNHCR's objectives mentioned at interviews in Nairobi and Kakuma, is the education and awareness-raising of police officers in order for them to be aware of the meaning of being a refugee, the legal aspects it entails and to get familiar with refugee documentation. Today, police attitude towards refugees is mostly hostile: "There is a widespread belief within the police that refugees should be restricted to camps, and there is little understanding of the reasons why they might want to reside permanently in Nairobi. Police officers also typically assume that refugees are criminally minded, while Somalis in particular may be suspected of links with terrorist organizations."³⁹⁰

The underlying problem is a lack of valid Identity Documents respectively the default of non-acceptance of the issued documents. The *Refugee Act* provides every refugee and asylum seeker with a refugee identity card or pass.³⁹¹ This need for ID is already expressed internationally in the *Refugee Convention*.³⁹² As for today, there is a difference between the documentation refugees enjoy and the papers they are acquired to have. Refugees should have a *Refugee Identification Pass* issued by the Government of Kenya, but only refugees processed before 1998 hold them while the rest gets documents from UNHCR:

After arriving in Kenya and presenting themselves a UNHCR office outside the camps, everyone will get an *Appointment Letter* which indicates the scheduled date of the Status Determination interview. Problematic with this letter is that it does not explicitly state that its holder is protected. As shown above, the time frame between the first contact with the UN and the final determination can last very long, mostly months or years. If the process is determined and the asylum seeker recognized as a refugee, he or she will get the UNHCR "Mandate Refugee Certificate" also known as "*Protection Letter*".³⁹³ This is an A4 size sheet of paper including a passport photo, the name and eventual family members and stating

³⁸⁹ Interview with Linet Opiyo, UNHCR Nairobi, 13.08.2010

³⁹⁰ Pavanello/Elhawary/Pantuliano 2010: 17.

³⁹¹ The Refugee Act: Art. 14: "Every refugee and asylum seeker shall -

(a) be issued with a refugee identity card or pass in the prescribed form; and

(b) be permitted to remain in Kenya in accordance with the provisions of this Act."

³⁹² Convention relating to the Status of Refugees: Art. 27: "The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document."

³⁹³ Pavanello/Elhawary/Pantuliano 2010: 17.

that the holder is a refugee recognized by UNHCR. It further states whether the holder is required to live in a camp or can stay in Nairobi or another part of Kenya.³⁹⁴

For a lot of residents at the camp, the only paper that identifies them is the ration card, which simply states their asylum number for UNHCR but does not include a photograph or name.



Picture 4: Ration card³⁹⁵

It could be argued that further documentation might not be necessary, as inside the refugee camps the ration card is the necessary form. However, this is not only contradicting reality with many refugees leaving the camp compounds, but also against Kenya's own legislation, which guarantees "every" refugee and asylum seeker an identity card or pass. Another form of documentation is available to camp residents: the *Movement Pass*. Foremost rejected as a mean to restrict freedom of movement, it does have the positive aspect of identifying its holder as a refugee who is allowed to travel outside the camp.

However, the police routinely do not accept the ID from UNHCR presented by refugees or asylum seekers. Some urban refugee state that the "protection letter is not worth the paper it is written on".³⁹⁶ This notion, together with other reasons such as long waiting periods and harassment by the police on the way to UNHCR, leads many asylum seekers to not apply for a regularization of their status but

³⁹⁴ Veridrame 1999: 59.

³⁹⁵ The Telegraph: Pictures of the day: 2. August 2011.

³⁹⁶ Verdirame 1999: 60.

instead to live in the city undocumented, which in turn confirms the police's attitude towards asylum seekers and refugees as being in the country unlawfully and illegally. Urban refugees report that their papers are either ignored or even torn apart when stopped, and that they then have to pay a bribe or else would be charged: "Sometimes when they arrest the refugees who have the documents, they just throw out the document, throw it away and take them to the police station and then to court."³⁹⁷

One argument sometimes raised why the IDs are not accepted is that they are not issued by the Kenyan government but by UNHCR that has not the sovereignty to either determine the refugee status nor to certificate Identity Documents which the Kenyan police has to accept. The reason for UNHCR to take over these tasks is that the Government of Kenya does not yet carry them out sufficiently. Through the *Refugee Act* and the establishment of the *Department of Refugee Affairs*, it is now also legally the task of the Government to issue Identity Documents. It has not yet been implemented, with some positive exceptions,³⁹⁸ so that up until now it is still UNHCR that gives out IDs. The importance of IDs has also been acknowledged by George Okoth-Obbo, former UNHCR Representative in Kenya: "These cards could change the lives of many refugees in Kenya. We should see less intimidation, harassment and even arbitrary arrests of refugees."³⁹⁹ Identity Documents are also necessary for other areas: "IDs are important in order to engage in financial matters, e.g. opening a bank account, to register at university etc. So in short, the refugee status and therefore the IDs enable refugees to access certain services they could otherwise not access."⁴⁰⁰

Thus, valid documents are a prerequisite for refugees in order to enjoy other rights, such as the right to work, to health care or education. On its internet page, the *Department of Refugee Affairs* promised to begin issuing IDs, and that every recognized refugee is entitled to an ID within two weeks after recognition.⁴⁰¹ The ID will be similar to that of Kenyan IDs instead of the A4 sheets from UNHCR that the police often do not accept, see picture 5.

³⁹⁷ Interview with Kituo cha Sheria, 12.08.2010

³⁹⁸ UNHCR: Feature: Refugees get trump card - and identity - in Kenya. 15. April 2003b.

³⁹⁹ UNHCR 2003b: 2.

⁴⁰⁰ Interview with Linet Opiyo, UNHCR Nairobi, 13.08.2010

⁴⁰¹ Department of Refugee Affairs: Frequently Asked Questions. 2011a.



Picture 5: Refugee Identity Card⁴⁰²

In the interviews with UNHCR and the *Department of Refugee Affairs*, both assured that the ID from the Government are on the way, but until now DRA has not yet had enough means to implement the issuance of them. As shown, under international and national law, Kenyan authorities are required to guarantee IDs to asylum seekers and refugees. From a practical standpoint, this would mean an immediate improvement for the lives of many refugees, foremost for urban refugees, as police harassment, arbitrary arrest and the payment of bribes are linked to the non-acceptance of UNHCR documents.

If refugees are indeed detained and the case reaches the courts, most are charged with “unlawful presence”. It is an offence under the *Immigration Act* to be in the country without a valid entry permit and the police can arrest any person suspected of being unlawfully present in Kenya.⁴⁰³ The provision then requires them to repatriate. However, the *Refugee Act* overrules this provision for every asylum seeker if they have already made the application for RSD, and every refugee.⁴⁰⁴ As already mentioned, there has been a decisive ruling by the High

⁴⁰² Department of Refugee Affairs: Refugee Identification Document. 2011b.

⁴⁰³ Immigration Act: Art. 4 (2): “[T]he presence in Kenya of any person who is not a citizen of Kenya shall, unless otherwise authorized under this Act, be unlawful, unless that person is in possession of a valid entry permit or a valid pass.”; Art. 12 (1): „An immigration officer or a police officer who has reasonable cause to suspect that a person has committed an offence under this Act, or is unlawfully present in Kenya, may, if it appears to him to be necessary to do so in order to secure that the purposes of this Act shall not be defeated, arrest that person without warrant.”

⁴⁰⁴ The Refugee Act: Art. 13: „Notwithstanding the provisions of the Immigration Act or the Aliens Restriction Act, no proceedings shall be instituted against any person or any member of his family in respect of his unlawful presence within Kenya - (a) if such a person has made a bona fide application under section 11 for recognition as a refugee, until a decision has been made on the application and, where appropriate, such person has had an opportunity to exhaust his right of appeal under that section: or (b) if such person has become a refugee.

Court of Kenya not to apply the provision of the *Immigration Act* as this would in fact constitute a breach of the principle of *non-refoulement*.⁴⁰⁵

Unfortunately, most police officers and authorities are not yet aware of this legal difference between refugees, asylum seekers and other immigrants. Further, persons stopped and taken to the police station or prison may not know that their asylum seeker or refugee status qualifies them for immediate release.⁴⁰⁶ In these numerous cases, legal advice is vital, but many cannot afford a lawyer. *Kituo cha Sheria* and RCK stepped into this protection gap and now represent and advice detained refugees and asylum seekers - however, often there are cases that do not reach their office and as a result of ignorance of refugee matters, police harassment and lack of legal representation, the person may be sent back to his or her country of origin, which not only violates Kenya's legal obligations, but can also be dangerous for the individual who was fleeing the country for safety reasons in the first place.

However, due to awareness raising campaigns from UNHCR and other organizations, the Courts are beginning to ask indicted person whether they are in Kenya for protection reasons: "But normally our courts, they are cooperative in dealing with refugees."⁴⁰⁷ Mostly, they also accept the UNHCR documents and discharge them immediately. Some ask if the prosecuted were in fact asylum seekers, then they give them time to legalize the status before the case will be prosecuted.⁴⁰⁸

There are reasons to be optimistic about the security hassles in town due to police arrests and the lack of accepted Identity Documents. Awareness raising among Kenyan authorities dealing with refugee matters, the promise to fully implement the DRA's task to issue governmental IDs and the ruling of Courts when dealing with unlawful presence of refugees and asylum seekers will help to establish these rights.

⁴⁰⁵ Republic of Kenya in the High Court of Kenya in Nakuru: Criminal Revision No. 205 of 2010 and Criminal Revision No. 58 of 2010

⁴⁰⁶ Interview with Linet Opiyo, UNHCR Nairobi, 13.08.2010

⁴⁰⁷ Interview with Kituo cha Sheria, 12.08.2010

⁴⁰⁸ Harrell-Bond/Verdirame 2005: 169.

4. Mind the gap! Reasons for the disparities: some explanations

The previous section gave examples for the gap⁴⁰⁹ that exists between the rights refugees should enjoy and the liberties they can indeed exercise. After having identified the most prominent violations, the aim is now to discover some of the reasons for them. When asking the question why the application of certain rights is not guaranteed, the answer will be multifold offering many factors. Some are political, for example the role that foreign policies or internal political quarrels play for refugee lives, others sociological such as the construction of refugees as “the other”, therefore leaving them outside certain rights, some are economic, including the high unemployment rate in Kenya, limited resources of the government, and the endemic corruption experienced by the majority of refugees, further the individual level shall not be ignored and so on. All of these require a deep analysis in the respective field of study, and although I regard as important to take a look outside your discipline and acknowledge that the above mentioned problems are global and indeed to be considered from various angles, the attempt in this section is not to give a full answer to the question, but rather to follow the approach of the thesis analyzing the problems from a legal perspective and to offer certain explanations by examining the main actors involved in refugee protection, mainly the host State and UNHCR.

4.1. The host State and UNHCR: an ambiguous relationship

4.1.1. The demise of the State

“No law is self-applying.”⁴¹⁰

This old legal saying gets to the heart of the dilemma of refugee rights in Kenya. The possibility for refugees to exercise their rights presented lies within the responsibility of the host State, in our case Kenya. But as the government did not

⁴⁰⁹ This expression derives from Crips, Jeff (2001): Mind the gap! UNHCR, humanitarian assistance and the development process. New Issues in Refugee Research. Working Paper No. 43. Geneva: UNHCR.

⁴¹⁰ Quoted after Goodwin-Gill, Guy: Closing Address. Principles and Protection: Making it Work in the Modern World. In: Dennis McNamara/Guy Goodwin-Gill (1999): UNHCR and International Refugee Protection. RSP Working Paper No. 2. Oxford: Refugee Studies Programme: 14.

perform this duty the way it is legally obligated to, UNHCR stepped in and took over some of the pivotal roles for refugee protection. This is a development that can be observed not only in Kenya, but it can be identified as a general transformation of the role of UNHCR, without yet having adapted its mandate.

The reluctance of the host State to deal with refugees is a global phenomenon, historically intensified when refugee admissions did not maintain their former political importance during the post-Cold War period.⁴¹¹ Most Western countries were setting up restrictive policies and the pronounced idea was to stem immigration, including refugees. As a result, the UN *Convention* was interpreted more narrowly and often, though not openly rejected, refugee rights were curtailed.⁴¹² Further, resettlement options were limited and funding governments now preferred to finance projects that coincided with these aims, such as in-country protection. The result was that, as had already been the case before, most asylum seekers fled to neighbouring countries which were foremost development countries. This wish not to deal with asylum seekers and at best to keep them outside their borders was a thought that began to dominate refugee policies in many Asian and African countries too, including Kenya.

But as new asylum seekers arrived at a large scale at the same time during these years in the 1990s, there was a huge gap in protection that UNHCR started to fill.

In Kenya, this shift from State responsibility towards more decision-making power for UNHCR also took place at the beginning of the 1990s. Since then, the agency has been responsible for Status Determination and the administration of the camps, together with the co-decisions about who may or may not leave the camp compounds. Kenya declared that it was a “transit country”, thus enhancing the idea that refugees were temporary and the government did not have to deal with them, and even went so far as to pronounce that refugees were “the responsibility of UNHCR”.⁴¹³

The government’s disregard towards refugees was also reflected in the lack of a domestic legal framework. In fact, the reluctance to implement the international

⁴¹¹ Bakircioğlu, Önder: The evolving role of the UNHCR: Should the conventional role of the UNHCR be expanded? In: Ankara Law Review, 2008, 5/1: 105.

⁴¹² Slaughter, Amy/Crisp, Jeff (2009): A surrogate State? The role of UNHCR in protracted refugee situations. New Issues in Refugee Research, Working Paper No. 168. Geneva: UNHCR: 4f.

⁴¹³ Harrell-Bond/Verdirame 2005: 272.

norms into the national legislation may account for many rights violations presented, foremost for the incidents of *refoulement*, the absence of the RSD process and the experienced insecurity. But in 2006, the *Refugee Act* was passed, thus enhancing the government's role in refugee protection and diminishing the position of UNHCR.

Of the rights presented, the power shift from State to UN is relevant for the right to freedom of movement, to a fair and fast RSD, the right to work and equal payment, and security due to the camp administration and the issuance of IDs.

4.1.2. The role of UNHCR

The United Nations High Commissioner for Refugees was founded to assist European refugees fleeing from World War II, originally with a three-year mandate only. Soon it became clear that the agency was needed for longer and in other parts of the world as well, and its mandate was extended globally and prolonged “until the refugee problem is solved”.⁴¹⁴ The original mandate was to provide “international protection”, to seek “permanent solutions for the problem of refugees” and to “facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.”⁴¹⁵ Thus, the concept was to promote asylum and guarantee the treatment of asylum seekers and refugees in regard to the UN *Refugee Convention*.

Since its establishment, the Office has experienced many changes, due to several major crises such as the situations in former Yugoslavia or the Great Lakes region in the early 1990s. Globally, the origins of conflict changed: it was a shift from international clashes caused by State tensions along the Cold War lines towards internal conflicts and civil war. Consequently, refugee flows changed, and new and differing tasks were required from UNHCR that could not be found within its Statute - together with a dramatic expansion of its activities worldwide, in terms of personnel, missions and budget.⁴¹⁶ The protection gap mentioned was beyond

⁴¹⁴ UNHCR (2011): About us. Governance and Organisation.

⁴¹⁵ UNHCR (1950): Statute of the Office of the United Nations High Commissioner for Refugees. General Assembly Resolution 428 (V) of 14 December 1950: Chapter 1.

⁴¹⁶ Barutciski, Michael: Introduction. Confusion about UNHCR's Role. In: Dennis McNamara/Guy Goodwin-Gill (1999): UNHCR and International Refugee Protection. RSP Working Paper No. 2. Oxford: Refugee Studies Programme: 3f.

the limits of UNHCR's mandate, including problems such as the plight of Internally Displaced Persons, humanitarian assistance, Status Determination and the administration of refugee camps. As the governments of the host countries were regularly neither willing nor able to accomplish these tasks, UNHCR took over pivotal elements of the host State's responsibility. Some argue that UNHCR also pressured host countries to let them carry out these central responsibilities, as they could generate more funds and hence considered the power shift as in the interest of the refugees.⁴¹⁷ This model was often not reversed, so that in turn the role of the State was weakened and UNHCR's position strengthened.⁴¹⁸ Thus, an "increasing slippage between UNHCR and state responsibilities"⁴¹⁹ was developed.

Probably the most important and at the same time heavily criticized task for UNHCR in Kenya is the administration of the two camp complexes. When they were planned and constructed, the Government of Kenya had already declared that refugees were not its responsibility but UNHCR's - at the same time, some authors argue that UNHCR themselves lobbied for the encampment policy and its own vital role in it. Most likely, it was seen by both parties as in their mutual interest - UNHCR because they could generate more funds and protect refugees directly, and the government since it could get rid of the financial burden.⁴²⁰ While UNHCR and its personnel speak out vehemently against the encampment of long-term refugees, the problem is again that they maintain this situation of human rights violations by administering them and comply with the idea that camps are inevitable.⁴²¹ As an example, it was UNHCR that organized the buses to transport refugees to camps involuntarily, escorted by the police, after a round-up in 1997.⁴²² The position of UNHCR on encampment is also reflected in their urban refugees policies, which until recently called refugees outside camps "irregular movers" who belonged into camps,⁴²³ enhancing the insecure situation of many urban refugees.

⁴¹⁷ Harrell-Bond/Verdirame 2005: 272f.

⁴¹⁸ Slaughter 2009: 2ff.

⁴¹⁹ Hyndman, Jennifer: Change and Challenge at UNHCR: A Retrospective of the Past Fifty Years. In: *Refuge*, 2001, 19/6: 45-53.

⁴²⁰ Harrell-Bond/Verdirame 2005: 273.

⁴²¹ Harrell-Bond/Verdirame 2005: 287.

⁴²² Harrell-Bond/Verdirame 2005: 303.

⁴²³ UNHCR (1997): *Comprehensive Policy on Urban Refugees*. Geneva: UNHCR: 6ff.

A further point of critique of UNHCR's role in Kenya is the insistence they put on repatriation to the country of origin as the preferred option for refugees. This is in compliance with the government's position, which considers refugees as being in the country temporarily. That this policy is far from reality has been shown. Therefore, integration into the local communities, including enhanced rights such as employment and free choice of residence, were sidelined.⁴²⁴

A contributing factor to the gap between rights in the books and on the ground are the "care and maintenance programmes" that UNHCR has advanced since the 1980s. Following this model, UNHCR offers services to refugees and asylum seekers separate from public services, such as education, health facilities, sanitation and even access to food.⁴²⁵ These are often better equipped than the services available locally, thus contributing to the tension between host and refugee populations and increasing insecurity. Additionally, the idea of encampment and the consequences it brings along, such as restrictions on the freedom of movement and choice of residence or the right to work, present quick relief but do not put forward long-term solutions such as integration into the host society and self-sufficiency. Moreover, they further enhance the role UNHCR plays, making it inevitable for refugees to address the agency, and thus diminishing the role of the State. In turn, this approach is highly reliant on outside funds, mostly originating from donor countries. The opposite concept is found in the rights-based approach. It works upon the assumption that refugees, such as all human beings, are entitled to certain rights.⁴²⁶ In following these rights, durable solutions will ultimately be found, thus refugees protected and asylum promoted. Goodwin-Gill has argued that the "portion of UNHCR protection work that was rooted in international law, standards and principles, has been eclipsed by so-called pragmatic approaches to refugee problems, in which everything seems to be negotiable."⁴²⁷

These differing approaches led to a conflict between quick relief and durable, rights-based protection. This conflict is also present within the agency's priorities between humanitarian assistance and the promotion of asylum: While the original

⁴²⁴ Harrel-Bond/Verdirame 2005: 290f.

⁴²⁵ Slaughter 2009: 8.

⁴²⁶ Jamal 2000: 35.

⁴²⁷ Goodwin-Gill, Guy: Refugee Identity and Protection's Fading Prospects. In: Frances Nicholson/Patrick Twomey (1999b): Refugee Rights and Realities. Evolving International Concepts and Regimes. Cambridge: Cambridge University Press: 235.

aim was to be a strong moral authority in ensuring the rights of forced migrants, humanitarian emergencies opened up through mass movements that the responsible governments were not tackling adequately, and UNHCR undertook at the expense of guaranteeing civil and social rights.

To summarize, the role of UNHCR shifted from its original mandate to promote asylum, which is still valid today, to a variety of new tasks formerly the responsibility of the host State. In an article about this development, Amy Slaughter calls UNHCR a “surrogate State”, accurately describing its difficult role. The problem with the expansion is first the imprecise legal framework for the new tasks - States hold international responsibilities for their actions, but as UNHCR is not a State and not party to central treaties and Conventions, it is not subjected to international law the way States are. UNHCR is often exercising sovereignty, for example in the refugee camps or through RSD, but is merely a guest in the country of asylum.⁴²⁸ Secondly, UNHCR uses its funds, influence and personnel working for the new duties, while compromising its role as an advocate of refugees and their rights. Initially, UNHCR was considered a moral authority for refugee protection, criticizing the misbehaviour of governments and demanding them to respect their international obligations. But this role cannot be upheld if they themselves take part in decisions and situations that some perceive as a violation of refugee rights, such as the confinement of refugees to camps. To conclude, “it is precisely the agency’s involvement in vaguely defined humanitarian activities that has diluted its role as the main international actor responsible for promoting asylum.”⁴²⁹

Thus, while it seemed as the most logical step for UNHCR to fill the gaps the State left, this paper argues that this has proven to be counter-productive. By supporting the encampment policy and even deciding who is allowed to leave the compounds, thus following an approach that renders refugees dependent in a protracted situation like the one in Kenya, UNHCR is turning away from its original activities to promote asylum and pursue a rights-based approach.

⁴²⁸ Wilde, Ralph: *Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of “Development” Refugee Camps Should be Subject to International Human Rights Law*. In: Yale Human Rights & Development, 1998, 1/5: 113ff.

⁴²⁹ Barutciski 1999: 2.

4.2. The plurality of the Refugee Status

4.2.1. RSD: a further responsibility of UNHCR

The status is essential for refugee protection, because many instruments, such as the right to work, are linked to a regularized stay in the country of asylum. Problematic in this regard is that in practice there is more than one refugee status and the respective rights the different “statuses” entail remain uncertain.

Until today, UNHCR is responsible for RSD in Kenya, although the *Department of Refugee Affairs* has promised to take over this task. It is only a State that can provide someone with the refugee status. Therefore, as was shown, the agency can only grant a so-called “Mandate status”, meaning that UNHCR offers protection under its mandate. The consequence is that this legal status is not clearly defined, as host States do not have to accept a refugee status granted by a UN agency. In Kenya, this uncertainty of the status leads to security problems due to Identity Documents: it is UNHCR that has so far given out IDs, not the Government of Kenya, and these are regularly not accepted by the police and authorities, thus leading to insecurity for refugees. Further, while in many countries the agency represents rejected asylum seekers and advocates on their behalf, thus promoting asylum, this cannot be done when UNHCR is the decision-making body. Other NGOs were founded during the last years to take up these challenges, often supporting court cases against UNHCR decisions. This clearly indicates the shift and the problems that it includes. Therefore, the role of UNHCR in Kenya can be seen as one reason for the inadequate standards in RSD and security.

4.2.2. *Prima facie* status: a legal anomaly responsible for the lack of protection?

Connected to the role of UNHCR and its position in RSD is the *prima facie* status that the Office grants to certain asylum seekers as a group, presenting a legal category difficult to grasp. Asylum seekers from Somalia and Darfur do not undergo individual Refugee Status Determination procedures, but are granted refugee status on a *prima facie* basis. Despite its widespread use, it remains unclear what this status entails and which rights these refugees enjoy as compared to refugees that

have undergone an individual screening. In this chapter, it will be examined whether the use of this status can be seen as a reason for the gap in rights.

A temporary status for an indefinite time

The necessity for a *prima facie* determination of refugees arises when a large amount of people seeking refuge arrive during a short period of time. It is used in the following scenario: a State's capacity to conduct individual RSD is surpassed, mostly because of a large scale influx. In order not to close the borders or to allow anyone to enter the country unregistered, *prima facie* is granted as a refugee status to all people that arrive from a certain place during a certain period.⁴³⁰ It principally follows the idea that as long as there is no evidence to the contrary, these asylum seekers will be regarded as refugees, while usually it is the other way around.

In Kenya, UNHCR began conducting this procedure as soon as it took over the RSD in the 1990s, due to the rapid and large influx of asylum seekers.⁴³¹ At the time, the *prima facie* status did not have any legal source as no refugee law had been established on the domestic level. That did not keep the Kenyan authorities and UNHCR to allow refugees to reside inside the country on a *prima facie* status, limited to the newly established refugee camps.⁴³² Their legal status, however, remained unclear. Today, asylum seekers from Somalia and Darfur are granted *prima facie* status without undergoing individual status determination, due to the large number of Somali and Darfurian migrants and the high likelihood that they are indeed refugees because of the dangerous situation in these regions - previously Southern Sudanese had been included, but due to positive political changes in the country, they now require individual RSD.⁴³³

"In the absence of international instruments providing for standards of recognition of refugees on a *prima facie* basis, States have devised their own procedures under national legislation and State practice."⁴³⁴ Kenya was one of the first African

⁴³⁰ Albert, Matthew (2010): *Prima facie* determination of refugee status. An overview and its legal foundation. RSC Working Paper Series No. 55. Oxford: Refugee Studies Center 2010: 9.

⁴³¹ Rutinwa, Bonaventure (2002b): *Prima facie* status and refugee protection. New Issues in Refugee Research. Working Paper No. 69. Geneva: UNHCR: 10f.

⁴³² Hyndman/Nylund 1998: 24.

⁴³³ Hyndman/Nylund 1998: 30.

⁴³⁴ Rutinwa 2002b: 7.

countries that amended domestic legislation on the *prima facie* status through the implementation of the *Refugee Act* in 2006.⁴³⁵

In search for a legal foundation

Are *prima facie* refugees legally refugees? The status and the rights attached are heavily discussed in literature on international refugee law.⁴³⁶ To answer this question, there are two schools of thought:⁴³⁷ One opinion, mainly held by Okoth-Obbo, highlights the provisional character of the status and the presumption that comes with it. He states that it is a temporary concept that considers a person a refugee without completing the individual RSD. “Persons assisted under the *prima facie* framework still await the conclusive determination of their refugee status no less than an asylum-seeker awaiting adjudication before a tribunal.”⁴³⁸ According to this opinion, this status is not per se a refugee status, as all the asylum seekers granted *prima facie* will undergo an individual procedure once the State gets hold of the large-scale influx that led to the use of the *prima facie* status. It will then be replaced with an individual status determination procedure, with the result of rejection or the refugee status after the UN *Convention*. However, in practice, the “temporary” *prima facie* status will often stay unchanged for years or not be reversed at all.⁴³⁹

The second school of thought is based on the idea that forced migrants having been determined on a *prima facie* basis are indeed refugees and enjoy the same rights as anyone individually processed: “Determination that a group is *prima facie* a refugee group, raises a presumption that the individual members of the group are refugees. As such, they can benefit from the international protection and assistance extended to them by UNHCR, on behalf of the international community.”⁴⁴⁰

⁴³⁵ Section 3 paragraph 2 of the Refugee Act: “A person shall be a *prima facie* refugee for purposes of this Act if such person owing to external aggression, occupation, foreign domination or events seriously disturbing public order in any part or whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”

⁴³⁶ see for example: Albert 2010, Hyndman/Nylund 1998, Okoth-Obbo 2001.

⁴³⁷ Rutinwa 2002b: 3.

⁴³⁸ Okoth-Obbo 2001: 121f.

⁴³⁹ Albert 2010: 9.

⁴⁴⁰ Jackson, Ivor (1999): The refugee concept in group situations. the Hague/London/Boston: Martinus Nijhoff Publishers: 4.

To conclude which position is more adequate, an overview over the legal foundations and the historical employment of the *prima facie* status are necessary.

The term *prima facie* originates from the law of evidence, where it is essentially used to allocate the burden of proof.⁴⁴¹ It cannot be found in the UN *Refugee Convention*, nor the OAU *Convention* or any other legally binding document in international refugee law.⁴⁴² Nevertheless, it has been used and is still used in several countries regarding forced migrants. Historically for the first time, it was in 1956 with the massive flight of Hungarians to Austria that the need for a group determination was expressed.⁴⁴³ UNHCR justified the use of the *Refugee Convention* for *prima facie* refugees: The Austrian authorities “are prepared to consider the Hungarian refugees in Austria to be within the scope of the UN *Refugee Convention* and to issue them with a normal eligibility certificate to this effect as soon as it is technically possible.”⁴⁴⁴ This favours Jackson’s interpretation of *prima facie* refugees as falling within the scope of the *Convention*, thus not having a temporary, but indeed a valid refugee status.

Contrary to its widespread use over time, international refugee law is silent on the matter of *prima facie* on both how it may be defined and what it implies. But despite its lack of legal foundation, “*prima facie* determination has become common if not consistent practice for mass movements of refugees in Africa.”⁴⁴⁵

Limited standards of protection for *prima facie* refugees?

“What are the standards of treatment which *prima facie* refugees are entitled to? Are these standards different from those applicable to refugees recognized on individual basis?”⁴⁴⁶ The main question in terms of *prima facie* refugees is whether they are granted different, sub-standard protection compared to “regular” refugees - thus, if the status can be used as an explanation for the gap in rights.

No matter which school of thought you follow, *prima facie* refugees are refugees, therefore entitled to every single one of the described rights. However, during a situation of large-scale influx of asylum seekers, UNHCR has begun to classify rights

⁴⁴¹ Rutinwa 2002b: 5.

⁴⁴² Okoth.Obbo 2001: 120f.

⁴⁴³ Rutinwa 2002b: 4.

⁴⁴⁴ Jackson 1999: 117.

⁴⁴⁵ Hyndman/Nylund 1998: 30.

⁴⁴⁶ Rutinwa 2002b: 1.

into different categories: from the most basic rights, namely the principle of *non-refoulement* and rights necessary to ensure immediate physical survival, to rights said to be more elaborate, such as the right to work, to identity papers or travel documents.⁴⁴⁷ This categorization is nowhere provided for in law, and it further works on the assumption that all rights will gradually be included after the emergency situation of the mass influx - this has not been done in Kenya.

Although theoretically, the *prima facie* status does not imply any limitations, in practice there is a difference between Convention or statutory refugees and *prima facie* refugees: “Because of the discretionary application of *prima facie* status, this move has allowed for a politicization of refugee determination processes and the gradual institutionalization of weaker standards of refugee status.”⁴⁴⁸ Hyndman and Nylund elaborate that Kenya resorted to this status in order to avoid having to grant full rights to all asylum seekers, arguing that “the human rights of refugees in Kenya are being exchanged for their temporary asylum in camps.”⁴⁴⁹ This is made possible by the lack of a clear definition or legal foundation in international law.

Contrary to this view, the interviewees did not consider the application of the *prima facie* status per se as a reason for limited rights. Foremost because the limitations, for example the requirement to stay in camps, the non-issuance of work permits or the insecurity experienced is not linked to the *prima facie* status, but to the situation of all refugees, regardless of their status.

To conclude, although the *prima facie* status further enhances the confusion about the legal status and what it entails, it cannot serve as an answer to the question whether it is responsible for the gap in rights.

In this chapter it was shown that there is no simple answer as to why forced migrants in Kenya do not enjoy the rights they are legally entitled to. Rather, the reasons are a combination of legal and non-legal factors, most notably the ambiguous role of UNHCR and the Government of Kenya and the lack of understanding of the refugee status.

⁴⁴⁷ Jamal 2000: 13.

⁴⁴⁸ Hyndman/Nylund 1998: 32.

⁴⁴⁹ Hyndman/Nylund 1998: 38.

5. Conclusion

Question: If you had the power, what would you change for refugees in Kenya?

*Answer: I think as per what was implemented in international human right laws, we should give refugees the opportunities of the laws that are already in place. It's like these laws and policies were just mentioned and written in sample books and archives, but they were not implemented.*⁴⁵⁰

In the course of this paper, several hypotheses have been presented. The principal hypotheses, regarding whether or not refugees are able to enjoy their basic human and refugee rights in Kenya, has shown to be partly true. There is indeed a discrepancy between theory and practice: although Kenya has ratified the relevant international protection regime, there is a considerable lack of its execution.

For the international principle of *non-refoulement* it can be acknowledged that there have been incidents, foremost in the past due to the closure of the border with Somalia. However, this right is mostly adhered to.

Further, the State does not perform its duty to determine the refugee status of asylum seekers, but rather leaves this responsibility to UNHCR. Therefore, the RSD process contains several problems, including long waiting periods and inadequate procedures to appeal.

Many of these legal problems can be directly linked to the poor implementation of the freedom to move: refugees are required to stay in camps indefinitely. Although the majority indeed lives in two large camp complexes in the periphery of Kenya, many choose to stay outside these areas and therefore face various other obstacles.

One of these is the poor implementation of the right to employment, which is neither met in the camps nor for urban refugees. In camps, a legally unknown system of “incentives” instead of payment has been developed, creating further problems regarding equal pay. Therefore, refugees gain their major revenue from informal work. Further, insecurity and violence is a daily concern for many refugees, often linked to lacking identity documents and police harassment.

⁴⁵⁰ Interview with a refugee in Kakuma camp, 10.09.2010

The reasons for the gap between these theoretical and practical rights can be found in the ambivalent role of UNHCR and the confusion about what the refugee status entails.

Although the paper has a clear focus on Kenya, the analysis and conclusions are equally true for many other countries - African and worldwide. Globally, a more restrictive climate for immigrants - including refugees - can be observed and similar conclusions can be drawn for the majority of countries dealing with a large number of asylum seekers and refugees.

However, for Kenya, positive closing words are in place:

“In a nutshell, I think, well, there have been steps that have been made towards protecting the rights of refugees, but there’s still a lot to be done.”⁴⁵¹

⁴⁵¹ Interview with Edwin Abuya, 10.07.2010

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7. Abstract

Refugees in Kenya cannot fully enjoy the rights they are entitled to. The discrepancy between refugee and human rights in theory and practice are analysed through some selected rights, including the principle of *non-refoulement*, the Refugee Status Determination process, the freedom to move and choose a place of residence, the right to work and security rights.

The country has ratified the essential international Conventions and treaties - namely the *Refugee Convention and Protocol*, the *Convention of the former Organisation of African Unity (OAU)* and the *International Bill on Human Rights*. Through the *Refugee Act*, the first national legal framework concerning refugees, refugees are now entitled to most of the above mentioned rights, but these have not yet been fully implemented.

In practice, refugees are obliged to stay in two major and remote refugee camps, Kakuma and Dadaab, and are only allowed to leave under certain circumstances, with the joint permission from the government and UNHCR. Nevertheless, many choose to live outside these areas and face various challenges due to this irregularity. These include police harassment and a general situation of physical insecurity, which is also experienced in the camps. Although refugees both in the camps and urban refugees have the right to work, they are hardly ever granted the work permission needed and hence resort to other forms of income, mainly in the informal economy.

Reasons for this discrepancy between theory and practice can be found in the inactivity of the State towards refugees and the therefore ambiguous role of UNHCR, which carries out many of these State responsibilities, for example the administration of the refugee camps. Another possible explanation lies in the application of a *prima facie* status and the confusion about which rights the refugee status contains.

8. Zusammenfassung

Es gibt eine Diskrepanz zwischen der Situation von Flüchtlingen in Kenia und ihren international festgelegten Rechten. Diese wird anhand einiger ausgewählter Rechte - darunter das Prinzip des *Non-Refoulement*, dem Aufbau des Asylverfahrens, die Bewegungsfreiheit, das Recht auf Arbeit und einem eventuellen Recht auf Sicherheit - untersucht.

Kenia hat die zentralen internationale Abkommen zu Flüchtlings- und Menschenrechten unterschrieben und ratifiziert. Diese umfassen vor allem die *Genfer Flüchtlingskonvention*, *OAU Flüchtlingskonvention* und die *Allgemeine Erklärung der Menschenrechte*, sowie *Zivilpakt* und *Sozialpakt*. Weiters wurde auf nationaler Ebene der *Refugee Act* erlassen, der erstmals Rechte und Pflichten von Flüchtlingen festlegt. Da diese Abkommen sämtliche genannten Rechte garantieren, stehen diese Rechte allen Flüchtlingen in Kenia zu.

Dieser theoretische Anspruch korreliert jedoch nicht mit der Umsetzung: Flüchtlinge sind verpflichtet, in einem der beiden abgelegenen Flüchtlingslagern Kakuma oder Dadaab zu leben, und können diese nur mit einer Genehmigung auf kurze Zeit verlassen. Trotz dieser Einschränkung entscheiden sich viele dazu, außerhalb der Lager zu leben und sehen sich deshalb mit weiteren Schwierigkeiten, wie etwa polizeilicher Willkür, konfrontiert. Obwohl Flüchtlingen sowohl in der Stadt als auch in den Camps das Recht zu arbeiten zusteht, wird die dafür nötige Arbeitsbewilligung nur selten gewährt, sodass sich die meisten anderer Einnahmequellen, überwiegend im informellen Sektor, bedienen.

Gründe für den Unterschied zwischen den theoretischen Rechte und ihrer praktischen Umsetzung ergeben sich daraus, dass die Regierung ihren internationalen Verpflichtungen bezüglich Flüchtlingen nur spärlich nachkommt, weshalb UNHCR diese übernimmt, wie beispielsweise die Leitung der Flüchtlingslager. Weiters ist der Flüchtlingsstatus und welche Rechte er impliziert oft unklar, was durch die Verwendung der undurchsichtigen Kategorie *Prima Facie* Flüchtlinge noch verstärkt wird.

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