

THE PHYSICAL SECURITY OF REFUGEES IN KENYAN CAMPS

LEGAL AND HUMAN RIGHTS IMPLICATIONS

Master of Arts in Law and Diplomacy Thesis

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April 2003

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THE FLETCHER SCHOOL

MALD PAPER

The Physical Security of Refugees in Kenyan Camps : Legal and Human Rights Implications

Submitted to Professor Karen Jacobsen and to Professor Hurst Hannum

Courses: Seminar on Issues of Forced Migration and Seminar on Current Issues of Human Rights

Second semester

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In full fulfillment of the MALD Paper requirement

April 2003

As refugees,
we are victims of violence and war,
We left our motherland
because we were being mistreated in many ways.
We ran to get protection in other countries.

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But as a refugee,
you are always simple in front of anybody.
You are subject to prejudice and mistaken ways.
You are a human being without any value.
You can pass through any disaster
and nobody will care about you.

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Andrew Mayak, Kakuma Refugee Camp¹

¹ The Lutheran World Federation, *Kenya and Sudan Programs* (accessed January 4, 2003); available from http://www.lwfkenyasudan.org/kakuma_refugee_camp.htm.

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EXECUTIVE SUMMARY

One of the biggest issues for a refugee² is its safety. A refugee, by definition, is an individual fleeing persecution and violence who has lost the protection of his State and thus needs protection from another entity. In its 2002 global appeal for Kenya, the UNHCR states as its first main objective to “ensure *safe* and dignified asylum for all refugees.”³ Refugee camps exist in order to provide refugees with protection and assistance. But are refugees living in camps safe from dangers? And do they have a *right* to be safe from danger?

In many cases, persons who have fled violence in their home countries seem to find themselves confronted with violence in the country of asylum. This is particularly true with refugees living in camps (or “prima facie” refugees in protracted refugee situations), who appear to be confronted on a daily basis to a whole range of security threats coming from within the camps and from outside the camps.

In a first section, I explore the kinds of security problems that refugees face in Kenyan camps (Kakuma and Dadaab). The security threats include rapes and other forms of gender based violence, domestic and community violence, armed attacks and robbery in the camps, violence within and between national refugee groups, and confrontations with local populations. I also explore the measures taken to protect the refugees, which include life-fencing, firewood, “Women Victims of Violence” and community-organization projects, peace education programs, the creation of security committees, the training of local security services, and the establishment of refugee-affected area programs.

In the following section, I try to discover whether international norms protecting the physical security of refugees in camps exist. Is the physical security of a refugee living in a

² For the purpose of simplicity, the term « refugee » will be used throughout this paper to describe displaced people that found refuge in Kenya, notwithstanding whether or not they received the legal status of refugees (Convention refugees) through an individual process. The use of the word will thus depart from the strict legal definition of a refugee.

³ *UNHCR 2002 Global Appeal – Kenya* (accessed October 5, 2002); available from <http://www.uhcr.ch/pubs/fdrs/ga2002/ken.pdf>.

camp a right, and if it is, under what legal order? Does *refugee law* cover the physical security of those who are not “Convention refugees” ? If not in refugee law, can the principle of the protection of the physical security of refugees living in camps be found in the norms of *human rights law* ?

To answer to these questions, I first take into consideration the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, as well as a regional agreement, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. Kenya is a party to all these conventions. I discover that most refugees currently living in Kenyan camps, as they have not been processed individually to apply for asylum and potentially become Convention refugees, have the status of *prima facie* refugees and thus, are *not* entitled to the rights offered by the international refugee regime. I therefore argue that the physical security of refugees living in Kenyan camps is *not* protected by the international refugee regime.

I then turn to the international human rights regime and use a human rights law case-study method, analysing step by step how the chosen case (the protection of the physical security of refugees living in Kenyan camps) can be translated into legal categories of international human rights law. I start by identifying the relevant human rights instruments which include a right to physical security, namely the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the African Charter of Human and Peoples’ Rights and the African Charter on the Rights and Welfare of the Child, making sure beforehand that all these instruments have actually been ratified by the Kenyan government. It is important to note that the formulation of this right to physical security varies from one instrument to another, as it includes the right to life, the right to integrity of person, the right to security of person, the

right to protection from physical violence, sexual abuse and exploitation, as well as the prohibition of torture or other cruel, inhuman or degrading treatment or punishment.

After having identified the relevant human rights instruments which include a right to physical security, the paper next analyses whether the principles of State responsibility and of jurisdiction are applicable to the chosen case, and how limitations, derogations and due diligence issues can be applied to the case. For this purposes, I use jurisprudence cases of the European Court of Human Rights and the Inter-American Court of Human Rights and proceed by *analogy*, in order to draw conclusions relevant to the chosen case-study.

The findings of this paper are the next: having their physical security protected is a right for all human beings, including refugees living in Kenyan camps. Most refugees currently living in Kenyan camps, as they have not been processed individually to apply for asylum and potentially become Convention refugees, have the status of *prima facie* refugees and thus, are not entitled to the rights offered by the international refugee regime. However, as human beings, refugees are protected by human rights, and the right to physical security has its place in the human rights regime. The obligation to protect the physical security of these people, moreover, is on the Kenyan government, on the basis of the principle of State responsibility in human rights law, and because refugees living in the Kenyan camps find themselves under Kenyan jurisdiction. Accordingly, Kenya has the obligation to protect and ensure all the rights enshrined in the different human rights instruments it has ratified, not only to the less constraining ones. Limitations and derogations seem not to be justifiable, at least after some time and especially for non-derogable rights such as the right not to be tortured, although, as a general rule, most rights are balanced to some extent by the principle of good faith. Kenya not only has a negative obligation to prevent from violating the right to physical security of refugees living in camps, but more importantly, it also has a positive

obligation to protect the right to physical security of refugees living in camps by taking all reasonable measures to prevent violations from happening.

Lastly, in a third section, the paper adds some practical implications related to the result of the research, broadening the issue with the introduction of the principles of solidarity and burden-sharing. The reality is indeed that most of the world's refugees are located in developing countries and that countries like Kenya consequently find themselves in the very difficult situation of having legal obligations that they possibly do not entirely have the means - or the will - to fulfill. The paper demonstrates that although it is true that the Kenyan State has a legal obligation to enhance the protection of the physical security of refugees living in its camps, the international community, according to the principle of burden-sharing and solidarity, must also play a role in helping the Kenyan government to fulfill its obligations. Moreover, it is shown that the UNHCR has gradually expanded its activities to cover not only the legal protection of refugees but also the protection of the physical security of refugees in protracted refugee situations.

Finally, given the reality in refugee camps in Kenya – where the safety of refugees is not assured, and given the evident gaps between the existing international norms protecting refugees in camps and the actual implementation of these norms, the paper points to the general direction that might be taken to improve the protection of the physical security of refugees living in camps. In other words, it identifies the measures that all the different actors (the State, UNHCR and the international community) could conjunctly take to contain violence in and around the Kenyan camps, so as to make life more secure for the refugees living there and to enable them to fully enjoy their human right to physical security. In a way, the idea is to move from what the reality is to somewhere closer to what it should be.

INTRODUCTION

In this paper, I am concerned with the lack of physical security that refugees are confronted to in refugee camps in Kenya. As refugee camps exist in theory in order to provide refugees with protection and assistance, it is important to observe whether or not they fulfil their function. Since the first section of this paper suggests that the refugees living in Kenyan camps are actually not safe from dangers, the question then follows in the second section as to whether they have a right to be safe from dangers. In other words, the paper attempts to discover whether there is an international right to physical security that would apply to refugees living in Kenyan camps.

When raising issues concerning the physical security of refugees, it is however important to realize that other related issues, as important as this one, have received less attention and have thus been less documented than that of the lack of physical security in the camps.

For instance, one could try to find out whether refugees are actually safer in camps than they would be outside of the camps, if the camps had not been put in place. (But would the governments allow the refugees in at all if there were no camps foreseen to gather them?) Would refugees be better off if they lived among the local populations?

Another issue related to that of physical security which is poorly documented concerns local populations and how their lives might be less secure after the arrival in their regions of flows of refugees and the settlement of camps.⁴ If a right to physical security exists in the international human right regime, aren't host populations as entitled to it as refugees?

I recognize that both issues are serious and important. This paper, nevertheless, will not address them but will rather focus on the threats to refugees living in camps.

⁴ On this issue, see Robert Chambers, "Hidden Losers? The Impact of Rural Refugees and Refugee Programs on Poorer Hosts," *International Migration Review*, Vol.20, No.2 (1986), 245-263.

PART 1: THREATS TO PHYSICAL SECURITY IN KENYAN REFUGEE CAMPS KAKUMA AND DADAAB AND MEASURES ADOPTED

I. HISTORICAL BACKGROUND OF KAKUMA AND DADAAB CAMPS

Kenya is in the unpleasant position of sharing borders with five nations which have all – with the exception of Tanzania – generated sufficient internal conflict to produce asylum-seekers in Kenya.⁵ It indeed shares borders with Somalia, Ethiopia, Sudan, Uganda, and Tanzania. As such, it serves as an attractive gathering place and potential country of asylum for displaced persons from all of these countries.

For long, Kenya was one of a few African States which had been spared major refugee crisis.⁶ This changed in the late eighties, when Kenya experienced an increasing influx of displaced people, as a result of the continued conflict in Uganda after 1986, and later in Ethiopia and Somalia. In 1990-91, the crossing of 400,000 Somalis⁷ combined with the arrival of a large group of Sudanese young men who came walking from Ethiopian camps after their stay there was no longer safe.

Before this large influx, the government of Kenya was responsible for status determination on a largely individual basis.⁸ Under pressure from the increasing numbers, however, the government lost its ability to deal with the refugees and sought the assistance of the international community.

In order to attract funding, the government of Kenya agreed to designate specific areas to house refugees in camps, and the UNHCR set up a number of camps throughout the

⁵ Jennifer Hyndman and Viktor Bo Nylund, "UNHCR and the Status of Prima Facie Refugees in Kenya," *International Journal of Refugee Law*, Vol.10, No.1/2 (1998), 23.

⁶ John Rogge, "The Challenges of Changing Dimensions among the South's Refugees: Illustrations from Somalia," *International Journal of Refugee Law*, Vol.5, No.1 (1993), 25.

⁷ The wars in Somalia along with prolonged droughts forced more than 900,000 Somalis to flee to neighboring countries. Approximately 400,000 of them took refuge in Kenya. Since then, a majority have returned to their country. However, some 131,000 Somalis remain in Kenya.

⁸ Guglielmo Verdirame, "Human Rights and Refugees: the Case of Kenya," *Journal of Refugee Studies*, Vol.12, No.14 (1999), 56-57.

country. In 1992 and 1993, the UNHCR thus spent forty million to establish refugee camps and border sites in Kenya.⁹

The Sudanese refugees were largely settled in Kakuma, a camp established in the Turkana region of Northern Kenya in July 1992, after tens of thousands of refugees fled from the Sudan into north western Kenya. The Ethiopians initially mainly stayed in Mandera at the border of Kenya, Somalia and Ethiopia and the Somalis were initially spread over a number of camps, including Dadaab, a group of three camps - Ifo, Dagahaley and Hagadera – in Kenya's remote eastern zone near the Somali border. The camps were set up around the town of Dadaab, a small town in the Garissa district of Northeast Kenya, beginning in 1991 when civil wars erupted on a grand scale in Somalia.

Nevertheless, due to tensions and to lack of effectiveness, between 1994 and 1997, the government of Kenya ended up closing most of the camps in Kenya, leaving only Kakuma and Dadaab, the two camps in Kenya's most remote areas, for refugees to settle.¹⁰ The UNHCR's thus organized a relocation of the refugees to these camps and since 1995, some 35,000 people have been transported from the coastal area to the camps in the deserts of the northeast and the northwest.¹¹

Today, the UNHCR cares for approximately 213,000 refugees living mainly in Dadaab (129,800) and Kakuma (70,000).¹² The refugee population in Kakuma is mainly composed of Sudanese, with small numbers from Somalia, Ethiopia and elsewhere. In Dadaab, most of the population comes from Somalia, with small numbers from Ethiopia, Sudan, Eritrea and Uganda.

⁹ Jennifer Hyndman and Viktor Bo Nylund, "UNHCR and the Status of Prima Facie Refugees in Kenya," *International Journal of Refugee Law*, Vol.10, No.1/2 (1998), 24.

¹⁰ Cindy Horst, "Refugee Life in the Camps. Providing Security or Sustaining Dependency," p.3 (accessed October 5, 2002); available from <http://www.hiiraan.ca/may02/op/cindy.htm>.

¹¹ Guglielmo Verdirame, "Human Rights and Refugees: the Case of Kenya," *Journal of Refugee Studies*, Vol.12, No.14 (1999), 69.

¹² *UNHCR 2002 Global Appeal – Kenya*, p.1 (accessed October 5, 2002); available from <http://www.unhcr.ch/pubs/fdrs/ga2002/ken.pdf>. These numbers should nevertheless be taken as an approximation, since it is difficult to know the exact number of refugees living in camps.

II. SECURITY THREATS TO REFUGEES IN KAKUMA AND DADAAB CAMPS

As Jennifer Hyndman states, minimally, the term refugee camp connotes safety. Too often, though, it means intimidation, lawlessness and violence.¹³ Camps do not naturally provide physical security to refugees who live there. On the contrary, the camp organization itself often serves to exacerbate feelings of uncertainty and insecurity.¹⁴ Sexual coercion, torture and rape are relatively common occurrences in conflict zones. Despite being recognized places of asylum for people fleeing persecution, refugee camps can be unstable environments where residents are susceptible to sexual and physical violence. Hyndman speaks about a “bleak and insecure holding camps along the Kenyan-Somali border.”¹⁵

The border areas of north-west and north-east Kenya where Kakuma and Dadaab camps are located are insecure and characterized by banditry and insurgency, as well as violent clashes between the Kenyan army and local armed groups. As a result of conflicts taking place in neighboring countries (Ethiopia, Somalia, Sudan and Uganda), these areas have been flooded with small arms and automatic weapons. While the areas of Kakuma and Dadaab have traditionally experienced high levels of insecurity, the establishments of the camps seems to have led to a geographical concentration of the violence¹⁶ and the proliferation of weapons evidently aggravates the security problems.¹⁷ Life in both camps is very directly affected by the events which take place in the refugees’ countries of origin.

¹³ Jennifer Hyndman, *Managing Displacement. Refugees and the Politics of Humanitarianism* (Minnesota: University of Minnesota Press, 2000), XXVII.

¹⁴ Cindy Horst, “Refugee Life in the Camps. Providing Security or Sustaining Dependency,” p.5 (accessed October 5, 2002); available from <http://www.hiiraan.ca/may02/op/cindy2.htm>.

¹⁵ Jennifer Hyndman, *Managing Displacement. Refugees and the Politics of Humanitarianism* (Minnesota: University of Minnesota Press, 2000), 24.

¹⁶ Jeff Crisp, “A State of Insecurity: the Political Economy of Violence in Refugee-Populated Areas of Kenya,” *Evaluation and Policy Analysis Unit of UNHCR*, Working Paper No.16, December 1999, p.14 (accessed September 22, 2002); available from <http://www.jha.ac/articles/u016.htm>.

¹⁷ UN, *Note on International Protection*, Executive Committee of the High Commissioner’s Programme, 44th session, A/AC.96/815, August 31, 1993, para.31.

Kakuma, for instance, provides recruits for the Sudan People's Liberation Army (SPLA) rebel forces and acts as a safe refuge for the families of men who are fighting in southern Sudan.¹⁸

In this section, I will explore the kinds of threats to physical security that refugees face in Kenyan camps. In the next section, I will then describe the measures taken to enhance security in the camps.

1. RAPES AND OTHER FORMS OF GENDER-BASED VIOLENCE

Sexual abuses constitute a daily reality for refugees living in northern Kenya, particularly women and girls.¹⁹ Rape and other sexual violence remain among the most serious problems facing women refugees. It is a common experience for refugee women in camps, which often provide them with little protection.²⁰ The dislocation and violence experienced by refugee populations often destroys family and social structures, and with them, the norms and taboos that normally would have proscribed sexual violence.²¹ Doctor Pauline Riak of the Sudanese Woman's Association describes Kakuma as a prison, where young women are especially vulnerable.²²

Rape tends to occur when refugees, predominantly women and girls, leave the relative security of the camp in order to collect firewood with which to cook and in order to herd goats. Indeed, refugees who leave the camps for hours at a time in search of firewood are

¹⁸ Information received from Marjorie Granjon, UNHCR staff working in Kakuma camp (1999), January 6, 2003, by phone with Geneva. See also Jeff Crisp, "A State of Insecurity: the Political Economy of Violence in Refugee-Populated Areas of Kenya," *Evaluation and Policy Analysis Unit of UNHCR*, Working Paper No. 16, December 1999, p. 17 (accessed September 22, 2002); available from <http://www.jha.ac/articles/u016.htm>.

¹⁹ Information received from Marjorie Granjon, UNHCR staff working in Kakuma camp (1999), January 6, 2003, by phone with Geneva.

²⁰ Cindy Horst, "Refugee Life in the Camps. Providing Security or Sustaining Dependency," p. 2 (accessed October 5, 2002); available from <http://www.hiiraan.ca/may02/op/cindy.htm>.

²¹ Human Rights Watch, *Protection of the Rights of Refugee Women*, p. 1 (accessed October 5, 2002); available from <http://www.hrw.org/reports/1997/gen3/General-04.htm>.

²² Isabel Matheson, "The Lost Girls of Sudan," *BBC News World Edition*, June 7, 2002.

vulnerable to bandit attacks.²³ Bandits is a term used to describe wandering groups of men who are also responsible for theft, cattle rustling and other criminal activities.²⁴ Around 80% of the rapes involve female refugees from 12 to 50 years of age and take place in the bush that surrounds the camps during the hours of daylight.²⁵ Moreover, as land surrounding the camps becomes more and more denuded, women must go further and further to collect firewood. This increases their chances of encountering bandits who threaten them, beat them, sexually assault and sometimes abduct them.²⁶

In addition, rapes also take place at night. After nightfall, unarmed households, especially those known to be headed by women, are the easy targets of bandits from within the camp itself.

According to Human Rights Watch, in the country of refuge, women refugees are targeted for rape because they are refugees, because of their actual or perceived political or ethnic affiliations, and because they are women.²⁷ Moreover, rape is often used as a weapon of war. Women in refugee camps close to the site of the conflict that caused the displacement are frequently the object of attacks from factions that enter the camps in order to dominate and punish the refugees perceived to be supporting other factions.

In visit to refugee camps in 1993, 1994 and 1996, Human Rights Watch documented testimonies of rape survivors.²⁸ Many of those interviewed had been gang raped at gunpoint, some by as many as seven men. In the vast majority of cases, rape victims were also robbed,

²³ Jennifer Hyndman, *Managing Displacement. Refugees and the Politics of Humanitarianism* (Minnesota: University of Minnesota Press, 2000), 77.

²⁴ According to Crisp's report, bandits who plague the Dadaab area are a mixture of local Kenyans, Somali refugees and, less frequently, Somalia-based militia members engaged in cross-border raids. They move on foot in groups of 5 to 25 people, carrying arms and wearing masks.

²⁵ Jeff Crisp, "A State of Insecurity: the Political Economy of Violence in Refugee-Populated Areas of Kenya," *Evaluation and Policy Analysis Unit of UNHCR*, Working Paper No.16, December 1999, p.5 (accessed September 22, 2002); available from <http://www.jha.ac/articles/u016.htm>.

²⁶ Jennifer Hyndman, *Managing Displacement. Refugees and the Politics of Humanitarianism* (Minnesota: University of Minnesota Press, 2000), 136.

²⁷ Human Rights Watch, *Protection of the Rights of Refugee Women*, p.1 (accessed October 5, 2002); available from <http://www.hrw.org/reports/1997/gen3/General-04.htm>.

²⁸ Human Rights Watch, *Protection of the Rights of Refugee Women*, p.1 (accessed October 5, 2002); available from <http://www.hrw.org/reports/1997/gen3/General-04.htm>.

severely beaten, knifed and shot. A small portion of rapes were committed by Kenyan police and other refugees. Most of the rapes were clearly ethnically motivated, aimed at demoralizing and destroying the social fabric of the refugee settlements. The lack of adequate investigation and prosecution of rape contributed to the situation of lawlessness and impunity. Indeed, bringing suspects to trial is difficult, due to the lack of effective witness protection arrangements and to the fact that people fear revenge attacks.²⁹ In addition, rape seems to be such a shameful experience for women that most incidents go unreported.³⁰ It is thus difficult to get a good idea of the exact magnitude of rape and other form of gender-based violence in and around the camps.³¹

2. DOMESTIC AND COMMUNITY VIOLENCE

Rape and other forms of abuse do not only occur outside the camps, carried out by bandits, but much of the violence experienced is actually inflicted upon refugees by members of their own family and community. Domestic violence, normally involving the physical abuse of women, children and adolescents by adult men, seems to be common within the camps, although the exact scale of the problem is unknown. The increase of domestic violence might be related to the fact that refugee men in camps have largely lost the responsibilities, work, property and status they used to have.³²

²⁹ Until recently, there was no courtroom for refugees to provide evidence in the camps and they had to travel long distances to get to a courtroom. Yet a court has been built in Kakuma camp (sometimes referred to as the “mobile court”) which today spares refugees from having to travel long distances to give evidence.

³⁰ Jeff Crisp, “A State of Insecurity: the Political Economy of Violence in Refugee-Populated Areas of Kenya,” *Evaluation and Policy Analysis Unit of UNHCR*, Working Paper No.16, December 1999, p.4 (accessed September 22, 2002); available from <http://www.jha.ac/articles/u016.htm>.

³¹ Cindy Horst, “Refugee Life in the Camps. Providing Security or Sustaining Dependency,” p.2 (accessed October 5, 2002); available from <http://www.hiiraan.ca/may02/op/cindy.htm>.

³² Cindy Horst, “Refugee Life in the Camps. Providing Security or Sustaining Dependency,” p.3 (accessed October 5, 2002); available from <http://www.hiiraan.ca/may02/op/cindy.htm>.

3. ARMED ATTACKS AND ROBBERY IN THE CAMPS: BANDITS ACTIVITIES

The problem of banditry, in addition of being one of the main causes of rapes, is also often manifested in the form of armed robbery. The majority of armed robberies in Dadaab take place at night, and are committed by the same bandits that rape women during the day. These groups of armed robbers target refugees, especially those who have a business or a cash income. Their attacks inside the camps generally include robbing and looting, as well as sexual assaults, beatings and killings.³³ The situation is aggravated by the proliferation of weapons that are the fallout of wars in the refugees' country of origin.³⁴

Bandits sometimes verify the clan of their intended victim before proceeding with a robbery. "The frequency with which the victims of robbery are subjected to a thorough (and in some cases fatal) beating suggest that the bandits are eager to maintain a climate of fear and intimidation in Dadaab, thereby reinforcing the degree of impunity which they appear to enjoy."³⁵ The increasing banditry in the camps greatly reduce the feeling of security of refugees in the camps.³⁶

4. VIOLENCE WITHIN NATIONAL REFUGEE GROUPS (FIGHTS AMONG CLANS AND SUB-CLANS) AND BETWEEN NATIONAL REFUGEE GROUPS

Physical insecurity not only stems from a high level of violence in general, that affects every refugee equally, but is also clan – or sub-clan – related. Indeed, refugee camps in Kenya are often the theater of violent clashes between exiles of the same nationality. Kakuma has

³³ Jennifer Hyndman, *Managing Displacement. Refugees and the Politics of Humanitarianism* (Minnesota: University of Minnesota Press, 2000), 136.

³⁴ UNHCR, *The Personal Security of Refugees*, EC/1993/SCP/CRP.3, para.10.

³⁵ Jeff Crisp, "A State of Insecurity: the Political Economy of Violence in Refugee-Populated Areas of Kenya," *Evaluation and Policy Analysis Unit of UNHCR*, Working Paper No.16, December 1999, p.7 (accessed September 22, 2002); available from <http://www.jha.ac/articles/u016.htm>.

³⁶ Cindy Horst, "Refugee Life in the Camps. Providing Security or Sustaining Dependency," p.3 (accessed October 5, 2002); available from <http://www.hiiraan.ca/may02/op/cindy.htm>.

been especially affected by this phenomenon.³⁷ For example, in June 1997, fighting between Sudanese Dinkas and Sudanese Nuers led to many deaths and injuries.³⁸ In January 1999, violent clashes took place in Kakuma between the Sudanese Dinkas and the Didingas.³⁹ Similarly, in April 2002, serious fights between Sudanese caused the death of around ten people and injuries of around 200 others.⁴⁰ Clashes also take place between the different Somali clans and sub-clans living in Dadaab, such as between the majority of Somali refugees and the minority of Bantu Somalis. It is important to recall that violence within groups in the camps often follow security incidents in the countries of origin.

In addition to violence within national groups, refugee camps are also affected by tension and conflict between the refugees from different countries, such as fights in Kakuma between Sudanese and Ethiopian refugees, or Somali and Sudanese refugees.

5. CONFRONTATIONS WITH LOCAL POPULATIONS – HOST COMMUNITIES

Refugees in Kenyan camps can clearly present competition and create resentment among some locals with whom they share scarce resources.⁴¹ In Dadaab, there is a persistent climate of suspicion between Sudanese refugees and local Turkana populations. Fighting can occur as a result of this tension, resulting in high number of injuries⁴² and refugees face intimidation, extortion and physical harassment.⁴³

³⁷ Information received from Marjorie Granjon, UNHCR staff working in Kakuma camp (1999), January 6, 2003, by phone with Geneva.

³⁸ Jeff Crisp, "Forms and Sources of Violence in Kenya's Refugee Camps," *Refugee Survey Quarterly*, Vol.19, *Security in Refugee Populated Areas*, ed. Oxford University Press, No.1 (2000), 57.

³⁹ Jeff Crisp, "A State of Insecurity: the Political Economy of Violence in Refugee-Populated Areas of Kenya," *Evaluation and Policy Analysis Unit of UNHCR*, Working Paper No.16, December 1999, p.17 (accessed September 22, 2002); available from <http://www.jha.ac/articles/u016.htm>.

⁴⁰ Information received from Kofi Mable, Head of UNHCR Sub-Office in Kenya responsible for Kakuma camp, October 24, 2002, Famine Center, Tufts University.

⁴¹ Jennifer Hyndman, *Managing Displacement. Refugees and the Politics of Humanitarianism* (Minnesota: University of Minnesota Press, 2000), 136.

⁴² Jeff Crisp, "Forms and Sources of Violence in Kenya's Refugee Camps," *Refugee Survey Quarterly*, Vol.19, *Security in Refugee Populated Areas*, ed. Oxford University Press, No.1 (2000), 58.

⁴³ UN, *Note on International Protection*, Executive Committee of the High Commissioner's Programme, 52th session, A/AC.96/951, 13 September 2001, para.28.

III. MEASURES TAKEN TO PROTECT THE REFUGEES FROM THREATS TO PHYSICAL SECURITY

Given the level of insecurity in Kenyan refugee camps, the UNHCR and its NGO partners have taken certain steps to limit the level of violence. Recent years have indeed witnessed a concerted effort on the part of UNHCR and its partners to address both the causes and consequences of insecurity in Kakuma and Dadaab.⁴⁴ Current UNHCR programs try to address the problem of violence in an integrated manner, combining key functions such as protection, assistance, camp management, education and community services.

Asked what the UNHCR is doing to reduce incidents of violence against women in the camps, Reinier Thiadens, former UNHCR's representative in Kenya, interviewed by the East African in July 2001, answered: "Security in and around the refugee camps has remained precarious, but we are trying to address the issue as best as we can. We have already put in place a firewood project to reduce chances of exposure to rape. (...) We now also have mobile courts within the refugee camps. At Dadaab, we have established a "live-fencing" project where thorn hedges are planted around residential quarters to reduce physical contact. (...) Four additional vehicles have been provided for the police and the number of police officers based in the Kakuma and Dadaab camps has been increasing by over 15 per cent to nearly 220."⁴⁵

Things have evolved a little since July 2001. Nevertheless, as explained by Reinier Thiadens, UNHCR has organized a program for refugees to plant "live fences" (several rows of thick thorn bushes) around the refugee camps to discourage incursions into the camps by

⁴⁴ Jeff Crisp, "A State of Insecurity: the Political Economy of Violence in Refugee-Populated Areas of Kenya," *Evaluation and Policy Analysis Unit of UNHCR*, Working Paper No.16, December 1999, p.10 (accessed September 22, 2002); available from <http://www.jha.ac/articles/u016.htm>.

⁴⁵ The East African, *Ethiopian Refugees Need Not Fear Harassment in Camps*, July 2, 2001, p.2 (accessed October 5, 2002); available from <http://www.nationaudio.com/News/EastAfrican/090072001/Opinion/Interview1.html>.

bandits. Thus, in Dadaab, more than 150 kilometers of live thorn bush fencing has been planted around the blocks which compose the three refugee camps in the area.

In addition, in Dadaab, measures are taken through the “Firewood Project,” established by the UNHCR in 1998 and funded by the US government.⁴⁶ The project aims at providing refugees in Dadaab with part of their firewood needs (through regular distribution), thereby limiting the needs for women and girls to venture in the bush. Trials are also to be undertaken in the next years⁴⁷ with alternative energy sources such as kerosene and solar power to further reduce the need for firewood collection. But firewood collection is only one of the occasions that facilitate rape, and while rape numbers related to firewood did go down in periods of distribution, at the same time rape in other areas went up.⁴⁸

Other measures were also taken that conferred greater responsibility on the refugees, including refugee women, for establishing security in their camps and addressing the issue of violence. Some authors refer to this kind of measures as “community organization,” based on the principle of community self-management, which is designed to empower the refugees and boost their involvement in camp life.⁴⁹ Kakuma camp is, for instance, divided in different zones; each zones has its own security system and refugee guards, equipped with radio handsets and uniforms.⁵⁰ Moreover, UNHCR in conjunction with CARE trained refugees, including some men, to be counselors in situations of sexual violence to the survivors, their

⁴⁶ UNHCR, *Mid-Year Progress Report 2002*, UNHCR Publications, 84. See also Cindy Horst, “Refugee Life in the Camps. Providing Security or Sustaining Dependency,” p.3 (accessed October 5, 2002); available from <http://www.hiiraan.ca/may02/op/cindy.htm>.

⁴⁷ Information received from Kofi Mable, Head of UNHCR Sub-Office in Kenya responsible for Kakuma camp, October 24, 2002, Famine Center, Tufts University.

⁴⁸ Cindy Horst, “Refugee Life in the Camps. Providing Security or Sustaining Dependency,” p.3 (accessed October 5, 2002); available from <http://www.hiiraan.ca/may02/op/cindy.htm>.

⁴⁹ Jeff Crisp, “A State of Insecurity: the Political Economy of Violence in Refugee-Populated Areas of Kenya,” *Evaluation and Policy Analysis Unit of UNHCR*, Working Paper No.16, December 1999, p.10 (accessed September 22, 2002); available from <http://www.jha.ac/articles/u016.htm>.

⁵⁰ Information received from Kofi Mable, Head of UNHCR Sub-Office in Kenya responsible for Kakuma camp, October 24, 2002, Famine Center, Tufts University. See also Jeff Crisp, “A State of Insecurity: the Political Economy of Violence in Refugee-Populated Areas of Kenya,” *Evaluation and Policy Analysis Unit of UNHCR*, Working Paper No.16, December 1999, p.10 (accessed September 22, 2002); available from <http://www.jha.ac/articles/u016.htm>.

families and their community. Various committees were moreover created, such as “security committees,” “anti-violence committees” and “anti-rape committees.”

Furthermore, one of UNHCR’s principal objectives in Kenya has been to reinforce the capacity and efficacy of the local security services, including the police force. It provided material support and training to local police forces,⁵¹ offered human rights and refugee law training to Kenyan police officers and supported the construction of police posts. Kenya provides 32 policemen for the protection of refugees in Kakuma camp, which is nowadays equipped with three police stations.⁵² UNHCR also provided up to seven pick up vehicles to the Kenyan police, to which it in addition pays incentives (payments for fuel and spare parts) to drive around the camps, do night-time rounds and maintain order at distribution places.⁵³ According to the UNHCR’s mid-year progress report of 2002, the deployment of more police officers in and around the camps and the acquisition of new vehicles and equipment “contributed to reducing the number of crime incidents in the region.”⁵⁴

In addition, UNHCR has tried to establish better security arrangements within the camps.⁵⁵ A senior security officer has been appointed to the branch office in Nairobi and former Kenyan army officers have been recruited to serve as security coordinators in the two camps. Their responsibilities include, among others, advising other staff members and NGO personnel on security issues, compiling security reports and gathering intelligence on potential security problems. In Kakuma, the security arrangements established in the camps

⁵¹ Lawyers Committee for Human Rights, *Preserving the Humanitarian Character of Refugee Camps and Operations*, Conference Memorandum, October 31, 2001, p.2 (accessed October 5, 2002); available from <http://www.lchr.org/conference/MEMOJacobsen.htm>.

⁵² Information received from Kofi Mable, Head of UNHCR Sub-Office in Kenya responsible for Kakuma camp, October 24, 2002, Famine Center, Tufts University.

⁵³ Jeff Crisp, “A State of Insecurity: the Political Economy of Violence in Refugee-Populated Areas of Kenya,” *Evaluation and Policy Analysis Unit of UNHCR*, Working Paper No.16, December 1999, p.10 (accessed September 22, 2002); available from <http://www.jha.ac/articles/u016.htm>.

⁵⁴ UNHCR, *Mid-Year Progress Report 2002*, UNHCR Publications, 84.

⁵⁵ Jeff Crisp, “Forms and Sources of Violence in Kenya’s Refugee Camps,” *Refugee Survey Quarterly*, Vol.19, *Security in Refugee Populated Areas*, ed. Oxford University Press, No.1 (2000), 60.

include the creation of a 120-strong force of local guards, drawn from both the refugee and local populations.

The UNHCR also advocated for the protection of refugees with the Kenyan government. The result has been a significant decline in the incidence of rape, a number of successful prosecution of rapists, and improved protection provided by Kenyan police officers.⁵⁶

Furthermore, “refugee-affected area” programs have been established in Kakuma and Dadaab to ensure that local populations derive some tangible benefits from the presence of refugees and thus are less likely to engage in violent acts against them. In Kakuma, UNHCR and its partners have built water catchments for local herders. In addition, UNHCR subsidizes the local hospital. In Dadaab, UNHCR has, among other things, constructed a health center, built secondary school classrooms and provided the town with anti-banditry fencing similar to the one planted around the camps. In both areas, moreover, local people have guaranteed access to the health services, schools, training facilities and employment opportunities available in the camps.⁵⁷

Besides, UNHCR and the US government have launched a “peace education” program in Kakuma and Dadaab, designed to “encourage understanding, tolerance and commitment to peaceful co-existence amongst the refugees.”⁵⁸

A specific UN initiative needs to be mentioned as well, the “Women Victims of Violence” project, launched in 1993 in the Kenyan camps for Somali refugees. This project aimed at protecting refugees from sexual violence. Among the project’s objectives was the improved security in and around the refugee camps to prevent future violence and increased

⁵⁶ Human Rights Watch, *Protection of the Rights of Refugee Women*, p.2 (accessed October 5, 2002); available from <http://www.hrw.org/reports/1997/gen3/General-04.htm>.

⁵⁷ Information received from Marjorie Granjon, UNHCR staff working in Kakuma camp (1999), January 6, 2003, by phone with Geneva.

⁵⁸ Information received from Marjorie Granjon, UNHCR staff working in Kakuma camp (1999), January 6, 2003, by phone with Geneva. See also Jeff Crisp, “A State of Insecurity: the Political Economy of Violence in Refugee-Populated Areas of Kenya,” *Evaluation and Policy Analysis Unit of UNHCR*, Working Paper No.16, December 1999, p.11 (accessed September 22, 2002); available from <http://www.jha.ac/articles/u016.htm>.

awareness of the problem among law enforcement personnel, staff and the general public.⁵⁹ The project included erecting live thorn-bush fences around the camps, stationing police nearby, and setting up a system to prosecute assailants.⁶⁰

Yet that kind of protection effort remains the exception rather than the rule since UNHCR policies to protect victims of sexual violence are not being adequately integrated into UNHCR programs and services in the field.⁶¹ Human Rights Watch suggests that the protection measures employed by UNHCR in the Kenyan refugee camps be used as a basis for incorporating a standardized protection strategy for refugee women into the practices of the agency. Specific ideas for appropriate responses can be found in the UNHCR Guidelines on the Protection of Refugee Women, issued in July 1991 and Sexual Violence against Refugees: Guidelines on Prevention and Response, issued in March 1995.⁶²

Nonetheless, despite the introduction of numerous measures to counter the problem, violence continues to be a constant threat to the physical security of refugees living in Kakuma and Dadaab.

⁵⁹ Jennifer Hyndman, *Managing Displacement. Refugees and the Politics of Humanitarianism* (Minnesota: University of Minnesota Press, 2000), 78.

⁶⁰ Dennis Mc Namara, "Human Rights and Refugees: Women and Children First," *The Christian Science Monitor*, March 25, 1998, p.1 (accessed October 5, 2002); available from <http://www.csmonitor.com/durable/1998/03/25/opin/opin.1.html>.

⁶¹ Human Rights Watch, *Protection of the Rights of Refugee Women*, p.1 (accessed October 5, 2002); available from <http://www.hrw.org/reports/1997/gen3/General-04.htm>.

⁶² Human Rights Watch, *Protection of the Rights of Refugee Women*, p.2 (accessed October 5, 2002); available from <http://www.hrw.org/reports/1997/gen3/General-04.htm>.

PART 2: LEGAL AND HUMAN RIGHTS ASPECTS : THE RIGHT TO PHYSICAL SECURITY IN REFUGEE CAMPS

The physical security of refugees living in Kenyan camps is threatened on a daily basis, as has been shown in the previous section. In this section, I will attempt to analyze whether refugees living in camps have a *right* to physical security (and if so, who has the obligation to protect and ensure this right).

I. IS PHYSICAL SECURITY OF REFUGEES IN CAMPS PROTECTED BY REFUGEE LAW?

To answer this question, I will first give a brief overview of the content of the international refugee regime and its main principles. I will then explore whether refugees living in Kenyan camps are protected by this international regime.

1. GENERAL REFUGEE LAW PRINCIPLES

International refugee law is comprised of the 1951 Convention Relating to the Status of Refugees⁶³ (hereafter : 1951 Convention) and the 1967 Protocol Relating to the Status of Refugees⁶⁴ (hereafter : 1967 Protocol), as well as of different regional agreements, such as the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa⁶⁵ (hereafter: 1969 OAU Convention). As to September 2002, 141 States were parties to the 1951 Convention and 139 were parties to 1967 Protocol.⁶⁶ The 1951 Convention and 1967 Protocol constitute together the most important international agreements concerning the

⁶³ UN, *Convention relating to the Status of Refugees*, adopted on July 28, 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 14, 1950, entered into force April 22, 1954.

⁶⁴ UN, *Protocol relating to the Status of Refugees*, taken note of with approval by the Economic and Social Council in resolution 1186 (XLI) of November 18, 1966 and taken note of by the General Assembly in resolution 2198 (XXI) of 16 December 16, 1966, entered into force October 4, 1967.

⁶⁵ Convention Governing The Specific Aspects of Refugee Problems In Africa, Assembly of Heads of African States and Governments, Addis Ababa, September 10, 1969, 1001 U.N.T.S. 45, entered into force June 20, 1974.

⁶⁶ See website of the United Nations High Commissioner for Human Rights, <http://www.unhchr.ch/html/menu3/b/treaty2ref.htm> (accessed November 1, 2002).

protection of refugees, and their fundamental character has been widely recognized on a regional as well as international level.

The 1951 Convention was the first international agreement covering the most fundamental aspects of a refugee's life. It establishes the essential minimum norms relating to the treatment of refugees. These norms must be applied without discrimination as to race, religion or country of origin. The 1951 Convention is the key legal document in defining who is a refugee, the rights of refugees and the legal obligations of States. It spells out the kind of legal protection, other assistance and social rights a refugee should receive from States parties to the document as well as a set of basic human rights (such as freedom of religion and movement, the right to work, education and accessibility to travel documents) which should for refugees be at least equivalent to freedoms enjoyed by foreign nationals. Equally, it defines a refugee's obligations to host governments and indicates people or group of people who are not covered by the Convention, such as war criminals (they do not qualify for refugee status).

Host governments are primarily responsible for protecting refugees and parties to the 1951 Convention and /or the 1967 Protocol are obliged to carry out its provisions. They agree to cooperate with the UNHCR in one of its duties, which is the promotion of international agreements for the protection of refugees and the overseeing of their application.⁶⁷ The UNHCR can intervene if necessary to ensure that displaced people that fall under the definition of refugees are granted asylum and are not forcibly returned to countries where their lives may be in danger.

Article 1(2) of the 1951 Convention states that the definition of a refugee shall apply to any person who:

⁶⁷ Article 35 paragraph 1 of the 1951 Convention and article 2 paragraph 1 of the 1967 Protocol.

“As a result of events occurring before 1 January 1951⁶⁸ and owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

It is therefore the non-availability of effective national protection (when a country is unable or unwilling to protect its individuals), and the need for international protection, which is the main characteristic of a refugee.⁶⁹

An interesting point for the purpose of this paper (as it focuses on African refugees), is that the 1969 OAU Convention not only broadens but also reformulates the definition of a refugee. It adds, in article 1(2), the provision that:

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

This broader definition of a refugee hence recognizes the legitimacy of flights in situations of generalized danger not limited to individual persecution. The 1969 OAU Convention is a cornerstone of Africa’s asylum policy going beyond the confines of the 1951 Convention and reflecting “the hospitality of African governments towards the continent’s refugees.”⁷⁰

It is in addition important to mention that the 1951 Convention and 1967 Protocol do *not* contain a right to asylum.⁷¹ States have in practice tended to accept at least a moral obligation to give asylum to those who meet the definition of “refugee” in the 1951

⁶⁸ It is important to remark that the 1967 Protocol removed the geographical and temporal restrictions that are present in the 1951 Convention.

⁶⁹ James Darcy, “Human Rights and International Legal Standards: What do Relief Workers Need to Know?”, *Relief and Rehabilitation Network*, Paper No.19, February 1997, (London: Overseas Development Institute), 27.

⁷⁰ Statement by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees and Salim Ahmed Salim, Secretary-General, Organization for African Unity, OAU/UNHCR, Regional Meeting on Refugee Issues in the Great Lakes, Kampala, May 9, 1998.

⁷¹ UNHCR, *The State of the World’s Refugees: A Humanitarian Agenda*, 1997 (Oxford and NY: Oxford University Press), Chapter 5 “The Asylum Dilemma”, 183-223.

Convention. However, what constitutes asylum is not defined in that or any other text.⁷² The 1969 OAU Convention states that “member States of the OAU shall use their best endeavors (...) to receive refugees (...).”⁷³ Accordingly, States have the right to grant asylum, but there is no universal right of asylum - that is, there is no legal obligation on States to grant protection to refugees, despite the wording of the Universal Declaration of Human Rights.⁷⁴

Nevertheless, the State’s discretionary right of non-admission is restricted by certain obligations, the most important of which being the principle of non-refoulement (that nobody should be forcibly returned to a country where his or her life or freedom would be at risk). Article 33(1) of the 1951 Convention in fact states:

“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

The 1969 OAU Convention has a similar article prohibiting refoulement, namely article 2(3). The principle of non-refoulement reflects the concern and commitment of the international community “to ensure to those in need of protection the enjoyment of fundamental human rights, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person.”⁷⁵ These, and other rights, are threatened when a refugee is forcibly returned to persecution or danger. The principle of non-refoulement applies to refugees irrespective of whether they have been formally recognized as such.

⁷² James Darcy, “Human Rights and International Legal Standards: What do Relief Workers Need to Know?”, *Relief and Rehabilitation Network*, Paper No.19, February 1997, (London: Overseas Development Institute), 28.

⁷³ Article 2 paragraph 1 of the 1969 OAU Convention.

⁷⁴ Article 14 paragraph 1 of the 1948 Universal Declaration of Human Rights states that “everyone has the right to seek and to enjoy in other countries asylum from persecution.”

⁷⁵ UN, *Note on International Protection*, Executive Committee of the High Commissioner’s Programme, 44th session, A/AC.96/815, August 31, 1993, para.10.

Kenya became a party to the 1951 Convention in 1966 and to the 1967 Protocol in 1981. The country is also a party to the 1969 OAU Convention, which the government ratified on January 23, 1992.⁷⁶

2. PRIMA FACIE STATUS

Refugees currently living in Kenyan camps would theoretically fall under the definition of refugees, if not under the 1951 Convention and its additional 1967 Protocol, in any case under the OAU's broader definition of a refugee. Indeed, most of them have been compelled to leave their countries due to war, an event seriously disturbing public order. Yet the reality is somewhat different; despite being a signatory to the 1951 Convention and 1967 Protocol, the Kenyan government is currently not considering most asylum seekers for full Convention refugee status (most asylum seekers are not processed on an individual basis to observe whether they fall under the definition of a refugee, in which case they would benefit from the rights that go together with the status). Most of the refugees in Kenya receive a "prima facie" status which excludes them from the standard protection offered by the refugee regime.

The prima facie regime can be defined as the determination of eligibility based on first impressions, or in the absence of evidence to the contrary.⁷⁷ Prima facie determination is generally applied in situations of mass movements where individual determination is impractical. This designation is usually made on a group basis rather than by individual determination procedures that are the norm for determining Convention status. It is a temporary measure that tends to provide assistance in an contained area to a displaced group of persons. Temporary protection comprises at least admission, protection against refoulement

⁷⁶ Information available at: <http://www1.umn.edu/humanrts/instree/afrinst.htm> (accessed January 3, 2003).

⁷⁷ Jennifer Hyndman and Bo Viktor Nylund, "UNHCR and the Status of Prima Facie Refugees in Kenya," *International Journal of Refugee Law*, Vol.10, No.1/2 (1998), 29.

and respect for fundamental human rights, while awaiting a hoped-for safe return following international efforts to achieve a political solution.⁷⁸

Despite the individualistic focus on the 1951 Convention, the UNHCR started early to engage in situations where determination of refugee status was needed on a group basis (especially in Asia and Africa). The concept of “good offices” indeed gives the High Commissioner for Refugees the flexibility and discretion to assist specified groups of refugees without having to take a position on their legal status or having to expand the definition of a refugee. UNHCR’s good offices were created by Resolution 1673 (XVI) of the UN General Assembly on December 18, 1961. The resolution provided a basis for action that aimed to be flexible, responsive, and meaningful in emerging refugee situations, and it allowed the High Commissioner to define groups as prima facie refugees without normal determinations procedures.⁷⁹

Since the 1960s, prima facie determination has become common practice for mass movements of refugees in Africa. Prima facie refugee status was established by the OAU Convention as a protection measure to complement the refugee determination procedures of individual States. The status was never intended, however, to be used alone because it stipulates neither conclusive actions nor solutions for refugees designated as such.⁸⁰ The prima facie regime has become a de facto regime under which legal protection and assistance can be provided to massive flows of refugees, where no individual screening is necessary to declare a group of people refugees.⁸¹

⁷⁸ UN, *Note on International Protection*, Executive Committee of the High Commissioner’s Programme, 44th session, A/AC.96/815, August 31, 1993, para.25.

⁷⁹ Jennifer Hyndman, *Managing Displacement. Refugees and the Politics of Humanitarianism* (Minnesota: University of Minnesota Press, 2000), 10.

⁸⁰ Jennifer Hyndman, *Managing Displacement. Refugees and the Politics of Humanitarianism* (Minnesota: University of Minnesota Press, 2000), 176.

⁸¹ Jennifer Hyndman and Bo Viktor Nylund, “UNHCR and the Status of Prima Facie Refugees in Kenya,” *International Journal of Refugee Law*, Vol.10, No.1/2 (1998), 33.

Hence, the majority of refugees in Kenya are not granted Convention status, but rather temporary asylum under the prima facie regime.⁸² All groups, except for individuals accepted under the 1951 Convention prior to 1991 as having a Convention or “full” refugee status, are expected to remain in the refugee camps (although not all do so⁸³) and are vulnerable to arrest if living outside the camps. Currently, the refugee groups determined on a prima facie basis in Kenya are Somalis and Southern Sudanese who arrive directly from their country of origin to Kenya.⁸⁴ Though the prima facie status does entitle them to basic food, shelter, and health and social services in the camps, it precludes the possibility of their generating a more independent livelihood elsewhere as their mobility is restricted and they have no access to employment. In a way, Convention status has been displaced, in the Kenyan case, by the discretionary group designation of prima facie refugees.⁸⁵

According to some authors, the prima facie status is “a means to avoid recognition under the OAU Convention, which would trigger other obligations from which recognized refugees may benefit under that Convention.”⁸⁶ Prima facie refugee status is indeed the minimum provision for forced migrants and it allows host countries, such as Kenya, to avoid the obligations and entitlements which go together with Convention refugee status.

Consequently, the prima facie status offers few, if any, solutions to refugees. The government of Kenya effectively exiles them to remote border regions and prohibits them from living outside the camps. As displaced people without permanent legal status in the country, they must either accept the terms UNHCR offers – which includes dependence on foreign foodstuffs and spatial segregation in the camps – or go underground to create an

⁸² It is interesting to remark that Kenya has no refugee act; a proposition for a Refugee Bill exists but has not yet been approved by the Parliament. Thus, there is no national legislation concerning asylum seekers and status determination in Kenyan law.

⁸³ Some refugees prefer staying in the urban areas which offer access to better education, security and comfort.

⁸⁴ Jennifer Hyndman and Bo Viktor Nylund, “UNHCR and the Status of Prima Facie Refugees in Kenya,” *International Journal of Refugee Law*, Vol.10, No.1/2 (1998), 30.

⁸⁵ Jennifer Hyndman, *Managing Displacement. Refugees and the Politics of Humanitarianism* (Minnesota: University of Minnesota Press, 2000), 25.

⁸⁶ Jennifer Hyndman and Bo Viktor Nylund, “UNHCR and the Status of Prima Facie Refugees in Kenya,” *International Journal of Refugee Law*, Vol.10, No.1/2 (1998), 35.

unofficial livelihood elsewhere⁸⁷ and in the majority of cases, voluntary repatriation is the only available long term solution for them. Prima facie refugees can thus be seen as the “human objects of a containment strategy to isolate and control displaced populations.”⁸⁸ The second-rate statute accorded to them in the camps, equivalent to “temporary cities,” is problematic.⁸⁹ In a way, they receive material help at the expense of legal status.

As a result, the prima facie regime that applies to most refugees in Kenya puts these refugees outside of the international protection granted by refugee law. The only Convention refugee law protection that displaced people benefit from when they arrive in Kenya is the respect of the non-refoulement principle. Indeed, they are given temporary safety and protection from forcible return to the country they fled and thus receive protection of their right to life. Nevertheless, non-refoulement may be the most important principle of refugee law, but it is inadequate in and on itself to address the massive scale of displacement and the conditions of those uprooted by these crises.⁹⁰ The prices refugees pay from this protection from refoulement is high.

To conclude this section, I will argue that the physical security of most refugees in camps is *not* protected by refugee law, as most refugees do not enjoy a full refugee status but only a prima facie status. In addition, it is interesting to note that, even if these refugees enjoyed a full status and were in that sense covered by the 1951 Convention (and its 1967 protocol), their right to physical security would still not be protected by refugee law, as this regime “lacks explicit provisions on the question of the physical security of refugees.”⁹¹

⁸⁷ Jennifer Hyndman, *Managing Displacement. Refugees and the Politics of Humanitarianism* (Minnesota: University of Minnesota Press, 2000), 146.

⁸⁸ Jennifer Hyndman and Bo Viktor Nylund, “UNHCR and the Status of Prima Facie Refugees in Kenya,” *International Journal of Refugee Law*, Vol.10, No.1/2 (1998), 41.

⁸⁹ Jennifer Hyndman, *Managing Displacement. Refugees and the Politics of Humanitarianism* (Minnesota: University of Minnesota Press, 2000), 23.

⁹⁰ Jennifer Hyndman and Bo Viktor Nylund, “UNHCR and the Status of prima facie refugees in Kenya,” *International Journal of Refugee Law*, Vol.10, No.1/2 (1998), 46.

⁹¹ Elly-Elikunda Mtango, “Military and Armed Attacks on Refugee Camps,” *Refugees and International Relations*, ed. Loescher and Monahan (New York: Oxford University Press, 1990), 113.

A case can certainly be made that the mere existence of refugee law, through the values and ideas it aims to emphasize, shows that general principles of protection should be respected. This would apply to Kenya, as it is a full member of the refugee regime. As a signatory of the 1951 Convention, the 1967 protocols and the OAU Convention, Kenya is thus under the obligation to respect fundamental principles of refugee protection. According to the Addis Ababa document, “governments should use their best endeavors to treat refugees according to the standards established under refugee law. In particular, they should ensure the personal safety of refugees, locate them in areas which are accessible, safe and where basic services and amenities can be provided, and enable them to regain a normal way of life.”⁹² Moreover, according to the UNHCR’s Executive Committee, refugees’ rights to security and personal safety underpin the entirety of the provisions of the 1951 Convention.⁹³ In addition, the international refugee instruments are all grounded in the Universal Declaration of Human Rights, and its affirmation that human beings shall enjoy fundamental rights and freedoms without discrimination.⁹⁴

Unfortunately, nothing more than general values and principles (as opposed to concrete legal obligations) can be deduced from refugee law in our case, since it does not apply to *prima facie* refugees.

Accordingly, as to the present day, it would *not* be legally accurate to affirm that the right to physical security of refugees living in Kenyan camps (and the obligations that come with this right) can be deduced from refugee law. Another path must thus be explored, namely human rights law. Indeed, although most refugees in Kenyan camps have not been granted status under any legal instruments, certain standards nonetheless apply to all people,

⁹² Addis Ababa Document on Refugees and Forced Population Displacements in Africa, adopted by the OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa, Addis Ababa, September 8-10, 1994, Recommendation Seven (ii).

⁹³ UN, *Note on International Protection*, Executive Committee of the High Commissioner’s Programme, 52th session, A/AC.96/951, September 13, 2001, para.15.

⁹⁴ Arafat Jamal, “Minimum Standards and essential Needs in a Protracted Refugee Situation. A Review of the UNHCR Programme in Kakuma, Kenya,” *UNHCR: EPAU/2000/05*, November 2000, para.29; available from <http://www.unhcr.ch>.

citizens or refugees.⁹⁵ Human rights standards apply to all human beings, thus also to refugees.⁹⁶ Crossing an international border does not deprive asylum-seekers and refugees of their human rights and human beings have human rights, whatever label they are given and wherever they are.⁹⁷

II. IS PHYSICAL SECURITY OF REFUGEES IN CAMPS PROTECTED BY HUMAN RIGHTS LAW?

“Once an individual, a human being, becomes a refugee, it is as though he has become a member of another race, some other sub-human group. You talk of rights of refugees as though Human Rights did not exist which are broader and more important.”⁹⁸

1. HUMAN RIGHTS INSTRUMENTS WHICH INCLUDE A RIGHT TO PHYSICAL SECURITY

To answer to the question as to whether the physical security of refugees in camps is protected by human rights law, we first need to identify as many (and diverse) human rights instruments (international as well as regional) as possible that include a *right to physical security*. For the purpose of this paper, we will focus on the instruments to which the State of Kenya is a party.

The analysis of whether these are of any relevance for refugees living in camps will come in further sections.

The Universal Declaration of Human Rights

Adopted and proclaimed by the UN General Assembly in December 1948, the Universal Declaration of Human Rights⁹⁹ (hereafter : UDHR) stresses the inherent value of human dignity and the universal nature of human rights. Although the Declaration, which

⁹⁵ Jennifer Hyndman and Bo Viktor Nylund, “UNHCR and the Status of Prima Facie Refugees in Kenya,” *International Journal of Refugee Law*, Vol.10, No.1/2 (1998), 38.

⁹⁶ James Darcy, “Human Rights and International Legal Standards: What do Relief Workers Need to Know?,” *Relief and Rehabilitation Network*, Paper No.19, February 1997 (London: Overseas Development Institute), 13.

⁹⁷ Amnesty International, *Rights Wherever You Are*, AI-index: POL 33/001/2002, November 4, 2002.

⁹⁸ Jennifer Hyndman, *Managing Displacement. Refugees and the Politics of Humanitarianism* (Minnesota: University of Minnesota Press, 2000), 110.

⁹⁹ UN, *Universal Declaration of Human Rights*, adopted and proclaimed by General Assembly resolution 217 A (III) of December 10, 1948.

comprises a broad range of rights, is not a legally binding document, it has inspired more than sixty human rights instruments which together constitute an international standard of human rights.

Furthermore, the concepts enshrined in the UDHR have been reproduced in national and international legal instruments, and several countries' constitutions have used it as the basis for a bill of rights. In addition, the obligation to implement it has been repeatedly affirmed in international human rights instruments and declarations, including the 1993 Vienna Declaration.¹⁰⁰

According to article 3 of the UDHR: "Everyone has the right to life, liberty and *security of person*." Article 5 states that "no one shall be subjected to *torture* or to cruel, inhuman or degrading treatment or punishment." In addition, article 25 goes as follows: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food (...) and the *right to security* in the event of unemployment, sickness (...) or other lack of livelihood in circumstances beyond his control." As will be seen, all the relevant rights mentioned in this declaration have been codified in legally binding instruments.

The International Covenant on Civil and Political Rights

The UDHR, together with the International Covenant on Economic, Social and Cultural Rights¹⁰¹ (hereafter : ICESCR) and the International Covenant on Civil and Political Rights¹⁰² (hereafter : ICCPR) and its optional protocol are known collectively as the International Bill of Human Rights. These instruments form the cornerstone of the human

¹⁰⁰ UN, *Vienna Declaration*, World Conference on Human Rights, UN Doc.A/CONF.157/24, June 14-25, 1993.

¹⁰¹ UN, *International Covenant on Economic, Social and Cultural Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of December 16, 1966, entered into force January 3, 1976.

¹⁰² UN, *International Covenant on Civil and Political Rights* adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of December 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976.

rights regime. Kenya has ratified both covenants on the first of May, 1972. For the purpose of this paper, we will only focus on the ICCPR, deliberately leaving aside the ICESCR.

According to article 9(1) of the ICCPR, “everyone has the right to liberty and *security of person*.” In addition, article 6 protects the “inherent right to *life*” of every human being, and article 7 states that no one shall be subjected to *torture* or to cruel, inhuman or degrading treatment or punishment.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁰³ (hereafter : CAT) was adopted by the UN General Assembly in 1986 and came into force a year later. Kenya has ratified it on February 21, 1997.

The Convention includes a definition of torture (article 1) and States parties take on extensive obligations. These include the obligation to take measures to prevent acts of torture (article 2), an obligation not to return any person to a State where there are substantial grounds for believing that he would be in danger of being subjected to torture (article 3), and obligations to establish jurisdiction over the offence of torture (articles 4 and 5).

International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination¹⁰⁴ (hereafter : CERD) was adopted by the UN General Assembly in December 1965 and came into force in January 1969. Kenya became a party in September 2001.

According to article 5(b), States Parties

¹⁰³ UN, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), adopted by General Assembly resolution 39/46 of December 10, 1984, entered into force June 26, 1987.

¹⁰⁴ UN, *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted and opened for signature and ratification by General Assembly resolution 2106 (XX), 660 U.N.T.S. 195, entered into force January 4, 1969.

“undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (...) The right to security of person and protection by the State against violence and bodily harm, whether inflicted by government officials or by any individual group or institution (...).”

Unfortunately, this Convention seems to be of no relevance to our case, as article 1(2) clearly specifies that the Convention “shall *not* apply to distinctions, exclusions, restrictions or preferences made by a State Party (...) between citizens and non-citizens.”

Convention on the Elimination of All Forms of Discrimination against Women

Adopted by the UN General Assembly in December 1979, the Convention on the Elimination of All Forms of Discrimination against Women¹⁰⁵ (hereafter : CEDAW) entered into force two years later and was ratified by Kenya in March 1984. It is today one of the most widely ratified international human rights instrument.

Unfortunately, *no* right to physical security is to be found in this Convention.

Convention on the Rights of the Child

Adopted in 1989, the Convention on the Rights of the Child¹⁰⁶ (hereafter : CRC) was the first international treaty to specifically target the rights of children. It seeks to protect children from practices which particularly endanger their welfare, including economic exploitation, traffic in children, illicit use of drugs, and all forms of sexual exploitation and abuse. The Convention entered into force on September 2, 1990, and has become the most widely ratified of all human rights treaties. Kenya ratified it on July 31, 1990.

According to article 19(1), States Parties “shall take all appropriate (...) measures to protect the child from all forms of *physical (...) violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse (...).*” In addition, article 6

¹⁰⁵ UN, *Convention on the Elimination of All Forms of Discrimination against Women*, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force September 3, 1981.

¹⁰⁶ UN, *Convention on the Rights of the Child*, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990.

states that “every child has the inherent right to *life*” and that State Parties shall “ensure to the maximum extent possible the survival and development of the child.”

Moreover, according to article 34, “State Parties undertake to protect the child from all forms of *sexual exploitation and sexual abuse*” and in accordance with article 37(a), States Parties shall ensure that “no child shall be subjected to *torture* or other cruel, inhuman or degrading treatment or punishment.”

African Charter of Human and Peoples’ Rights

Adopted by the 18th session of the Assembly of Heads of State and Government of the OAU in June 1981, the African Charter of Human and Peoples’ Right¹⁰⁷ (thereafter : African Charter) entered into force on October 21, 1986, and Kenya became a party in January 1992.¹⁰⁸

According to article 4, human beings are inviolable and “every human being shall be entitled to respect for his *life* and the *integrity of his person*.” Moreover, article 5 states: “Every individual shall have the right to the respect of the dignity inherent in a human being (...). All forms of exploitation or degradation of man, particularly (...) *torture*, cruel, inhuman or degrading punishment and treatment, shall be prohibited.” Lastly, article 6 guarantees the right of every individual to liberty and to the *security of person*.”

African Charter on the Rights and Welfare of the Child

This Charter¹⁰⁹ was adopted by the OAU at the 26th Session of the Assembly of Heads of State and Government in July 1990; it entered into force on November 29, 1999. Kenya

¹⁰⁷ African [Banjul] Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), adopted June 27, 1981, entered into force October 21, 1986.

¹⁰⁸ As to May 2002, Kenya had submitted none of the five due reports to the African Commission of Human and Peoples’ Rights. For more details, see http://www.achpr.org/state_periodic_reports.doc (accessed January 3, 2003).

¹⁰⁹ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force November 29, 1999.

became a party on July 25, 2000. The wording of this Charter is very similar to the one used in the CRC.

Accordingly, the Charter acknowledges that every child has an inherent right to *life* (article V.1), that children shall be protected against *child abuse* and *torture* (article XVI.1), as well as against *sexual exploitation* (article XXVII).

Broader comments: addressees of these rights?

As has been shown, there clearly exists a right to physical security in different instruments of human rights law. This right is expressed in the legal texts as the right to security of person, but also as the right to life, right to dignity, the right not to be tortured, and/or the right to respect of integrity of person. Children, as a vulnerable group, are moreover to be extensively protected against any abuse, torture or exploitation.

The question as to whether this right to physical security, which is to be found in diverse international as well as regional human rights instruments, also applies to refugees living in camps will be thoroughly analyzed in a further chapter entitled “under its jurisdiction”. It is nevertheless interesting to remark already the general language used in these different instruments: “everyone,” “every human being,” “every child,” “every individual” or “every person” shall be protected.

Moreover, many of the instruments cited above include clauses of non-discrimination and equality (with the exception of the CERD). According to article 2(1) of the UDHR, “everyone is entitled to all the rights and freedoms set forth in this Declaration, *without distinction* of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin (...)”. Article 7 adds that “*all are equal before the law* and are entitled without any discrimination to equal protection of the law.” too, article 2(1) of the ICCPR, in words very similar to the UDHR’s article 2(1), states: “Each State Party to the

present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, *without distinction of any kind*, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” In addition, according to article 3 of the same Covenant, States must ensure the *equal right* of men and women to the enjoyment of all civil and political rights set forth in the ICCPR. According to article 2 of the African Charter as well, every individual should be entitled to the enjoyment of the rights guaranteed in the Charter, “*without distinction* of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”

Interestingly, apart from having a similar non-discrimination clause in article 2(1), the CRC even goes as far as specifying that it applies to refugee children. Indeed, according to article 22(1), States parties shall take appropriate measures to “ensure that a child who is seeking refugee status or who is considered a refugee (...) receive appropriate protection (...) in the enjoyment of applicable rights set forth in the (...) Convention and in other international human rights or humanitarian instruments to which the States are Parties.”¹¹⁰ In addition, the African Charter on the Rights and Welfare of the Child includes an article on refugee children, article XXIII, which is identical to article 22(1) of the CRC.

Finally, it is significant to mention the existence of a declaration, the “Declaration of the Human Rights of Individuals Who are not Nationals of the Country in which they Live,” which was adopted by the UN General Assembly, without vote, in December 1985. In accordance with article 5 of this declaration, aliens shall enjoy the “right to *life and security* of person”. Moreover, according to article 6, “no alien shall be subjected to *torture* or to cruel, inhuman or degrading treatment or punishment.”

¹¹⁰ For more information on Kenya’s enforcement of article 22(1) of the CRC, see UN, *Initial reports of States parties due in 1992 : Kenya*, Committee on the Right of the Child, CRC/C/3/Add.62, February 16, 2001, para. 470-474.

Refugees, like all people, are entitled to human rights, which are required to live a life of freedom and dignity.¹¹¹ As emphasized by the UNHCR's Executive Committee, refugees should "enjoy the fundamental civil rights internationally recognized, in particular those set out in the Universal Declaration of Human Rights"¹¹² and "should not be subjected to cruel, inhuman or degrading treatment".¹¹³ The Executive Committee reaffirmed as well "the responsibility of States to respect and ensure the *fundamental human rights* of refugees and asylum-seekers to life, liberty and security of person as well as to freedom from torture or other cruel, inhumane or degrading treatment or punishment."¹¹⁴ It furthermore stated that temporary protection comprises at least admission, protection against refoulement and *respect for fundamental human rights*, while awaiting a hoped-for safe return following international efforts to achieve a political solution.¹¹⁵ Likewise, in the "State of the World's Refugees" of 1997, one can further read that "people with temporary protection must be treated in a manner which is compatible with internationally accepted *human rights* principles."¹¹⁶

2. IDENTIFICATION OF SOME RIGHTS AS ERGA OMNES CUSTOMARY LAW

We have now identified international and regional human rights instruments that include a right to physical security, in one form or another. This right is thus a conventional one. In this chapter, we would like to add that some of the elements of the right to physical security are not only treaty based but can also be considered erga omnes customary law.

¹¹¹ Arafat Jamal, "Minimum Standards and essential Needs in a Protracted Refugee Situation. A Review of the UNHCR Programme in Kakuma, Kenya," *UNHCR: EPAU/2000/05*, November 2000, para.39 and 40; available from <http://www.unhcr.ch>.

¹¹² UNHCR, *Protection of Asylum-Seekers in Situation of Large Scale Influx*, Excom Conclusion No.22 (XXXII) 1981, II.B.2.(b).

¹¹³ UNHCR, *Protection of Asylum-Seekers in Situation of Large Scale Influx*, Excom Conclusion No.22 (XXXII) 1981, II.B.2.(d).

¹¹⁴ UNHCR, *Personal Security of Refugees*, Excom Conclusion No.72 (XLIVI) 1993, preamble clauses.

¹¹⁵ UN, *Note on International Protection*, Executive Committee of the High Commissioner's Programme, 44th session, A/AC.96/815, August 31, 1993, para.25.

¹¹⁶ UNHCR, *The State of the World's Refugees: A Humanitarian Agenda*, 1997 (Oxford and NY: Oxford University Press), Chapter 5 "The Asylum Dilemma", 210.

The prohibition of torture, for example, is today a widely accepted norm considered erga omnes customary law and torture is recognized as a crime of universal jurisdiction. Similarly, the right to life is also recognized as erga omnes customary law.

Less clear is the case of rape. It can be argued that the prohibition of rape could be added to the category of erga omnes customary law. Indeed, various international authorities have recognized that rape constitutes a form of torture, as defined by the CAT, when it is used for any reason based on discrimination, or to punish, coerce and intimidate, and is performed by State agents or with their acquiescence.¹¹⁷ “Rape is torture when the State has failed in its responsibilities to protect, investigate and provide redress to women victims.”¹¹⁸ If rape is a form of torture, then it must also be considered as a crime of universal jurisdiction.

If not considered torture, rape, one can argue, can nevertheless fall in the category of cruel, inhuman or degrading treatment, according to article 16 of the CAT. In any case, whenever committed by a State agent or an armed insurgent, whether a matter of policy or an individual incident of torture, rape constitutes an abuse of power and a violation of international human rights law. For Human Rights Watch, the differential treatment of rape – as opposed to other abuses – makes clear that most of the problem lies not in the absence of adequate legal prohibitions but in the international community’s willingness to tolerate sexual abuse against women.¹¹⁹

3. HUMAN RIGHTS PRINCIPLE OF PRIMARY RESPONSIBILITY OF STATE

Under Human Rights law, as well as under Refugee Law, it is the *State* who is primarily responsible for protecting human rights.¹²⁰ “The nation-State remains the main unit

¹¹⁷ Report by the former Special Rapporteur on Torture, P. Koojimens, appointed pursuant to Commission on Human Rights resolution 1985/33, UN Document E/CN.4/1986/15 (February 19, 1986), para.6.

¹¹⁸ Amnesty International, “Kenya: Rape - The Invisible Crime,” AI-index: AFR 32/007/2002, March 8, 2002.

¹¹⁹ Human Rights Watch, *Multiple and Repeated Rapes* (accessed October 5, 2002); available from <http://www.hrw.org/about/projects/womenrep/General-76.htm>.

¹²⁰ See reference to the concept of “State responsibility” in James Darcy, “Human Rights and International Legal Standards: What do Relief Workers Need to Know?”, *Relief and Rehabilitation Network*, Paper No.19, February 1997, (London: Overseas Development Institute), 8.

of international law and the primary site of enforcement in relation to regional and international agreements.”¹²¹ It is thus clearly the responsibility of the Kenyan government to protect and ensure the right to physical security, in its many forms, of its citizens.

But is Kenya also responsible for the protection of the rights to physical security of others, namely refugees living in camps set up on its territory?

In the domain of refugee protection, the host State is responsible.¹²² International human rights norms require governments to ensure that all individuals within their territories, *regardless of citizenship*, enjoy the equal protection of law. In the case of refugees, the responsibility to protect “remains the primary responsibility of the countries where the refugees find themselves.”¹²³

Nicholas Bwakira, former regional director of UNHCR for southern Africa, emphasized the “primary responsibility of host States to ensure security.”¹²⁴ Furthermore according to the Executive Committee of the UNHCR, “the security of refugees (...) is of course the direct responsibility of the State where they find themselves.”¹²⁵ The Executive Committee in fact deplored

*“all violations of the right to personal security of refugees and asylum-seekers, [urged] States to take all measures to prevent or remove threats to the personal security of refugees and asylum-seekers in border areas and elsewhere (...) by situating refugee camps (...) in secure locations [and] by ensuring the safety of vulnerable groups [and called upon States], in collaboration with UNHCR (...) to provide effective physical protection to asylum seekers and refugees.”*¹²⁶

¹²¹ Jennifer Hyndman, *Managing Displacement. Refugees and the Politics of Humanitarianism* (Minnesota: University of Minnesota Press, 2000), 7.

¹²² Jeff Crisp, “A State of Insecurity: the Political Economy of Violence in Refugee-Populated Areas of Kenya,” *Evaluation and Policy Analysis Unit of UNHCR*, Working Paper No.16, December 1999, p.24 (accessed September 22, 2002); available from <http://www.jha.ac/articles/u016.htm>.

¹²³ Report of the UN High Commissioner for Refugees, 38 UN GAOR Supp. (no.12), p.8, UN Doc. A/38/12 (1983).

¹²⁴ Introductory remarks by Mr. Nicolas Bwakira, former regional director of UNHCR for southern Africa, to the Open-Ended Ad Hoc Working Group on the Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa, created by General Assembly resolution 53/92, New York, May 17, 2000, para.11.

¹²⁵ UN, *Note on International Protection*, Executive Committee of the High Commissioner’s Programme, 44th session, A/AC.96/815, August 31, 1993, para.30.

¹²⁶ UNHCR, *Personal Security of Refugees*, Excom Conclusion No.72 (XLIVI) 1993, (b) and (d).

Nevertheless, to prove that the government of Kenya is responsible for the protection of the right to physical security of refugees living in camps on its territory, some more steps need to be made. The essential one is to prove that refugees living in Kakuma and Dadaab camps find themselves “under the jurisdiction” of the Kenyan government.

4. “UNDER ITS JURISDICTION”

As opposed to refugee law, where the 1951 Convention applies to “all the territories” (article 40), human rights law functions on the basis of obligations of States towards whoever is *under their jurisdiction*.

In the end of the UDHR’s preamble, one can read:

“The General Assembly proclaims (...) that (...) every organ of society (...) shall strive (...) to promote respect for these rights (...) and to secure their universal and effective recognition and observance, both among the people of Member States themselves and among the peoples of territories under their jurisdiction.”

Moreover, according to article 2(1) of the ICCPR, “each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant (...).” Similarly, the CAT includes the obligation to prevent acts of torture in any territory under the State’s jurisdiction as, according to article 2(1), “each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any *territory under its jurisdiction*.” Likewise, according to article 2 of the CRC, “State Parties shall respect and ensure the rights set forth in the (...) Convention to each child *within their jurisdiction* (...).”

Consequently, in order to prove that the Kenyan government has an obligation to protect and ensure the right to physical security of refugees living in Kakuma and Dadaab, one needs to prove that those camps are under the jurisdiction of the Kenyan government.

With the purpose of doing that, one must hence understand the meaning of the words “under its jurisdiction.”

By analogy, it is interesting to observe how the European Court of Human Rights deals with issues of jurisdiction. According to article 1 of the European Convention of Human Rights¹²⁷ (hereafter : ECHR), the Parties shall secure the rights and freedoms “to everyone within their jurisdiction.” Three jurisprudence cases are particularly relevant: the Bankovic decision¹²⁸ – which has not gone beyond the admissibility phase - the Loizidou case,¹²⁹ and the case of Cyprus versus Turkey.¹³⁰ In the Bankovic decision, the Court reaffirmed that States have obligations only to people under their jurisdiction. The Court indeed used the interpretation rules of the Vienna Convention on the Law of Treaties¹³¹ to find the meaning of the words “under its jurisdiction”. The Court judged that article 1 of the ECHR must be considered to reflect the ordinary and essentially territorial notion of jurisdiction, and observed as well that it had only exceptionally recognized extra-territorial acts as constituting an exercise of jurisdiction, when the respondent State, through the effective control of the relevant territory and its inhabitants abroad, exercised all or some of the public powers normally to be exercised by the government. The Court thus judged that, as NATO forces never physically took over Belgrade on the ground, they had no human rights obligations towards people on the Serbian territory. By opposition, in the Loizidou case, the Court decided that the northern Cypriot complainant was under the jurisdiction of the Turkish government because,

¹²⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS No. 5), 213 U.N.T.S. 222, November 4, 1950, entered into force September 3, 1953, as amended by Protocol 11.

¹²⁸ European Court of Human Rights, Bankovic, Stojadinovic, Stoimenovski, Joksimovic and Sukovic against Belgium, The Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, The Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom. Decision, December 12, 2001, 00052207/99.

¹²⁹ European Court of Human Rights, Loizidou versus Turkey, December 18, 1996, Reports 1996-VI.

¹³⁰ European Court of Human Rights, Cyprus versus Turkey, Judgment, May 10, 2001, Application 25781/94.

¹³¹ *Vienna Convention on the Law of Treaties* (May 23, 1969), entered into force January 27, 1980, UN Doc A/Conf 39/28, UKTS 58 (1980), 8 ILM 679, article 31.

*“bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.”*¹³²

The Court reached the same conclusions in the case of Cyprus versus Turkey.¹³³

Accordingly, one can easily conclude that Kakuma and Dadaab refugee camps find themselves under the jurisdiction of the Kenyan government. First, they are physically located on the Kenyan *territory* and the territorial principle of jurisdiction remains the most basic organizing principal in a world order constituted primarily of and by territorially organized States.¹³⁴ And second, the Kenyan government controls these areas through its local administration and police forces present there. As will be seen in a further chapter, it is moreover only with the Kenyan government’s consent that the UNHCR is allowed to administer the camps. Consequently, the UNHCR would have to leave the country if the Kenyan government so desired.

However, to prove that refugees living in camps are under Kenya’s jurisdiction is not enough. Limitations issues must also be dealt with. According to the Addis Ababa document, “the international community, the United Nations, the UNHCR, and other relevant organizations, should support and assist host Governments in fulfilling their responsibilities towards refugees in a manner consistent with the principles of refugee law on the one hand, and legitimate national security, social and economic interests on the other hand.”¹³⁵

¹³² European Court of Human Rights, *Loizidou against Turkey*, December 18, 1996, Reports 1996-VI, para.62.

¹³³ European Court of Human Rights, *Cyprus versus Turkey*, Judgment, May 10, 2001, Application 25781/94, para.69-80.

¹³⁴ M. Othman-Chande, “International Law and Armed Attacks in Refugee Camps,” *Nordic Journal of International Law*, Vol.59, Fasc. 2/3 (1990), 166.

¹³⁵ Addis Ababa Document on Refugees and Forced Population Displacements in Africa, adopted by the OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa, Addis Ababa, September 8-10, 1994, Recommendation Eight.

5. LIMITATION ISSUES

The human rights regime, created as a balance between the need to recognize the inherent rights of individuals and the existence of sovereign nation-States, allows States a certain *margin of appreciation* in dealing with the rights protected. States are thus permitted, in certain situations and for specific reasons, to limit some of the rights protected. In a more general sense, human rights law is not a regime that expects States to reach perfection; most rights are balanced to some extent by what is possible to be done by States under the principle of good faith. States thus have to engage in good faith efforts to prevent and punish violations of human rights.¹³⁶

In more specific cases, so-called “limitations” are explicitly tolerated, although they must follow very strict and specific criteria. Each human rights instrument has its own way of expressing the limitations/restrictions. Hence in some cases, one will find a general article dealing with limitations while, in others, the limitation sentences will be included in the relevant articles, usually in a second paragraph.

For instance, article 29(2) of the UDHR states: “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are *determined by law* solely for the *purpose of securing due recognition and respect for the rights and freedoms of others* and of meeting the just requirements of *morality, public order* and the *general welfare* in a democratic society.”

In contrast, article 7 of the ICCPR (prohibition of torture) allows no restriction. Article 6 (right to life) does not provide for limitations, except for the countries that have not abolished the death penalty; in that case, sentences to death must be *in accordance with the law* and not contrary to the provisions of the ICCPR and the Convention on the Prevention

¹³⁶ This notion of margin of appreciation left to States under the principle of good faith clearly shows through the formulation of, among other articles, article 4 of the African Charter on Human and Peoples’ Rights, that states that no one may be “arbitrarily” deprived of the right to life and integrity of person.

and Punishment of the Crime of Genocide.¹³⁷ Article 9 provides for limitations to the right to liberty. The right to security of person, however, does not seem to be explicitly subjected to limitations.

Likewise, article 6 (right to life), article 19(1) (right to protection from violence), article 34 (right to be protected from sexual abuses) and article 37(a) (prohibition of torture) of the CRC do not seem to explicitly provide limitations (as opposed to article 13, 14 and 15, for instance). Moreover, the CRC does not include a general clause on limitations/restrictions.

Similarly, none of the following articles, article 4 (right to life and integrity of person), and article 5 (right to respect of dignity and prohibition of torture) of the African Charter on Human and Peoples' Rights explicitly provide for limitations. In contrast, article 6 (right to liberty and to security of person) does provide for limitations. It indeed states, in the second sentence, that no one may be deprived of his freedom except for reasons and *conditions previously laid down by law*. This seems, however, to apply to the right to liberty rather than to the right to security of person (as with article 9 of the ICCPR). Nevertheless, in chapter II of the Charter, that enumerates the duties of individuals, article 27(2) states: "The rights and freedoms of each individual shall be exercised with *due regard to the rights of others, collective security, morality and common interest*."

Lastly, articles V(1) (right to life), article XVI(1) (right to protection against child abuse and torture) and article XXVII (right to protection against sexual exploitation) of the African Charter on the Rights and Welfare of the Child do not provide for limitations. In addition, the Charter does not include a general clause on limitations/restrictions.

Clearly, for most of the rights considered to be components of the right to physical security, such as the right not to be tortured, no limitation whatsoever is permitted. Most of the instruments we have identified as containing a right to physical security do not explicitly

¹³⁷ UN, *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 U.N.T.S. 277, approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of December 9, 1948, entered into force January 12, 1951.

provide for limitations of this right. However, it was shown that the African Charter does include a general clause providing for some sorts of limitations. Should one conclude that the Kenyan government has an absolute obligation to protect all of the rights we included in a broader right to physical security, without being permitted some limitations? Again, it is important to keep in mind the principle of good faith referred to earlier, especially since there is no absolute and non-relative way for a State to define the physical security of a person.

I will thus envisage the right to physical security as a broad and possibly flexible category and analyze now theoretically when, how and if at all limitations to certain rights (with the exception of the absolute ones) could be tolerated in some very peculiar situations, on the basis of article 27(2) of the African Charter. The analysis will nevertheless be done in the light of the logic of limitations that can be found in the ICCPR and the ECHR. Article 12 of the ICCPR as well as article 8 of the ECHR will be taken as examples. The reason for this choice is that both instruments have a similar logic, a more restrictive one for governments than article 27(2) of the African Charter, and one that is precise and developed (through case law) enough for it to be a clear model of analysis.

Article 12(3) of the ICCPR states:

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

Likewise, according to article 8(2) of the ECHR,

“there should be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the prevention of health or morals, or for the protection of the rights and freedoms of others.”

States such as Kenya, Tanzania, and Uganda that have historically welcomed large numbers of refugees habitually view them as a source of violence and insecurity.¹³⁸ Many governments point to threats to national security and fear of domestic political destabilization.¹³⁹ Refugees, in addition, are often accused of threatening State security since their arrival can lead to the spread of firearms, increased levels of crime and social unrest.¹⁴⁰

In that sense, the government of Kenya has often argued that restrictions of the rights of refugees are necessary in order to protect national security and the internal order of the country. For instance, the Somalis for decades were blamed of threatening Kenyan national security.¹⁴¹ Kenya has indeed historically been in a problematic relation with the Somali State as it has challenged Kenyan territory in an attempt to accomplish the pan-Somali dream.¹⁴² A long history of conflict and tension has consequently created a hostile image of the Somalis as “enemies” of the Kenyan State.¹⁴³ In January 1993, after a series of armed attacks, the Kenyan government asked the UNHCR to repatriate all of its Somali, Ethiopian and Sudanese refugees in the country, arguing that the number of refugees had seriously compromised the security of the country.¹⁴⁴

According to one author, governments in Africa have legitimate security concerns, because the conflicts in Rwanda, Burundi, the Democratic Republic of Congo, Somalia,

¹³⁸ Binaifir Nowrojee, “In the Name of Security: Erosion of Refugee Rights in East Africa,” *World Refugee Survey 2000* (accessed October 5, 2002); available from http://www.refugees.org/world/articles/wrs00_eafrica.htm.

¹³⁹ Elly-Elikunda Mtango, “Military and Armed Attacks on Refugee Camps,” in *Refugees and International Relations*, ed. Loescher and Monahan (New York: Oxford University Press, 1990), 92. See also UN, *Note on International Protection*, Executive Committee of the High Commissioner’s Programme, 52th session, A/AC.96/951, September 13, 2001, para.18.

¹⁴⁰ Jeff Crisp, “A State of Insecurity: the Political Economy of Violence in Refugee-Populated Areas of Kenya,” *Evaluation and Policy Analysis Unit of UNHCR*, Working Paper No.16, December 1999 (accessed September 22, 2002); available from <http://www.jha.ac/articles/u016.htm>.

¹⁴¹ Otunnu Ogenga, “Factors Affecting the Treatment of Kenyan-Somalis and Somali Refugees in Kenya: A Historical Overview,” *Refuge*, Vol.12, No.5 (December 1992), 21.

¹⁴² Cindy Horst, “Refugee Life in the Camps. Providing Security or Sustaining Dependency,” p.4 (accessed October 5, 2002); available from <http://www.hiiraan.ca/may02/op/cindy3.htm>.

¹⁴³ Otunnu Ogenga, “Factors Affecting the Treatment of Kenyan-Somalis and Somali Refugees in Kenya: A Historical Overview,” *Refuge*, Vol.12, No.5 (December 1992), 21.

¹⁴⁴ Bonaventure Rutinwa, “Refugee protection and Security in East Africa,” *Forced Migration Review*, October 1996 (accessed October 5, 2002); available from <http://www.fmreview.org/rpn225.htm>.

Sudan, Ethiopia, and Eritrea can, and have, spilled over in their region. Hence, cross-border extremist activity, arms trafficking, recruitment and training of refugees by rebel groups, and the extortion of food or money by militias are serious national security concerns that the governments must address.¹⁴⁵ Ogata and Ahmed, likewise, refer to the “legitimate security concerns of States.”¹⁴⁶ Similarly, according to Kofi Mable, there are real risks and security hazards for States as Kenya that have the great responsibility to host large populations of refugees.¹⁴⁷

From the above, it follows nevertheless that, at best, an argument can be made by the Kenyan government to restrict the *freedom of movement* of refugees, on the basis of the necessity and proportionality of such a measure. Indeed, the confinement to camps could be justified to secure the rights of others (if it can be proven that the unrestricted presence of refugees all over the country can threaten other rights of the population), or to protect the common interest (if it can, for instance, be proven that the refugees, if left free to move in the country, could be susceptible of organizing a rebellion or takeover that would threaten the stability, if not even the existence, of the State). According to Cindy Horst, one of the common justifications for segregating refugees in camps from the side of governments is precisely that they represent a national security threat. Refugees are seen as threatening the host country’s security by increasing demands on its scarce resources or threatening the security of regions by their sheer presence.

Nevertheless, one of the problems of the security argument is that often deterioration in camp security is a result of failure of the host States to disarm refugees and the

¹⁴⁵ Binaifir Nowrojee, “In the Name of Security: Erosion of Refuge Rights in East Africa,” *World Refugee Survey 2000* (accessed October 5, 2002); available from http://www.refugees.org/world/articles/wrs00_eafrica.htm.

¹⁴⁶ Statement by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees and Salim Ahmed Salim, Secretary-General, Organization for African Unity, OAU/UNHCR, Regional Meeting on Refugee Issues in the Great Lakes, Kampala, May 9, 1998.

¹⁴⁷ Information received from Kofi Mable, Head of UNHCR Sub-Office in Kenya responsible for Kakuma camp, October 24, 2002, Famine Center, Tufts University.

concentrating of refugees in camps.¹⁴⁸ In that sense, one of the solution to security problems is to make sure all refugees are disarmed upon admission into host country and to ensure as much as possible that refugees are not concentrated in one place, especially in border regions. In a way, a case can be made that it is not fair to blame refugees and not *necessary* nor *proportionate* to limit their freedom of movements,¹⁴⁹ as the insecurity might very well be the result of the policy itself of placing refugees in large camps located on borders. Criminality on the part of refugees, for instance, may well be a function of their complete destitution and lack of gainful employment, the result of confinement in camps. While national and border security issues are clearly a priority for any government and need to be addressed, long-term security interests are probably better served by implementing mechanisms that uphold the rule of law. Ultimately, indiscriminately criminalizing refugees might not be an effective, nor a sustainable security policy. Thus “confining refugees to camps is highly questionable as necessary to public interest.”¹⁵⁰ In addition, the rights of the individuals, and those of the State to limit them must always be put on a balance. The location of refugees, one can argue, should as much be determined by the security needs of the receiving State as by the refugees’ safety and well-being.¹⁵¹

However, in any case, no such limitation argument can be made as to the restriction of any of the rights we considered as being part of a broader right to physical security,¹⁵² since it is never necessary nor proportionate, for any reason, to restrict these rights. Indeed, although the security concern may be valid, there is no legitimate aim for not protecting a person from rape or assault and allowing violence to be widespread in the camps. It is not necessary – on

¹⁴⁸ Bonaventure Rutinwa, “Refugee protection and Security in East Africa,” *Forced Migration Review*, October 1996 (accessed October 5, 2002); available from <http://www.fmreview.org/rpn225.htm>.

¹⁴⁹ See UN, *General comment No. 27 on Freedom of Movement*, Human Rights Committee, CCPR/C/21/Rev.1/Add.9, November 2, 1999.

¹⁵⁰ Jennifer Hyndman and Bo Viktor Nylund, “UNHCR and the Status of Prima Facie Refugees in Kenya”, *International Journal of Refugee Law*, Vol.10, No.1/2 (1998), 42.

¹⁵¹ UNHCR, *Protection of Asylum-Seekers in Situation of Large Scale Influx*, Excom Conclusion No.22 (XXXII) 1981, II.B.2(g).

¹⁵² As opposed to the argument to restrict the right to *freedom of movement*.

the contrary – in order to protect rights of others, collective security, morality or the common interest.

If no limitation can be made, can the government of Kenya argue that it has the right to *derogate* from some of its obligations? This is the focus of the following section.

6. DEROGATION ISSUES

Aside from the possibility of limitations, derogations are a second way for a State to circumvent its human rights obligations. Derogations from international human rights instruments are nevertheless to be employed in special circumstances and for a limited period of time.

The African Charter on Human and Peoples' Right, as well as the African Charter on the Rights and Welfare of the Child and the CRC do *not* include a derogation clause; in other words, they apply at all time.

Likewise, according to article 2(2) of the CAT, “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture.”

However, article 4 of the ICCPR states:

“1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party (...) availing himself of the right to derogation shall immediately inform the other States Parties (...) through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made (...) on the date on which it terminates such derogation.”

Out of the three articles of the ICCPR previously identified as pertaining to a broader right to physical security, two (article 6 and 7) are clearly non-derogable, as stated in article 4. These rights are indeed of a peremptory nature, as is explained by General Comment 29 of the Human Right Committee.¹⁵³ In this comment, the Committee moreover clearly affirms that derogation measures must be of an exceptional and temporary nature (paragraph 1); derogations must be strictly required by the exigencies of the situation and be *proportionate* (paragraph 4); States must provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation (paragraph 5); finally, States parties when they resort to their power of derogation, commit themselves to a regime of international notification (paragraph 17).

Clearly, Kenya might have found itself at some point in situations amounting to a public emergency which threatens the life of a nation, as it is surrounded by unstable and conflict-producing countries. But does Kenya fulfill all the necessary requirements that would justify the declaration of a state of emergency? As to the formal requirements of article 4, it seems that Kenya only partly fulfilled them. Indeed, when trying to find a formal proclamation of a state of emergency by the government of Kenya in the last decade, one realizes that none has been made to the relevant treaty body, namely the Human Right Committee. The only relevant information on this issue is to be found in a list of States which, since January 1, 1985, have proclaimed, extended or terminated a state of emergency. Indeed, in this list, one can find a motion – although quite vague and imprecise - on Kenya: “According to a non-governmental source, a long-term state of emergency has been in effect in the north-eastern part of the country until the beginning of 1992. The Special Rapporteur awaits more precise information to be submitted by the Government, especially with regard to

¹⁵³ UN, *General Comment No. 29 on States of Emergency (article 4)*, Human Rights Committee, , CCPR/C/21/Rev.1/Add.11, August 31, 2001, para.11.

the emergency-type detention law currently in force.”¹⁵⁴ Undoubtedly, this does not replace a formal declaration of a state of emergency by the State of Kenya. Moreover, even if a state of emergency had been formally declared, its time limit seems to be over.

In addition, apart from the formal requirements, other requirements must also be fulfilled. First, not all rights can be derogated from, and it seems that the right to physical security in most of its possible shapes fits into this category. However, even admitting that some part of the right to physical security, such as the right to security of person, is not included in the list of non-derogable rights, it would be hard to argue that the suspension of the protection of the security of person is a measure required and proportionate to protect the life of the nation. Lastly, the suspension of certain human rights might be justified at some point, but a state of emergency cannot continue indefinitely, and derogation measures must thus be of a temporary nature. As explained by the Human Rights Committee, “the restoration of a state to normalcy where full respect of the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant.”¹⁵⁵

It therefore seems, as for limitations, that the argument in favor of derogation is a rather weak one. One last issue still needs to be taken into consideration, namely the fact that most violations of the right to physical security of refugees in Kenyan camps are perpetrated by private parties, as opposed to the State itself.

¹⁵⁴ UN, ECOSOC Document E/CN.4/sub2/1996/19, June 18, 1996, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-eighth session, Item 10 (a) of the provisional agenda: “The administration of justice and the human rights of detainees: question of human rights and state emergency,” Ninth annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37; available from: www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/aef7281c485f7682802566aa00541190?Opendocument.

¹⁵⁵ UN, *General Comment No. 29 on States of Emergency (article 4)*, Human Rights Committee, CCPR/C/21/Rev.1/Add.11, August 31, 2001, para.1.

7. DUE DILIGENCE

Notwithstanding all the above developments, the State of Kenya could make a case that it does not violate any of the rights to physical security of the refugees living in the camps under its jurisdiction, since the violence is often perpetrated on a private basis by individuals on others, for instance in the case of domestic violence. Although it would not be completely accurate to argue that none of the violence comes from the State itself (via its agents, such as policemen), this argument must still be taken into consideration.

Human Rights Watch describes domestic violence as violence involving “the infliction of bodily injury, accompanied by verbal threats and harassment, emotional abuse or the destruction of property as a means of coercion, control, revenge or punishment, on a person with whom the abuser is involved in an intimate relationship.”¹⁵⁶ The police and judicial authorities often dismiss domestic violence as a “private” matter rather than a widespread scourge that demands urgent State action. The forms of violence that women experience at home, including rape, murder and assault are condemned by the criminal laws of virtually all countries. However, when committed in an intimate relationship, these attacks are more often tolerated as the norm than prosecuted as crimes.¹⁵⁷

While the ICCPR does not explicitly refer to private violence, including domestic violence, the broad language in articles 6(1), 7 and 9(1) clearly can encompass such abuse. State parties are thus under the obligation to combat domestic violence by virtue of having undertaken to “respect and to ensure” the rights recognized in the ICCPR.

According to the Inter-American Court of Human Rights, the concept of State responsibility has developed to recognize that States are “obligated to investigate every

¹⁵⁶ Human Rights Watch, *Domestic Violence* (accessed October 5, 2002); available from <http://www.hrw.org/about/projects/womenrep/General-185.htm>.

¹⁵⁷ Human Rights Watch, *Domestic Violence* (accessed October 5, 2002); available from <http://www.hrw.org/about/projects/womenrep/General-185.htm>.

situation involving a violation of the rights protected by [international law].”¹⁵⁸ In the Velasquez-Rodriguez case, the Inter-American Court offered commentary on the scope of States’ duty under article 1 of the American Convention on Human Rights¹⁵⁹ to *ensure* the rights within the treaty to all person within their jurisdiction. Likewise, the same requirement to ensure rights protected by a treaty is found in article 2 of the ICCPR. The Inter-American Court further judged that a State “has failed to comply with [this] duty (...) when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.”¹⁶⁰ Moreover, the Court required governments to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.¹⁶¹

States consequently have the positive obligation to act in order to prevent domestic violence. Thus, what would otherwise be wholly private conduct is transformed into a constructive act of the State, “because of lack of due diligence to prevent the violation or respond to it as required by the [American Convention].”¹⁶² Elaborating on the due diligence standard, the Court stated moreover that a single violation of human rights does not establish a State’s lack of diligence. Rather, the test is whether the State *undertakes its duties seriously*. The due diligence requirement encompasses as well the obligation both to provide and enforce sufficient remedies to survivors of private violence.

Thus, a State that does not act against crimes of domestic violence is as guilty as the perpetrators. States are under a positive duty to prevent, investigate and punish crimes

¹⁵⁸ Inter-American Court of Human Rights, Velasquez-Rodriguez, July 29, 1988, Series C, No. 4, para.176.

¹⁵⁹ American Convention on Human Rights, OAS Treaty Series No.36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

¹⁶⁰ Inter-American Court of Human Rights, Velasquez-Rodriguez, July 29, 1988, Series C, No. 4, para.176.

¹⁶¹ Inter-American Court of Human Rights, Velasquez-Rodriguez, July 29, 1988, Series C, No. 4, para.174.

¹⁶² Inter-American Court of Human Rights, Velasquez-Rodriguez, July 29, 1988, Series C, No. 4, para.172.

associated with violence. According to the UN Committee on the Elimination of Discrimination against Women, “States may (...) be responsible for private acts if they fail to act with due diligence to prevent violations of rights, or to investigate and punish acts of violence.”¹⁶³ When States respond to evidence of murder, rape or assault of women by members of their families with inaction, they fail to *take the minimum steps necessary to protect* the women’s rights to physical integrity and, in extreme cases, to life.

Similarly, at the European level, the Court has judged that article 8 (right to privacy) of the ECHR creates not only negative but also positive obligations on the State to protect individuals in the sphere of relations with other individuals. Thus, interpersonal private sphere violence can trigger the responsibility of the State if the State has failed to act.¹⁶⁴ In order for a State to have respected its human rights obligations, it must have taken all reasonable measures to prevent violations from happening.¹⁶⁵

Thus, for Kenya to prove that it does not violate the right to physical security of refugees living in camps, it would have to show that it undertakes its duty seriously by taking all necessary steps and reasonable measures to prevent violations from happening. This, of course, is left to interpretation and to a certain margin of appreciation. It also brings us back more generally to what has been explained earlier in the paper, namely that crucial in all these issues is the principle of good faith. Perfection is expected from no one, but governments have to engage in good faith efforts to prevent and punish violations of human rights.

As has been shown part 2 of this paper, having their physical security protected is a right for all human beings, including refugees living in Kenyan camps.

Most refugees currently living in Kenyan camps, as they have not been processed individually to apply for asylum and potentially become Convention refugees, have the status

¹⁶³ UN, *General Recommendation 19*, Committee on the Elimination of Discrimination against Women, January 19, 1992.

¹⁶⁴ European Court of Human Rights, *X. and Y. against Netherlands*, March 26, 1985, Series A, No.91.

¹⁶⁵ European Court of Human Rights, *Osman against United Kingdom*, October 28, 1998, ECHR 1998-VIII.

of prima facie refugees and thus, are not entitled to the rights offered by the international refugee regime. Some of the spirit of the existence of a right to physical security for displaced people can arguably be found in refugee law. For our case, nevertheless, refugee law only offers a general direction, as opposed to legally binding principles, as the people we are referring to do not have the refugee status.

However, these refugees are entitled to human rights. As human beings, refugees are protected by human rights, and the right to physical security has its place in the human rights regime. The obligation to protect the physical security of these people, moreover, is on the Kenyan government, on the basis of the principle of State responsibility in human rights law, and because refugees living in the Kenyan camps find themselves under Kenyan jurisdiction. Accordingly, Kenya has the obligation to protect and ensure all the rights enshrined in the different human rights instruments it has ratified, not only to the less constraining ones. Limitations and derogations seem not to be justifiable, at least after some time and especially for non-derogable rights such as torture, although, as a general rule, most rights are balanced to some extent by the principle of good faith. Kenya not only has a negative obligation to prevent from violating the right to physical security of refugees living in camps, but more importantly, it also has a positive obligation to protect the right to physical security of refugees living in camps by taking all reasonable measures to prevent violations from happening.

Kenya has ratified the relevant human rights conventions, and some of the elements of the right to physical security are even considered customary international law. There is thus no legal vacuum: legally, rights-holders and duty holders, as well as the content of the right to physical security of refugees living in Kenyan camps, can be identified.

PART 3: PRACTICAL IMPLICATIONS OF THE EXISTENCE OF A RIGHT TO PHYSICAL SECURITY

Part 1 has shown that refugees living in Kenyan camps are confronted to daily violence and threats to their physical security and that measures, although insufficiently, are being taken to enhance the security of the refugees in camps. Part 2 has demonstrated that the Kenyan government has the legal obligation to protect and ensure in good faith the right to physical security of these refugees. The Executive Committee accordingly stated that “it is a well established principle in international law that host States have primary responsibility for the physical protection of refugees and for maintaining the humanitarian and civilian character of their camps and settlements.”¹⁶⁶

Unfortunately, one thing is to identify rights and obligations; another is to make sure that rights can be and are implemented. The reality is that most of the world’s refugees find themselves in developing countries. Countries like Kenya find themselves in the very difficult situation of having legal obligations that they possibly do not entirely have the means – or the will - to fulfill. As noted by the UNHCR’s Executive Committee, there are

*“inevitable tensions between international obligations and national responsibilities where countries called upon to host large refugee populations, even on a temporary basis, are suffering from their own severe economic difficulties, high unemployment, declining living standards (...) and/or natural disasters.”*¹⁶⁷

It is important to note that there is a considerable difference between the *inability* of a State to fulfill its human rights obligations and a State’s *unwillingness* to do so. More often than not, this distinction, once again, will depend on the interpretation of the extent to which the good faith principle is applied.

¹⁶⁶ UNHCR, *The Security, Civilian and Humanitarian Character of refugee Camps and Settlements: Operationalizing the Ladder of Options*, Executive Committee of the High Commissioner’s Programme, Standing Committee, 18th meeting, EC/50/SC/INF.4, June 27, 2002.

¹⁶⁷ UN, *Note on International Protection*, Executive Committee of the High Commissioner’s Programme, 52th session, A/AC.96/951, September 13, 2001, para.109.

If one acknowledges that the State of Kenya – which has been found to have the legal obligation to protect/ensure the right to physical security of refugees living in camps on its territory - might be unable or unwilling to do so, what is then to be done to enhance this protection? Something indeed has to be undertaken, as we have shown that these people have a *right* to physical security. Two distinct options are thinkable:

- A. Induce the State of Kenya to be more responsible and encourage it to fulfill its obligations, by first getting the government to acknowledge its obligations and then providing it with the necessary means to do so. This would engage the international community as a whole under the principles of burden-sharing and solidarity.
- B. Shift part of the responsibility of the protection of the right to physical security of refugees living in Kenyan camps to some entity other than the State of Kenya. Although it is hard to prove that the UNHCR’s mandate has evolved in such an extensive way that the UNHCR now has the *legal* obligation to protect the physical security of refugees living in the camps it administers, it nevertheless can be argued that politically, the UNHCR seems to be willing to take on such an obligation. This seems to be a positive development, since the State of Kenya seems to be insufficiently able or willing to do so.

A. Principle of burden-sharing and solidarity

The obligation to protect and ensure the physical security of refugees should not rest on asylum countries alone but should be imposed on all States, both individually and collectively.¹⁶⁸ According to the UNHCR Executive Committee, the international protection of refugees would be impossible without the cooperation of States, in a spirit of international solidarity and burden-sharing, both in providing asylum to those who need it and in fostering

¹⁶⁸ Elly-Elikunda Mtango, “Military and Armed Attacks on Refugee Camps,” *Refugees and International Relations*, ed. Loescher and Monahan (New York: Oxford University Press, 1990), 114.

solutions to refugee problems. The Executive Committee stated its hopes that ways will be found in which the UNHCR, concerned States and the international community as a whole “can most effectively discharge their responsibilities towards refugees.”¹⁶⁹ In the same note, it recognized that the burden of providing asylum can be very great and that many less-developed countries need help to sustain the immediate additional costs of caring for refugees. It also affirmed that the first asylum countries already shelter the vast majority of the world’s refugees and are also in many cases the countries least able to muster the material resources needed to maintain them. International burden-sharing, the Committee concluded, can thus be extremely important to the international protection of refugees by helping to relieve a part of the material, political and social costs of providing asylum.¹⁷⁰

Moreover, in one of its conclusions, the Executive Committee affirmed that a mass influx may place unduly heavy burdens on certain countries, that a satisfactory solution of a problem, international in scope and nature, cannot be achieved without international cooperation and that States shall, within the framework of international solidarity and burden-sharing, take all necessary measures to assist, at their request, States which have admitted asylum seekers in large-scale influx situations.¹⁷¹

In a similar way, the General Assembly of the UN reaffirmed the principle of international solidarity and burden-sharing, and urged the international community to assist receiving countries in order to enable them to cope with the additional burden created by their presence.¹⁷² Likewise, the OAU/UNHCR Symposium on Refugees and Forced Population

¹⁶⁹ UN, *Note on International Protection*, Executive Committee of the High Commissioner’s Programme, 44th session, A/AC.96/815, August 31, 1993, para.63.

¹⁷⁰ UN, *Note on International Protection*, Executive Committee of the High Commissioner’s Programme, 44th session, A/AC.96/815, August 31, 1993, para.28.

¹⁷¹ UNHCR, *Protection of Asylum-Seekers in Situation of Large Scale Influx*, Excom Conclusion No.22 (XXXII) 1981, IV.(1).

¹⁷² UN, *Report of the United Nations High Commissioner for Refugees*, General Assembly Resolution 39/140, December 14, 1984, para.6.

Displacements in Africa called for “genuine international solidarity and burden-sharing.”¹⁷³ In addition, States parties to the 1951 Convention and/or its protocol stressed that respect by States for their protection responsibilities towards refugees is strengthened by international solidarity involving all members of the international community and that the refugee regime is enhanced through committed international cooperation in a spirit of solidarity and effective responsibility and burden-sharing among States.¹⁷⁴ In addition, State parties committed themselves

*“to providing, within the framework of international solidarity and burden-sharing, better refugee protection through comprehensive strategies, notably regionally and internationally, in order to build capacity, in particular in developing countries (...), especially those which are hosting large-scale influxes or protracted refugee situations, and to strengthening response mechanisms, so as to ensure that refugees have access to safer and better conditions of stay and timely solutions to their problems.”*¹⁷⁵

The same Declaration moreover served as the framework for an Agenda for Protection in which States commit themselves to share burdens and responsibilities more equitably.¹⁷⁶ States indeed commit themselves to better responsibility-sharing arrangements to shoulder the burdens of first asylum countries, to cooperate more in order to strengthen protection capacities in refugee-receiving countries and, most importantly, to use resettlement more effectively, as a tool of burden sharing.

Accordingly, it can be argued that the international community has a legal commitment to the protection of human rights where they are not otherwise protected by the State. If the party with primary responsibility – in our case, Kenya - is unable or unwilling to

¹⁷³ Addis Ababa Document on Refugees and Forced Population Displacements in Africa, adopted by the OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa, Addis Ababa, September 8-10, 1994, Recommendation Eleven.

¹⁷⁴ Declaration adopted at the Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, Geneva, December 13, 2001, preamble para.8.

¹⁷⁵ Declaration adopted at the Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, Geneva, December 13, 2001, operative para.12.

¹⁷⁶ UN, *UNHCR Agenda for Protection*, A/AC.96/965/Add.1, June 26, 2002, goal 3.

provide the necessary protection, then the responsibility of other parties such as the international community may need to be invoked.¹⁷⁷

A few authors have expressed their opinion on the issue of burden-sharing. James Hathaway makes a case that the international refugee regime should be radically reformed. He advocates for an internationally supervised burden-sharing regime that would meet the needs of refugee populations.¹⁷⁸ This system for sharing out the duty of refugee protection should be formulated on the basis of each State party's resources and absorptive capacity. Consequently, less developed States, which currently host the substantial majority of the world's refugee population, would benefit from a guarantee of international financial and logistical support in meeting the needs of refugees.¹⁷⁹

According to Jennifer Hyndman, the principle of refugee burden-sharing should be carefully reviewed as a "transnational response to displacement," a response orchestrated by UNHCR, NGOs, human rights organizations, legal scholars and donor governments rather than States alone.¹⁸⁰

Similarly, Binaifir Nowrojee believes that the international community needs to adopt a two-fold approach: provide greater material assistance to African host governments and condemn abuses and advocate forcefully policies and practices that uphold refugees' fundamental rights. Moreover, host governments in East Africa need to be given greater international assistance in order to adopt other steps to address security, such as increasing police patrols and surveillance of the border communities with high numbers of refugees, relocating refugee settlements farther away from the borders, and investigating and

¹⁷⁷ James Darcy, "Human Rights and International Legal Standards: What do Relief Workers Need to Know?", *Relief and Rehabilitation Network*, Paper No.19, February 1997, (London: Overseas Development Institute), 16-17.

¹⁷⁸ Daniel Warner and James Hathaway, "Refugee Law and Human Rights: Warner and Hathaway in Debate," *Journal of Refugee Studies*, Vol. 5, No. 2 (1992), 170.

¹⁷⁹ James Hathaway, "Reconceiving Refugee Law as Human Rights Protection," *Journal of Refugee Studies*, Vol. 4, No. 2 (1991), 126-128.

¹⁸⁰ Jennifer Hyndman, *Managing Displacement. Refugees and the Politics of Humanitarianism* (Minnesota: University of Minnesota Press, 2000), 186.

prosecuting those foreign nationals committing crimes. Each of these proposals would allow a more sustainable and rights-respecting security policy over the long term, according to the author, who concludes that:

“It is not enough for the international community only to condemn the violation of refugee rights. More constructive efforts are necessary to address the financial and administrative burden that such alternative security measures would pose to these countries’ already overburdened judicial and law enforcement branches. Supporting the capacity of host countries to protect and assist refugees is the sine qua non that enables host governments to abandon policies and practices that violate refugee rights and to move toward durable solutions on their behalf.”¹⁸¹

To conclude this section, it is important to recall that all members of the UN have pledged themselves to take joint and separate action, in cooperation with the organization, for the achievement of universal respect for, and observance of, human rights.¹⁸² There is therefore a collective legal obligation for members of the international community to take the necessary measures to find a solution to the problem of violations of the human right of refugees to physical security. To borrow from the former High Commissioner’s words, “in a world being profoundly changed by globalization, forced human displacement is everybody’s problem – not just the problem of countries receiving hundreds of thousands of refugees or returnees. We must do more to help these countries shoulder their responsibilities.”¹⁸³

B. Extension of UNHCR’s mandate?

The UNHCR settles in a country at the invitation of the host government. It was invited by the Kenyan government in 1992. Whereas normally, host governments officials

¹⁸¹ Binaifir Nowrojee, “In the Name of Security: Erosion of Refugee Rights in East Africa,” *World Refugee Survey 2000* (accessed October 5, 2002); available from http://www.refugees.org/world/articles/wrs00_eafrica.htm.

¹⁸² Article 55 and 56 of the United Nations Charter.

¹⁸³ Statement by Mrs. Sadako Ogata at the Third Committee of the United Nations General Assembly New York, November 11, 1998.

administer a camp, in Kenya this responsibility has been ceded to UNHCR and NGOs and UNHCR's primary role is one of supervision and coordination.¹⁸⁴

In one of Human Rights Watch reports, one can read that the UNHCR must ensure physical security in the refugee camps.¹⁸⁵ But this statement is less obvious than it may appear, and opinions seem to diverge on this issue.

Kofi Mable, the UNHCR head of Kakuma camp, clearly believes that the physical protection of refugees is the government's responsibility, not the UNHCR's.¹⁸⁶ Likewise, Reinier Thiadens, former UNHCR representative in Kenya, interviewed by the East African in July 2001, emphasized in a similar way that "security is essentially a matter for the government. [UNHCR] mandate is restricted to providing, protecting and assisting the refugees, whereas the government is responsible for ensuring that there is adequate security within the camps."¹⁸⁷

Similarly, Hyndman envisages the issue as a triangular responsibility, with the UNHCR being responsible for peacekeeping and controlling the political games in the camps, NGOs providing resources and services and the government of Kenya responsible for providing security.¹⁸⁸ In an analogous way, according to Jeff Crisp, "UNHCR's mandate with respect to the physical safety and security of refugees is a limited one, such issues being in the first place the responsibility of host States."¹⁸⁹ In his opinion, thus, UNHCR's role in physical protection (as distinct from its role related to the legal protection of refugees) is only to

¹⁸⁴ Cindy Horst, "Refugee Life in the Camps. Providing Security or Sustaining Dependency," p.4 (accessed October 5, 2002); available from <http://www.hiiraan.ca/may02/op/cindy.htm>.

¹⁸⁵ Human Rights Watch, *Response of the Kenyan Government and the UNHCR* (accessed October 5, 2002); available from <http://www.hrw.org/about/projects/womenrep/General-79.htm>.

¹⁸⁶ Information received from Kofi Mable, Head of UNHCR Sub-Office in Kenya responsible for Kakuma camp, October 24, 2002, Famine Center, Tufts University.

¹⁸⁷ The East African, *Ethiopian Refugees Need Not Fear Harassment in Camps*, July 2, 2001, p.2 (accessed October 5, 2002); available from <http://www.nationaudio.com/News/EastAfrican/090072001/Opinion/Interview1.html>.

¹⁸⁸ Jennifer Hyndman, *Managing Displacement. Refugees and the Politics of Humanitarianism* (Minnesota: University of Minnesota Press, 2000), 139.

¹⁸⁹ Jeff Crisp, "A State of Insecurity: the Political Economy of Violence in Refugee-Populated Areas of Kenya," *Evaluation and Policy Analysis Unit of UNHCR*, Working paper No.16, December 1999, p.9 (accessed September 22, 2002); available from <http://www.jha.ac/articles/u016.htm>.

support host States in their task of providing security, because UNHCR has neither the mandate nor the capacity to provide physical protection.

In contrast, according to Human Rights Watch,

*“UNHCR has (...) recently interpreted its protection mandate to go beyond the legal aspects of refoulement and asylum to the physical protection of refugees. If UNHCR fully implements these commitments, such practice would lead to important improvements in refugee protection, particularly for women refugees.”*¹⁹⁰

But is the protection of the physical security of refugees in camps part of the UNHCR’s mandate?

To understand what UNHCR’s mandate consists of, one has to look at the Statute of the Office of the UNHCR. The original mandate of the UNHCR stems from the General Assembly in the form of resolution 428(V) of December 14, 1950, to which UNHCR’s Statute was annexed. According to article 1, the UNHCR

“shall assume the function of providing protection (...) to refugees who fall within the scope of the Present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments (...) to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.”

Thus, in line with its Statute, the agency’s mandate contains two main elements: providing international protection on the one hand, and seeking permanent solutions to the problem of refugees on the other.¹⁹¹

According to Goodwin-Gill, to provide international protection means to insist on the fulfillment of international obligations, to use all available mechanisms for the assurance of protection (municipal laws, regional and international mechanisms and protest) and to actively promote the political processes that determine solutions.¹⁹² In that sense, the initial mandate of the UNHCR is quite narrow. To be sure, the UNHCR was not meant to be an

¹⁹⁰ Human Rights Watch, *Protection of the Rights of Refugee Women*, p.1 (accessed October 5, 2002); available from <http://www.hrw.org/reports/1997/gen3/General-04.htm>.

¹⁹¹ James Darcy, “Human Rights and International Legal Standards: What do Relief Workers Need to Know?”, *Relief and Rehabilitation Network*, Paper No.19, February 1997, (London: Overseas Development Institute), 30.

¹⁹² Guy S. Goodwin-Gill, “Refugee Identity and Protection’s Fading Prospect,” in *Refugee Rights and Realities, Evolving International Concepts and Regimes*, eds. Frances Nicholson and Patrick Twomey (Cambridge: Cambridge University Press, 1999), 248.

operational agency, but rather to fulfill an advocacy role. It was meant to offer refugees legal rather than physical protection. It was moreover not intended to be responsible for all the people fleeing strife and war but only for people fleeing countries because of a genuine fear of persecution.

Nevertheless, it is important to note that article 9 of the UNHCR statute allows for expansions of the mandate, as it stipulates that the High Commissioner should engage in such additional activities as the General Assembly may determine. Consequently, it is not sufficient to simply analyze the initial statute of the UNHCR, as the 1950 Statute no longer encompasses the entire mandate of the UNHCR. The UNHCR has a highly dynamic and fragmental legal basis¹⁹³ and one has to look at the UNHCR Statute in the broad sense (that is the Statute and the additions made over the years).

Accordingly, as has already been mentioned, in 1961, UNHCR's good offices were created by Resolution 1673 (XVI) of the General Assembly, providing a basis for meaningful action in emerging refugee situations, and allowing the High Commissioner to define groups as prima facie refugees without normal determination procedures.¹⁹⁴ The expansion of UNHCR's role to cover categories of people other than refugees is consistent with the Statute of the organization and a series of General Assembly resolutions provides the legal basis for many of UNHCR's activities with non refugee populations.¹⁹⁵

However, did the mandate also expand from legal to physical protection? Different sources seem to diverge on this issue.

According to the Schnyder report, international protection, which is one of the most important statutory function of the UNHCR, does *not* involve providing actual physical

¹⁹³ Volker Turk, "The Role of the UNHCR in the Development of International Refugee Law," in *Refugee Rights and Realities, Evolving International Concepts and Regimes*, eds. Frances Nicholson and Patrick Twomey (Cambridge: Cambridge University Press, 1999), 154.

¹⁹⁴ Jennifer Hyndman, *Managing Displacement. Refugees and the Politics of Humanitarianism* (Minnesota: University of Minnesota Press, 2000), 10.

¹⁹⁵ UNHCR, *The State of the World's Refugees 2000, Fifty Years of Humanitarian Action*, p.3 (accessed November 2 and December 20, 2002); available from <http://www.unhcr.ch/pubs/sowr2000//sowr2000toc.htm>.

protection to the refugees since this is the primary responsibility of the authorities of the asylum countries. The UNHCR international protection mandate is aimed at ensuring that refugees are treated in conformity with basic standards recognized by the international community rather than providing actual physical protection to refugees. However, the UNHCR, in carrying out its mandate, has a role to play in promoting conditions which ensure that refugees in camps are not exposed to attacks. As an intermediary of goodwill, the High Commissioner can encourage governments to find appropriate solutions and should seek to arouse the widest possible international interest in the problem of physical security of refugees.¹⁹⁶

Similarly, Othman-Chande argues that the UNHCR does not have the mandate for and the means to directly assume the responsibility for the physical protection and security of refugees, which remain the responsibility of the authorities of the countries of asylum. In his opinion, though, the UNHCR can play a proactive role by being present and if necessary by protesting, if it is to be an effective protector of refugees.¹⁹⁷

Yet, in one of its conclusions, the Executive Committee affirmed that the

*“UNHCR and other concerned organs of the United Nations should make every effort, within their respective terms of reference and in keeping with the principles of the United Nations Charter, to promote conditions which ensure the safety of refugees in camps (...).”*¹⁹⁸

The Executive Committee also stated in another conclusion that

“the personal security of refugees is an essential element of international protection.(...) Ensuring the safety of refugees and asylum-seekers when they are threatened with harm has consequently been a major preoccupation of UNHCR and an important component of the Office’s field activities.¹⁹⁹(...) [Moreover] safeguarding the personal security of refugees is implicit in the High Commissioner’s mandate of providing international protection²⁰⁰(...)”

¹⁹⁶ UNHCR, *Military Attacks on Refugee Camps and Settlements in Southern Africa and elsewhere*, report by Ambassador Felix Schnyder, EC/SCP/26, March 15, 1983.

¹⁹⁷ M. Othman-Chande, “International Law and Armed Attacks in Refugee Camps,” *Nordic Journal of International Law*, Vol.59, Fasc. 2/3 (1990), 170.

¹⁹⁸ UNHCR, *Military or Armed Attacks on Refugee Camps and Settlements*, Excom Conclusion No.48 (XXXVIII), 1987, 4 (c).

¹⁹⁹ UNHCR, *The Personal Security of Refugees*, EC/1993/SCP/CRP.3, para.1.

²⁰⁰ UNHCR, *The Personal Security of Refugees*, EC/1993/SCP/CRP.3, para.23.

[and] safeguarding the basic, human rights of refugees, including their personal security, is fundamental to international protection (...).²⁰¹

It is here important to bear in mind that the Standing Committee's conclusions are endorsed by the Executive Committee during plenary sessions and that, although they are non-binding, the conclusions express an important international consensus on legal matters concerning refugees. These conclusions have served to fill gaps in areas of the international refugee law regime not foreseen by the 1951 Convention or the 1967 Protocol. Thus, while not binding, conclusions adopted by the Executive Committee of the UNHCR offer some guidance on minimum standards applicable to refugees.

In addition, in 1991, the UNHCR adopted the "Guidelines on the Protection of Refugee Women." These guidelines are devoted primarily to the problems of women refugees located in UNHCR camps. They call for "integrating the resources and needs of refugee women into all aspects of programming so as to assure equitable protection and assistance activities."²⁰² Moreover, they emphasize the inherent relationship that exists between protection and assistance, and state that improving protection for refugee women requires a combination of programming tools and measures that strengthen safety and security. As stated in the guidelines,

"UNHCR has the responsibility, as part of its protection function, to ensure the non-discriminatory access of all refugees to its assistance. Beyond that, UNHCR assistance should be supportive of efforts to provide for the safety and dignity of refugee women and be responsive to the needs of those already victimized."²⁰³

The guidelines review the range of legal and physical protection needs that arise for females in refugee situations, outlining those areas of protection that are in need of particular attention and response and the actions that can and should be taken when protection problems occur.²⁰⁴

²⁰¹ UNHCR, *The Personal Security of Refugees*, EC/1993/SCP/CRP.3, para.43.

²⁰² UNHCR, *Guidelines on the Protection of Refugee Women*, para.1.4.

²⁰³ UNHCR, *Guidelines on the Protection of Refugee Women*, para.77.

²⁰⁴ Women's Commission for Refugee Women and Children, *UNHCR Policy on Refugee Women and Guidelines on Their Protection: An Assessment of Ten Years of Implementation*, May 2002 (accessed December 12, 2002); available from: <http://www.womenscommission.org/reports/pdf/unhcr2002.pdf>.

They also suggest mechanisms to improve the reporting of physical and sexual protection problems and programs for improving protection as well as improvements in camp design and implementation of assistance programs to ensure greater safety.

Additionally, in 1995, the UNHCR issued “Sexual Violence Against Refugees: Guidelines on Prevention and Response (Sexual Violence Guidelines),” affirming the responsibility of staff to prevent and provide protection to, and the obligation of governments to diligently prosecute cases of sexual violence. These guidelines offer basic, practical advice to field workers in the areas of medical treatment, psychological support, and legal intervention and serve as an introduction on when and how sexual violence can occur in the refugee context. They also underscore the need for education, training, and information campaigns among refugee and host or other local populations, and emphasize that women have a particular need for training in legal awareness, leadership, and other skills.

According to the former High Commissioner for Refugees, “protection” involves other aspects of what is sometimes defined with the rather broad term of “human security”: the physical safety of those who are uprooted.²⁰⁵

Lastly, it is also important to mention the “Agenda for Protection” adopted in June 2002, during the fifty-third session of the Executive Committee.²⁰⁶ The Agenda focuses on suggested activities which would strengthen international protection of refugees. It is intended to guide action by UNHCR, together with States, NGOs and other protection partners, in furthering protection objectives during the years ahead. The Agenda suggests a “Programme of Action” composed of six goals, one of which being to address security-related concerns more effectively. And one of the objectives set in the Programme of Action to address security-related concerns more effectively is for the UNHCR to develop its own institutional capacity, through an enhanced refugee security project, to assist States in ensuring the

²⁰⁵ Statement by Mrs. Sadako Ogata at the Third Committee of the United Nations General Assembly New York, November 11, 1998.

²⁰⁶ UN, *UNHCR Agenda for Protection*, A/AC.96/965/Add.1, June 26, 2002.

physical safety of refugees; and to identify partnership opportunities between host governments, donors and UNHCR to strengthen national capacity to manage refugee-related security issues.²⁰⁷ Moreover, it is affirmed that States and the UNHCR should explore how to provide material support to UNHCR to establish standby mechanisms for the deployment of human security officers in refugee situations.

Although one has seen that many additions have been brought to UNHCR activities over the decades, it would be hard to equate them with a legal expansion of the UNHCR's mandate. To be sure, according to UNHCR's *State of World's Refugees*, UNHCR's core mandate has not changed since 1950.²⁰⁸ The protection of refugees and the search for solutions to the problems of refugees remain the central objectives of the organization. It is the environment in which UNHCR works and the types of activity undertaken by the organization that have changed significantly over the past fifty years. The report acknowledges that the range of activities carried out by UNHCR has evolved from a focus mainly on facilitating the resettlement of refugees to a wider range of activities that include the provision of material assistance such as food and shelter, as well as the provision of healthcare, education and other social services. It is interesting to observe that the protection of physical security is not included in this list of new activities.

Therefore, while the range of activities of the UNHCR has undeniably been expanding throughout the years to include some assistance, apart from the legal protection, and while UNHCR's present approach to protection appears to be the "culmination of a decades-long process of evolution of its intentionally dynamic mandate,"²⁰⁹ it would probably be going a step too far to affirm that the UNHCR's mandate has evolved in such an extensive way that

²⁰⁷ UN, *UNHCR Agenda for Protection*, A/AC.96/965/Add.1, June 26, 2002, goal 4, objective 1.

²⁰⁸ UNHCR, *The State of the World's Refugees 2000, Fifty Years of Humanitarian Action*, p.3 (accessed November 2 and December 20, 2002); available from <http://www.unhcr.ch/pubs/sowr2000//sowr2000toc.htm>.

²⁰⁹ Erin D. Mooney, "In-country Protection: Out of Bounds for UNHCR?" in *Refugee Rights and Realities, Evolving International Concepts and Regimes*, eds. Frances Nicholson and Patrick Twomey (Cambridge: Cambridge University Press, 1999), 205.

the UNHCR now has the *legal* obligation to protect the physical security of refugees living in the camps it monitors.

Nevertheless it can be argued that politically, the UNHCR demonstrated its willingness, especially through the “Agenda for Protection,” to be more active in helping to enhance the protection of the physical security of refugees. This must be seen as a positive development, since the State of Kenya is unable or unwilling to do enough to protect and ensure the physical security of refugees living in its camps. The UNHCR is indeed in many ways in a good position to be the coordinator/catalyst of programs designed to help protect the physical security of refugees in camps and it seems to be willing to do so, as stated in the first initial objective for Kenya in UNHCR’s mid-year progress report of 2002, which aims to “ensure *safe* and dignifies asylum for all asylum-seekers and refugees.”²¹⁰

²¹⁰ UNHCR, *Mid-Year Progress Report 2002*, UNHCR Publications, 84.

CONCLUSION : POTENTIAL MEASURES TO ENSURE REFUGEES' HUMAN RIGHT TO PHYSICAL SECURITY

Many African refugees are living with the uncertainty and fear that come from inadequate protection from threats to their physical security. In that sense, their human right to physical security is not satisfactorily protected and ensured. The Kenyan State has a legal obligation to better protect the physical security of refugees living in its camps, and the international community, according to the principle of burden-sharing and solidarity, must also play a role in helping the Kenyan government to fulfill its obligations. Moreover, the UNHCR has gradually expanded its activities to cover not only the legal protection of refugees but also the protection of the physical security of refugees in protracted refugee situations.

To be sure, the purpose of this paper is *not* to affirm that all actors involved with refugees in Kenya are deliberately acting in bad faith, doing nothing where a lot could easily be done. Obviously, the lack of security in the Kenyan refugee camps is a dramatic problem to which responses are extremely difficult to find and to implement. Nevertheless, more can certainly be done to protect refugees, as is demonstrated for instance by the way in which the international community dealt with refugee issues in the Balkans. Clearly, African refugees receive less attention than other refugees.

Thus, given what the reality is on the field, what better measures could all the different actors conjunctly take to contain violence in and around the Kenyan camps, so as to make life more secure for the refugees living there and to enable them to fully enjoy their human right to physical security?

The most radical way of approaching the issue of lack of physical security of refugees living in Kenyan camps is to try to avoid putting refugees in camps. As some authors believe,

camps are inherently dangerous places. Verdirame refers to camps as “anomalies.”²¹¹ Similarly, in Rutinwa’s opinion, “to address (...) security, host countries should (...) whenever possible, avoid putting refugees in camps.”²¹² Likewise, Nowrojee believes that camps are not the solution and that, rather than acquiescing in the erosion of refugee rights, the international community should be promoting ways to return to more durable solutions.²¹³

Pleading for more resettlement is another way of approaching the issue of lack of security in the camps. Consistent with the principle of international solidarity and burden-sharing, States other than the overburdened developing countries should be willing to resettle more refugees²¹⁴ as, according to the former High Commissioner for Refugees, resettlement of refugees to third countries is an important expression of global solidarity.²¹⁵

But there are also less radical ways of dealing with this issue. One difficult but essential measure is related to the geographic location of camps: refugee camps should be located further away from borders.²¹⁶ The discouragement of frontier refugee settlements indeed seems to be a sensible response towards ensuring effective protection to refugees.²¹⁷ “In order to minimize problems of international security, host States should implement article 2(6) [of the 1969 OAU Convention].²¹⁸ (...) This will minimize, if not prevent, cross border raids into refugee camps. It will also make it difficult for camps to be used as a base for

²¹¹ Guglielmo Verdirame, “Human Rights and Refugees: the Case of Kenya,” *Journal of Refugee Studies*, Vol.12, No.14 (1999), 54-77.

²¹² Bonaventure Rutinwa, “Refugee protection and Security in East Africa,” *Forced Migration Review*, October 1996 (accessed October 5, 2002); available from <http://www.fmreview.org/rpn225.htm>.

²¹³ Binaifir Nowrojee, “In the Name of Security: Erosion of Refugee Rights in East Africa,” *World Refugee Survey 2000* (accessed October 5, 2002); available from http://www.refugees.org/world/articles/wrs00_eafrica.htm.

²¹⁴ Information received from Kofi Mable, Head of UNHCR Sub-Office in Kenya responsible for Kakuma camp, October 24, 2002, Famine Center, Tufts University.

²¹⁵ Statement by Mrs. Sadako Ogata at the Third Committee of the United Nations General Assembly New York, November 11, 1998.

²¹⁶ See, among other sources, UNHCR, *Protection of Asylum-Seekers in Situation of Large Scale Influx*, Excom Conclusion No.22 (XXXII), 1981, para.II.B.2.g, UNHCR, *Violence sexuelle à l’encontre des réfugiés: principes directeurs concernant la prévention et l’intervention* (Genève : HCR, 1995), 12 and Elly-Elikunda Mtango, “Military and Armed Attacks on Refugee Camps,” *Refugees and International Relations*, ed. Loescher and Monahan (New York: Oxford University Press, 1990), 118.

²¹⁷ M. Othman-Chande, “International Law and Armed Attacks in Refugee Camps,” *Nordic Journal of International Law*, Vol.59, Fasc. 2/3 (1990), 170.

²¹⁸ Article 2(6) of the 1969 OAU Convention makes it an obligation for States, on grounds of security, to settle refugees at a reasonable distance from the frontier of their country of origin.

launching attacks (on their country of origin), thus removing the possibility of potential interstate conflict.”²¹⁹ Unfortunately, as explained by the Head of Kakuma camp, the UNHCR can only take what it is given, according to what States are willing to offer. Moreover, in the case of Kenya, it would be hard to find much other free space available.²²⁰

More generally, in many cases, “insecurity affecting refugee camps and refugee populated areas has resulted from a failure to strictly respect the civilian and humanitarian character of refugee operations.”²²¹ Accordingly, no weapon should be allowed in the camps, and camps must remain demilitarized. Refugee camps must retain an exclusively civilian and humanitarian character²²² and the UNHCR should take on the tough task of excluding militarily active elements from the camps.²²³

Moreover, there seems to be a broad agreement on the need, in extreme cases, for international intervention in refugee situations to ensure that the civilian character of camps is maintained and respected.²²⁴ In a statement to the Security Council on November 10, 1998, the High Commissioner reviewed various options, referring to “soft” (preventive measures), “medium” (deployment of civilians or police monitors) and “hard” options (military deployment), which reflect the phasing of measures that could be undertaken under her humanitarian mandate, to a full international or multinational military operation under either

²¹⁹ Bonaventure Rutinwa, “Refugee protection and Security in East Africa,” *Forced Migration Review*, October 1996 (accessed October 5, 2002); available from <http://www.fmreview.org/rpn225.htm>.

²²⁰ Information received from Kofi Mable, Head of UNHCR Sub-Office in Kenya responsible for Kakuma camp, October 24, 2002, Famine Center, Tufts University.

²²¹ Introductory remarks by Mr. Nicolas Bwakira, former regional director of UNHCR for southern Africa, to the Open-Ended Ad Hoc Working Group on the Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa, created by General Assembly resolution 53/92 (December 16, 1998), New York, May 17, 2000, para.II.6.

²²² UNHCR, *Military or Armed Attacks on Refugee Camps and Settlements*, Executive Committee Conclusion No.48 (XXXVIII), 1987, para.4 (b) and UNHCR, *Conclusion on the Civilian and Humanitarian Character of Asylum*, Executive Committee Conclusion No.94 (LIII), 2002, preamble para.7 and para. (a), (b), (c) and (f).

²²³ Binaifir Nowrojee, “In the Name of Security: Erosion of Refugee Rights in East Africa,” *World Refugee Survey 2000* (accessed October 5, 2002); available from http://www.refugees.org/world/articles/wrs00_eafrica.htm.

²²⁴ Statement by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees and Salim Ahmed Salim, Secretary-General, Organization for African Unity, OAU/UNHCR, Regional Meeting on Refugee Issues in the Great Lakes, Kampala, May 9, 1998.

Chapter VI or Chapter VII of the Charter of the United Nations.²²⁵ In that sense, a measure that could enhance the protection of the physical security of refugees living in Kenyan camps could be to give UN peace missions the authority and appropriate means to ensure protection, in coordination with host governments or otherwise, of camp populations.²²⁶ Jeff Crisp proposes a less drastic measure, which is the permanent deployment of the Kenyan army or of an anti-banditry unit in the vicinity of the camps.²²⁷

Another way of addressing the issue of lack of physical security in protracted refugee situations is to manage these situations in a manner that both enhances refugee capacities and benefits host countries. Thus, according to Jamal, the UNHCR should develop more income-generation and community self-management projects.²²⁸ Likewise, as said by the Women's Commission for Refugee Women and Children, the

*“UNHCR should consider conducting a review of the causes, dynamics, and effects of refugee men's inactivity with a view to establishing a strategy which (...) reduces male perpetrated violence in situations of uprootedness (...). Such a strategy might include components like men's and boy's training in new skills more appropriate to the most likely durable solution, thereby providing not only activity but a sense of purpose where none existed before. It could also involve income generation and a new division of labor which might relieve some of the added burden often borne by women and girls in refugee situations.”*²²⁹

Kofi Mable, on the same note, sees as the only real solution for States to give more funds to the UNHCR, in order for the UNHCR to enable the majority of refugees living in Kenyan camps (through micro-projects, for instance) to be productive. That would diminish

²²⁵ UNHCR, *The Security and Civilian and Humanitarian Character of Refugee Camps and Settlements*, EC/49/SC/INF.2, January 14, 1999, para.10.

²²⁶ Bonaventure Rutinwa, “Refugee protection and Security in East Africa,” *Forced Migration Review*, October 1996 (accessed October 5, 2002); available from <http://www.fmreview.org/rpn225.htm>.

²²⁷ Jeff Crisp, “A State of Insecurity: the Political Economy of Violence in Refugee-Populated Areas of Kenya,” *Evaluation and Policy Analysis Unit of UNHCR*, Working Paper No.16, December 1999, p.23 (accessed September 22, 2002); available from <http://www.jha.ac/articles/u016.htm>.

²²⁸ Arafat Jamal, “Minimum Standards and essential Needs in a Protracted Refugee Situation. A Review of the UNHCR Programme in Kakuma, Kenya,” *UNHCR: EPAU/2000/05*, November 2000; available from <http://www.unhcr.ch>.

²²⁹ Women's Commission for Refugee Women and Children, *UNHCR Policy on Refugee Women and Guidelines on Their Protection: An Assessment of Ten Years of Implementation*, May 2002 (accessed December 12, 2002); available from: <http://www.womenscommission.org/reports/pdf/unhcr2002.pdf>.

violence as refugees would not stay inactive all day long and lose their human dignity.²³⁰ Jeff Crisp adds to these measures the necessity of having better lighting in the camps, of providing additional security training to UN and NGO staff, of improving police standards and of deploying female police officers in Kakuma and Dadaab.²³¹

Thus, although it is far from being easy, many ways can be envisaged to help making African refugees' lives in camps more secure and human. Refugee camps exist in order to provide refugees with protection and all must therefore be done so that they really fulfil their function. Refugees living in camps must be safe from danger and violence. The need is now for the international community to acknowledge that displaced people, whatever their status and whatever region they come from, have a human right to physical security. The international community must show more willingness and good faith in taking the appropriate measures to ensure this right. There is no reason why a refugee should remain a "human being without value"²³² or, to borrow from Franz Fanon's words, a "wretched of the earth."²³³

²³⁰ Information received from Kofi Mable, Head of UNHCR Sub-Office in Kenya responsible for Kakuma camp, October 24, 2002, Famine Center, Tufts University.

²³¹ Jeff Crisp, "A State of Insecurity: the Political Economy of Violence in Refugee-Populated Areas of Kenya," *Evaluation and Policy Analysis Unit of UNHCR*, Working Paper No.16, December 1999, p.23 (accessed September 22, 2002); available from <http://www.jha.ac/articles/u016.htm>.

²³² Andrew Mayak, Kakuma Refugee Camp (see title page).

²³³ Franz Fanon, *Les damnés de la terre* (Paris : Maspero, 1961).

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