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**The American University in Cairo**  
**School of Global Affairs and Public Policy**

**FREEDOM OF MOVEMENT OF REFUGEES:  
THOSE FORCED TO MOVE FIND THEMSELVES WITHOUT  
THEIR HUMAN RIGHT TO MOVE**

**A Thesis Submitted to the**  
**Department of Law**  
**in partial fulfillment of the requirements for the degree of**  
**Master of Arts in International Human Rights Law**

**By**

**Amanda Michele Slobe**

**May 2011**

The American University in Cairo  
School of Global Affairs and Public Policy

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Master of Arts in International Human Rights Law  
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# Under a Certain Little Star

*By Wislawa Szymborska*

*Translated by Joanna Trzeciak*

My apologies to chance for calling it necessity.  
My apologies to necessity in case I'm mistaken.  
Don't be angry, happiness, that I take you for my own.  
May the dead forgive me that their memory's but a flicker.  
My apologies to time for the quantity of world overlooked per second.  
My apologies to an old love for treating a new one as the first.  
Forgive me, far-off wars, for carrying my flowers home.  
Forgive me, open wounds, for pricking my finger.  
My apologies for the minuet record, to those calling out from the abyss.  
My apologies to those in train stations for sleeping soundly at five in the morning.  
Pardon me, hounded hope, for laughing sometimes.  
Pardon me, deserts, for not rushing in with a spoonful of water.  
And you, O hawk, the same bird for years in the same cage,  
staring, motionless, always at the same spot,  
absolve me even if you happen to be stuffed.  
My apologies to the tree felled for four table legs.  
My apologies to large questions for small answers.  
Truth, do not pay me too much attention.  
Solemnity, be magnanimous toward me.  
Bear with me, O mystery of being, for pulling threads from your veil.  
Soul, don't blame me that I've got you so seldom.  
My apologies to everything that I can't be everywhere.  
My apologies to all for not knowing how to be every man and woman.  
I know that as long as I live nothing can excuse me,  
since I am my own obstacle.  
Do not hold it against me, O speech, that I borrow weighty words,  
and then labor to make them light.

The American University in Cairo  
School of Global Affairs and Public Policy

Department of Law

FREEDOM OF MOVEMENT OF REFUGEES:  
THOSE FORCED TO MOVE FIND THEMSELVES WITHOUT THEIR HUMAN  
RIGHT TO MOVE

Amanda Michele Slobe

Supervised by Professor Alejandro Lorite Escorihuela

ABSTRACT

For several decades, thousands of refugees have been fleeing into Kenya, and now Kenya is host to the world's largest refugee settlement. The mass influx of refugees and their protracted situation in Kenya gives evidence that there is a crisis within international refugee law. Refugees are a group of people that have been given a distinct rights regime, and their right to freedom of movement has been inhibited due to state practices. This is proof that the international refugee protection regime is at risk of breaking down. It is creating an environment in which states are resorting to harmful policies of containment and restrictions on movement. This is leading to the development of warehousing refugees which is considered a possible new solution to protracted refugee situations. This policy of containment is not a solution to the refugee "problem," and the reality that it is considered a fourth solution among the three durable solutions raises concern. Warehousing is a consequence of the shortcomings of the 1951 Convention Relating to the Status of Refugees and subsequent 1967 Protocol which were not designed to respond to current protracted refugee situations. Regardless of the legality of warehousing under the refugee rights regime, it is a violation of the human right to freedom of movement. The lack of application of human rights law to refugees symbolizes the harmful gap that exists between these two international law regimes.

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## I. Introduction

When Abdullahi Salat was forced to the Dadaab camp as a young boy in 1991, fleeing civil war in his homeland Somalia, little more than shrubs and a few tents dotted the landscape. A woman working for the United Nations greeted him in what was then a safe haven and a nearly empty environment. She showed him to his tent and sprinkled seeds into his palm. “Plant them,” Mr. Salat remembered the aid worker telling him, “It’s hot here.” He had told her no that day, since Dadaab was not his home, and he believed he would be moving on shortly. Now he says, “The trees are very huge.”<sup>7</sup>

For twenty years, violence and anarchy in Somalia has forced an estimated two million Somali citizens to flee the country.<sup>8</sup> Of these, an estimated half of all Somalis fleeing to Kenya comprise the world’s largest refugee settlement. Urban refugees have also existed within Nairobi, and international aid agencies have long been aware of them. Today, there are estimated 40,000–100,000 refugees in the city.<sup>9</sup> For several decades, Kenya has been a host to refugees. Now there are over 412,000 refugees living in the country making it one of the largest refugee-hosting countries in the world. Although the Kenyan border is officially closed to Somali asylum seekers, there are 6,000-7,000 “new arrivals” each month.<sup>10</sup> Kenya is still in the midst of a rapidly escalating refugee crisis in both the camps and in the cities because Somalia’s conflict has yet to be resolved.

This protracted situation in Kenya is just one of many that serves as evidence that there is a crisis within the refugee regime. There are mass numbers of refugees and this brings about concern and frustration when trying to deal with the influx. This is proof that the international refugee protection regime appears to be at risk of breaking down. Refugees are state-made foreigners. The circumstances in which they find themselves, in a host country, question their right to freedom of movement and just how free they are to

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<sup>7</sup> Josh Kron, *Somalia’s Wars Swell a Refugee Camp in Kenya*, N.Y. Times, Nov. 11, 2010, available at <http://www.nytimes.com/2010/11/12/world/africa/12dadaab.html>.

<sup>8</sup> Melissa Fleming, *Neighbouring countries feeling the strain as Somalia’s emergency grows*, UNHCR: THE UN REFUGEE AGENCY, May 3, 2010, available at <http://www.unhcr.org/4bde90856.html>.

<sup>9</sup> Sarah Dix, *Urbanisation and the social protection of refugees in Nairobi*, 35 HUMANITARIAN PRACTICE NETWORK, Nov. 2006, available at <http://www.odihpn.org/report.asp?id=2841>.

<sup>10</sup> Elizabeth Campbell, *Somalis in Kenya: Invest in the Long-Term*, REFUGEES INTERNATIONAL FIELD REPORT (Nov. 29, 2010), available at <http://www.refugeesinternational.org/sites/default/files/somali%20refugees%20in%20kenya.pdf>.



go about their daily lives. This is where human rights law must enter the dynamics; if the international refugee regime reaches a point where it actually may break down, human rights law can be there to pick up the pieces. I do not believe that the refugee regime has already collapsed, but it is under a considerable amount of pressure. This pressure needs to be countered with support from human rights law.

There are barriers and discrimination imposed by the Kenyan government and the UNHCR (United Nations High Commissioner for Refugees) in both the Dadaab camps and in Nairobi. Critique of the refugee regime in regards to the UNHCR's role will prove that human rights law and refugee law should not be treated separately. NGOs (non-governmental organizations) and observers have reported that problems exist, and the Kenyan government is taking certain actions to affect or constrain movement of refugees. Using Kenya as a case study to analyze larger issues, this thesis will explore the more subtle ways in which governments' ambivalence about the presence of refugees expresses itself in the form of policy towards, and control measures on, refugee populations. It will highlight state actions that restrict freedom of movement and determine whether differential treatment towards refugees is indicative of poor application of international law. State actions of confining refugees to camps will be underscored to prove that refugee law is outdated. Despite knowing that refugee law is a specific regime created for a particular group of people, the new idea that human rights must accommodate refugee law will be emphasized.

Part I studies Kenya and its domestic as well as international character in the refugee regime. The background will illustrate the situation in Kenya, as it is home to one of the world's largest refugee settlements.<sup>11</sup> It will elucidate the consequences from the difficulty of establishing clear movement rights for refugees. These consequences include state actions of warehousing and detention. Part II explains the right to freedom of movement and the limitations on movement of refugees through the lens of human rights. The focus is on the right to freedom of movement and what it entails for refugees while reminding the international community that human rights law must assist refugee

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<sup>11</sup> Human Rights Watch: From Horror to Hopelessness: Kenya's Forgotten Somali Refugee Crisis 12 (March 2009).

law.<sup>12</sup> This analysis will be a normative assessment of the policies of Kenya to argue that warehousing and detention of refugees are not solutions to the “refugee problem”<sup>13</sup> and because they are even considered solutions, it is further cause for a push for a human rights application within the refugee regime. There is a problematic gap that exists between human rights law and refugee law, and this allows for violations of refugees’ right to freedom of movement. While states are arguably trying to cope with mass influxes of refugees, the lack of human rights application contributes to the ongoing crisis of refugees’ restrictions on movement.

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<sup>12</sup> The word “refugee” will be used if an individual has been recognized under the 1951 Convention Relating to the Status of Refugees as well as if the individual is considered a *de facto* refugee. If the case is *de facto*, the individual is one of the thousands of those forced to leave their home and thus on the move, and they have yet to gain official recognition from the United Nations High Commissioner for Refugees (UNHCR). Asylum seekers are those looking to obtain refugee status and just have not gone through the Refugee Status Determination (RSD) process yet to be possibly granted refugee status. Just because they are not officially recognized as a refugee does not mean that they should be treated differently than those who are officially recognized. All are people who have been uprooted, and the massive numbers of those who have been displaced makes it difficult for a speedy process of RSD.

<sup>13</sup> T. Alexander Aleinikoff, *State-Centered Refugee Law: From Resettlement to Containment*, 14 MICH. J. INT’L L. 121 (1992).

## II. Case Study: Kenya

### A. Background of the Issue

Beginning in 1992, several hundred thousand Somali refugees crossed the border into Kenya's Northeast Province as the civil conflict in Southern Somalia intensified.<sup>14</sup> Still today, Somali asylum seekers are crossing Kenya's officially closed border by the thousands to escape Somalia's violence and to seek shelter within three heavily overcrowded and chronically under-funded refugee camps near Dadaab in north-east Kenya.<sup>15</sup> Somali refugees remain stuck in a limbo in camps which are now home to over 300,000 refugees, making them the world's largest refugee settlement.<sup>16</sup> Dadaab is located about 100 kilometers from the Somali-Kenyan border. The camps were created in mid-1992 after Kenya realized it was impossible to run the camps in Liboi due to daily violence in the southern border region. Thus, with security concerns for the international staff, refugees, and humanitarian supplies, Dadaab camps were created further inside Kenya's borders. Dadaab camps are located in a region that is semi-arid and originally sparsely populated by nomadic Somali-Kenyans before the arrival of refugees fleeing the violence in Somalia. The massive number of refugees fleeing across the Kenyan border when war in Somalia broke out overwhelmed the local nomadic population as well as the natural resources which were scarce in the area. International organizations brought the previously marginalized region attention with provision of services such as boreholes, hospitals, and schools. By March of 2003, 160,000 of over 400,000 Somali refugees who fled the war remained in Kenya. Of these, 130,000 were in Dadaab; the remaining lived in other camps while some moved to urban areas such as Nairobi.<sup>17</sup>

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<sup>14</sup> Jennifer Hyndman & Bo Viktor Nylund, *UNHCR and the Status of Prima Facie Refugees in Kenya*, 10 INT'L J. REFUGEE L. 23 (1998).

<sup>15</sup> Human Rights Watch, *supra* note 5, at 1.

<sup>16</sup> There are three camps which surround Dadaab. They are Dagahaley (population 77,036), Hagadera (91,982), and Ifo (86,732), according to UNHCR statistics on file with Human Rights Watch. The camps are located within an 18 kilometer radius of Dadaab, cover 50 kilometers, and each are separated by significant distances, *as described in* Human Rights Watch, *supra* note 5.

<sup>17</sup> Awa M. Abdi, *In Limbo: Dependency, Insecurity, and Identity amongst Somali Refugees in Dadaab Camps*, 22 REFUGEE 6 (Winter 2005).

The entry of thousands into what is an already severely overcrowded and under-resourced camp has exacerbated the shortages of shelter, water, food, and healthcare for all refugees. The number of refugees who have directly traveled to Nairobi is unknown. They have been described as having ‘disappeared’ into the city and do not receive any support; they remain invisible to the world.<sup>18</sup> They may arguably have the right to freedom of movement since they can travel throughout the cities, yet Kenya does not consider them for refugee protection unless they stay within the confinements of the refugee camps.

Somalis, and other groups of refugees in Kenya,<sup>19</sup> face a complicated problem – they are leaving a situation where security has been destabilized; meanwhile, they find themselves living along Kenya’s borders and within its capital where they face many problems. One of the official positions of the Kenyan Government (which is widely supported by the local population), is that urban refugees are an economic burden on the city.<sup>20</sup> Some refugees remain forgotten in camps where they cannot go back home because of threats of persecution. Some move to cities like Nairobi, and others stay in camps such as Dadaab and become one of hundreds of thousands waiting for resettlement. While refugees leave their homeland to escape persecution and death, the ideal circumstance is that they are leaving a bad situation to arrive in a better one for only a limited amount of time. However, Somali refugees – both within the camps and in Nairobi – have remained in Kenya for nearly 20 years. Kenya sees its refugees as a burden, yet it still provides camps for the refugees and gives those living in the camps benefits and incentives to remain there and away from the cities.

Kenya’s refugee policy has “oscillated, in a distinctly Machiavellian sense, between ‘hospitality and hostility to refugees and asylum-seekers.’”<sup>21</sup> Unlike its neighbors Uganda and Tanzania, Kenya had considered itself a transit state. It also

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<sup>18</sup> Human Rights Watch, *supra* note 5, at 1.

<sup>19</sup> Although most of the refugees living in the camps are Somali, there are also refugees from Uganda, Sudan, the Congo and other countries suffering from conflict, as described in CARE, *available at* <http://www.care.org/careswork/emergencies/dadaab/>.

<sup>20</sup> Elizabeth H. Campbell, *Urban Refugees in Nairobi: Problems of Protection, Mechanisms of Survival, and Possibilities for Integration*, 19 JOURNAL OF REFUGEE STUDIES 396 (2006).

<sup>21</sup> Monica Kathina Juma & Astri Suhrke, *ERODING LOCAL CAPACITY: INTERNATIONAL HUMANITARIAN ACTION IN AFRICA* 100 (Nordic Africa Institute, ed.) (June 2003).

furthered the Machiavellian mindset and “wielded a heavy stick” against refugees it considered a threat to state security.<sup>22</sup> The refugees who did not threaten Kenya’s security and national interests were treated with ambivalence, and the UNHCR and NGOs in the state were allowed to manage refugee affairs.<sup>23</sup> Kenya’s ambivalence can be seen through its encampment policy of confining thousands of refugees in camps while paying no attention to those who are moving freely in the cities.

### ***B. International Responsibilities***

Kenya has international obligations for hosting refugees. Kenya signed the 1951 Convention in 1966 and the 1967 Protocol in 1981.<sup>24</sup> The Kenyan government is also a party to the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa.<sup>25</sup> The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees grant specific rights to refugees while they are applying for asylum. State signatories have an obligation to grant these rights.

Kenya became a signatory to the International Covenant on Civil and Political Rights (ICCPR) without reservations on May 1, 1972.<sup>26</sup> By belonging to the ICCPR, Kenya has international legal obligations to allow for freedom of movement within its borders.<sup>27</sup> Article 12(1) states, “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.”<sup>28</sup> It also has the obligation to provide the CCPR Human Rights Committee with any relevant domestic legal rules and administrative and judicial practices relating to

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<sup>22</sup> This is included Somali refugees in the 1990s, *see id.* at 100.

<sup>23</sup> *Id.*

<sup>24</sup> Hyndman, *supra* note 8, at 29.

<sup>25</sup> Kenya ratified the OAU Convention in 1992, *as described in* Hyndman, *supra* note 8, at 29.

<sup>26</sup> International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, *entry into force* March 23, 1976. U.N.T.S.

<sup>27</sup> *See* Article 12 (4), General Comments: “Everyone lawfully within the territory of a State enjoys, within that territory, the right to move freely and to choose his or her place of residence. In principle, citizens of a State are always lawfully within the territory of a that State,” *as described by* Human Rights Committee, General Comment 27, Freedom of movement (Art. 12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999).

<sup>28</sup> International *supra* note 20, at art. 12(1).

the rights protected by Article 12.<sup>29</sup> This is required to prevent officials from taking “arbitrary and abusively discretionary decisions” as well as to ensure that those whose right to free movement is restricted understand what their rights are.<sup>30</sup> Further international law obligations of Kenya require it to guarantee refugees within its borders the right to choose their own residence and move freely throughout Kenya.<sup>31</sup> In reality, however, this is not the case.

### ***C. Unclear Rights***

Currently, the rights of refugees to move freely within Kenya and to reside in urban areas are not clear. The Kenyan government did pass a Refugee Act in 2006 that “[set] out the legal and institutional framework for managing refugee affairs.”<sup>32</sup> Although Kenya has shown lack of support towards its refugees (by allowing both discrimination and police brutality towards the refugees to continue), it has made efforts to provide for them. Refugees do make a contribution to the local and national Kenyan economy through informal employment and businesses.<sup>33</sup> However, the legal system that Kenya established for refugees still does not afford them their human rights, especially if they are in the cities.

The Refugee Act set out legal framework governing refugees and established the institutions and procedures to implement it. In practice, however, there is inadequate capacity and effort to ensure its effective implementation. Also, there is no national refugee or asylum policy that assists the Refugee Act, and there is “some confusion about the government’s official position.”<sup>34</sup> Kenya and the UNHCR, in practice, have used

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<sup>29</sup> Human Rights Committee, *supra* note 21.

<sup>30</sup> Human Rights Watch: Welcome to Kenya: Police Abuse of Somali Refugees 80 (June 2010).

<sup>31</sup> 1951 Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, art. 26 states: “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.”

<sup>32</sup> The Act has been described as “largely unwelcomed by civil society” yet “represent[ing] a step in the right direction,” *as described in* Sara Pavanello, Samir Elhawary & Sara Pantuliano, *Hidden and exponed: Urban refugees in Nairobi, Kenya*, HPG Working Paper, 8 (March 2010).

<sup>33</sup> *Id.*

<sup>34</sup> The confusion can be seen through various disincentives that the Kenyan government instills on the refugees to leave the camps while at the same time refusing to provide additional land for the continuous influx of refugees from Somalia, *id.* at 15.

various disincentives to limit the number of refugees choosing to move outside of camps while continuing to allow refugees to cross its borders.<sup>35</sup> Part of this can be attributed to Kenya's different asylum policies and its changing attitude towards the refugees.

#### ***D. Shifting Asylum Policies***

Between the years of 1989 and 2007, Kenya's asylum policy went through two apparent phases. The first phase was "abdication' and containment" from 1989-2002, and the second phase, described as the "age of 'interventionism" began in 2002.<sup>36</sup> Both of these phases were reflections of the political dynamics in Kenya during Daniel Moi's authoritarian regime and current President Mwai Kibaki's administration. The two administrations have been described as viewing Somali refugees "through a distinct security prism, with the dictates of state security eclipsing their humanitarian obligations."<sup>37</sup> The abdicationist policy which Kenya adopted gave the UNHCR overarching power when addressing the refugees and influence concerning deals with the local population. Neither the central government nor the local administration was consulted when the UNHCR began brokering land deals. Kenya was not able to offer proper and much-needed security surrounding the camps. Therefore, the UNHCR assumed responsibility and subsidized local security personnel and set up police stations in Dadaab.<sup>38</sup> The overall consequence of Kenya's abdicationist policy was that the camps began to provide a "dangerous refuge" for Somali refugees who had escaped their war-torn homeland.<sup>39</sup>

Refugees in both the Dadaab and Kakuma camps face restrictions on their freedom of movement as well as their access to local labor markets. Since there appears to be no solution to the refugees' situations at home, high numbers have begun to self-settle in Nairobi. However, this is considered illegal under host states' laws, and they are

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<sup>35</sup> Hyndman, *supra* note 8, at 3.

<sup>36</sup> Gil Loescher, James Milner, Edward Newman & Gary Troeller, *PROTRACTED REFUGEES SITUATIONS: POLITICAL, HUMAN RIGHTS AND SECURITY IMPLICATIONS* 219 (United Nations University Press) (2008).

<sup>37</sup> *Id.*

<sup>38</sup> Monica Kathina Juma & Astri Suhrke, *ERODING LOCAL CAPACITY: INTERNATIONAL HUMANITARIAN ACTION IN AFRICA* 105 (ed., 2002).

<sup>39</sup> *Id.* at 106.

seen as voluntarily giving up their provision of aid. Therefore, what is seen as possibly greater socio-economic independence comes at the price of loss of protection by the international community.<sup>40</sup> There have been attempts at discussing the possible advantages of integration into local communities as a solution to the uncertain situation of refugees in protracted or warehoused situations. However, host countries in the sub-Saharan region such as Kenya are usually disinclined to take up this discussion, let alone take initiative to make it happen.<sup>41</sup>

### ***E. Urban Refugees***

Theoretically, urban refugees in Kenya do not exist. There is no national legislation that addresses urban refugees, so they are sometimes subjected to the 1967 Immigration Act and the 1973 Aliens Restriction Act of Kenya.<sup>42</sup> They are not registered since they are not in the camps, and they face continuous threats and public statements concerning their “illegal” status. One of the official positions of Kenya’s government is that urban refugees are an economic burden on the city. The economic burden blame, and the position that urban refugees should be forbidden from living and working in urban areas, are views which are supported by the local population.<sup>43</sup>

Before the early 1990s, Kenya had been hosting refugees for decades.<sup>44</sup> By 1988, there were approximately 12,000 refugees living in Kenya, and these refugees enjoyed full status rights. They also had the freedom to move throughout Kenya, as well as to apply for legal local integration. When the conflicts in Sudan, Ethiopia, and especially Somalia had caused such vast numbers of refugees to enter Kenya, the Kenyan Government became overwhelmed. Consequently, Kenyan authorities withdrew from refugee affairs although it was still a signatory under international refugee law. The pre-1991 refugee regime in Kenya was described as “generous and hospitable, with emphasis

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<sup>40</sup> Katy Long and Jeff Crisp, *Migration, mobility and solutions: an evolving perspective*, FORCED MIGRATION REVIEW 56 (July 2010).

<sup>41</sup> Tania Kaiser, *Participating in Development? Refugee protection, politics and developmental approaches to refugee management in Uganda*, 26 THIRD WORLD QUARTERLY 353 (2005).

<sup>42</sup> Campbell, *supra* note 14, at 400.

<sup>43</sup> *Id.* at 396.

<sup>44</sup> *Id.* at 399.



on local integration,” while the “post-1991 regime has been less hospitable, characterized by growing levels of xenophobia and few opportunities for local integration.”<sup>45</sup> Kenya’s ad hoc policies used to address refugee issues, as the numbers of refugees crossing into Kenya are still increasing, has resulted in reluctance to accept the new refugees. However, with no other choice, the refugees are required to live in the camps rather than roam around urban centers. Despite this, there are several thousand refugees who are living permanently in Nairobi.<sup>46</sup> They do run their own small businesses and engage in small local trade. Since they are living independently in the cities, they do not have assistance from the UNHCR. They are consistently the victims of police abuse and arrest. They cannot work legally and therefore they do not have formal positions in the Kenyan economy. This reinforces the economic burden image. Nairobi’s refugees are the ones who are in “legal limbo” because Kenya no longer recognizes their rights as refugees. Since they are outside of the camps, they do not qualify for any assistance or aid from Kenya or the UNHCR. It is still common, however, to find refugees searching for protection by going to the UNHCR Nairobi Branch Office as well as the Ministry of Home Affairs’ Refugee Secretariat office. Most of Kenya’s focus has been towards those living in the camps so there is no defined urban refugee policy or definition as to what constitutes an urban refugee within Kenya.<sup>47</sup> Urban refugees have freedom of movement because of Kenya’s lack of concern for its urban refugees – not because of the refugees receiving any sort of services or benefits from Kenya. It is Kenya’s indifference to its urban refugees that gives them a false sense of freedom of movement.

Although Kenya does not officially allow urban refugees to live within the cities, it cannot do much to stop them from leaving the camps. As long as the refugees have money for transportation, money to bribe police, and the ability to make it past all

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<sup>45</sup> *Id.*

<sup>46</sup> Most of the refugees living in Nairobi are Somali. There are also Ethiopians, Ugandans, and a small percentage of Sudanese, *as described in id.*

<sup>47</sup> Campbell, *supra* note 14, at 400.

checkpoints, they can find themselves in Nairobi where they “slip” into their appropriate communities.<sup>48</sup>

Kenya’s urban refugees must avoid the Nairobi police if they do not have proper documentation or enough money for bribes.<sup>49</sup> Despite their illegality in the cities, it better serves the interest of the Kenyan government to not have the refugees removed. They do integrate into society, but the confusion regarding their legality (whether intentional or not) allows them to be the ones to blame when something goes wrong socially or economically. This in turn further fuels the xenophobic attitudes that are dominant in the cities.<sup>50</sup> Even as these refugees are allowed to move freely throughout the city, they still suffer considerably from Kenya’s ambivalence towards the overall population of refugees.

#### ***F. The Dadaab Camps: An Example of Dangerous Management:***

In 1992, Kenya opened the Dadaab camps, in north-eastern Kenya, eighty kilometers from the border with Somalia. The camps were designed mainly to reduce the real or perceived threat that refugees in a host country posed to national security. This policy of containment rested on renouncing responsibility to humanitarian agencies (specifically the UNHCR) and pushing refugees to the margins of society.<sup>51</sup> As a result, the refugees would be removed from economic activities and not blatantly discriminated against in public society. Refugees would only be able to qualify for assistance if they were living in the camps and not living in urban areas such as Nairobi. Anyone found outside the camps was considered an illegal alien and the threat of deportation was a reality. The security concern of Kenya and the blame of refugees as a burden to the host state provided an excuse for the detrimental treatment towards the refugees.

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<sup>48</sup> The majority of Nairobi’s urban refugees live in a suburb called Eastleigh. Mostly Somalis live in Eastleigh. It is low-income but the informal economy is doing very well. The economic success has brought competition to the area which has pushed out other businesses, *as described in id.* at 402.

<sup>49</sup> *Id.* at 401.

<sup>50</sup> In Elizabeth Campbell’s 2004 survey, 48 out of 50 non-Somali Kenyans who were residing in Eastleigh believed that the urban refugees should either live in the camps or go home, *as described in id.*

<sup>51</sup> Loescher, *supra* note 30, at 221.

Further, by settling refugees in the Dadaab camps, Kenya hoped that the hardships endured by the refugees there would push them to “drift away to their homes.”<sup>52</sup> Peter Mwangi Kagwanja, the Southern Africa Project Director for International Crisis Group, believes that Kenya may have planned to take advantage of the massive flow of relief aid to ensure that the local Kenyan population would benefit from the predicted spill-over effects, of both resources and infrastructure, which were originally intended for the refugees living in the camps. Kagwanja saw the refugee aid as a vital part of the politics in the region.<sup>53</sup> As the numbers of refugees increased, tensions towards the refugees increased, as well.

The massive influx of refugees beginning in the early 1990s caused hostility to arise out of the state. Kenya accused refugees of smuggling in firearms and escalating crime and insecurity within its borders. Refugees were seen widely as an economic, social, and environmental liability and burden. Most of the refugees that had crossed into Kenya were poor and did not have useful skills to offer. In December of 1992, President Moi made a threat to send Somali refugees back by force. A month later, Moi asked the UNHCR to repatriate all of the refugees residing in Kenya – Somali, Ethiopian and Sudanese. President Moi stated that refugees “seriously compromised the security of [Kenya] [and] greatly overstretched the infrastructure and medical services.”<sup>54</sup> In the beginning, refugees were seen as a vital source for aid, but then they were turned away because Kenya did not want them on its soil. Nothing, however, could stop the massive flows of refugees back into Kenya.

In November 2010, nearly 10,000 Somalis fled intense fighting in western Somalia and entered Kenya seeking refuge. Upon entering Kenya, the Somalis were forced back into Somalia by Kenya’s administrative police even though they had registered with the UNHCR. By turning away a high number of refugees under such extreme conditions, it shows that the Kenyan government is even now facing extreme

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<sup>52</sup> Juma, *supra* note 32, at 105.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 104.

exasperation and desperation.<sup>55</sup> Still, Kenya is host to nearly 340,000 refugees from Ethiopia, Somalia and Southern Sudan. Despite the UNHCR's appeals to allow for these refugees' freedom of movement, they are still, to this day, confined to the camps.<sup>56</sup>

### ***G. Refugee Camps: A Legal Anomaly***

Refugees and their camps are seen as the “essence of aid; they are a visible sign of comprehensible and concentrated human need for charity.”<sup>57</sup> Answering this call for comprehensible charity is adhering to international obligations and taking action to provide security for the refugees. Since the 1950s, when the international protection system was created, “[physical] threats have grown worse as sprawling refugee camps near conflict zones have become a lynchpin of the refugee protection system.”<sup>58</sup> In addition, with political and security priorities challenges, the UNHCR is also forced to make choices regarding camps locations and protection.<sup>59</sup> The UNHCR has said that it would “prefer to ‘redirect its efforts to ensure wider freedom of movement’ for Somali refugees ‘rather than be perceived as condoning encampment.’”<sup>60</sup> Further efforts have yet to be taken.

Refugee camps and repatriation are the “twin pillars” of the strategy of containment.<sup>61</sup> Refugee camps are a legal “anomaly”<sup>62</sup> in regards to the right to freedom of movement. Camps are located directly within the borders and on the territory of the host country. The host country, in an effort to be cleared of its international responsibility, will hand it over to the international organizations that are also present on

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<sup>55</sup> Alex Palmer, *A New Future of Kenya? Reforming a Culture of Corruption*, HARVARD INTERNATIONAL REVIEW 35 (Winter 2011).

<sup>56</sup> “Kenya: Working Environment,” UNHCR Global Appeal (2010-2011).

<sup>57</sup> Alex de Waal, “Famine Crimes: Politics & The Disaster Relief Industry in Africa, (1997)” (footnote 36) as described in Merrill Smith, *Development without Refugee Rights – A Civil Society Response*, 28 FORDHAM INT’L L.J. 1485 (2004-2005).

<sup>58</sup> Mariano-Florentino Cuellar, *Refugee Security and the Organizational Logic of Legal Mandates*, 37 GEO. J. INT’L L. 587 (2006).

<sup>59</sup> Beth Elise Whitaker, *Funding the International Refugee Regime: Implications for Protection*, 14 GLOBAL GOVERNANCE 243 (2008).

<sup>60</sup> *Neighbouring countries feeling the strain as Somalia’s emergency grows*, UNHCR: THE UN REFUGEE AGENCY, 45 (May 3, 2010), available at <http://www.unhcr.org/4bde90856.html>.

<sup>61</sup> Jacob Stevens, *Prisons of the Stateless: The Derelictions of the UNHCR*, 42 NEW LEFT REVIEW 65 (Nov.-Dec. 2006).

<sup>62</sup> *Id.* at 66.

the territory (including the UNHCR). The consequences of this withdrawing of responsibility are seen through both state actions of, and the UNHCR's complicity in states confining refugees to camps.

According to the Kenyan Department of Refugee Affairs (DRA), protection services are available and free of charge to those living in confinement. Those seeking asylum are encouraged and advised to report to either the Dadaab or Kakuma camps to submit their asylum claims. There is no assistance to refugees living in urban areas; they are "expected to take care of themselves."<sup>63</sup> The Department claims that there are humanitarian organizations in Nairobi that would assist urban refugees but they must contact them for any further help.<sup>64</sup>

Those with valid documents and who are recognized refugees are protected under refugee law against forcible return. There are to be no proceedings against a person in respect to his "unlawful" presence within Kenya if there has been an application submitted for recognition as a refugee. If a refugee has been arrested by the police and is facing serious charges, the only suggestion is to immediately inform the DRA or UNHCR.<sup>65</sup> There are no suggestions on how to do this, and it can be assumed that issuing any complaint while being detained would be quite difficult.

The Kenyan DRA stated that those who decide to live outside the camps would not receive medical benefits. However, reasons for obtaining a certain movement pass to leave the camps include medical consideration. The validity of the pass is stated on the card, and the holder of the card must return to the designated area before the expiration or risk prosecution.<sup>66</sup> Still, there is no true freedom of movement when holding a movement pass. Subtle management such as this affects the lives of refugees yet it is not enough to be seen as a breach of international law.

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<sup>63</sup> Republic of Kenya, Department of Refugee Affairs Frequently Asked Questions, *available at* [http://www.refugees.go.ke/index.php?option=com\\_content&view=article&id=75&Itemid=102](http://www.refugees.go.ke/index.php?option=com_content&view=article&id=75&Itemid=102) (last visited April 5, 2011).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

The lack of care and measures for those living in the cities begs the question: when does refugee law begin to apply? Those who live in the cities have freedom of movement but they do not have proper consideration and protection from the state.

### ***H. Nationals vs. Non-Nationals***

The state controls refugees differently than it does with its general population. First, a state does not need to know where its nationals are all of the time. For non-nationals this is quite different. Kenya, for example, uses its encampment policy to be sure of the whereabouts of over 300,000 asylum seekers.<sup>67</sup> Kenya does not, however, have concern for refugees who find their way to urban settings because once the refugees are there, they are on their own. The only way to receive protection and assistance from both the state and the UNHCR is to be in the camps. This causes problems for refugees who do not wish to live in a life of encampment. Human rights can prove itself worthy in this situation as systems created to implement the 1951 Convention have not been suffice to address mass influxes of arrivals. Erika Feller, the Assistant High Commissioner for Protection, reminds the international community that applying the 1951 Convention in situations of mass arrivals poses problems. Feller calls for action to be taken to address the challenge on how to realize solutions for individuals, as well as refugees, that are both lasting and protection-based.<sup>68</sup> Here the human rights regime fits no matter where one falls under a state's jurisdiction, as human rights apply to all.

There is a contradiction between human rights and national sovereignty, and this has implications for the legitimacy of the state and the rights of nationals and non-nationals. The idealization of human rights is based upon this “metaphysical notion of a sovereign subject” and it raises the individual's concerns over state sovereignty. This happens at the same that affirming the nation-state also means human rights are protected and enforced only as nation rights.<sup>69</sup> They are not considered universal. Nationalism has

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<sup>67</sup> Human Rights Watch, *supra* note 5, at 12.

<sup>68</sup> Erika Feller, *International refugee protection 50 years on: The protection challenges of the past, present and future*, VOL. 83 593 (2001), available at [http://www.icrc.org/eng/assets/files/other/atmsmwjv581-606\\_feller.pdf](http://www.icrc.org/eng/assets/files/other/atmsmwjv581-606_feller.pdf).

<sup>69</sup> Patrick Hayden, *From Exclusion to Containment: Arendt, Sovereign Power, and Statelessness*, 3 SOCIETIES WITHOUT BORDERS 251 (2008).

ascended to change the state from protecting human rights of “all inhabitants in its territory no matter what their nationality” to a state whose function is to distinguish between nationals and non-nationals and on this basis to only grant full civil and political rights to those who are nationals by origin and birth.<sup>70</sup> With this transformation, citizenship rather than human rights became “the precondition for the effective possession of human rights and coincided with the emphasis on mutually exclusive citizenries within the nation-state system.”<sup>71</sup> Anyone who finds themselves as a non-national is in-turn a state-made foreigner and when compared to the national, has very few rights.

Refugees suffer lack of citizenship while seeking refuge within a host country. The Rights of Man,<sup>72</sup> which have been defined as inalienable, are no longer that. Refugees have no government to back these rights, and they have to fall back on their minimum rights. This leaves them with no authority to protect themselves and no institution willing to instill and guarantee these rights. There is a paradox of human rights in the instance of refugee rights: “...while the protection of human rights within the international system is inseparably tied to state sovereignty, states are also authorized to deprive citizens of those same rights and to exclude individuals from the condition of nationality that would enable them to have human rights.”<sup>73</sup>

The reason for there even to be a discussion concerning the relationship between refugee law and human rights law is because of the “limbo” that refugees are continually stuck in. It is a limbo because the refugees are “neither assimilated, integrated nor immediately eliminated.”<sup>74</sup> They are forced to leave their homeland while seeking protection and resettlement in order to continue their lives. Kenya’s encampment policy is a visual reminder of the gap between the two regimes, and more specifically, the lack of freedom of movement and Kenya’s ambivalence towards its refugees. However, the

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<sup>70</sup> *Id.* at 252.

<sup>71</sup> *Id.*

<sup>72</sup> Hannah Arendt, *THE ORIGINS OF TOTALITARIANISM*, (Schocken Books) (2004), *as discussed in id.* at 253.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 264.

gap can be filled if Kenya fulfills its international, humanitarian and political obligations that ensure refugees basic human rights, especially the right to freedom of movement.

All of the elements discussed above comprise a discussion of how one reaches human rights in the refugee world. There is a complex gap which is not only about human rights – the focus extends further than this. First, human rights law and refugee law are different. Human rights law, as previously mentioned, can be there to pick up the pieces, but because of the dichotomy between the two regimes, it is not as easy as that. It is more complicated because the discussion focuses around a specific group of people who have their own rights regime because of the circumstances in which they find themselves. This group of people, who have been forced to move, suffer from a lack of human rights and more specifically, a lack of the right to freedom of movement. There is a limitation on movement by states, clearly. So, if there is a limitation on refugee movements, what does this mean for freedom of movement for refugees? This question, and the notion that the warehousing is considered a fourth solution, is what lead to the conclusion that there needs to be a stronger human rights focus within refugee law. Discussing the freedom of movement of refugees is risky and complicated because freedom of movement is found in human rights language. Human rights of refugees can be problematic because these are two different regimes. Without human rights discussion there is no freedom of movement for refugees.

### ***I. A “Movement” Pass for Refugees***

In Kenya, refugees who have been forced out of their home country and have found themselves in the camps must work their way through a hierarchy of power that would provide them with a pass. This “movement permit” gives them permission to leave the camp or settlement but refugees’ right to freedom of movement is constrained through administrative and legislative practices.<sup>75</sup> Refugees resort to producing fake passes, and these have been described by both the UNHCR and Kenya’s DRA as being difficult to distinguish from valid passes. Thus, Kenyan police often forcibly turn back or

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<sup>75</sup> Zachary A. Lomo, *The Struggle for Protection of the Rights of Refugees and IDPs in Africa: Making the Existing International Legal Regime Work*, 18 BERKELEY J. INT’L. L. 281 (2008).



arrest refugees who are carrying valid movement passes that are valid. There are instances in which refugees carrying valid movement passes are arrested or turned back even when it is known that these passes are valid. According to an official working for an agency in Dadaab, “Now we don’t know from one day to the next how restrictive the policy will be.”<sup>76</sup> One instance occurred during February 2010 in which police at the Modikare check point arrested four refugees traveling to Garissa for medical care. Although all four of the refugees had valid movement passes, as well as their medical documents, the officers looked at the four refugees and told them, “You don’t really look sick.” Consequently, all were returned to the camps.<sup>77</sup>

The DRA has taken measures to prevent Kenyan police from turning back or forcibly returning refugees who are traveling with valid movement passes. However, so far, it has been described as unsuccessful. The DRA has taken steps to provide police at checkpoints with daily updates on whom are traveling with valid movement passes from Dadaab to Garissa and then from there to Nairobi. This attempt to avoid refugees from being detained or taken to court has been unsuccessful even with the UNHCR’s help. The UNHCR claims that it has provided police at the Garissa checkpoint with UNHCR phone numbers for them to call if they have any doubts but no phone calls have been made.<sup>78</sup>

Kenya’s obligations through international refugee law require it to guarantee refugees the right to choose their own residence as well as to be able to move freely throughout Kenya. Kenya is only allowed to limit movement, whether it is of nationals or non-nationals, if it is “provided by law...and necessary to protect national security, public order, public health or morals, or the rights and freedoms of others.”<sup>79</sup> Also, the restrictions must be non-discriminatory and seen as necessary to achieve a legitimate aim. This also leaves room for open interpretation for Kenya to determine what it sees as a legitimate aim. A restriction on a refugee’s freedom of movement in Kenya must be

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<sup>76</sup> Human Rights Watch Interview, Dadaab, March 2010 (name and precise date withheld) *as described in* Human Rights Watch, *supra* note 24, at 75.

<sup>77</sup> *See* Human Rights Watch, *id.* at 76.

<sup>78</sup> *Id.*

<sup>79</sup> Article 12(3), ICCPR, *as described in* Human Rights Watch, *supra* note 24, at 79.

proportionate in relation to the aim sought to be achieved by the restriction.<sup>80</sup> While refugees often have a valid movement pass, there is a distinct violation of this privilege by measures taken to limit their movement.

### ***J. State Fears Lead to Warehousing***

Kenya's concern for its refugee situation might be expressed through common state anxieties that refugee protection will lead to permanent immigration. The duty that comes with admitting refugees within a state's border as well as the costs with their arrival (and often, their protracted stay) are never fairly proportioned among receiving host countries.<sup>81</sup> Even though few governments admit refugee status with permanent residence, there is little thought or effort by states to "dovetail the modalities of temporary asylum"<sup>82</sup> and create permanent solutions that do not display hostility or negligence of refugees' human rights.

By warehousing the thousands that have sought protection within Kenya's jurisdiction, Kenya has created a permanent solution for its Somali refugees. Recently, in 2004, the U.S. Committee for Refugees in their World Refugee Survey coined the term, "warehousing" to describe the housing of refugees seeking asylum. The term "shed new light on old problems and create[d] fresh insight into the reasons for such problems."<sup>83</sup> Kenya has never officially adopted a policy which requires Somali refugees to stay in camps. Although Kenya does not want refugees within its borders and while it is not acting aggressive or hostile toward the refugees, it is still not welcoming.

Kenya's actions have supported the observation that the asylum process serves more as a police function than a humanitarian function. This reinforces the "us" from "them" notion. It also reinforces the Machiavellian idea that sovereign power supersedes a state's concern outside of its borders. The conflict here is that refugee law requires

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<sup>80</sup> *Id.*

<sup>81</sup> James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 117 (1997).

<sup>82</sup> *Id.* at 119.

<sup>83</sup> U.S. Comm. For Refugees, World Refugee Survey 2004 21 (2004), described in Traci L. Massey, *To Keep Water, Water: How We Missed the Mark with Cote d'Ivoire's Warehoused Refugees*, 31 N.C.J. INT'L L. & COM. REG. 209 (2005-2006).

states to have a responsibility to protect those who are crossing into its jurisdiction. The nexus of sovereign power and refugees can be characterized as a powerful system of global apartheid. This apartheid establishes a permanent underclass of superfluous human beings<sup>84</sup> and further enforces the division between human rights law and refugee law.

### ***1. Warehousing as a Fourth “Solution”***

There are three durable solutions to refugee outflows, generally. They are voluntary repatriation, local integration into the host society, or resettlement to another country. A fourth solution has been also seen – warehousing. It has been described as a forth *de facto* and “all-too-durable” solution.<sup>85</sup> Warehousing is the practice of keeping refugees in protracted situations with major restrictions on the right to freedom of movement. There is restricted mobility, enforced idleness, and unwanted dependencies since their lives have been put on hold and their rights restricted. There are different standards as to what a protracted situation may be. Some believe it to be more than five years in exile with no end in sight.<sup>86</sup> Regardless, warehousing is focused upon the denial of the right to freedom of movement although states may see it as a way to handle the refugee problem and protect national security and local employment. The UNHCR’s Global Consultations on International Protection stipulate that, “A protracted refugee situation is one where, over time, there have been considerable refugees’ needs, which neither UNHCR nor the host country have been able to address in a meaningful manner, thus leaving refugees in a state of material dependency and often without adequate access to basic rights (e.g. employment, freedom of movement and education) even after many years spent in the host country.”<sup>87</sup> What a state sees as handling its refugee issue is in-turn negatively affecting refugees’ right to freedom of movement.

There are historical and political reasons why host states in Africa increasingly

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<sup>84</sup> Hayden, *supra* note 63, at 262.

<sup>85</sup> Merrill Smith, *Warehousing Refugees: A Denial of Rights, a Waste of Humanity*, WORLD REFUGEE SURVEY. 38 (2004).

<sup>86</sup> *Id.*

<sup>87</sup> UNHCR Global Consultations on International Protection, 4<sup>th</sup> Meeting, “Local Integration,” EC/GC/02/6 p. 1, fn. 2. (Global Consultations 2002) (April 25, 2002).

rejected local integration of refugees from the 1970s onward in favor of warehousing.<sup>88</sup> These reasons include concerns regarding both economic and environmental burdens (in both poor and richer countries), security concerns, anger at being ‘abandoned’ by richer countries who also have similar international legal obligations for protecting refugees, fear of the domestic ramifications of xenophobia, and the realist need to reassert sovereignty over porous borders. Also, host governments benefit from the international aid associated with encampment, which “would not be forthcoming for self-sufficient, integrated refugees.”<sup>89</sup> The arguments stem from a realist state-centric perspective and are based on the assumptions that state rights (sovereignty) trump individual rights, and that citizen rights trump human rights. Based on these assumptions, warehousing is seen as a legitimate means to prevent perceived threats and gain desired benefits for the state and for citizens without injuring any significant interests (since refugee interests are not considered *a priori* significant).<sup>90</sup>

While human rights law respects movement generally, it is the legal articulation that discriminates between the forms of movements. It supports, paradoxically, free human movement that is disciplined and bounded by state sovereign coercion.<sup>91</sup> In his book, *The Global Community*, W.M. Spellman explains that “[t]ogether with unpredictable shifts in climate, natural disasters and threats from hostile neighbours, a life of movement was the norm for most people and, as a result, fixed notions of territory and resource appropriation, the ‘mine and thine’ were largely absent from the collective assumptions of the group or kinship community.”<sup>92</sup> It also has been a *de facto* right in every practical sense because it has been exercised freely by anyone who historically had chosen to actually exercise it. Within the “annals of international morality, [freedom of movement] was recognized freely long before the development of modern international law.”<sup>93</sup>

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<sup>88</sup> Tara Polzer, *Negotiating Rights: The Politics of Local Integration*, 26 REFUGEE 5 (2011).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Mark F.N. Franke, *The Displacement of the Rights of Displaced Persons: An Irreconciliation of Human Rights between Place and Movement*, 7 JOURNAL OF H.R. 269. (2008).

<sup>92</sup> W.M. Spellman, *THE GLOBAL COMMUNITY*, 1 (Sutton Publishing Limited) (2002), as described Satvinder S. Juss, *Free Movement and the World Order*, 16 INTERNATIONAL JOURNAL OF REFUGEE LAW 203 (2004).

<sup>93</sup> See Juss, *id.* at 316.

Therefore, there is evidence that freedom of movement across national borders is a basic human right because it has a long and well-known history.

Article 28 of the 1951 Refugee Convention requires signatory states to issue a travel document to refugees. The travel document represents the ‘core’ of the rights of the refugees and the international refugee regime. The Article stipulates that travel documents shall be issued to refugees lawfully staying in the host country’s territory. States should also be sympathetic to refugees who are unable to attain a travel document from the country of their lawful residence.<sup>94</sup> The article further proves how vital the right to freedom of movement was regarded after the Second World War when the Convention was created and the world saw the mass numbers of refugees the War had produced.<sup>95</sup> Those being forced to move should have effective means to disengage from detrimental state policies that have failed to adhere to international human rights law. Failure to enhance protection of refugees through human rights and ensure their right to freedom of movement “signals a retrenchment to a paradigm where individual liberties are subjugated to political expediency.”<sup>96</sup>

By restricting freedom of movement and enforcing policies of warehousing, this policy of containment has proven to regard refugees in a category different from nationals and therefore requiring different rights. Yet, these refugee rights are not enforced or practiced, either. Refugees are now often seen as “problem people” as well as a “collective source of anxiety and potential instability due to their ‘irregularity.’”<sup>97</sup>

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<sup>94</sup> 1951 Convention, art. 28 stipulates: (1) The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory, they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence. (2) Travel documents issued to refugees under previous international agreements by Parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article.

<sup>95</sup> Otto Hieronymi, *The Nansen Passport: A Tool of Freedom of Movement and of Protection*, 22 REFUGEE SURVEY QUARTERLY 38. (2003). Hieronymi reminds the reader that one of the first human rights denied to the citizens of the totalitarian regimes during 20<sup>th</sup> century was the right to travel freely.

<sup>96</sup> Michael J. Parrish, *Redefining the Refugee: The Universal Declaration of Human Rights as a Basis for Refugee Protection*, 22 CARDOZO L. REV. 248 (2000).

<sup>97</sup> Philip Marfleet, REFUGEES IN A GLOBAL ERA 150-151 (Basingstoke: Palgrave Macmillan) (2006), as described in Hayden, *supra* note 63, at 258.

The response to the influx of refugees within a state's borders has consisted of tightening border control as well as migration policies. It has also consisted of looking towards the UNHCR for relief. So, instead of focusing on granting refugees asylum and integrating them into society, the strategy has been to contain them and restrict their rights;<sup>98</sup> this is largely because unlike nationals, refugees are often deemed a threat to state security. Warehousing refugees prevents them from exercising their basic human rights and because it is seen as a fourth solution, it supports the growing gap between the two regimes of international law.

## *2. Warehousing Effects*

Warehousing, a euphemism for restricting refugees' right to freedom of movement, is usually seen in dangerous and isolated areas. Warehousing is rarely done for humanitarian reasons but to protect the political and economic interests of the state. Warehousing threatens refugee protection. Human rights cannot be respected in the camps.<sup>99</sup> Refugees do not have freedom of movement and thus suffer in the camps from "high incidence(es) of violence, exploitation and other criminal activities."<sup>100</sup> Due to prolonged confinements in the Dadaab camps, Somali refugees become bored, depressed and resort to chewing *khat* leaves.<sup>101</sup> As the effects from the *khat* leaves wears off, they become aggressive against women and girls.<sup>102</sup>

Warehousing can also bring collective punishment and allow the administrators of the camps to operate without any sort of checks on power in regards to the treatment to the confined refugees. For example, in Kakuma in 1994 and 1996, food distribution was withheld from the entire camp for weeks at a time in order to find the unidentified

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<sup>98</sup> See Hayden, *supra* note 63, at 258.

<sup>99</sup> Guglielmo Verdirame, *Human rights and refugees: the case of Kenya*, 12 JOURNAL OF REFUGEE STUDIES 55 (1999).

<sup>100</sup> UHNCR Standing Committee, *Framework for durable solutions for refugees and persons of concern*, EC/53/SC/INF.3 10 (Standing Committee Framework) (Sept. 16, 2003).

<sup>101</sup> Khat is a stimulant drug native to East Africa and southern Arabia. Chewing khat can induce a state of euphoria and elation as well as feelings of increased alertness and arousal. *Description available at* <http://www.nida.nih.gov/Infofacts/khat.html>

<sup>102</sup> Jeff Crisp, *A state of insecurity: the political economy of violence in refugee-populated areas of Kenya*, UNHCR New Issues in Refugee Research (NIRR), Working Paper No. 16, 25-6, 29 (Dec. 1999).

persons who had been vandalizing enclosures that were used for counting the refugees and distributing rations.<sup>103</sup>

Warehousing also inhibits voluntary return when refugees are subject to military leaders in the camps. This is in the host country's best interests if it does not wish to have refugees within its borders. Warehousing refugees can make their disempowerment even worse as they sit confined all day and "become spectators in their own lives rather than active participants in decision-making."<sup>104</sup> Freedom of movement and the right to a travel document are both described as "Anti-Warehousing Rights."<sup>105</sup>

Security is still the rising concern and justification for warehousing. Refugees living in disputed border areas may be a risk, and camps can become "hotbeds of political agitation."<sup>106</sup> Camps are used for drug smuggling, human trafficking, and gunrunning. Camps also fall under military or political elements which undermine local law authorities. An example here is the Sudan People's Liberation Army (SPLA) using the Kakuma camps to recruit people for the rebel forces.<sup>107</sup>

Refugees are also seen as an economic burden so warehousing solves this issue of possibly burdening the host country and society. One argument for encampment and segregated settlement that limits freedom of movement is, "Given the large numbers of those who need to be integrated, the very low or negative economic growth rates, the high population growth rates, the drastically declining commodity prices and agricultural output and the debt crisis, it is imperative that African host governments [keep refugees] in spatially segregated sites so that the cost of their subsistence would be met by international refugee support systems...All other talk about integration is wishful thinking based on inadequate understanding of the economic, social and political realities of the present day Africa."<sup>108</sup> This argument does not take into consideration the reality that those who are segregated have their human rights restricted and their daily lives

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<sup>103</sup> Verdirame, *supra* note 93, at 64.

<sup>104</sup> Smith, *supra* note 79, at 42.

<sup>105</sup> *Id.* at 40.

<sup>106</sup> Lisa H. Malikki, "Purity and Exile: Violence, Memory and National Cosmology among Hutu refugees in Tanzania," 1995, *as described by* Smith, *supra* note 79, at 45.

<sup>107</sup> Smith, *supra* note 79, at 46.

<sup>108</sup> Gaim Kibreab, "Local Settlements in Africa: A Misconceived Option?" 2 JOURNAL OF REFUGEE STUDIES 473-4 (1989) *as described in* Smith, *supra* note 79, at 46.

come to a complete halt. It also ignores the truth that once states segregate communities, they are often forgotten about and the segregated living becomes a protracted situation.

Because refugees are deprived of their human rights, they are “simultaneously *integrated within* the decision-making authority of sovereign power and *segregated from* the normalized territory of potential host states.”<sup>109</sup> Refugees are integrated within the decision-making authority when laws and restrictions are considered to keep them contained and limit their freedom of movement. This is what causes them to be segregated from the normalized territory. The recent policies and practices of states, including warehousing and providing disincentives to leave situations of encampment, have redefined refugees through an exclusionary process which places them outside the host community. Typically the host community and society are seen as those holding human rights when compared to refugees. Since they are not “right-holders” within the realm of sovereignty, they are instead “superfluous human beings in a state of permanent limbo.”<sup>110</sup> Consequently, Kenya, a state with responsibility for over 300,000 refugees,<sup>111</sup> has a reputation with the refugees that is “turning sour.”<sup>112</sup> Kenya’s ambivalence towards both its containment of refugees in the camps and its apathy towards the refugees in the cities persists because of the lack of human rights application.

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<sup>109</sup> Hayden, *supra* note 63, at 259.

<sup>110</sup> *Id.* at 262.

<sup>111</sup> Human Rights Watch, *supra* note 5.

<sup>112</sup> *Id.* at 4.



### III. Freedom of Movement: What Does This Right Entail?

Freedom of movement is the ‘first and most fundamental of man’s liberties.’<sup>113</sup> It is basic among the element constituting liberty and what it means to have it. The freedom to leave one’s own country to go to another enables those wishing to escape corrupt or abusive political systems that deny them their other rights and freedoms. This allows for freedom of movement to be seen as a right of “last resort”<sup>114</sup> and proves that freedom of movement is a foundational and basic human right.

The Universal Declaration of Human Rights (UDHR) establishes the right to freedom of movement. Article 13 states, “(1) Everyone has the right to freedom of movement and residence with the borders of each state; and (2) [e]veryone has the right to leave any country, including his own, and to return to his country.”<sup>115</sup> The ICCPR also states that everyone has the right to freedom of movement.<sup>116</sup> Article 14 of the UDHR recognizes that all persons have the right to movement as a means for protection. This is in order to protect their civil and political rights.<sup>117</sup>

The ability to access a foreign country or territory is considered a necessary component of the right to freedom of movement because it allows individuals to have the alternative of participating in social processes of another state. The importance of this is that it allows for development of freedom and appreciation of life. The right to free movement is so fundamental that the realization of human aspirations and development depend upon it.<sup>118</sup> The UDHR’s statement on freedom of movement is not completely

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<sup>113</sup> M. Cranston, *What are Human Rights?* 33 (1973) as described in Juss, *supra* note 86, at 289.

<sup>114</sup> Human Rights Watch: Families Torn Apart, “Freedom of Movement in International Law,” (Feb. 3, 2009).

<sup>115</sup> U.N. Universal Declaration of Human Rights, art. 13.

<sup>116</sup> International *supra* note 20, at art. 12: (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 own residence; (2) Everyone shall be free to leave any country, including his own; (3) The above-mentioned rights shall not 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; [and] (4) No one shall be arbitrarily deprived of the right to enter his own country.”

<sup>117</sup> Art. 14 states: (1) Everyone has the right to seek and enjoy in other countries asylum from persecution; and (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

<sup>118</sup> Juss, *supra* note 86, at 290.

supported because the right to leave a country cannot be fully exercised unless there is a corresponding right to enter another country. The right to freedom of movement is not fully accepted. The continuous need by states to protect themselves from an influx of other people who are not like the host community or may be deemed a threat to national security or to the state economy<sup>119</sup> leaves the right to freedom of movement to be neglected. Further, Article 12 of the African Charter on Human and Peoples' Rights stresses the importance of the right to freedom of movement as well as the right to seek asylum. In addition, the right to leave and return to one's own country is also given importance.<sup>120</sup>

The International Convention on the Elimination of All Forms of Racial Discrimination protects the right to freedom of movement and residence within the borders of a state. The Convention also states that it "shall not apply to distinctions, exclusions, restrictions, or preferences made by a state party to this Convention between citizens and non-citizens."<sup>121</sup> The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) establishes the "equality of men and women of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."<sup>122</sup> It does not contain any right to freedom of movement, nor does the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. It prevents *non-refoulement*<sup>123</sup> but it does not affirm the right to freedom

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<sup>119</sup> Juss, *supra* note 86, at 294.

<sup>120</sup> African Charter, art. 12: "(1) Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law. (2) Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality. (3) Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions. (4) A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law. (5) The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups."

<sup>121</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art. 1(2).

<sup>122</sup> Convention on the Elimination of All Forms of Discrimination against Women, art. 1, 1979, 1249 U.N.T.S. 13.

<sup>123</sup> 1951 Convention, art. 33 (1): "Prohibition of expulsion or return ('refoulement'): 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."

of movement.<sup>124</sup> These all include adults but children are not forgotten, either, as they also make up a large portion of the refugee population.

The Convention on the Rights of the Child states that, “States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered in accordance with applicable international or domestic law and procedures shall...receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention.”<sup>125</sup> Although Article 10 allows for a child to enter or leave a country for purposes of family reunification,<sup>126</sup> there is still no freedom of movement allowed and this process of reunification is left in the hands of the state. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families recognizes that “[m]igrant workers and members of their families shall be free to leave any state, including their State of origin” and they also shall have the “right at any time to enter and remain in their State of origin.”<sup>127</sup> Note that this does not include freedom of movement or a right to enter into any state.

The Vienna Declaration and Programme of Action from the UN World Conference on Human Rights “stresses the importance of the Universal Declaration of Human Rights, the 1951 Convention relating to the status of Refugees, its 1967 Protocol and the regional instruments” so that there is reaffirmation that “everyone, without distinction of any kind, is entitled to the right to seek and to enjoy in other countries asylum from persecution, as well as the right to return to one’s own country.”<sup>128</sup> There are no further rights from this. The right to secure asylum is left out, as well, as this is considered “exactly the situation that pertained nearly half a century ago when the UDHR was proclaimed.”<sup>129</sup>

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<sup>124</sup> Doc. A /RES/39/46: see Article 3(1). 101 Parties, *entered into force* on June 26, 1987.

<sup>125</sup> Convention on the Rights of the Child, *adopted and opened for signature, ratification and accession* by GA Res. 44/25 of 20 Nov. 1989, *entered into force* Sept. 2 1990, in accordance with Article 49, art. 10.

<sup>126</sup> *Id.*

<sup>127</sup> Doc. A/RES/45/158: see Article 8 (1) and Article 8(2) respectively.

<sup>128</sup> UN Document A/CONF. 157/24 (Part 1) 13 (Oct. 13, 1993) 220–46, 32 ILM 1661 (1993). 14 HRLJ 352 (1993), 1 IHRR 240 (1994). Adopted by the World Conference on Human Rights at its 22nd plenary session on 25 June 1993. The Conference was convened by the United Nations and attended by representatives of 171 States.

<sup>129</sup> Juss, *supra* note 86, at 296.

Article 5 of the General Assembly's Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live states, aliens lawfully in a territory of a State shall enjoy the right to liberty of movement and freedom to choose their own residence within the border of the State.<sup>130</sup>

Freedom of movement may be considered one of the more tolerant practices which many cultures have in common when there is peace and progress in a society. Immigrants, however, are voluntary migrants and for them, freedom of movement is only half a right. This is because the state has a right to pass laws to exclude them and it does not privilege an individual's right over the state.<sup>131</sup> Unfortunately, this very issue has been seen in the refugee regime, as well. Refugees are excluded from national laws and not afforded the right to freedom of movement that nationals enjoy. The comparison between nationals and non nationals will be discussed later.

The right to return also relates to the freedom of movement. The right return to one's own country protects against government repression. It forbids the state from exiling or forcibly returning those who are seen as a burden or threat. The right to return also strengthens the right to leave a country in the case of non-nationals. If a non-national wants to return, it would typically mean that they have a safe place to go back.<sup>132</sup> Further, the obligation for states to respect the right to return to one's own country is much stricter. The ICCPR specifically states that individuals should be not be arbitrarily deprived of this right, and the U.N. Human Rights Committee concludes that there "are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable."<sup>133</sup> The Convention on the Rights of the Child allows for no

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<sup>130</sup> GA Res. 40/144, Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, adopted by GA Res. 40/144 of (Dec. 13, 1985) art. 5, *available at* <http://www.ohchr.org/english/law/individual.htm>.

<sup>131</sup> Juss, *supra* note 86, at 293.

<sup>132</sup> Human Rights Watch, *supra* note 108.

<sup>133</sup> ICCPR General Comment No. 27, para. 21 states: "The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable...."

restrictions on the right to return. This is for the purpose of reuniting families.<sup>134</sup> There are different aspects to freedom of movement of refugees that go beyond detention. Freedom of movement is required everywhere, both within the refugee regime as well as the human rights regime.

### *A. Necessities*

The right to freedom of movement is an individual right which has to be faced with a state-based international community whose concern is regarding human migration<sup>135</sup> as well as sovereignty. A right to leave it does not automatically mean a right to enter another state. This is a problem of any type of migration.

Article 26 of the Refugee Convention states that, “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.”<sup>136</sup> Government and UNHCR officials often claim that refugees’ freedom of movement is actually not inhibited. However, there are obstacles and gaps in the law that make it difficult, if not impossible, for refugees to exercise their right to freedom of movement.

An important issue concerning host countries and their treatment towards refugees in regards to freedom of movement is the common (yet not obvious) action of keeping refugees near the border of their country of origin.<sup>137</sup> States may argue that refugees are only in transit and that they will soon be leaving, either back to their homeland or resettled to another country. Therefore, the practice is to keep them near the border and away from the host country’s society. However, an article in the 1969 Convention states: “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.”<sup>138</sup> The description

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<sup>134</sup> Human Rights Watch, *supra* note 108.

<sup>135</sup> Colin Harvey & Robert P. Barnidge, *Human Rights, Free Movement, and the Right to Leave in International Law*, 19 INT’L J. REFUGEE L. 2 (2007).

<sup>136</sup> 1951 Convention, art. 26.

<sup>137</sup> Zachary A. Lomo, *The Struggle for Protection of the Rights of Refugees and IDPs in Africa: Making the Existing International Legal Regime Work*, 18 BERKELEY J. INT’L L. 281. (2008).

<sup>138</sup> 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, art. 2(6).

“reasonable” in regards to distance from the border leaves the interpretation open to states. This policy that is used by state discretion has led to many attacks on refugees who have not been able to move beyond their designated living areas. In Africa, “it is the rule rather than the exception that refugees are settled close to the borders.”<sup>139</sup> The rule here which contradicts the international obligation is justified by the hope of temporary protection. States hope that they will only be providing temporary security and shelter. Then the fighting will cease in the refugees’ homeland and they will return. This denial causes refugees harm and the continual suppression of their freedom of movement causes further harm and violations of international law.

The limitation on freedom of movement is done, whether blatantly or more discreetly, in order to prevent refugees from integrating into mainstream society. Also, camps and settlements provide the state with means to oversee the refugee population and know of their whereabouts at all times. Refugees are accepted as temporary guests until the reasons that have created their displacement are eliminated.<sup>140</sup>

### ***B. Push for Human Rights Law***

Solutions to refugee problems depend on international solidarity and burden-sharing, together with parallel developments in those institutions competent to examine root causes and measures to avert flows. Detention, however, involves for the international community and UNHCR both a basic human rights issue and a basic protection issue.<sup>141</sup> Next to life itself, freedom of movement is among the most precious of human rights.<sup>142</sup> Detention plays a main role when state governments wish to prevent and suppress crime. Circumstances of flight may generate criminal liability where refugees enter a receiving country illegally or without proper documentation. The majority of refugees, however, are not guilty of serious crimes. In assessing the current situation in Kenya, or any host country which keeps its refugees in containment, critical

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<sup>139</sup> Lomo, *supra* note 131, at 282.

<sup>140</sup> Gaim Kibreab, *Why Governments Prefer Spatially Segregated Settlement Sites for Urban Refugees*, 24 REFUGE 30 (2007).

<sup>141</sup> Guy S. Goodwin-Gill, *International Law and the Detention of Refugees and Asylum Seekers*, 20 INTERNATIONAL MIGRATION REVIEW 194 (1986).

<sup>142</sup> *Id.* at 195.

attention must be paid to the state practice towards refugees in regards to rights under both refugee law as well as international human rights law.<sup>143</sup>

If refugees are subject to the same laws as nationals in the negative connotation, then they must be regarded as such in the light of international human rights law. Refugees who are often subject to the same law as nationals are exposed to punishment or detention on account of illegal entry or any entry or movement without valid documents. Detention is also ordered when the refugee is seen as a public or national threat to security. This happens to nationals, as well. It is no different, except that with refugees, the detention is often joined with any immigration violations or offences.<sup>144</sup>

Distinguishing between nationals and non-nationals allows for a global apartheid to exist, and this lets the nation-state remain at the core of all decision-making. It remains the political and administrative unit,<sup>145</sup> even though there are international laws that state other responsibilities. The idea of ‘inclusion’ and that those who are included are tied to the national identity is an issue that perhaps international law cannot solve. This can result from the globalized world where “whole classes of people – including refugees, asylum-seekers, and migrant workers – become *de facto* if not *de jure* stateless persons as the mutating borders of exclusion continually deprive individuals and communities of the ability to effectively exercise their civil, political, social, and economic rights.”<sup>146</sup> This ensures that stateless persons are continually in limbo. They are caught between the conditions they fled and the conditions they find themselves in while in the host country. They are often not integrated but the state’s ambivalence has kept them on the territory, often isolated.<sup>147</sup> Refugees in protracted situations must be included here. The containment and segregation policies as practices of a global apartheid call for recognition of such principles as the right to freedom of movement. The “limitations of freedom of movement has...been the precondition for enslavement,” and the right to have rights cannot be properly guaranteed and exercised without a

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<sup>143</sup> *Id.* at 196.

<sup>144</sup> *Id.* at 204.

<sup>145</sup> Hayden, *supra* note 63, at 263.

<sup>146</sup> *Id.* at 264.

<sup>147</sup> *Id.*

corresponding guarantee of freedom of movement.<sup>148</sup> Without the right to freedom of movement, there is no possibility for refugees to obtain other rights. While living in protracted situations, under warehousing policies, the one who is making the decision on the refugees' living conditions and movement limitations essentially possesses the refugees' civil rights. This enforces that the sovereign power requires a condition of inequality for it to function – limits must be placed upon the right to freedom of movement and there must be some type of exclusion<sup>149</sup> for a sovereign state to assert its supremacy and authority over its territory and the people living on it.

### ***C. Differences between Human Rights and Refugee Law***

In comparison to the system of international human rights protection, the international refugee regime “can be considered as having greater potential to ensure compliance with *international refugee protection standards*.”<sup>150</sup> In support of this, the UNHCR can play an effective supervisory and *de facto* enforcement role in the application of international refugee law and related human rights standards. However, the systems of both refugee and human rights protection differ in significant ways.<sup>151</sup> In regards to limitations of the refugee regime, there is no formal mechanism, like there is for human rights protection, for receiving individual or inter-state complaints or petitions. Secondly, the UNHCR has not given full effect to Article 35 of the 1951 Convention which is a Contracting State's duty to provide the UNHCR with information regarding implementation of the Convention.<sup>152</sup> There is also no system of country practices that

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<sup>148</sup> Hannah Arendt, *Men in Dark Times*, San Diego, New York and London: Haroucrt Brace, 1968. 9, as described in Hayden, *supra* note 63, at 265.

<sup>149</sup> Hayden, *supra* note 63, at 266.

<sup>150</sup> Brian Gorlick, *Human Rights and Refugees: enhancing protection through international human rights law*, NEW ISSUES IN REFUGEE RESEARCH Working paper No. 30. Available at <http://www.jha.ac/articles/u030.htm>.

<sup>151</sup> *Id.*

<sup>152</sup> 1951 Convention, art. 35: “The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention. 2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning: (a) The condition of refugees, (b) The implementation of this



can be used to formulate observations and recommendations for states and therefore help ensure compliance with international refugee protection standards. The extent of the UNHCR's involvement in protection and human rights issues concerning refugees depends upon state's allowance of the UNHCR to exercise its mandate in a particular country as well as provide the UNHCR with available and appropriate resources for the operation.<sup>153</sup> As a consequence, there is a considerable obstacle and hindering in the UNHCR delivering its protection mandate. With limited human and financial resources, there is limited effort the UNHCR may be able to produce. This is also a perfect opportunity for Contracting States to step up to their responsibilities and duties under international law and ensure that human rights are applied to those living within their borders. They already have the help of the UNHCR there, so it is time that States took advantage of that. Otherwise, there is no point in having mass numbers of refugees on their soil as well as the UNHCR and then not ensuring that human rights are afforded.

The first requirement of actual human rights governance is recognizing that refugees in the camps are covered by human rights law. Ralph Wilde, a member of the International Committee on Human Rights Law, asks the question, “[D]oes international human rights law apply to individuals who claim asylum but who have not had their status determined by the host state, or does their “temporary” status obviate this?”<sup>154</sup> Regardless of the label that someone who has been moved carries, human rights law does apply. Most of the refugees in the camps meet the criteria for refugee status regardless of the determination by the host state. In Kenya it is difficult to fathom granting official refugee status to over 300,000 asylum seekers. However, the individuals should be entitled to all the rights that are afforded to refugees since “determination is declaratory, not constitutive, of refugee status.”<sup>155</sup>

Erika Feller argues that the gaps in refugee protection do not derive, by and large, from the legal framework. It is abound with principles and guidelines. There is a gap,

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Convention, and (c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.”

<sup>153</sup> Gorlick, *supra* note 144.

<sup>154</sup> Ralph Wilde, *Why and How UNHCR Governance of “Development” Refugee Camps Should be Subject to International Human Rights Law*, 1 YALE HUM. RTS. & DEV. L. J. 112 (1998).

<sup>155</sup> *Id.*

and the gap lies in implementation, with access to asylum, or its provision on adequate terms which are not fully guaranteed or reliable.<sup>156</sup> However, there is no recognition of freedom of movement in practice so refugees are “swiftly losing ground” in terms of legal protection provided by states. Many states have pledged their responsibility to international refugee law yet have also undertaken radical changes through their domestic legislation and inter-state arrangements. This results in restrictions to asylum and provision of legal rights, of human rights, to refugees. The practice of states that limits refugees’ freedom of movement is the policy of encampment, or warehousing, or administrative detention. Whatever it is called, it is a violation of refugee law and in turn, a violation of human rights law. This “regressive”<sup>157</sup> approach is seen in many traditional asylum countries that claim to be overburdened with refugees. It cannot be denied that there is a gap in the international protection regime; the arrival of such a vast number of asylum seekers crossing sovereign states’ borders as well as the potential abuse of the asylum process and procedures have resulted in a large burden on some states. As a Refugee Law Training Officer in Stockholm, Brian Gorlick, states, “[I]t should be recalled that the system of international refugee protection could not have foreseen these unprecedented and wide-ranging developments to avoid state responsibility.”<sup>158</sup> Because of this, Gorlick asserts, a gap exists.

Alice Edwards focuses on conceptualizing the relationship between refugee law and human rights law. The regimes form part of the same legal schema. Tradition and isolation of refugee law from human rights norms as well as the institutions means that refugees have lived without recourse to rights which are they are entitled to as not only refugees but as human beings.

Gorlick reminds us that although there is a majority focus by states to enhance immigration control mechanisms, and these difficulties of reconciling such control objectives with obligations are founded in refugee law, there ought to be a similarly-

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<sup>156</sup> Statement by Ms. Erika Feller, Assistant High Commissioner for Protection, Fifty-seventh session of the Executive Committee of the High Commissioner’s Programme, Agenda item 5(a). 3. Available at <http://www.unhcr.org/refworld/pdfid/4524bc952.pdf> (last visited May 3, 2011).

<sup>157</sup> Gorlick, *supra* note 144.

<sup>158</sup> *Id.*

major focus on another body of international law – international human rights law. The High Commissioner for Refugees, in her address to the 54<sup>th</sup> session of the Commission on Human Rights, stated that there is an “impressive array of international, regional, and national human rights standards and structures which must continue to evolve to ensure that gaps and weaknesses are identified.”<sup>159</sup> So, the gaps and weaknesses are those in the body of international law which begins with implementation of refugee law.

Human Security Now is a Commission on Human Security which has studied “People on the Move” generally. To the 1951 Convention and 1967 Protocol’s credit, a report of Human Security Now states that these make up the “most developed normative framework...for refugees.”<sup>160</sup> However, it is the application that is lacking, and there is a gap which persists because of the missing application of human rights law with refugee law. One of the main focuses, right to freedom of movement, affects both those who move voluntarily as well as those who are forced to leave and depend upon the host country for protection and enforcement of rights.

In 1995, the UNHCR Executive Committee called upon the Office “to strengthen its activities in support of national, legal and judicial capacity building, where necessary, in cooperation with the UN High Commissioner for Human Rights.”<sup>161</sup> One argument is not only should the UNHCR support developing justice systems in post-conflict situations, but the Office should also work toward making judicial authorities and the legal community aware of human rights problems facing refugees and other persons of concern. By building awareness and expertise amongst legal and administrative institutions and other actors, he says, there can be a positive impact on developing favorable administrative practices and in some instances policies and jurisprudence. Therefore, the strength of UNHCR’s field presence should not be underestimated “in respect of its overall potential to build upon the system of international refugee and more broadly human rights protection.”<sup>162</sup> States must not solely depend upon the UNHCR but instead support its purpose and advocacy towards ensuring that refugees are afforded

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<sup>159</sup> *Id.*

<sup>160</sup> Commission on Human Security, *Human Security Now Report*, 46 (June 1, 2003).

<sup>161</sup> *As described in Gorlick, supra* note 144.

<sup>162</sup> *Id.*

their rights as both refugees and human beings.

#### ***D. The Inter-Relationship between Human Rights and Refugee Law***

Without human rights, there would be no basis for refugee rights, as “[t]oday’s human rights abuses are tomorrow’s refugee movements.”<sup>163</sup> Human rights abuses are the core of population displacement, yet there is little research done that tests the relationship between human rights abuses and the movement of people seeking protection outside their country of origin.<sup>164</sup> There are inherent human rights that accompany a refugee wherever he or she goes, regardless of whether a border has been crossed or nearly approached upon. Since a host country must respect the human rights of anyone under its jurisdiction and on its territory, the human rights of refugees are part of the larger human rights protection regime.<sup>165</sup> The relationship between the violation of human rights and refugee movements is causal.<sup>166</sup> The Executive Committee of the UNHCR, in its 1988 Conclusion No. 52 (XXXIX) on “International Solidarity and Refugee Protection,” stated that it had a “deep concern over the *serious violations of human rights* which accompany refugee problems and the dislocation and distress they cause for millions of individuals involved.”<sup>167</sup> The concern is justified as refugee law is affected by states’ ambivalence towards its refugees as well as its desire to maintain sovereignty.

Alice Edwards believes that asylum policies and practices by governments question the scope of the 1951 Convention. She sees western governments “implementing hard-line or restrictive asylum policies and practices in order to deter and to prevent asylum-seekers from seeking refuge on their territory, including by interception and interdiction measures, visa controls, carrier sanctions, ‘safe third

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<sup>163</sup> UN Commissioner for Refugees Sadako Ogata, as described in John Stremmler, *People in Peril: Human Rights, Humanitarian Action, and Preventing Deadly Conflict*, THE JOURNAL OF HUMANITARIAN ASSISTANCE (Feinstein International Center) (May 1, 998).

<sup>164</sup> Apodaca, *Human Rights Abuses: Precursor to Refugee Flight?* 11 JOURNAL OF REFUGEE STUDIES 80 (1998).

<sup>165</sup> Alfred de Zayas, *Human Rights and Refugees*, 61-62 NORDIC J. INT’L L. 253 (1992-1993).

<sup>166</sup> *Id.*

<sup>167</sup> Executive Committee of the UNHCR, in its 1988 Conclusion No. 52 (XXXIX) on “International Solidarity and Refugee Protection as described in *id.*”

country' arrangements, administrative detention, and/or restrictive interpretations of the refugee definition.”<sup>168</sup> These restrictions on freedom of movement are due to states' ability to keep international refugee law distinct from human rights law and “flout minimum standards.”<sup>169</sup> It is custom for the UNHCR to view refugee law as part of the (what should be) broader international human rights framework, yet it does not always stress its obligatory nature and instead offers suggestions and guidance for States' standards domestically-speaking.<sup>170</sup> This allows for states to take advantage of the gap between the two international law regimes. However, as Edwards states, understanding the inter-relationship is crucial in order to be able to identify the obligations of countries of asylum. To Edwards, this is a starting point of any sort of determination of the standards of treatment for refugees (even though it is still often neglected). It is accepted that human rights law can “support, reinforce or supplement refugee law.”<sup>171</sup> Although it may appear obvious, the right to freedom of movement, which is a basic human right, is linked to successful actions taken towards durable solutions. This is why it is beneficial for host states to ensure that refugees are afforded this protection. The State is exhibiting responsibility from the start by establishing camps, so it must further that responsibility to include enforcement and assurance of basic human rights.

In *Canada v. Ward*, the Supreme Court of Canada affirmed that the protection of those at risk of human rights violations is “the lens through which refugee law must be focused.” The decision in June of 1993 in the appeal of Patrick Francis Ward “broadens the scope of the definition to include those genuinely lacking protection from imminent harm while cutting shy of those who have other viable options than to seek refugee status.” The *Ward* decision makes lack of protection by the state the central element of refugee definition.<sup>172</sup> Yet, there is a tension between what is seen as the right to respect and dignity as a human being, regardless of where they are, and what is often seen as the

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<sup>168</sup> Alice Edwards, *Human Rights, Refugees, and The Right 'To Enjoy' Asylum*, INTL. J. OF REF. LAW 293 (2005).

<sup>169</sup> *Id.* at 294.

<sup>170</sup> *Id.* at 295.

<sup>171</sup> Elisa Mason, *UNHCR, Human Rights and Refugees Collection and Dissemination of Sources*, 25 INT'L. J. LEGAL INFO 40 (1997).

<sup>172</sup> Linda E. Tranter, *A Step Forward in Protection Human Rights: Canada v. Ward*, 13 REFUGEE 16 (1993).

right of all sovereign nationals and states to safeguard their own interests.<sup>173</sup> States complain that there is an ‘erosion’ of sovereign freedom as there is a continuous deference to human rights and migration law. The conditions and circumstances under which it is considered possible to shift displaced persons’ rights claims are not found only in the lack of political will by states to respect and protect refugee rights. Neither are they found in poor interpretations of the law. Instead, they are rooted in the “discursive limits”<sup>174</sup> within which the modern human rights regime now functions. The discursive limits are attributed to the gap between human rights law and refugee law.

Counter-arguments have insisted that the human rights regime is not divided and the human right to freedom is founded within the authority of sovereign states. Internationally-speaking, there are no laws of rights of the displaced unless there is codification from the ‘emplaced’ states’ citizens. This way, the rights of displaced persons may be different but they are still under the heading of human rights law created by sovereign states.<sup>175</sup> Under the heading of refugee law, states who are signatories to the conventions are not obligated to admit anyone onto their territory. A state is responsible to provide asylum to those who make refugee claims on the state’s own territory. This further enforces the idea that those who are displaced are subject solely to state governances and jurisdiction

### ***1. Refugee Law and its Origins in Human Rights Law***

The refugee protection regime has its origins “in general principles in human rights.”<sup>176</sup> By looking at the UDHR’s Article 14 and its right to seek and enjoy asylum from persecution<sup>177</sup> along with “unanimously agreed human rights and fundamental freedoms” one can see that this “squarely places [international refugee law] within the

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<sup>173</sup> Mark F.N.Franke, *The Displacement of the Rights of Displaced Persons: An Irreconciliation of Human Rights between Place and Movement*, 7 JOURNAL OF H.R. 262 (2008).

<sup>174</sup> *Id.* at 263.

<sup>175</sup> *Id.* at 264.

<sup>176</sup> Feller, *supra* note 62, at 582.

<sup>177</sup> UDHR, art.14: (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution; (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.”

human rights paradigm.”<sup>178</sup> After all, the Senior Legal Coordinator for the Division of International Protection at the UNHCR in Geneva Alice Edwards reminds the international community that even though refugees are not specifically mentioned in the UN Charter, it was not an oversight considering the post-World War II environment and massive refugee flows helped initiate the creation of the United Nations.<sup>179</sup> The inclusion of this particular article in the UDHR reinforces this.

Furthermore, the Executive Committee of the High Commissioner’s Programme (ExCom) reiterated the obligation to “treat asylum-seekers and refugees in accordance with applicable human rights and refugee law standards as set out in relevant international instruments.”<sup>180</sup> In their allegiance to the 1951 Convention and 1967 Protocol, Contracting States “[r]eaffirmed [their] continued commitment, in recognition of the social and humanitarian nature of the problem of refugees, to upholding the values and principles embodied in these instruments, which are consistent with Article 14 of the Universal Declaration of Human Rights, and which require respect for the rights and freedoms of refugees.”<sup>181</sup> This pledge was in 2002 – ten years into Somalia’s civil war and Kenya’s policies of containment towards the refugees.

The 1951 Convention’s preamble states its decent from the UN Charter as well as the Universal Declaration of Human Rights.<sup>182</sup> The 1951 Convention and other refugee law instruments codify rights which states are responsible for providing to refugees. The 1951 Convention is “very much a living document which, despite its vintage, maintains its relevance in respect of providing a normative framework to address contemporary

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<sup>178</sup> Edwards, *supra* note 162, at 297.

<sup>179</sup> *Id.*

<sup>180</sup> Executive Committee Conclusion No. 82 (XLVIII) on ‘Safeguarding Asylum,’ para. (d)(vi) (Oct. 17, 1997). Available at <http://www.unhcr.org/3ae68c958.html>.

<sup>181</sup> UN High Commissioner for Refugees, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, HCR/MMSP/2001/09 (Jan. 16, 2002), available at <http://www.unhcr.org/refworld/docid/3d60f5557.html>.

<sup>182</sup> The relative statements in the Preamble include, “Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination, Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms...”

refugee problems.”<sup>183</sup> Despite the scope of human rights which is applicable to everyone, national or not, the provisions are often ignored or manipulated by the receiving host state. Refugee law provides human rights standards for refugees, and within the framework of human rights, one of the very important standards is the right to freedom of movement.

Since its inception, refugee law has been a “means of reconciling the commitment of states to discretionary control over immigration to the reality of coerced international movements of persons between states.”<sup>184</sup> In other words, refugee law can provide assistance to states who are forced to distinguish between those moving across its borders. There are some movements that states cannot avoid, and these movements can come in massive numbers. By establishing a regime which claims to objectively define those with a preferred right to admission, refugee law legitimizes the protectionist norm.<sup>185</sup> In many respects, refugee law crosses the threshold enforceability past which international human rights law has found it difficult to continue. Refugee law provides an enforceable remedy – available under specified circumstances – for an individual facing human rights abuses.<sup>186</sup> The refugee law regime is “generating a serious body of law that elaborates basic human rights norms and has important implications in – and beyond – the refugee context.”<sup>187</sup>

## ***2. Protection and the UNHCR***

The uniqueness of the international refugee protection system lies in its roots – a legally binding and standard setting treaty – which itself borrowed heavily from universal human rights principles and customary international law. International refugee protection has evolved and developed not only through the experiences, practices and implementations of its language by principal actors such as State signatories and the UNHCR. Refugee law has also developed through the contribution of a variety of

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<sup>183</sup> Gorlick, *supra* note 144.

<sup>184</sup> Deborah E. Anker, *Refugee Law, Gender and the Human Rights Paradigm*, HARVARD HUMAN RIGHTS JOURNAL 138 (Oct. 30, 2008).

<sup>185</sup> James C. Hathaway, *Reconceiving Refugee Law as Human Rights Protection*, 4 JOURNAL OF REFUGEE STUDIES 114 (1991).

<sup>186</sup> Anker, *supra* note 178.

<sup>187</sup> Anker, *supra* note 178, at 133.



international instruments, the work of intergovernmental bodies, including regional organizations, and jurists<sup>188</sup> who parallel their work with human rights law. Refugee law and human rights law must work together to fill in the gaps of implementation. A state cannot delegate human rights duties, so the UNHCR is present within state territory. However, proof that the refugee system is collapsing, and the lack of enforcement of human rights protection comes from the UNHCR delegating state responsibilities.

The UNHCR is a rights-based organization. To the UNHCR, refugees are “victims of human rights abuses, or human rights deficits, and they lack a national government willing or able to redress their situation. Protection, at its most basic, means activities to restore rights...[p]rotection is also about the creation of an enabling environment so that these, and other rights, have a real chance of being enjoyed until a durable solution is found.” Protection of human rights is first a state responsibility, but often the UNHCR is called upon to be the “deliverer of protection.”<sup>189</sup> Because of this calling, the UNHCR has “crossed the line”<sup>190</sup> that was once the division of human rights law and refugee law. It has already done this with the establishment within the United Nations that works with refugees. As the UNHCR continues to exercise its capacity as a human rights monitoring and intervening agency, while trying to balance the role of providing humanitarian assistance, it must also seek to remain attentive to the human rights of refugees in the host country.<sup>191</sup> The solutions for refugees are dependent upon the restoration and protection of their rights – foremost the right to freedom of movement.

The promotion of human rights principles as part of its protection policies is described in the UNHCR’s policy paper. This policy paper is the first time UNHCR has addressed the “interrelationship of human rights and refugee protection in a

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<sup>188</sup> Bemma Donkoh, *A Half-Century of International Refugee Protection: Who’s Responsible, What’s Ahead?* 18 BERKELEY J. INT’L L. 263. (2000).

<sup>189</sup> Statement by Ms. Erika Feller, Assistant High Commissioner for Protection, Fifty-seventh session of the Executive Committee of the High Commissioner’s Programme, Agenda, item 5(a) 2, available at <http://www.unhcr.org/refworld/pdfid/4524bc952.pdf>.

<sup>190</sup> Bill Frelick, *Refugee Rights: The New Frontier of Human Rights Protection*, 4 BUFF. HUM. RTS. L. REV. 271 (1998).

<sup>191</sup> *Id.* at 272.

comprehensive manner.”<sup>192</sup> The UNHCR states that human rights bodies (in particular, treaty implementation bodies), have become “increasingly aware of the relevance of refugee protection problems to their mandates and have been actively seeking a UNHCR input into their deliberations.”<sup>193</sup> The policy paper also stresses the founding principle of the UN Charter relating to collective and individual responsibility for human rights<sup>194</sup> as well as mentioning the UNHCR’s first address to the UN Commission on Human Rights in which the linkage between human rights concerns and refugee issues was expressed. The linkage was described as the following:

*Violations of human rights are a major cause of refugee exodus and in its efforts to curb such violations this Commission also contributes to the prevention of refugee flows. Violations of human rights also create complex problems of protection in countries of asylum [...] Finally, too, restoration of acceptable human rights situations in countries of origin can be the key to successful resolution of long-standing refugee problems. It is clear that human rights considerations are central across the spectrum of the refugee problem, from departure through refuge to the realisation of a lasting solution.*<sup>195</sup>

The policy statement is important in that it provides the UNHCR with a general guideline of how to incorporate human rights “standards, information and mechanisms” in its protection activities.<sup>196</sup>

A fundamental strongpoint is the day-to-day presence of UNHCR protection officers in field situations. This allows UNHCR officials to develop an appreciation of the country conditions and potential solutions to refugee protection problems as well as a likelihood of different approaches having a favorable outcome. A continuous field

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<sup>192</sup> Gorlick, *supra* note 144.

<sup>193</sup> UNHCR and Human Rights: A policy paper resulting from deliberations in the Policy Committee on the basis of a paper prepared by the Division of International Protection, 1, *available at* <http://www.unhcr.org/refworld/pdfid/3ae6b332c.pdf>.

<sup>194</sup> The paper states, “It is a founding principle of the United Nations Charter that sovereign states are charged with the collective and individual responsibility to promote universal respect for, and observance of, human rights and fundamental freedoms for all. /1(1) Whilst the primary duty rests with states themselves, the effective implementation of these universal standards remains, nonetheless, a legitimate concern of all other entities and individuals. In this, UNHCR has a particular role to play insofar as its mandate extends to refugees and others of concern to the Office.”

<sup>195</sup> *As described in* UNHCR and Human Rights: A policy paper, *supra* note 187.

<sup>196</sup> Gorlick, *supra* note 144.

presence is important for assessing as well as monitoring the extent of human rights issues in a particular region since the host state has basically passed its protection responsibility onto the UNHCR. This has an impact on protecting or producing refugees. Assessments may develop into a strategy to take remedial action through intervening and working with government authorities, legal or national human rights institutions as well as NGOs. This way, assistance programs and protection initiatives towards protecting and ensuring human rights for refugees can be developed and implemented.<sup>197</sup>

Although UN mechanisms may not provide a framework of protection as expansive, reliable and accessible as some domestic systems, international human rights law has contributed to this international legal system which can be invoked in support of both specific cases and more broad – based advocacy on behalf of refugees. The UNHCR can use the laws and mechanisms to enhance protection principles and give effect to forms of enforcement. The recent developments in human rights law, including the UN Commission and Sub-Commission on Human Rights as well as the Human Rights Committee, can assist in refugee protection.<sup>198</sup>

Besides the variety of the scope and application in the international treaties, difficulty is in the enforcement of rights. Ensuring that refugees are afforded their human rights while still being kept in parallel with refugee law instruments is the difficulty involved with the gap. Under human rights, there is an established system of treaty bodies playing a supervisory role that ensures states are complying with their obligations.<sup>199</sup> There is also the limitation of state agreement with the actions the UN can take, as well as the provisions of the human rights treaty under which the state is a signatory, which can hinder human rights law from enforcing refugee rights. The UNHCR has the “necessary personality” within international law to engage with the

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> There are periodic state reports that are produced, as well as special procedures reports. There are also the committees which are established under the authority of a particular treaty and are composed of independent experts.

human rights law that applies to refugees,<sup>200</sup> making it one example of how to render human rights of refugees possible.

### ***E. Lack of Freedom of Movement: The Sovereignty Challenge***

#### ***1. Right to Leave and Return***

The element of refugee choice is being compromised both with respect to the right to leave and the right to return. Thus, the only right being upheld is the right to remain. This is “suspect,”<sup>201</sup> according to Bill Frelick, the director of Human Rights Watch’s refugee program. It is also challenging because the right to remain is also being enforced by the state restricting refugees’ freedom of movement. Since even durable solutions involve movement, any restriction on freedom of movement is also against a state’s interest to relieve itself of its refugee “problem.” Therefore, it is in both the state’s interest as well as the refugee’s interest for there to be an assurance of the right to freedom of movement. The state’s ambivalence is hindering itself from addressing its refugee issues in political and economic terms as well as humanitarian.

The traditional state-centered international regime of human rights is continually battling against the right to freedom of movement. Critics of the discord between rights of displaced persons and rights of nationals believe that the rights of the displaced fall within a category aside from international human rights law. The rights of the displaced actually support the autonomy of sovereign peoples. They argue that the international obligations created for states regarding any displaced persons are not exactly human rights law. They are not universally-recognized, and therefore they are their own category of rights stemming from “narrow treaties made by states for the purposes of securing the international social order within a state-based discipline of human rights.”<sup>202</sup>

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<sup>200</sup> Ralph Wilde, *Quis Custodiet Ipsos Custodes? Why and How UNHCR Governance of ‘Development’ Refugee Camps Should Be Subject to International Human Rights Law*, 1 YALE HUM. RTS. & DEV. L.J. 108 (1998).

<sup>201</sup> Frelick, *supra* note 184, at 273.

<sup>202</sup> Franke, *supra* note 167, at 264.

## **2. State Protection**

Satvinder Juss argues that the legal right of a State to exclude people is often asserted as an expression of its sovereignty. Sovereignty, he affirms, implies absolute power. However, state power cannot be described in terms of sovereignty because sovereignty is not a state of affairs nor is it a fact; it is “simply a doctrine.”<sup>203</sup> Since one of the core functions of a state is to protect its citizens, it can be assumed that a state, while exercising its sovereignty, regulates migration in and out of its jurisdiction. General Comment (GC) No. 31 of the ICCPR on the “Nature of the General Legal Obligation” states that, “Moreover, the article 2 obligation requiring that States parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.”<sup>204</sup> International law provides occasions in which States may restrict freedom of movement. These circumstances are very limited. Both the ICCPR and the Rights of the Child prohibit states from restricting the right to leave any country except when it is to “protect national security, public order, public health or morals or the rights and freedoms of others.”<sup>205</sup> The restrictions must also be consistent with the other rights recognized in those same treaties.

### ***F. Human Rights of Refugees: It Gets Complicated***

Submitting to international pressure and hoping to repair previous losses and rifts with outside financiers, Kenya had suspended its threat to forcibly remove its refugees. It ‘grudgingly’<sup>206</sup> allowed them to settle within Kenyan territory. It allowed them on Kenyan soil with conditions. The refugees could only stay if they resided in camps in the northern parts of Kenya. This would be to abate feelings of insecurity and threats to the

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<sup>203</sup> Juss, *supra* note 86, at 321.

<sup>204</sup> ICCPR General Comment No. 31, para 12.

<sup>205</sup> International, *supra* note 20.

<sup>206</sup> Juma, *supra* note 32.

tourism industry. Therefore, Kenya pressured the UNHCR to repatriate all refugees to camps near the Kenyan border with Somalia,<sup>207</sup> away from interaction with locals in major cities and urban areas.

While governments may proclaim a willingness or duty to assist refugees from countries who have suffered havoc and massive human rights violations, there also appears to be a “pattern of defensive strategies”<sup>208</sup> that assist host countries in avoiding the international legal obligation found in refugee law. For refugees themselves, perhaps what has been described as increasingly marginal relevance to refugee law does lead to the belief that there is an overall lack of protection.<sup>209</sup> If there is protection, it is because of a state’s realist-centric vision that actions such as warehousing could in the long-term assist a state in protecting its citizens without having to give up any jurisdiction, and a state could still argue that it is upholding its legal obligations under international refugee law.

The goal of refugee law is not enforceability, at least in the strict sense.<sup>210</sup> Instead it is described as a mechanism by which state governments agree to compromise their sovereignty to independent action in order to manage complex refugee issues, contain conflict, and avoid catastrophe. It also attempts to promote decency.<sup>211</sup> Juggling between these aspects while maintaining sovereignty, Kenya has acted on its responsibility to refugees by establishing the camps. However, it must further demonstrate its responsibility by ensuring freedom of movement for its refugees.

Camps and settlements in host states perpetuate refugee status rather than end it by preventing incorporation into society. Kenya has done this with warehousing in the Dadaab camps and incorporating a useless movement pass system. By placing the camps so far from society and close to the Somali border, Kenya has been successful at keeping refugees segregated so they maintain their old relationship with one another and keep their national identity. This segregation allows Kenya to prevent the refugees from

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<sup>207</sup> *Id.*

<sup>208</sup> Hathaway & Neve, *supra* note 75, at 116.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

competing with locals for many necessities including employment, land, housing, water, pasture, firewood, transportation services, and any income-generating activities.<sup>212</sup> Similar to surrounding countries such as Sudan, those who live outside of the Dadaab camps and travel to and from the camps face serious risk of being arrested, detained and deported.<sup>213</sup> As long as the refugees are kept in distinct groups in the camps with little movement opportunities, they are no longer seen as a threat (or arguably, a burden). If the refugees are allowed to travel to Nairobi or any other city outside of the camps, they could easily “melt”<sup>214</sup> into local communities and become indistinguishable which would cause a problem for Kenya. It would cause a problem for any country which depends upon international donor funds. Therefore, the placing of refugees in segregated camps is seen as necessary for shifting responsibility from the host country to the international community.<sup>215</sup> In this case, it is easier for Kenya to hand responsibility over to the UNHCR because the refugees are there in the camps. There is no hiding them, and they are there for the international community to have responsibility over, not among local Kenyans for the Kenyan government to try to distinguish apart. Kenya may think it is doing its fellow UN assistants a favor by keeping refugees segregated, but by limiting their freedom of movement Kenya is still violating both its responsibility to international refugee law and human rights law.

Forcing refugees to remain within a camp is a violation of their freedom of movement unless the governing authorities can show any of the following: that this forcing is based on clear and precise law; that it is being done only to meet a legitimate aim for the country and is the least restrictive means to achieve the specific aim,<sup>216</sup> and finally, while balancing the impact with the desired legitimate aim, it must be proportionate and non-discriminatory.<sup>217</sup>

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<sup>212</sup> Kibreab, *supra* note 134, at 31.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 32.

<sup>215</sup> *Id.*

<sup>216</sup> The means must take into account the numbers affected by this action, the extent of the restriction as well as the length of time involved, and the impact on the lives of those affected.

<sup>217</sup> Human Rights Watch, *supra* note 24.

While the Somali refugees are not “warmly welcomed” in Kenya, the Kenyan government has been obliged to accept them because of its commitment to international law. Mostly, however, Kenya accepts them because it needs the continued support of donor countries.<sup>218</sup> With its neighbor Somalia caught in an ongoing civil war, Kenya does have legitimate security concerns and a right to control what happens within its borders. However, the conflict in Somalia continues to feed the refugee problem within Kenya’s borders and as long as Somalia is unstable, Kenya will experience the repercussions. Kenya did close its borders in 2007, but 4,000 Somalis a month are still crossing the border.<sup>219</sup> Kenya’s relations to its refugees and its signs of ambivalence create different opinions as to whether Kenya is trying to rid itself of its refugee ‘problem’ or if it is acting accordingly to its obligations under international law. Kenya’s tolerance of the refugees is most likely due to the UNHCR accepting full practical responsibility.<sup>220</sup>

### ***G. Justifications for Restrictions of Movement***

Kenya’s Refugee Act of 2006 offers every refugee the entitlement to every right which Kenya has an international obligation.<sup>221</sup> However, the Kenyan refugee law also allows for authorities to establish camps, confine refugees to those camps, and on exception allow certain refugees to travel outside the camps if they have a valid pass.<sup>222</sup> Kenya’s constitution states that a person’s freedom of movement may be restricted if it is “reasonably required in the interests of defense, public safety, or public order.”<sup>223</sup> The interests may only be invoked if they meet the following criteria:

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<sup>218</sup> While the donor countries awaited the outcome of Kenya’s first mutli-party election, Kenya’s President Daniel Arap Moi “grudgingly allowed Somali refugees into Kenya on the condition that they reside in border camps,” *as described in Dix, supra* note 3, at 24.

<sup>219</sup> Guled Mohamed, *Somali refugees pour into Kenya*, Reuters (June 18, 2008), *available at* <http://uk.reuters.com/article/idUKL187685620080618> (last visited Oct. 23, 2010).

<sup>220</sup> Wilde, *supra* note 148, at 108.

<sup>221</sup> 2006 Refugees Act, Section 16(1)(a) states: “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.”

<sup>222</sup> Human Rights Watch, *supra* note 24, at 79.

<sup>223</sup> The Constitution of Kenya, revised 2001, <http://www.bunge.go.ke/downloads/constitution.pdf> (last visited April 23, 2010), s. 81(3)(a), *as described in id. at 80*.



### *Non-discrimination*

A restriction on movement must not have a discriminatory effect.<sup>224</sup> Differential treatment between non-citizens and citizens based on their citizenship must also be strictly justified.<sup>225</sup>

### *Provided for by national law*

Any restriction on freedom of movement must be distinctly set out in domestic law. This is to prevent any state official from making arbitrary and abusive decisions. It is also to ensure that those who have their right to free movement restricted understand their rights.

### *For a legitimate aim*

A restriction on freedom of movement must be justified by the following aims which are found within the ICCPR: national security, public order and health, or the rights and freedoms of others. Kenya must be specific regarding how any of these aims require a restriction on movement. The measure taken must be proportionate to the pursued aim.

### *Necessary*

Of course a restriction on freedom of movement must be considered necessary and the restrictions “must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant.”<sup>226</sup>

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<sup>224</sup> The Human Rights Committee describes this discriminatory effect as: “Any distinction, exclusion, restriction, or preference which is based on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”

<sup>225</sup> This may include political rights, such as the right to vote, *as described in* Human Rights Watch, *supra* note 24.

<sup>226</sup> UN Human Rights Committee, General Comment 27, para 11. *as described in* Human Rights Watch, *supra* note 24, at 81.

### *Proportionate*

In regards to proportionality, the least restrictive measures possible on freedom of movement must be taken to meet the aim. The state must balance three factors to determine which is least restrictive: first, the extent of the restriction; second, the impact on peoples' exercise of the right affected; and finally, the state must consider why the restriction is necessary to bring about the desired aim.<sup>227</sup>

Kenya is obligated under international law to balance all of these factors. One example is forcing a group to stay within the camp boundaries. This is a violation of their freedom of movement. States must show that based on the above criteria, restricting movement meets a legitimate aim and the least restrictive measures are being taken. The impact must also be proportionate and non-discriminatory.

Restricting only refugees' freedom of movement is discriminatory regardless of whether they have obtained a movement pass. The movement pass system does not meet the criteria because it is very subjective. It is ineffective because there is no one to monitor the police at checkpoints who decide whether a refugee is allowed through. Kenya has created an image that it seeks to help its large number of refugees on its soil, especially with its Refugee Act of 2006 but this conveniently does nothing for setting out the precise criteria on which the police may justify restricting refugees' freedom of movement. According to Human Rights Watch, Kenyan authorities have not been able to say why they have restricted the movement of nearly 300,000 refugees in Dadaab and why this would be necessary to achieve any aims. In fact, there has been no stated aim.<sup>228</sup>

### ***H. Responsibility-Sharing Rather Than Burden-Sharing***

The artificiality that has been created, between human rights and refugee law, has caused states to look to the UNHCR to deal with its burden-sharing. In fact, it is seen more as burden-sharing than responsibility-sharing and the UNHCR should not be expected to take on all of the states' roles in protecting refugees' rights. Providing

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<sup>227</sup> Human Rights Watch, *supra* note 24, at 81.

<sup>228</sup> *Id.* at 82.

effective protection to refugees has become more difficult as conflicts continue to ensue and push groups of people out, where warring factions lack legitimacy or proper authority, and where there is a lack of accountability in regards to compliance with human rights (or even humanitarian) behavior.<sup>229</sup> The UNHCR cannot be expected to solve a state's refugee problem, and there needs to be "some rationalization of responsibilities"<sup>230</sup> in order to introduce more effective and thus better outcomes of protection. Changing the mindset from burden-sharing to responsibility-sharing arises recognizing that refugees are not only a problem but also part of the solution. It also stems from recognizing that host countries are often the least equipped financially and logistically to assist refugees in situations of mass influx. Therefore, the UNHCR is often dependent on states offering asylum to share the task<sup>231</sup> and this hinders refugee protection as a whole.

The roles that the UNHCR holds, and its complicity in human rights violations such as warehousing, demonstrate the gap that exists in refugee protection between traditional international legal norms and the reality of the practical implementation. UNHCR has acquired *de facto* sovereignty while assisting Kenya in following through with its international obligations. Even though the UNHCR is exercising this type of sovereignty, *de jure* it is only an invited guest.<sup>232</sup> This further proves that the system is under a considerable amount of pressure and that international human rights law is not applicable to a relationship between refugees and the UNHCR.<sup>233</sup> Rather, human rights law is applicable to the relationship between refugees and the state.

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<sup>229</sup> Feller, *supra* note 62, at 588.

<sup>230</sup> *Id.* at 591.

<sup>231</sup> Feller, *supra* note 62, at 599.

<sup>232</sup> Wilde, *supra* note 148, at 113.

<sup>233</sup> *Id.*

## IV. Conclusion

There is a crisis within the scope of protection for refugees. What would be the applicable law regime is no longer meeting the interests and needs of whom it applies.<sup>234</sup> The local efforts of the UNHCR as well as the domestic legislation that is seen in Kenya are attempts of affording refugees their rights under the international law regime. Unfortunately, however, there is nothing in the 1951 Convention or the 1967 Protocol that prepares these actors and instruments for situations of mass influx. The host state has the “primary responsibility for ensuring security in refugee camps and refugee-populated areas.”<sup>235</sup> By delegating responsibility to the UNHCR it is delegitimizing its role as a sovereign state and proving that the 1951 Convention is outdated. Kenya’s ambivalence to both its refugees in the camps and in the cities exemplifies the challenge of arguing that refugees’ right to freedom of movement must be sought through a human rights lens. Without the support of the international community and human rights, countries that are legally responsible for protecting refugees would not have any means of meeting their responsibility.

For Human Security Now, the Commission on Human Security, it is not just about refugees who are moving. There are many groups of people moving. The issue is not the legal distinction between the groups on the move but rather that there are actually people moving within and across country borders to improve their livelihood, escape poverty, seek new opportunities, rejoin family members, or because of war, violent conflict, human rights abuses, expulsion or discrimination.<sup>236</sup> The movement of people must be looked at from all dimensions, being sure to take into account the political, civil, security, economic and social reasons people move. Human Security Now recognizes that today’s policies, norms, and institutions are not taking into account all that they should, and consequently there are major gaps left to fill regarding movement.

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<sup>234</sup> *Id.* at 107.

<sup>235</sup> Feller, *supra* note 62, at 595.

<sup>236</sup> Human Security Now, *supra* note 154, at 41.

The current “legal muddle”<sup>237</sup> that delegates state responsibility to the UNHCR intensifies the “cleavage”<sup>238</sup> that exists in refugee protection. Although the UNHCR is exercising de facto sovereignty, it is only de jure an invited guest. It is assisting in the host country’s obligations and from this standpoint onward, international human rights law can only be applicable to refugees and the host state rather than refugees and the UNHCR.<sup>239</sup> This confusion perpetuates the problematic gap that exists between human rights law and refugee law. It is necessary to consider human rights law in the deficiencies of refugee law; otherwise there will continue to be a crisis.

The refugee population is continuing to become more protracted. The average length of major refugee situations has increased from nine years to twenty, from 1993 until present day.<sup>240</sup> The reality of perpetual protracted situations exploits the gap between human rights and refugee law, and it puts failure on the international community to protect the refugees which, in essence, it has created. The UNHCR faces the challenge of upholding its norms and responsibilities while working within a state sovereign system that deals with massive numbers of refugees. To fulfill its mandate of protection, the UNHCR must play a more “facilitative and catalytic role”<sup>241</sup> in order to encourage states to fulfill their international responsibilities.

Human rights are required because refugee law is not sufficient to meet the movement needs of refugees. Freedom of movement is a part of the human rights vernacular, and there is little forward discussion on the human rights of refugees as such. There is a serious protracted condition in Kenya that proves there is a weakness, or a crisis, in the refugee law regime. This is crucial time for human rights law to enter the discourse.

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<sup>237</sup> Wilde, *supra note* 148, at 111.

<sup>238</sup> *Id.* at 113.

<sup>239</sup> *Id.*

<sup>240</sup> Gil Loescher, *A Universal Mandate to Protect: The Challenges of Refugee Protection*, HARVARD INT’L REVIEW 45 (Fall 2009).

<sup>241</sup> *Id.* at 47.