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Human Rights Violations in Refugee Camps: Whose Responsibility to Protect?

A case of Ethiopia

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Summary

Protection of refugees is a primary responsibility of the host state. However, if a state is unable or unwilling, to exercise its protection obligations, these shifts to international organizations, mainly UNHCR and its implementing partners. Considering UNHCR's specific mandate to provide 'international protection' to refugees and to seek 'permanent solutions for the problem of refugees' my research thesis will try to discuss the following questions:

- When a violation occurs in refugee camps to which actors shall responsibility be allocated?
- What circumstances may UNHCR be held internationally responsible for human rights violations taking place in refugee camps?

To resolve the above research questions, my paper will also answer the following three different but related questions: first, what is the normative status of refugee rights under Ethiopian legal system and the human rights obligation of the state in relation to refugee protection? Second, why do we still have refugee camps? Third, and more central: is that possible for a number of actors to be simultaneously responsible under both ILC's (ARISWA) and (ARIO)?

Keywords: *refugee camps, human rights violations, Ethiopian asylum system, UNHCR, responsibility to protect*

Preface

During the process of writing this thesis, I have learned a lot: I've learned not only from books about the laws and policies of states regarding the ever increasing complexity of refugee issues, But also, I have learned a great amount from my sojourn in the refugee camps about the hopes and dangers of human souls.

I would like to thank Lund University and the Raoul Wallenberg Institute for enjoyable learning and giving me the opportunity to be a human rights lawyer. I would also like to extend this gratitude to my professors and fellow students who made this journey a Successful one. I'm especially grateful for Professor Goran Melander, who I have had the honor of having him as a supervisor and he of course, deserves the biggest of thanks.

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I am particularly indebted to the Swedish people and government for welcoming and hosting me during my study period. I could not have attended the program without the Swedish Institute's generous award as part of study in Sweden scholarship. Thank you!

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Mewded Yirda Mengesha (February 2016)

Abbreviations

ARRA	Administration for Refugee and Returnees Affairs
ARIO	ILC's Articles on the Responsibility of International Organizations
ARISWA	ILC's Articles on State Responsibility
AU	African Union
COI	Country of Origin Information
CTD	Convention Travel Document
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EXCOM	Executive Committee of the UNHCR
EU	European Union
GA	United Nations General Assembly
IDP	Internally Displaced Person
ILC	International Law Commission
NGO	Non-governmental Organization
OAU	Organization of African Unity
RaDO	Rehabilitation and Development Organization
R2P	Responsibility to Protect
SGBV	Sexual and Gender Based Violence
UNHCR	United Nations High Commissioner for Refugees

Chapter one

Introduction

1.1 Back Ground

The host state has the primary responsibility for the protection of everyone, including refugees, present on its territory. From this follows the reasonable assumption that it is the authorities and laws of that state that also govern the refugee camps within its borders. Nevertheless, as we are going to see in this thesis, the extent to which the host state exercises authority and control in these camps varies widely. The refugee camp is as such an anomalous establishment being situated on the territory of a host state but in practice often controlled by a wide range of actors other than host state authorities. In place of the host state, UNHCR and its implementing NGOs have progressively assumed responsibility for the management and control of these camps.

Several legal norms furthermore govern which actors have an obligation to protect the fundamental human rights of refugees. The multiplicity of actors and, consequently, legal regimes - all converging within the space of the refugee camp arguably contributes to a state of legal ambiguity rather than to a strong and comprehensive regime in which refugees are protected at different levels. These are particularly the main issues we are going to discuss in this paper.

Refugee camps are intended to hold people for a short amount of time until they can return back to everyday life either in their home country, in the country of first asylum or being resettled in a third State. However, many people are unable to return home and end up staying in camps for years while suffering from lack of work, lack of freedom of movement, and at some level fear of physical abuse.

In Ethiopia refugee camps can in practice generally be said to be administered on three distinctive, but highly intricate, levels: the government of Ethiopia (as represented by the Administration of Refugees Returnees Affairs aka ARRA), the United Nations High Commissioner for Refugees (UNHCR), and the UNHCR implementing partners, which are often non-governmental organizations. These three levels often come about through various forms of

delegation. The Ethiopian Government for example to various extents, and with or without a formal agreement, delegate refugee-related tasks to the UNHCR. In turn, UNHCR may through a sub-contracting/tripartite agreement delegate refugee camp projects to non-governmental organizations, such as the Danish Refugee Council (DRC) or the Jesuit Refugee Service (]RS).

This delegation of work in refugee camps creates questions when it comes to issues of responsibility. Several different actors may have varying degrees of responsibility for the protection of the human rights of refugees. And the degree of responsibility attributed to each actor would primarily be dependent upon the ability and willingness of the host state, which is Ethiopia in our case to provide effective protection.

Therefore, basically the center of this paper is that of the unable or unwilling state, which is evidently true for Ethiopian refugee camps.

1.2 Aim of the Study

The primary aim of my paper is to contribute to the discussion of how to protect the human rights of refugees in refugee camps. While there is no doubt that the sovereign host state holds the primary responsibility for the human rights situation within its jurisdiction, it is also relevant to discuss issues of responsibility in relation to UNHCR and other actors inside refugee camps. Obviously, it is UNHCR's international law mandate to provide international protection to refugees and seek solutions for refugee problems.[1] Thus, we will be asking in detail on the following chapters of this paper, whether or not UNHCR has a duty to take action in response to human rights violations in refugee camps. If so, what are the possible limitations that exist for the scope of its responsibility? And also, is UNHCR responsible for acts and omissions of its implementing partners in refugee camps operations? This paper explores issues related to human rights of refugee in refugee camps and to some extent the rules of international responsibility, as well as in view of a case study of refugee camps in Ethiopia.

[1] See the Statue of the United Nations High Commissioner for Refugee [UNHCR Statue], adopted by the UN general assembly in Res. 428. See UN Doc. No. A/RES/428 (14 Dec. 1950), para 1.

1.3 Method and Material

In order to find answers to the above mentioned research questions, a number of research methods employed. The traditional legal methodology, encapsulating literature from recognized scholars, is mainly used. The international, regional and domestic refugee law instruments and Human Right Conventions are also examined in addition to the literatures. Since United Nation High Commissioner for Refugee (UNHCR) is at the core of this research paper, materials produced by the office are also used extensively. UNHCR ExCom decisions, different Handbooks, and further official reports are analyzed. The thesis chose the case study of human rights violations in Ethiopian refugee camps, in order to show the challenges of international protection from a practical perspective and to present the general over view of refugee camp situations. The legal analysis of domestic laws: most importantly, critical analysis of the Ethiopian Refugee Legislation, applicable human right laws and information obtained through discussions with ARRA and UNHCR staff members have been consulted and employed in addition to the writer's personal observation while working for UNHCR Ethiopia office reflected in this thesis.

1.4 Scope and Delimitations

Trying to present, examine, assess and compare then conclude a large subject such as the human rights violations in refugee camps of Ethiopia and determine which actor has the responsibility for such violations is indeed a hard work. It is hard because it has different dimensions at the national and international levels, and because it comprises a large composition of different areas such as legal, political and economic fields. No doubt that each area has its own significance in forming the whole picture. Nevertheless, the examination of all these areas with the limited scope of this thesis may give a broad study without depth in the subject matter. To equalize the depth with the breadth this study will seek to answer the following questions:

When a violation occurs in refugee camps to which actors shall responsibility be allocated?

What circumstances may UNHCR be held internationally responsible for human rights violations taking place in refugee camps?

What is the normative status of refugee rights under Ethiopian legal system and the human rights obligation of the state in relation to refugee protection?

Is that possible for a number of actors to be simultaneously responsible under both ILC's (ARISWA) and (ARIO)?

Moreover, it is important to note that the government in Ethiopia, especially the responsible refugee agency (ARRA) officials wasn't just un-supportive of the writer's intention to conduct research on the matters of refugee rights but, they genuinely brought danger to his safety. It was almost impossible to access any official information from ARRA office and most of the information provided in this paper gathered in a very informal way, mainly by asking his former colleagues at UNHCR Ethiopia.

1.5 Disposition

To begin with, chapter 2 will explain the legal basis of the principle of states responsibility in international law and the rights of refugees. In particular, this chapter will look at the interplay between international refugee law and international human rights law and/or international humanitarian law. Regarding states responsibility we will look at deep into each regimes of International refugee law, international human rights and international humanitarian law to analyze and discuss the provision that linked with states responsibility. In chapter 3, the presentation will describe the nature of refugee camps in general. Firstly, the definition of the term refugee camp will be addressed and, secondly, the protracted refugee situations will be explained. Here the text goes directly to discuss the problems that are attached to the long term refugee encampment policies. Thirdly, relevant policies of UNHCR related to refugee camps will be considered. Especially, we will have a sneak peak on the brand new UNHCR alternative to refugee camps policy document.

Chapter 4 describes the applicable Ethiopian legal system with regard to the refugee populations. This description comprehends the constitutional provisions, the 2004 refugee proclamation and some notes about the Administration for Refugee and Returnees Affairs (ARRA), a responsible government agency in a matter of refugees all over Ethiopia. The thesis is thereafter tied together in chapter 5 and the main questions of presented in this introductory chapter are answered and discussed. Firstly, I will analyze if there are any inconsistencies between the international law

regimes governing the attribution of responsibility to host states at the time of human rights violations in refugee camps. Secondly, I will summarize the reasons why UNHCR has a major share in refugee protection or in administration of refugee camps and as a result holding responsibility at the situation of any refugee rights violations. This chapter will lastly include a discussion on the possibility of responsibility sharing between UNHCR and its implementing partners in refugee camps. Finally, chapter 6 will conclude the thesis and at this point, I will present my final comments.

Chapter Two

Refugee Rights and States Responsibility

2.1 General Overview

"Human rights violations are a major factor in causing the flight of refugees as well as an obstacle to their safety and voluntary return home. Safeguarding human rights in countries of origin is therefore critical both for the prevention and for the solution of refugee problems. Respect for human rights is also essential for the protection of refugees in countries of asylum".[2]

-United Nations High Commissioner for Refugees

All refugees have the same human rights afforded to any other person. In addition, there are specific human rights applicable due to the circumstances refugees face. Human rights particularly relevant to refugees include:

- the right to life, liberty and security of person;
- the right to freedom from torture or cruel or inhumane or degrading treatment or punishment;
- the right to freedom of movement and residence within the borders of each state;
- the right to freedom of thought, conscience and religion;
- the right to freedom of opinion and expression;
- the right to a standard of living adequate for the health and wellbeing of the person and their family, including food, clothing, housing, medical care and necessary social services;
- the right to education
- freedom from discrimination; and
- respect for the unity of the family.

[2] Statement made at the 50th session of the UN Commission on Human Rights (1994) Quoted in UNHCR, Human Rights and Refugee Protection, Part I: General Introduction (October, 1995), p.4.

2.2 Refugee Rights as Human Rights

Are refugee rights human rights? Such a question may appear provocative at a time when refugees are regularly victims of abuses in a context of restrictive refugee policies. While this sad reality is anything but new, it is further exacerbated by the current crisis. The Ex-United Nations High Commissioner for Refugees (UNHCR) chief, António Guterres, observes that 'the human right agenda out of which UNHCR was born, and on which we depend, is increasingly coming under strain. The global …crisis brought with it a populist wave of anti-foreigner sentiment, albeit often couched in terms of national sovereignty and national security'.[3]

Against such a background, assessing the relations between refugee law, humanitarian law and human rights law is essential in order to identify the full range of states' obligations and thereby inform their practice towards refugees and asylum seekers. Although refugee law and human rights law were initially conceived as two distinct branches of international law, their multifaceted interaction is now well acknowledged in both state practice and academic writing.[4]

Refugee law, international humanitarian law, and human rights law are complementary bodies of law that share a common goal, the protection of the lives, health and dignity of persons. They form a complex network of complementary protections and it is essential that we understand how they interact.

2.2.1 Refugee Law vs. Human Rights Law

First, let's see the interplay between Refugee law and Human Rights law. In seeking to ensure humane treatment for a particularly vulnerable group of people, international refugee law is closely related to international human rights law, which focuses on preserving the dignity and well-being of every individual. Originally, the relationship between the two has been approached as a causal link, the violations of human rights being acknowledged as the primary cause of

[3] A. Guterres, Remarks at the Opening of the Judicial Year of the European Court of Human Rights, Strasbourg, 28 January 2011, 2.

[4] Vincent Chetail, Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law, Oxford University Press Scholarship Online, available at: http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198701170.001.0001/acprof-9780198701170-chapter-2?print=pdf

refugee movements.[5] The two bodies of law are complementary; increasingly, human rights principles have been applied to enhance refugee protection:

- In terms of the entitlements that refugees and asylum-seekers have under international human rights law in the country of asylum;
- In so far as international mechanisms to monitor the proper implementation of human rights law can be utilized by, and on behalf of, individual refugee men, women and children;
- In how international human rights law influences UNHCR policy, for instance, in setting standards of due process, conditions of detention, gender equality, and children's rights.

The entire international protection framework is based on human rights concepts. It aims to help those who have been forced to flee their countries because their rights have been violated. In particular, the notion of persecution, which is at the heart of the refugee definition in the 1951 Convention/1967 Protocol, is regularly interpreted in accordance with human rights standards.[6] An understanding of international human rights law is therefore vital for securing international protection for refugees and others of concern.

Since human rights law applies to everyone, including refugees, regardless of their legal status, it is a helpful standard to use in assessing the quality of the treatment that asylum countries offer to refugees and asylum-seekers on their territories. This is particularly important when States are not Parties to any of the refugee treaties (the 1951 Convention, its 1967 Protocol, or the OAU refugee Convention).

The prohibition under customary and treaty-based human rights law on returning a person to a territory where he/she is at risk of torture, or cruel, inhuman or degrading treatment or

[5] See, in particular, P. Weis, 'Refugees and Human Rights', 1 Israel Yearbook on Human Rights (1971) 35, esp. at 48–9; M. Moussalli, 'Human Rights and Refugees', Yearbook of the International Institute of Humanitarian Law (1984) 13; G. J. L. Coles, 'Human Rights and Refugee Law', Bulletin of Human Rights (1991/1) 63; T. Stoltenberg, 'Human Rights and Refugees', in A. Eide and J. Helgesen (eds), The Future of Human Rights Protection in a Changing World: Essays in Honour of Torkel Opsahl (1991) 145.
[6] James Hathaway, "Fear of Persecution and the Law of Human Rights", Bulletin of Human Rights, 91/1, United Nations, (New York, 1992), p.99.

punishment, reinforces the principle of non-refoulement under refugee law.[7] In doing so, it offers another legal avenue for securing protection for individual refugees, through recourse to an international complaints mechanism that is not available under the provisions of the 1951Convention/1967 Protocol.[8] The Human Rights Committee and the Committee against Torture have both, for example, prevented the expulsion of individuals facing a substantial risk of torture.[9]

Similarly, at the regional level, European Court of Human Rights can direct a country under its jurisdiction not to expel an asylum seeker to another country where he/she might be at risk of torture or any other violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).[10] The Inter-American Court of Human Rights has similar powers in relation to the prohibition on torture under the American Convention on Human Rights.

The promotion of human rights is also relevant in securing solutions to refugee crises. Efforts to improve the human rights situation in a refugee-producing country are imperative if there is to be any real prospect of sustainable voluntary return and reintegration.

Thus, the principles of human rights are applicable to all phases of the cycle of displacement which includes: the causes of displacement, determining eligibility for international protection, ensuring adequate standards of treatment in the country of asylum, ensuring that solutions are durable.

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[7] Chan, P., The protection of refugees and internally displaced persons: nonrefoulement under customary international law?, The International Journal of Human Rights, 2006, vol. 10, no. 3, pp. 231-239.
[8] Ibid
[9] See "Factum of the Intervenor, UNHCR, Suresh v. the Minister of Citizenship and Immigration; the Attorney General of Canada, SCC No. 27790" (hereafter: "UNHCR, Suresh Factum"), in 19:1 International Journal of Refugee Law (2002), pp. 141–157;
[10] For further on this topic, see the European Court of Human Rights website: http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+inf ormation+by+year/; the Human Rights website of the Swedish Government, http://www.manskligarattigheter.se/extra/faq/?module_instance=3&action=category_show &id=33&limit_category_ids=4, as accessed on 2011-05-01

2.2.2 Refugee Law vs. Humanitarian Law

International humanitarian law is of relevance to refugee law and refugee protection in a number of ways. First, it helps to determine who is a refugee. Many asylum seekers are persons fleeing armed conflict and often violations of international humanitarian law. A person fleeing an armed conflict might not automatically falls within the definition of the 1951 Refugee Convention, which lays down a limited list of grounds for persecution. Recognizing that the majority of persons forced to leave their state of nationality today are fleeing the indiscriminate effect of hostilities and the accompanying disorder, including the destruction of homes, food stocks and means of subsistence – all violations of international humanitarian law – but with no specific element of persecution, subsequent regional refugee instruments, such as the 1969 OAU Refugee Convention and the 1984 Cartagena Declaration on Refugees have expanded their definitions to include persons fleeing armed conflict.[11] Even states that are not party to these regional instruments have developed a variety of legislative and administrative measures, such as the notion of "temporary protection" for example, to extend protection to persons fleeing armed conflict.

A second point of interface between international humanitarian law and refugee law is in relation to issues of exclusion. Violations of certain provisions of international humanitarian law are war crimes and their commission may exclude a particular individual from entitlement to protection as a refuge.[12]

As far as protection is concerned international humanitarian law offers refugees who find themselves in a state experiencing armed conflict a two–tiered protection. First, provided that they are not taking a direct part in hostilities, as civilians refugees are entitled to protection from the effects of hostilities. Secondly, in addition to this general protection, international

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[11] EDUARDO ARBOLEDA, Refugee Definition in Africa and Latin America: The Lessons of Pragmatism, Int J Refugee Law (1991) 3 (2): 185-207 doi:10.1093/ijrl/3.2.185; See also UNHCR EXPERT ROUNDTABLE INTERNATIONAL PROTECTION FOR PERSONS FLEEING ARMED CONFLICT AND OTHER SITUATIONS OF VIOLENCE Cape Town, South Africa, 13 & 14 September 2012

[12] See statement at the International Association of Refugee Law Judges world conference, Stockholm, 21-23 April 2005, by Emanuela-Chiara Gillard, ICRC Legal Adviser.'International humanitarian law, refugee law and human rights law are complementary bodies of law that share a common goal, the protection of the lives, health and dignity of persons. They form a complex network of complementary protections and it is essential that we understand how they interact.'

humanitarian law grants refugees additional rights and protections in view of their situation as aliens in the territory of a party to a conflict and their consequent specific vulnerabilities.[13]

If respected, international humanitarian law operates so as to prevent displacement of civilians and to ensure their protection during displacement, should they nevertheless have moved. Parties to a conflict are expressly prohibited from displacing civilians. This is a manifestation of the principle that the civilian population must be spared as much as possible from the effects of hostilities.

During occupation, the Fourth Geneva Convention prohibits individual or mass forcible transfers, both within the occupied territory and beyond its borders, either into the territory of the occupying power or as is more the case in practice, in to third states.[14] The 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in time of War: article 44 of this Convention, whose aim is the protection of civilian victims, deals with refugees and displaced persons. Article 73 of the 1977 Additional Protocol stipulates that refugees and stateless persons shall be protected persons under parts I and III of the Fourth Geneva Convention.

In addition to this general protection, international humanitarian law affords refugees further specific protection. In international armed conflicts refugees are covered by the rules applicable to aliens in the territory of a party to a conflict generally as well as by the safeguards relating specifically to refugees.[15]

Refugees benefit from the protections afforded by the Fourth Geneva Convention to aliens in the territory of a party to a conflict, including:

- the entitlement to leave the territory in which they find themselves unless their departure would be contarary to the national interests of the state of asylum,
- the continued entitlement to basic protections and rights to which aliens had been entitled before the outbreak of hostilities.

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[13] Ibid

[14] Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. Available at: https://www.icrc.org/ihl/INTRO/380

[15] Supra note 11.

- guarantees with regards to mean of existence, if the measures of control applied to the aliens by the party to the conflict means that they are unable to support themselves.

While recognizing that the party to the conflict in whose control the aliens find themselves may, if its security makes this absolutely necessary, intern the aliens or place them in assigned residence, the Convention provides that these are the strictest measures of control to which aliens may be subjected. Finally, the Fourth Convention also lays down limitations on the power of a belligerent to transfer aliens.[16] Of particular relevance is the rule providing that a protected person may in no circumstances be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs; a very early expression of the principle of non-refoulement.

In addition to the aforementioned rules for the benefit of all aliens in the territory of a party to a conflict, the Fourth Geneva Convention contains two further provisions expressly for the benefit of refugees. The first provides that refugees should not be treated as enemy aliens – and thus susceptible to the measures of control - solely on the basis of their nationality. This recognizes the fact refugees no longer have a link of allegiance with that state and are thus not automatically a potential threat to their host state.

The second specific provision deals with the precarious position in which refugees may find themselves if the state which they have fled occupies their state of asylum. In such circumstances, the refugees may only be arrested, prosecuted, convicted or deported from the occupied territory by the occupying power for offences committed after the outbreak of hostilities, or for offences unrelated to the conflict committed before the outbreak of hostilities which, according to the law of the now occupied state of asylum, would have justified extradition in time of peace. The objective of this provision is to ensure that refugees are not punished for acts - such as political offences - which may have been the cause of their departure from their state of nationality, or for the mere fact of having sought asylum.

[16] Supra note 13.

And again, The Geneva Convention I-IV is only applicable in international armed conflicts, except common Article 3 which also applies in non-international armed conflicts. In order to determine which treaty law applies to a particular conflict, a prior characterization of the conflict as international or non-international is required and this is often difficult or subject to dispute. The study shows, however, that many rules apply equally in international and non-international armed conflicts. For example, the prohibition of attacks on civilians, journalists or humanitarian relief personnel and the prohibition of forced displacement of populations apply in any armed conflict. However, in a non-international armed conflict, each party is bound to apply, as a minimum, the fundamental humanitarian provisions of international law contained in Article 3 common to all four Geneva Conventions. Those provisions are developed in and supplemented by Geneva Protocol II of 1977. Both common Article 3 and Geneva Protocol II apply with equal force to all parties to an armed conflict, government and rebels alike.

- In addition, government troops and rebel forces must apply a number of other specific treaty rules relating to internal conflicts, namely:
- Article 19 of the 1954 Cultural Property Convention and its Second Protocol of 1999 (the latter protocol has not yet entered into force at the time of writing);
- Protocol II to the Conventional Weapons Convention, on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996;
- the Ottawa landmines treaty of 1997.

The rules of customary international law certainly apply as well, in particular the basic principles of distinction,[17] proportionality,[18]access to humanitarian relief,[19] treatment of civilians,[20] displacements and displaced persons[21] and good faith and humane treatment.

17 The Study on customary international humanitarian law conducted by the International Committee of the Red Cross (ICRC) and originally published by Cambridge University Press, Chapter 1: principle of distinction, Rule 1.
[18] Ibid, Rule 14.
[19] Ibid, Rule 55
[20] Ibid, Rule 87
[21] Ibid, Rule 129

2.3 Refugee Rights Violations and State Responsibility

2.3.1 International Human Rights Law as a Tool for State Responsibility

The movement to internationalize the protection of human rights has led to the adoption of specific legal conventions pertaining to human rights and which also layout the basis for state responsibility. Instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the Covenant on Economic, Social and Cultural Rights (ICESCR), elaborated after World War II, specifically bring about restraints for state actions as well as a state responsibility to enforce human rights standards.[22] Such frameworks consistently impose obligations on "state parties," "contracting parties," or "high contracting parties."

One of the clearest provisions in this regard is Article 2 of the ICCPR, which deals with the implementation of the rights agreed upon by states parties to the Covenant. It stipulates that:

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.[23]

Furthermore:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.[24]

In relation to this Article, the UN Human Rights Committee has expressed the view that while Article 2 of the Covenant generally leaves it to the states parties concerned to choose their method of implementation in their territories within the framework set out in that Article, the obligation under the Covenant is not confined to the respect of human rights, but that states parties have also undertaken to "ensure the enjoyment of these rights to all individuals under

[22] As recognized by the ICTY in the Tadic case, it is clear that international law is gradually emerging from a state-centric stance towards a moral, human rights approach. See Prosecutor v. Tadic [Tadic case], Case no. IT-94-l-I, ICTY, Decision on the Defense Motion for Interlocutory Appeal on jurisdiction, para. 97 (2 Oct. 1995). See also 1. Hammer, A FOUCAULDIAN APPROACH TO INTERNATIONAL LAW: DESCRIPTIVE THOUGHTS FOR NORMATIVE ISSUES (2007), at 115.

[23] ICCPR, Article 2(2).

[24] Ibid

their jurisdiction."[25] This duty to ensure has both negative and positive elements, it "is not to be understood as a negative right directed solely at the state, but rather that calls for positive measures to ensure it."[26] It is generally interpreted that the state fulfills its obligation to "respect" by not actively infringing the individual's rights, while the term "ensuring" indicates an affirmative obligation on the state to assure such rights.[27] Extensive case law on state obligations to take positive action has in particular been developed within the auspices of the European Court of Human Rights (ECtHR).[28] Importantly, the idea of positive and negative obligations is linked to the duty of states to exercise due diligence to prevent, protect, fulfill and promote human rights.[29]

Although due diligence obligations, unlike the rules of state responsibility, generally stem from treaty obligations, state obligations under human rights law and the laws of state responsibility seem to increasingly converge.[30] It is arguable that the standards of due diligence and state responsibility could work in tandem, by informing each other and forming parts of a single whole. They are complementary and mutually reinforcing. As such, the state's obligation to protect the human rights of all individuals within its jurisdiction and under its authority is very broad.

Many human rights conventions include special treaty mechanisms that have created procedures for monitoring and enforcing compliance with the obligations under the convention. Such

[25] UNHRC, General Comment 3 on ICCPR, Article 2 (1981), paras. 1-2. See Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. no. HRI/GEN/lIRev.1 (1994), at 4.
[26] M. Nowak, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY (ZOOS), at 105
[27] See UNHRC, General Comment 31, UN Doc. CCPR/C/21/Rev.l/Add.13 (2004).
[28] See in particular Marckx v. Belgium, 31 ECtHR (ser. A) (1979), Judgment (13 June) (Application N. 6833/74), para. 31; Young, James & Webster v. United Kingdom, 44 ECtHR (ser. A) (1981) (Application N. 7601176; 7806/77), Judgment, para. 49. See also the L.CB. v. United Kingdom judgment of the ECtHR, 9 June 1998, para. 36; Osman v. United Kingdom, 28 Oct 1998, para. ll5; A. v. United Kingdom, 23 Sept. 1998; ECtHR (Grand Chamber) Makaratzis v. Greece, Reports 2004-XI, paras. 56ff.
[29] Courts vary in their usage of the two concepts; the ECtHR, for example, exclusively refers to positive and negative obligations, whereas the Inter-American Court promulgates the term due diligence. See B. Hofstetter, European Court of Human Rights: Positive Obligations in E. and others v. United Kingdom, 2 I]CL 3 (2004), 525-560 at 531. See also E. Brems, HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY (2001), at 446.
[30] Certain scholars have nevertheless argued that they do not correctly reflect the contemporary international legal arena. For a critique of the application of the ILC Articles to matters regarding human rights violations, see C. Chinkin, A Critique of the Public/Private Dimension, 10 EJIL 2 (1999), 387-395 at 395; A. Clapham, HUMAN RIGHTS IN THE PRIVATE SPHERE (1993), at 188; A. Clapham, The 'Drittwirkunq' of the Convention, in R.St.J. Macdonald et al. (eds.), THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS (1993), at 170.

procedures include individual complaint procedures, periodic reporting, and political and judicial inter-state proceedings. Simma and Pulkowski have, for example, argued that, since, individual claims procedures and reporting procedures are not concerned with the same substantive matter as the ARSIWA, such mechanisms generally do not constitute *leges speciales* to the ARSIWA.[31] The function of reporting mechanisms is to provide a comprehensive monitoring and human rights critique of a particular member state, while the ARSIWA are concerned with the legal consequences of concrete breaches. Such procedures would complement the right to invoke state responsibility rather than replace it.

It should finally be noted that, with few exceptions, human rights guarantees are not absolute but are rather subject to specific limitations. The extent of these limitations cannot be determined in general terms, but has to be ascertained for each individual right. Article 4(1) of the ICCPR, for example, stipulates:

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.[32]

Nevertheless, no derogations are permitted from certain absolute human rights guarantees. Examples of absolute obligations relevant to this study include the prohibition of torture and inhuman treatment or punishment and the prohibition of slavery.[33]

Moreover, there are rights which in principle are non-derogable but where special cases entail that an interference with the right concerned does not constitute a violation.[34] Within human rights treaties, then, the main criterion used to assess whether a defense of necessity can be successfully invoked is proportionality. This principle holds that the extent of the restriction of

[31] B. Simma & D. Pulkowski, Leges Speciales and Self-Contained Regimes, in J. Crawford et al. (eds.), THE LAw OF INTERNATIONAL RESPONSIBILITY (2010). at 139-140.
[32]See also ECHR, Article 15; ACHR, Article 27.
[33] See for instance Prosecutor v. Furundzija, Case no. IT-95-17/1-T1O, ICTY (TC), Judgment (10 Dec. 1998).
[34] See for instance ICCPR, Article 8(3)(a) which prohibits forced and compulsory labor but also includes exceptions to this general prohibition.

the human right concerned should be proportionate to the legitimate aim pursued.[35] As such, the restriction will only be considered necessary when the proportionality requirement is satisfied.

2.3.2 International Refugee Law as a Tool for State Responsibility

There are a number of provisions in the 1951 Refugee Convention that pose duties upon states parties. Most importantly, states have a duty to provide protection to refugees. This includes states obligation to respect the principle of non-refoulement, embedded in Article 33 which stipulates that no refugee shall be returned to any country "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Importantly, neither the 1951 Refugee Convention nor regional refugee instruments such as the 1969 OAU Refugee Convention generally allow states to derogate from their obligations.[36] Although, unlike the UN Torture Convention that contains an absolute prohibition of refoulement, the 1951 Refugee Convention contains a provision in which states may lawfully restrict refugee rights under one or two narrow circumstances. Firstly, a small number of Convention rights may be withdrawn for reasons of security or criminality. Secondly, the rights of persons whose refugee status has yet to be confirmed may be temporarily suspended on national security grounds during a war of other grave emergency.

Although the ILC has labeled international refugee law as "exotic and highly specialized,"[37] this field of law lays only a limited basis for state responsibility. Within the 1951 Refugee Convention, one could envisage two different ways of holding states responsible for violations of the Convention; either through Article 35 concerning UNHCR'S supervisory function or through the Convention's compromissory clause as laid down in Article 38.

Article 35 of the Refugee Convention, titled "Co-operation of the National Authorities with the United Nations, obliges states parties in Article 35(1) to "undertake to co-operate with [UNHCR] in the exercise of its functions, and ... in particular facilitate its duty of supervising the

[35] C. Ryngaert, State Responsibility, Necessity and Human Rights, 41 NYIL (2010), 79-98 at 88.
[36] This possibility is expressly stated in the relevant articles of the Convention; see for instance Articles 28, 32-33. Secondly, the rights of persons whose refugee status has not yet been confirmed may be provisionally suspended on national security grounds during war or other grave emergency. See further J. Hathaway, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAw (2005), at 260ff.
[37] ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of International Law Commission, UN Doc. A/CN.4/L.682 (13 Apr. 2006), para. 8.

application of the provisions of [the] Convention." Article 35(2) goes on to state that states parties must "undertake to provide [UNHCR] ... with information and statistical data concerning: (a) the conditions of refugees, (b) the implementation of this Convention, and (c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.[38] As we can see, the primary purpose of the provisions appear to be to link the duty of states parties to apply the Convention and the 1967 Protocol with UNHCR'S task of supervising their application; a treaty obligation is imposed on states parties to on the one hand respect UNHCR'S supervisory power and not hinder the organization in carrying out this task, and, on the other hand, to actively cooperate with UNHCR in this regard in order to achieve an optimal implementation of all provisions of the Convention and its Protocol. Can such supervision by UNHCR function as a tool for state responsibility?

The true meaning of UNHCR'S supervisory duties has never been truly explored, and the drafting history shows that the drafters did not have a clear understanding of what supervision on the part of UNHCR would signify and entail. As one commentator explained, "the drafting process raised questions rather than [answer] them."[39] However, in the literature, "supervision" has generally been understood as the equivalent of monitoring rule compliance. It appears to presuppose a clear understanding of the meaning of the various provisions of the 1951 Convention and the 1967 Protocol, but, more importantly, supervision also appears to presuppose knowledge about actual application on the part of states parties.[40] There is nevertheless no periodic, regular reporting requirement for states as such; there is only an obligation to "undertake to provide" with information "in the appropriate form."[41] The supervisory powers of UNHCR are also not accompanied by the power to enforce compliance in states parties in case of contraventions or violations of the Convention and Protocol. UNHCR's power is limited to making formal and informal representations to governments. And even then, there has been increased criticism of UNHCR by outside observers, who point out that UNHCR cannot exercise the requisite of independence, and cannot take a strong stance towards states

[38] UNHCR'S supervisory responsibility is also mentioned in Article 1 and 8(a) and (d) of the UNHCR Statute, as well as Article II(l) of the 1967 Protocol.
[39] M. Zieck, Article 35 1951 Convention/Article II 1967 Protocol, in A. Zimmermann (ed.), THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY (2011), 1459-15ll at 1494, para. 64.
[40] Ibid at 1495, para. 65.
[41] Article 35(2) of the 1951 Refugee Convention.

which violate the rights of refugees. UNHCR has been fundamentally transformed from an agency whose task was to be a guardian of refugee rights as implemented by states, to an agency which itself is involved in rights implementation - UNHCR is often the means by which refugee rights are delivered on the ground. Article 35 is as such limited to at best being a means of "soft enforcement"[42] rather being a robust tool for state responsibility.

Article 38 of the 1951 Refugee Convention nevertheless provides a different opportunity for holding states responsible for refugee rights violations. It is a so-called "compromissory clause" attributing compulsory jurisdiction to the international Court of Justice under Article 36 of the ICJ Statute with regard to disputes arising under and with respect to the Convention. The subject matter of the dispute brought before the Court must be related to the "interpretation or application" of the Convention, and similar dispute settlement provisions can be found in numerous treaties. Under the decentralized implementation structure envisaged by the 1951 Refugee Convention, it is governments themselves which ultimately remain responsible to ensure that refugees are treated as the Convention requires. Any state party may legitimately take up concerns regarding non-compliance directly with any other state party, and may in most cases require the non-compliant state to answer to the International Court of Justice.[43]

The main problem with the compromissory clause in the Convention is that states which are not directly affected by non-compliance have little incentive to become active. In general it is not states but individuals who are victims of a violation of the Refugee Convention, and this without being accorded individual judicial protection. Protection before the ICJ could be exercised by way diplomatic protection, but the individual concerned will generally not be a national of the state of residence and his home state will not be interested in protection. Furthermore, inter-state complaints come at a high political cost; while there have been some formal protests by states parties about the conduct of other states parties, no application has ever been made to the international Court of Justice as contemplated by Article 38. Thus, in practice, Article 35 and 38 are clearly limited and offer little opportunity for holding states responsible for violations of international refugee law.

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[42] V. Turk, UNHCR'S Supervisory Responsibility, 14 RQDI (2001),135-159 at 135,149.

[43] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.) [Genocide case], 1993 IC] 3, at para. 29, quoting Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, adv. opinion, 1950 ICJ 74, and referring to East Timor (Port. v. Austral.), 1995 ICJ 100, Judgment.

2.3.3 International Humanitarian Law as a Tool for State Responsibility

The ILC has frequently referred to international humanitarian law as an example for or as an exception to rules contained in the ARSIWA, and international tribunals have applied the rules on state responsibility in order to attribute or not to attribute certain violations of international humanitarian law to a given state.[44] International humanitarian law came into being as law regulating belligerent inter-state relations, and thus as a part of the primary - traditional- layer of law. Today, however, it is almost inconceivable to apply this field of law unless it is understood within the second layer, i.e., as a law protecting victims of armed conflict against states and others who wage war. International humanitarian law is thus interesting as it must be comprehended and applied with due regard taken to both layers of law.

Several IHL frameworks impose obligations on states. Under Article 1 common to the four Geneva Conventions and Protocol I, all states undertake to "ensure respect" for their provisions "in all circumstances." This Article is today generally understood as referring to violations by other states.[45] IHLs dual nature is also evident in this Article, which in some respects, as Sassoli notes applies the general rules on state responsibility, while in other respects establishes a special secondary rule.[46] As such it appears to be both a primary and secondary rule at the same time.

International humanitarian law doesn't generally permit any derogation;[47] it is, after all, tailored for armed conflicts, which by their nature are emergency situations. Considerations of military necessity are already taken into account in the context of the "formulation and interpretation of the primary obligations."[48]

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[44] Genocide case, supra note 22, para. 52; Prosecutor v. Tadic [Tadic case], Case no. IT-94-l-I, ICTY, Decision on the Defense Motion for Interlocutory Appeal on jurisdiction, para. 116-144 (2 Oct. 1995).
[45] Cf.J. Pictet et al., THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY/Iv, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (1958), at 18; M. Bothe, K.J. Partsch & W.A Solf, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE Two 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 (1982), at 43; 1. Condorelli & 1. Boisson de Chazournes, Common Article 1 of the Geneva Conventions Revisited.: Protecting Collective Interests, IRRC 837 (2000), 67-87.
[46] See M. Sassoli, State Responsibility for Violations of International Humanitarian Law, 84 IRRC 846 (2002), 401-434 at 422.
[47] For exceptions, see, for example, Article 33(2) of First Geneva Convention; Articles 49(2) and (5), 53, 55(3) and 108(2) of the Fourth Geneva Convention, and Article 54(5) of Additional Protocol I.
[48] ILC, Report of the International Law Commission on the Work of its Fifty-Third Session (23April-1 June and 2 July-to August 2001), UN Doc. no. A/56/1O, at 206, para. 20 in Article 25

International humanitarian law and the ARSIWA both deal with the duty of states to make reparations; Article 31 ARSIWA provides that "the responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act," while the duty to make reparation for violations of IHL in international armed conflicts is explicitly referred to in Article 38 of the Second Protocol to the Hague Convention for the Protection of Cultural Property, as well as implied in the rule of the Geneva Conventions, according to which states cannot absolve themselves or another contracting party of any liability incurred in respect of grave breaches.[49]

[49] See Article 51 of First Geneva Convention; Article 52 of Second Geneva Convention**;** Article 131 of Third Geneva Convention; Article 148 of Fourth Geneva Convention.

CHAPTER THREE

The Nature of Refugee Camps

3.1 Overview

According to the political theorist Hannah Arendt, a 'refugee' is a 'stateless' or 'non-citizen' person who threatens the nation-state system.[50] Consequently, countries have acknowledged the need for a solution to the refugee problem, whose status is considered temporary, with two possible options: return to the homeland or country of origin, or naturalization in the host country.[51] Arendt views the refugee camp as a 'final solution' involving the incarceration of refugees after denying their citizenship. Only then do they become *homo sacer* in the sense implied by ancient Roman law: destined to die, with their life defined as 'bare'.[52]

"once I accompanied one of our Ministers to the Eastern region, and We all drove out of town to look at a new wave of refugees arriving from Eritrea. Before reaching the camp, the Minister – who was not familiar with the region - saw a cluster of shelters made of mats and under their shade were a number of families with children who were very thin and almost in rags. The Minister turned to the Governor of the region and asked him whether these were refugees, and the Governor promptly replied. 'No, your Excellency, these are the hosts".[53]

A while back I read the above statement of the former Sudanese Ambassador to Britain, from the transcript of the proceedings of the international symposium 'Assistance to Refugees: Alternative Viewpoints', Oxford, March 1984. In my understanding though most people put forward similar stories to argue against the rights of refugees or in an attempt to draw a false dichotomy between 'hosts' and 'refugees'. Well in a consequence, it paves a way for the inhuman concentration of refugees in camps, as it seems easy to understand and easy to justify.

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[50] Arendt, Hannah. 1966. The Origins of Totalitarianism. New York: Harcourt Brace & Company.
[51] Supra note 1.
[52] Supra note 1, at 280 – 283.
[53] Hidden Losers? The Impact of Rural Refugees and Refugee Programs on Poorer HostsAuthor(s): Robert ChambersSource: International Migration Review, Vol. 20, No. 2, Special Issue: Refugees: Issues and Directions (Summer, 1986), pp. 245-263

3.2 Definition of refugee Camps

Practically speaking refugee camp refers to designated area/places where refugees live in their asylum country. And I couldn't find a definition of the term 'refugee camp' in international law. However, in most cases it seems there is an agreement between scholars on the main characteristics of the refugee camps: the civilian character of its population, issues of freedom of movement and the way these camps governed.

One particular thing about the refugee camps is that the space requires being free from any kind of military activities. According to international law and UNHCR guidelines, camps should not be located close to the border. Article II(6) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa states that, "For reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin."[54] This has generally been understood to mean a minimum of fifty kilometers from the border. This principle is also reflected in several UNHCR Executive Committee Conclusions, including the 1987 Conclusion on Military or Armed Attacks on Refugee Camps and Settlements.[55] It should clearly be civilian and humanitarian in its nature. And, as we are going to see in the next part of our discussion, this character of refugee camp is firmly grounded on international law.

Let's break it down the definition and concept of refugee camps first, as it is important part of my thesis. First of all there is no definition in international law of the term refugee camps;[56] for everyone's surprise the 1951 Refugee Convention and The 1969 OAU Convention makes no reference of any kind to refugee "camps." However, if we look at the Kampala Convention on the Internally Displaced Persons we might be able to get a very short definition of Camps: it refers them as "places where internally displaced persons are sheltered."[57]

The 1951 refugee convention makes no reference of any kind to 'refugee camps.' The 1969 OAU refugee convention also offers nothing regarding the term 'refugee camp'. If we have to mention it, the only major international treaty which merely refers to "places where internally

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[54] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, ratified 18 October 1972.
[55] Conclusion on Military or Armed Attacks on Refugee Camps and Settlements, No. 48 (1987), para. (c).
[56] Janmyr,Maja, ' Protecting Civilians in Refugee Camps: Unable and Unwilling States, UNHCR and International Responsibility' International refugee Law Series.
[57] See the Kampala Convention, Article 5(i).

displaced persons are sheltered" is the Kampala Convention.[58] A comprehensive definition of the concept is also difficult to identify within the broader social sciences, and the operational definitions of international and non-governmental organizations provide little meaningful guidance for our purposes in this thesis. Within the realm of the so-called camp management project under the auspices of six international organizations, including UNHCR has been developed a single widely accepted operational definition. The term 'camp' applies to:

"...a variety of camps or camp-like settings – temporary settlements including planned or self-settled camps, collective centers and transit and return centers established for hosting displaced persons. It applies to ongoing and new situations where due to conflict or natural disasters, displaced persons are compelled to find shelter in temporary places."[59]

The lack of a clear definition is particularly disconcerting because the refugee camp "label" may confer an array of legal, political and bureaucratic implications for refugee protection. It also complicates any attempt of clarifying the underlying objectives of hosting individuals in refugee camps; while the very aim of the refugee camp at the outset appears to be the strengthening of refugee protection, critics have argued that the objective of such encampment rather seems to be to protect states from refugees.[60]

Understanding the specific characteristics of a camp is also necessary to understand where human rights violations occur, and thus their legality. It is also important to understand why and how they are used—in short or long-term situations (where the same rights may be denied, but more thoroughly over time and with less justification)—in order to seek alternative solutions. While it may be easy to think of a camp in terms of a rigid definition, the idea of a camp is far more fluid, and can be understood in different ways according to space, time and culture.

Some of the key Camp characteristics have been discussed and listed by different experts. Although many practitioners and scholars are also discuss "camps" without defining their

[58] See the Kampala Convention, Article 5(i), which states that members of armed groups shall be prohibited from, among other things, "[v]iolating the civilian and humanitarian character of the places where internally displaced persons are sheltered and shall not infiltrate such places."
[59] See NRC/Camp Management Project, Camp Managment Toolkit (May 2008), at 14.
[60] G. Verdirame, THE UN AND HUMAN RIGHTS, WHO GUARDS THE GUARDIANS? (2011), at 238.

characteristics in light of other types of settlements.[61] According to Jacobson,[62] here are outlines the various types of settlements that occur:

• Self-settlements occur when refugees settle amongst the local community without assistance from any government or international body. Refugees choose where they live, are able to work (though not necessarily legally), and usually do not receive formal protection from UNHCR or another body.

• Assisted settlements are intended to house refugees temporarily, and can be seen in camps and local settlements in rural areas, and mass shelters or public buildings in urban areas.

• Camps are "purpose-built sites, usually close to the border, and thus usually in rural areas". They are meant to be temporary, and thus refugees are not expected to be self-sufficient. They are geared toward repatriation, and most are closed, not allowing refugees to come and go freely (though it can vary).

• Local settlements are like camps in that they are planned and segregated villages created specifically for refugees, but differ in that they are intended to promote self-sufficiency.

Jacobsen emphasizes that refugee settlements are "seldom fixed" but are rather formed by "a fluid process, in which refugees settle in different situations".[63] For the purposes of this paper, camps are seen as different from settlements in that they severely restrict rights and freedoms, in particular the freedom of movement and the right to work, which at least the reality in Ethiopia's case.

3.3 The Normativity of Long Term Encampments

During the Cold War UNHCR became increasingly active with refugees outside of Europe.[64] In many cases, refugees were political pawns for state ideologies, as states resettled or locally

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[61] SCHMIDT, A. (2003) 'FMO Research Guide: Camps Versus Settlements', Oxford, Forced Migration Online, Available from: (accessed 13 May 2009).
[62] JACOBSEN, K. (2001) 'The Forgotten Solution: Local Integration for Refugees in Developing Countries', Working Paper No. 45. New Issues in Refugee Research, Geneva, UNHCR
[63] Supra note 10, at 8.
[64] LOESCHER, G. (2001) The UNHCR and World Politics: A Perilous Path, Oxford, Oxford UP.

integrated refugees who held their same political views.[65] However, with the end of the Cold War, sentiments toward refugees shifted, and the international community became more interested in the containment of refugees in their region of origin.[66] Resettlement and local integration became less favorable, and refugees were left with temporary asylum in camps with no prospect for a long-term solution (Loescher, Betts and Milner 2008).[67] In many cases, this made encampment more common, particularly in the 1980s in places like Ethiopia, South Africa, Pakistan and other parts of South Asia.[68]

Even though refugee camps are commonly designated as places of temporary shelter, their *de facto* duration is indeterminate. As such, they exist between the temporary and the permanent, or, as Agier has articulated, "[a] camp is an emergency intervention that has been on 'stand-by' for months or years ...."[69] Being characterized as temporary, while in practice often semi-permanent; the camp thus constitutes a paradoxical environment, also described by Bauman as "frozen transience."[70] Today the average lifespan of a refugee camp is 7 years, and UNHCR has coined the term "protracted camp" in response to the increasing reality of protracted refugee situations.[71] UNHCR defines a protracted refugee situation as a situation where "a refugee population of 25,000 persons or more has been living in exile for five years or longer in a developing country:' These protracted situations often have devastating human rights consequences; academics and practitioners alike have begun to emphasize the susceptibility of refugees in protracted refugee situations to exploitation, negative survival strategies, and to political and military movements whose activities conflict with the civilian and humanitarian nature of

[65] ROGGE, J. (1981) 'Africa's Resettlement Strategies', International Migration Review 15(1/2): 195-212.
[66] Supra note 12.
[67]LOESCHER, G., BETTS, A. and MILNER, J. (2008) The United Nations High Commissioner for Refugees (UNHCR): The Politics and Practice of Refugee Protection in the Twenty-first Century, Routledge: New York.
[68] LOESCHER, G. (2009) Class Lecture: UNHCR and World Politics course, 4 February, Oxford University.
[69] M. Agier, MANAGING THE UNDESIRABLES: REFUGEE CAMPS AND HUMANITARIAN GOVERNMENT (2011), at 72.
[70] Z. Bauman. SOCIETY UNDER SIEGE (2002). at 114-115. See also L. Wacquant. *Symbolefatal :quand ghetto et prison se ressemblent et s'assemblent,* ACTES DE LA RECHERCHE EN SCIENCES SOCIALS 139 (2002). 37-55.
[71] Loescher et al. (eds.) PROTRACTED REFUGEE SITUATIONS: POLITICAL , HUMAN RIGHTS AND SECURITY IMPLICATIONS (2008), 248-276; J. Crisp. No Solutions in Sight: The Problem of Protracted Refugee Situations in Africa, 22 RSQ 4 (2003).114-150; A. Jamal, Camps and Freedoms: Long term refugee situations in Africa, FMR 16 (2003), 4-7; UNHCR. Protracted Refugee Situations. UN Doc. no. EC/54/SC/CRP.14 (2004); UNHCR. IDP Camp Coordination and Camp Management. A Framework for UNHCR Offices (2006). at 7ff.

refugee camps.[72] For these reasons, many have started to question the legality of those long term encampments, advocating for regulated time limits.[73]

Containment of refugees in refugee camps was favored for several reasons. First and for most, developed/western countries "put forward a new state-centric approach, grounded in the refugees-as-burdens view".[74] Refugees were seen as "passive aid recipients" at best, and security threats at worst (this has been especially the rhetoric of the right wing politicians in recent years). In response, donor countries would rather see this "burden" or "drain" in camps overseas than at their shores. On the other hand, Host states like Ethiopia and Kenya, for example, chose encampment because "…when refugee settlements are more fully serviced by the international community, refugees are also less likely to be perceived as a burden by local hosts".[75] This in another words meant that in some cases, aid was conditional upon encampment. Merrill Smith writes, "When a tight-fisted international community says to a very poor country it will provide help for refugees in camps…this evidently encourages that poor country to root out refugees who are integrated and plunk them into camps".[76] The view that refugees are a burden is also linked to increases in mass influx refugee situations, which encourage encampment as a way to control seemingly overwhelming numbers.[77]

3.4 Problems and Rights Violations in Refugee Camps

Refugee camps as a space on their own are not necessarily illegal, and I am not arguing that camps should never exist according to international law, or that there are not conditions where some limitations on refugee rights are acceptable. However, the human rights violations that occur because of these Protracted refugee encampments, mainly concerning the right to work

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[72] A. Slaughter & J. Crisp. *A Surrogate State? The Role of UNHCR in Protracted Refugee Situations.* UNHCR NEW ISSUES IN REFUGEE RESEARCH. no. 168 (2009). at 9; UNHCR. THE STATE OF THE WORLD'S REFUGEES 2006: HUMAN DISPLACEMENT IN THE NEW MILLENNIUM (2006). at 105

[73] S. Deardorff. How long is too long? Questioning The Legality of Long Term Encampment through a Human Rights Lens, RSC WORKING PAPER SERIES, no. 54 (2009).

[74] SMITH, M. (2004) 'Warehousing Refugees: A Denial of Rights, a Waste of Humanity', World Refugee Survey 2004, US Committee for Refugees and Immigrants, Washington, DC, at 44.

[75] KAISER, T. (2008) 'Sudanese Refugees in Uganda and Kenya', in Loescher, G., Milner, J., Newman, E. and Troeller, G. (eds.) Protracted Refugee Situations: Political, Human Rights and Security Implications, New York: United Nations UP, at 256.

[76] See Smith (2004), Supra note 23, at 48.

[77] DURIEUX, J. and MCADAM, J. (2004) 'Non-refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies', International Journal of Refugee Law 16(1): 4-24.

and freedom of movement, do provide grounds for questioning the legality of 'Refugee Camps' itself. One of the well-known scholar on refugee issues, Jeff Crisp, writes that a common characteristic of protracted exile "…is the inability of exiled populations to avail themselves of basic human rights—including those rights to which refugees are entitled under the provisions of the 1951 Refugee Convention and other international instruments".[78]

Freedom of movement and the right to work are severely restricted in long-term camp situations, and this leads to other rights restrictions. This also proves that they are not consistent with the spirit of the 1951 Refugee Convention or international human rights norms. Another Refugee law scholar writes:

The tragedy is that the camp that once ensured the life of a refugee becomes, over time, the prime vehicle for denying that same refugee the rights to liberty, security of person and other rights enshrined both in the Universal Declaration of Human Rights and in the refugee instruments. The price of extending this short-term measure year after year is paid in terms of rights frustrated, capabilities deprived and expectations unmet.[79]

Similarly, Elizabeth Ferris writes, "Restrictions on employment and on the right to move beyond the confines of camps deprive long-staying refugees of the freedom to pursue normal lives and to become productive members of their new societies…Containing refugees in camps prevents their presence from contributing to regional development and state-building…It also increases the vulnerability of refugees to other forms of exploitation".[80]

Currently most refugee influxes, including the one in Ethiopia are dealt with in an ad hoc manner at first, only focusing on the most immediate right of non-refoulement, "with relief management occurring at the expense of individual rights and freedoms" as Schmidt eloquently described it 2003: 7).[81] In most cases, no legal excuse is given for curtailing the rights stipulated in the Convention (Schmidt 2003).[82]

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[78] CRISP, J. (2003) 'No Solutions in Sight: The Problem of Protracted Refugee Situations in Africa', Refugee Survey Quarterly 22 (4): at 124-125.

[79] JAMAL, A. (2000) 'Minimum Standards and Essential Needs in a Protracted Refugee Situation: A Review of the UNHCR Programme in Kakuma, Kenya', Evaluation and Policy Unit, Geneva, UNHCR, at 146.

[80] FERRIS, E. (2008) 'Protracted Refugee Situations, Human Rights and Civil Society', in Loescher, G., Milner, J., Newman, E. and Troeller, G., (eds.) Protracted Refugee Situations: Political, Human Rights and Security Implications, New York: United Nations UP, at 88.

[81] SCHMIDT, A. (2003) 'FMO Research Guide: Camps Versus Settlements' Oxford, Forced Migration Online, at 7. Available from: http://www.forcedmigration.org/research-resources/expert-guides/camps-versus-settlements/fmo021.pdf (accessed 07 January 2015).

[82] Ibid.

3.5 UNHCR Alternatives to Refugee Camps

"the best time to plant a tree is 20 years ago, and the second best time is today".

We have noticed for decades that the default response for any refugee crisis has been to set up refugee camps, which were believed to meet the social and political realities in which refugees are living. However, this assertion has been repeatedly proved wrong by a significant body of research.

The United Nations Refugee Agency (UNHCR) has been working on these issues for long. It came up with a new policy statement in 2009, on refugee protection and solutions in urban areas which recognized urban areas as "a legitimate place for refugees to enjoy their rights".[83] In 2014, this has taken a significant step by releasing an "Alternatives to Camps" policy which commits the agency to actively pursue alternatives to camps whenever possible. It also clarifies the official stand of UNHCR that camps should be a last resort rather than the default response to refugee influxes. [84]

This new policy is very deliberately focused on protection and solutions (we can easily grasp that idea by simply looking at the title of the document itself) and it tries to link the issue of urban refugees directly to the UNHCR mandate. The key element of the policy is to defend the freedom of movement of all refugees and defend mobility. It also identifies the most common human rights violations that urban refugees confronted in their day to day lives, such as detention, harassment, eviction and extortion. It focuses on providing refugees access to the livelihood and labor market. It has also an implication in integrating urban refugees into existing public and private services and limiting refugee specific services. And the beauty of this document is, it's a relatively brave move by UNHCR to commit in providing protection and solutions irrespective of national legislations, whether states like it or not. In general, UNHCR clearly states in this document the organizations commitment to adapt a more positive, contractive and more pro-active that it has been the past in this matter.

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[83] "Alternatives to refugee camps: Can policy become practice", by *Kristy Siegfried, published at IRIN website, http://www.irinnews.org/report/100691/alternatives-to-refugee-camps-can-policy-become-practice*

[84] UNHCR POLICY ON ALTERNATIVES TO CAMPS: http://www.unhcr.org/5422b8f09.html

Chapter Four

Protection of refugees Under Ethiopian Legal System

4.1 Overview

Under this chapter, we shall discuss the legal and institutional framework of Ethiopia regarding protection of refugees. Ethiopia has expressed its desire to be part of the effort of the international community to protect refugees by signing both the UN and OAU/AU refugee convention. Ethiopia has also further shown its concern to protect refugees through its constitution which recognizes certain rights of non-nationals and by adopting a proclamation that specifically deals with refugees. This chapter shall discuss the place of international and regional refuge instruments in Ethiopia, the relevant provisions of the FDRE constitution, the substantive and procedural guarantees the proclamation provides for refugees and consider those guarantees against the guarantees provided for by the UN and OAU/AU refugee conventions.

4.2 The Available Legal Framework for Refugee Protection

4.2.1 The Status of International Laws in Ethiopia

Ethiopia signed the 1951 Convention relating to the Status of Refugees on 10 Nov 1969 and its 1967 Protocol in Nov 1969.[85] It is a party to the convention with reservations to its article 8(that obliges states to exempt refugees from measures which may be taken against the person, property or interests of nationals of a foreign State), article 9 (that allows states, in time of war or other grave and exceptional circumstances, to take provisional measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security), article 17(2)(that prohibits states to impose restrictive measures that may be imposed on aliens or the employment of aliens for the protection of the national labour market, to refugees) and article 22(that obliges states to accord to refugees the same treatment as is accorded to nationals with respect to elementary

[85] See UNHCR, United Nations High Commissioner for Refugees: State parties to the 1951 Convention relating to the Status of refugees and the 1967 Protocol: http://www.unhcr.org/3b73b0d63.pdf

education).[86] Regionally, Ethiopia is also a party to the 1969 Convention governing the Specific Aspects of Refugee Problems in Africa (African Refugee Convention).[87]

Besides these refugee-specific instruments, Ethiopia is also a party to most of international and regional human rights and humanitarian law instruments such as International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, International Convention on Torture, Inhuman and Degrading treatment, The Convention on the Rights of the Child, The Convention on the Elimination of Discrimination against Women, the 1949 Geneva Conventions and, the African Charter on Human and Peoples Rights, thereby reinforcing protection for refugees.

More importantly, the fact that Ethiopia has committed itself to these refugee instruments both at international and regional level demonstrates the desire of the country to assume the shared responsibility of protecting those who are in a danger of persecution. Apparently, being a party to these regional and international treaties imposes obligation on Ethiopia to respect and protect them. This again means that Ethiopia should undertake various measures at a national level which may include: domesticating these instruments so that they can be enforced in Ethiopia, adopting refugee legislations at a national level, establishing or designating the necessary institutions to handle refugee matters etc.

The current Ethiopian constitution under its article 9(4) expressly provides that 'all international agreements ratified by Ethiopia are an integral part of the law of the land'.[88] Once the executive branch of the government negotiates and signs international treaties, they are expected to be presented before the House of Peoples Representatives for ratification. In the normal course of

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[86] The 1951 Convention and the 1967 Protocol are deposited with the Secretary-General of the United Nations (Article 39 (1) of the 1951 Convention and Article V of the 1967 Protocol). For the authoritative source of the current status of both treaties, please refer to the United National Treaty Collection website under status of Multilateral Treaties Deposited with the Secretary-General (MTDSG): https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en#EndDec

[87] Organization of African Unity (OAU), Addis Ababa Document on Refugees and Forced Population Displacements in Africa, 10 September 1994, available at: http://www.refworld.org/docid/3ae68f43c.html [accessed 16 January 2016]

[88] Constitution of the Federal Democratic Republic of Ethiopia, 1994 proclamation No 1/1995

things, after some level of deliberations, these instruments should be adopted which make them part of the law of the land.

The same provision of the constitution also provides that ‘the constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this constitution shall be of no effect.’[89] From this one could suggest that international and regional refugee conventions are subordinate to the constitution and the latter prevails in case the two conflict each other.

On the other hand, Chapter three of the constitution gives a catalogue of human rights. Article 13 of this chapter of the constitution provides that ‘the fundamental rights and freedoms specified in this chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenant on Human Rights and International instruments adopted by Ethiopia’.[90]

It is clear, therefore, that the constitution demands the long list of human rights under chapter three to be interpreted in conformity with international human rights instruments adopted by Ethiopia. This means that international human rights instruments including refugee-specific human rights are to be taken as a guideline to establish the meaning and content of the rights given in chapter three of the constitution. From this, again, one could suggest that as far as chapter three rights of the constitution are concerned, the constitution is subordinate to the adopted international human rights instruments, particularly where the issue of interpretation comes up.

Substantiating this line of argument, Article 27 of the Vienna Convention on the Law of Treaties provides that “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.[91] It is; therefore, clear that a domestic law including a constitution cannot be a justification for failing to live up to the expectations of international agreements. As a corollary, for a state party to perform its international obligations under a treaty, its national

[89] Supra note 4, Article 9.

[90] Supra note 4, Article 13.

[91] See Article 27 of the United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: http://www.refworld.org/docid/3ae6b3a10.html [accessed 16 January 2016]

laws should be made and interpreted in such a way that they do not go against these international commitments. The expression of article 13 of the constitution that the human rights provisions of the constitution should be interpreted in compliance with international human rights instruments is a keen indication of the enormous interest of Ethiopia to respect these instruments and its internal laws should not serve as an impediment to that end.

In sum, it is more tenable to take a position that the human rights provided in the constitution that applies to refugees and the refugee proclamation should be interpreted in light of the refugee convention, the OAU refugee convention and the international and regional human rights instruments Ethiopia is a party to. Doing in the otherwise would expose Ethiopia to a possible violation of its commitments at a regional and international level.

4.2.2 Ethiopian Legal and Institutional framework on the Protection of Refugees

The Ethiopian people have long been known for its hospitality and its governments have shown no less of this over the years. According to the UNHCR country report (2015), Ethiopia hosted more than 700 thousand refugees and asylum seekers, including about 265,010 Somalis who fled the collapse of the Somali state in 1991 or more recent turmoil, about 131,660 Eritrean and about 350,000 Sudanese who fled the civil war in the south of Sudan.[92]

The discussion about the legal and institutional framework to protect refugees should start with the very fact mentioned above: Ethiopia is a party to the 1951 international refugee convention and its additional 1967 protocol; At a regional level, it is a party to the OAU refugee convention of 1969.

Furthermore, Ethiopia is also a party to a number of international and regional human rights instruments which are meant to protect every individual including refugee. It is shown in chapter three that all refuge instruments are nothing but a restatement of refugee-specific human rights and, refugee law is a segment of the complex network of human rights law and the two are meant to complement each other.

[92] United Nations High Commissioner for Refugees (UNHCR),2015. "Global Appeal 2015." Available at: http://www.unhcr.org/ga15/index.xml [accessed 12 January 2016]

We have also seen above that the 1995 Constitution made adopted international agreements an integral part of the law of the land and gave the executive and legislative branches specific authority to provide asylum. What is more, most of the rights provided under chapter three of the constitution are couched in a language which goes as 'every person', which may well include aliens including refugees. If this understanding is tenable, refugees could benefit from most of those human rights in the constitution. On the other hand, one could also note that some of the rights in the constitution seem to be limited to only Ethiopian nationals as these provisions employ the phrase 'every Ethiopian'. Such provisions of the constitution include: article 40(the right to ownership of property, article 41(regarding economic, social and cultural rights) and article 42(right to work).[93]

The constitution in its article 32 also expressly provides non- national including refugees the freedom of movement within Ethiopia and the freedom to choose residence in the following words: "any ... foreign national lawfully in Ethiopia has, within the national territory, the right to liberty of movement and freedom to choose his residence, as well as the freedom to leave the country at any time he wishes," but the same provision seems to have reserved the right of re-entry to nationals.[94]

As a significant step towards enhancement of refugee protection, as granted by the refugee Convention, Ethiopia has also adopted a proclamation (2004) that specifically deals with refugees.[95]

Being a national refugee-specific instrument, the proclamation regulates a fairly wide areas related to refugees in almost same language the refugee convention provides. Apart from this, unlike many contemporary national refugee instruments, the proclamation does not provide for concepts such as internal flight alternative, safe country of origin, safe third country, subsidiary and temporary protection.

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[93] See the Constitution of the Federal Democratic Republic of Ethiopia, 1994 proclamation No 1/1995
[94] Supra note 9, Article 32.
[95] See Proclamation No.409/ 2004- Refugee Proclamation Regulating Refugee Status and the Right to Asylum, available at: http://www.refworld.org/pdfid/44e04ed14.pdf [accessed 01 December 2015]

We may say the adoption of this proclamation highlights Ethiopian's commitment to implement its international and regional obligations. Its adoption also facilitates the grant of asylum and the protection of refugees. To this effect, the preamble part of the proclamation reads: 'it is desirous to enact national legislation for the effective implementation of the aforesaid international legal instruments, establish a legislative and management framework for the reception of refugees, ensure their protection, and promote durable solutions whenever condition permit'.[96]

The proclamation also provides for institutions such as the Administration for Refugee and Returnees Affairs (ARRA).

4.2.3 Ethiopia's Refugee Proclamation

The 2004 proclamation incorporated refugee definition from both the 1951 Convention and the 1969 African refugee convention verbatim. Article 4 of the proclamation adopted a combined definitions of refugees given by the above two instruments.[97]

It has been shown in the previous chapters that while the 1951 convention refuge definition has been at times considered to be too restrictive, the 1969 OAU definition on the contrary has been hailed to be inclusive. The fact that the Ethiopian Refugee proclamation combines the two definitions suggests an enormous interest on the part of Ethiopia to be more accommodative and more open to the plights of refugees.

The Ethiopian Proclamation does not provide for subsidiary or supplementary protections, a kind of scheme that has been developed to extend international protection to individuals who do not satisfy the refugee definition but who otherwise need protection. Given the broader definition of refugee adopted in the proclamation one may, however, argue that such persons could even be subsumed into the definition itself.

Under its Article 19, the proclamation talks about group refugees. The provision reads as follows:

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[96] Supra note 11, read the preamble.
[97] Supra note 11, Article two.

"…If the Head of the Authority considers that any class of persons met the criteria under Article 4(3) of this Proclamation, he may declare such class of persons to be refugees."[98]

The reading of this provision suggests that a group of persons, whom the authority believes that they meet the refugee definition, may be recognized as refugee without even having gone through individual refugee determination procedure. In effect, this provision seems to refer to what is commonly referred to as prima facie refugee.[99] A prima facie approach means the recognition by a State or UNHCR of refugee status on the basis of readily apparent, objective circumstances in the country of origin or, in the case of stateless asylum seekers, their country of former habitual residence. A prima facie approach acknowledges that those fleeing these circumstances are at risk of harm that brings them within the applicable refugee definition.[100] Although a prima facie approach may be applied within individual refugee status determination procedures (for instance in EU states), it is more often used in group situations, for example where individual status determination is impractical, impossible or unnecessary in large-scale situations. A prima facie approach may also be applied to other examples of group departure, for example, where the refugee character of a group of similarly situated persons is apparent.[101]

Regarding some of the refugee rights that are established in this proclamation, we have the protection against refoulment as an international preemptory norm. States are obliged both under refugee specific and more broadly under international human rights instruments not to expel an individual to the place where she or he risks persecution. We also have seen that though this obligation suffers certain exceptions under the 1951 convention, it has largely been conceived, under human rights instruments, as absolutely absolute.

Article 9 of the proclamation provides for the protection against refoulment in the following words:

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[98] Ibid, Article 19.
[99] Messai Yahia Ali: The protection of Prima Facie Refugees under International Law: A Case study of Kenya
[100] UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 11: Prima Facie Recognition of refugee status, 24 June 2015, HCR/GIP/15/11, available at: http://www.refworld.org/docid/555c335a4.html [accessed 10 February 2016]
[101] Ibid

1) No person shall be refused entry in to Ethiopia or expelled or returned from Ethiopia to any other country or be subject to any similar measure if as a result of such refusal, expulsion or turn or any other measure, such person is compelled to return to or remain in a country where:

a) the may be subject to persecution or torture on account of his race, religion, nationality', membership of a particular social group or political opinion: or

b) his life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination of events seriously disturbing public order in part or whole of the country.

As with the 1951 convention, the proclamation, in addition, provides for grounds of exception in the following words:

2) The benefit of this provision may not, however, be claimed by a refugee whom there are serious reasons for regarding as a danger to the national security, or who having been convicted by a final judgment of a particularly serious crime, constitute a danger to the community.

Clearly, this provision of the proclamation is nothing more than a direct copy of the relevant provisions of the 1951 convention and the 1969 OAU Convention.

It is also worth noting that unlike the 1951 convention, the Ethiopian proclamation provides for expulsion clause under its article 10 stating that a ‘refugee who is lawfully resident in Ethiopia shall not be expelled except on the ground of national security and public order’.[102] This clause authorizes the concerned authority to expel a refugee on the grounds of national security and public order. While it is understandable that a refugee is not protected under the convention against refoulement in certain exceptional situations, and same is adopted by the proclamation under the non-refoulement clause, providing for another clause on expulsion might be criticized as a move to make the exception go wider.

Furthermore, any restriction to the protection against refoulment should be limited to those exceptional convention reasons. The trend to expand the exceptions would suggest nothing less than going counter to the contemporary understanding of the international community.

[102] Supra note 11, Article 10.

It is interesting to note that under its sub article 4, the provision of the proclamation envisaged a kind of moratorium whereby the decision to expel could be delayed, upon request of the refugee, so that a refugee seek admission to a country other than the country to which he is to be expelled.[103] As shown before, what is prohibited is not only expelling a person to the country where he or she risks persecution but also to the country from where that person could subsequently be expelled to a place where he or she risks persecution. The sub- article is significant in giving a chance to the refugee to look for safe-heavens elsewhere, and extending that chance, in effect, will help Ethiopia lives to the obligations of non-refoulemeent as provided by a number of international and regional human rights instruments to which it is a party.

As we have seen it above, though an asylum seeker has satisfied the requirement to be recognized as a refugee, he or she may be excluded from such status. Exclusion comes after a refugee determination is undertaken.[104] Exclusion from refugee status is meant to limit protection only to those deserving cases and to avoid the possibility of individuals escaping prosecution for serious crimes they have committed.

Accordingly, as with the 1951 convention, the Ethiopian Proclamation, under article 5, provides for grounds for excluding asylum seekers from refugee status. The grounds of exclusion given in the proclamation are similar to the grounds given under the convention except that the proclamation provides for one more grounds of exclusion under its sub article 4. This sub article provides that a person shall not be considered a refugee if;

4) having more than one nationality, he has not availed himself of the protection of one of the countries of which he is a national and has no valid reason, for not having availed himself of its protection.

One could argue that this sub article is either unnecessary addition to the provision or perhaps misplaced.

[103] Supra note 11, Article 10(4).
[104] Supra note 11, Article 5.

What is provided under this sub article is a component of the definition of refugee under the 1951 convention as well as the proclamation. Having a dual nationality and a refusal to avail oneself of that protection ,without good reason, is and should be an element of a refugee determination process and hence should not be raised at exclusion stage. This is because a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national." [105]

Such part of the definition of a refugee is intended to deny from refugee status all persons with dual or multiple nationalities that can avail themselves of the protection of at least one of the countries of which they are nationals. Wherever available, national protection takes precedence over international protection.

The Ethiopian proclamation, as with the other international and regional refugee instruments, recognizes family unity under its article 12.[106] It is part of states humanitarian obligation to allow and facilitate the family members of the asylum seeker and refugee join the latter in a country where the asylum is sought.[107] The proclamation does not limit the right of family unity only to refugees. It rather equally recognizes the right of family unity of asylum seekers.[108] The family members of both asylum seekers and refugees have the right to enter Ethiopia with a view to reunite with the asylum seeker and refugee.[109] The family members of the asylum seeker enjoy same measure of rights the asylum seeker enjoys and if the asylum seeker is found not to deserve refugee status, they also loose protection unless otherwise, of course, they are given refugee status on their right.[110]

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[105] Guidance on the interpretation and application of other exclusion clauses can be found in UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, available at http://www.unhcr.org/3f7d48514.pdf [accessed 09 November 2015] and in its accompanying Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, available at: http://www.refworld.org/pdfid/49c3a3d12.pdf [accessed on 10 November 2015]

[106] See Article 12 of Refugee Proclamation No. 409/2004 that discusses about 'unity of the family'.

[107] Ibid

[108] Supra note 20, Article 12(1).

[109] Supra note 20, Article 12(3).

[110] Supra note 20, Article 12(4) & (5).

Family members of the refugee are entitled to the same measure of rights a refugee is entitled to under the proclamation. Interestingly enough, in order for them to enjoy those rights, they need not have to apply for refugee status and need not necessarily have a refugee status themselves, as per sub-article 5 of Article 12. The family of asylum seekers and refugees, however, has the right not an obligation to apply for refugee status. Though the proclamation does not provide the details of how Ethiopia would facilitate family reunification, the fact that the proclamation recognizes family unity both for asylum seekers and refugees alike and that they are entitled to same rights the refugee has without they having been required to have a refugee status is an extremely positive gesture of humanitarianism and is in line with its commitment under the convention.

We all agree that the procedure for the application and determination of refugee status should be fair. The asylum seeker should be given the opportunity and time to lodge his application before a designated authority and the right to a fair hearing. These obligations have been duly recognized by international and regional refugee instruments. Similarly, the Ethiopian refugee proclamation extends procedural protections to asylum seekers in its provisions 13-18.

The Proclamation, under its article 13, requires asylum seekers to apply for asylum both at the frontier and within Ethiopia in 15 days period of time. They can report either at the nearest police stations or the office of the authority. The police station receiving the application shall, as soon as possible forward the application to the Authority. The applicant shall fill relevant forms and vouch for the truth of the statement therein. Having received the application, the Authority shall provide the applicant with identity card attesting to his status as asylum seeker pending refugee status determination.

Interestingly enough, unlike the refugee convention which allows for a possibility of detaining asylum seekers who are inside the country illegally, the proclamation prohibits both detention and criminal prosecution against a person who has applied or is about to apply for refugee status on the account of his illegal entry and presence in the country. Seen even from the standard provided by the refugee convention point of view, the proclamation is a step ahead as it categorically prohibits detention and prosecution of any sort for unlawful entry or presence.

According to the 2009 world refugee survey, 'there were no reports that Ethiopia detained refugees or asylum seekers for illegal entry, presence, work, or movement, but the Government kept several Eritreans in detention on national security grounds, allowing the International Committee of the Red Cross (ICRC) to visit them.'[111]

Having received the application of the asylum seekers and issued an asylum seeker with an identity card, the Administration of refugees and Returnees Affairs (ARRA) determines the refugee status of the applicant.[112] In deciding asylum application, the ARRA shall ensure that every applicant is given reasonable time to present his case; ensure the presence of qualified interpreter during all the stages of the hearing; cause the person concerned to be notified of its decision and the reason thereof in writing; decide on every application or case referred to it within reasonable period of time; and invite the United Nations High Commissioner for Refugees to participate as an observer.

Apart from these procedural guarantees the proclamation does not provide for a right to legal aid, an essential component of fair hearing. But one would only hope that an asylum seeker shall be given a free legal aid at least in circumstances where this looks imperative to establish the truth.

Several states subject asylum seekers and refugees to different standards of treatment such as alien, preferred nation's nationals and as nationals. The contemporary understanding of the refugee convention, however, means that refugees should be entitled more or less to the same measure of rights nationals are entitled to.[113] In other words, discriminatory treatment between nationals and refugees is increasingly becoming unacceptable.

The Ethiopian refugee proclamation, under its article 21, provides that a refugee shall be permitted to remain within Ethiopia, issued with identity card and travel document to travel outside of Ethiopia. In practice, the Government and UNHCR jointly adjudicated refugees'

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[111] United States Committee for Refugees and Immigrants, World Refugee Survey 2009 - Ethiopia, 17 June 2009, available at: http://www.refworld.org/docid/4a40d2a594.html [accessed 17 January 2016]

[112] In most of the recent refugee influxes towards Ethiopia from neighboring countries the role of UNHCR is quite pivotal and have important role in the decision making process.

[113] See Article 20 the Refugee Proclamation

written applications for international travel documents for educational, work-related, or urgent personal reasons.

Regarding the practice on the issuance of United Nations Convention Travel Document (CTD), when a refugee applies for CTD they need to bring all the necessary documents (it can be embassy appointment paper, reason for travel (it could be medical, study or family reunification). And the office determines their application for CTD and if it is found genuine, they will be referred to ARRA. Then ARRA prepares the Amharic version and send it to Immigration Authority in Ethiopia. Last year, UNHCR issued a convention travel document for approximately 102 individuals.

The other thing worth to mention here is that there are circumstances UNHCR help to issue other kinds of emergency travel documents. For instance, for the purpose of resettlement, it is laissez-passer prepared by Ethiopian immigration authority with exit Visa in coordination with IOM who transport refugees for RST as per the permission of the resettling country. UNHCR's role is very limited in this process.

Practically, it seems that expulsion of a recognized refugee on the ground of public or national security has never occurred in Ethiopia in a long time. There was only one case whereby a recognized refugee from Eritrea who was expelled to Kenya after he was found a threat to national security. Awoke Diress, a protection officer working with UNHCR confirms that "I know one case: An Eritrean refugee status is revoked due to security reasons, found to be involved in Shabia (Eritrean intelligence agency) spy ring. He was taken to court and his status was revoked and expelled to Kenya. UNHCR was closely observing the due process of law." [114]

The proclamation has also reaffirmed that refugees are entitled to the rights recognized under both the refugee convention and the OAU refugee convention. Notwithstanding the above, the proclamation under its sub article 2 provides that the Head of the Authority may designate places and areas in Ethiopia within which recognized refugees, persons who have applied for recognition as refugees, and family members thereof shall live, provided that the areas

[114] Interview with Awoke Diress, Associate Protection Officer with UNHCR

designated shall be located at a reasonable distance from the border of their country of origin or of former habitual residence.[115]

As shown before, the Federal Constitution of Ethiopia clearly provides that 'any ... foreign national lawfully in Ethiopia has, within the national territory, the right to liberty of movement and freedom to choose his residence, as well as the freedom to leave the country at any time he wishes,'[116] but reserved the right of re-entry to nationals.

Clearly, the 2004 Refugee Proclamation gave refugees the right to international travel documents, but likewise authorized the head of ARRA to designate areas where refugees and asylum seekers must live, thereby imposing residential restrictions.[117] This is a clear violation of the constitution. And in the situation of a proclamation contradicts the Constitution, it's important to for the government to amend the provisions which are in clear contradiction with the supreme law of the land (constitution).

The practice in most of refugee camps is ARRA issued permits specifying the period of travel to camp residents for personal, medical, educational, or safety reasons. In general, Ethiopia restricted freedom of movement of refugees in camps, with an exception to a very few number of refugee who are allowed to live in urban areas.[118]

Understandably, one could see that there is a general trend of confining refugees to campus. Such measures will deprive refugees of a chance to locally integrate with the people of Ethiopia and live a normal life free of confinement. Furthermore, such a measure apparently runs counter to the country's obligation to seek and work towards durable solution one of which being local integration.

Sub article 3 of Article 21 of the proclamation imposes further restriction on the scope of rights refugees could enjoy in Ethiopia in the following words: '…Every recognized, refugee, and

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[115] This the part that authorize the establishment of the Refugee Camps
[116] See the Federal Constitution of Ethiopia Article 11
[117] See Article 2 of the Refugee Proclamation.
[118] It's an exception in Ethiopia to get Urban Refugee status and mostly for Eritrean refugees.

family members thereof shall, in respect to wage earning employment and education, be entitled to the same rights and be subjected to the same restrictions as are conferred or imposed generally by the relevant laws on persons who are not citizens of Ethiopia.'[119]

Ethiopia did not allow refugees to work.[120] The Government granted work permits to foreigners only when there were no qualified nationals available and rarely issued permits to refugees. The Government also tolerated some refugees with special skills working illegally. Authorities tolerated refugee participation in the informal sector, including trading in markets or doing other piecemeal jobs.

The 2004 Proclamation exercised Ethiopia's reservation to the 1951 Convention's right to work, placing the same restrictions on refugees as on other foreigners. The Constitution offered only citizens the right to run enterprises and reserved other limited property rights to citizens.

As far as the right to education is concerned, the 1995 Constitution limited its offer of equal access to publicly funded services to citizens. The 2004 Proclamation exercised Ethiopia's reservation to the 1951 Convention's right to primary education, placing the same restrictions on refugees and their children as on other foreigners. Once, the UN's Committee for the Elimination of Racial Discrimination expressed concern about refugee children's enjoyment of their right to education and recommended that Ethiopia "adopt adequate measures" to ensure their equal access to education.[121]

4.2.4 Administration for Refugee and Returnees Affairs (ARRA) role

At present, the designated administrative body dealing with refugees in Ethiopia is ARRA, the Administration for Refugee and Returnee Affairs, established under NISS (National Intelligence and Security Service, formerly Security, Intelligence and Refugees Affairs Authority). ARRA is a *de facto* responsible for the protection of refugees, including registration, refugee status

[119] See Article 21(3) of the Refugee Convention.
[120] The 1995 Constitution offered only citizens the right to work; and also granted them the right to join unions, to bargain collectively, and to strike, as well as to other labor rights generally.
[121] United States Committee for Refugees and Immigrants, World Refugee Survey 2008 - Ethiopia, 19 June 2008, available at: http://www.refworld.org/docid/485f50d171.html [accessed 17 January 2016]

determination, the granting of asylum, security and management of refugee protection and assistance program.[122] Officially, UNHCR has a simple observatory role during a refugee status determination process.[123] But in practice it is heavily involved in all refugee matters, including the financing of ARRA. Both agencies are interdependent as neither is able to accomplish its mandate without financial or political support from the other.

As mentioned above, Ethiopia is signatory to UN refugee convention, the OAU Refugee convention and a number of international and regional human rights instruments. We have also noted that commitments under these instruments demands Ethiopia to bring its national laws inconformity with them and take various measures towards their implementation at a national level.

We have seen, in the other section of this chapter, that the constitution contains certain provisions that deal with non-nationals and hence refugees. It is also indicated that chapter three of the constitution is relevant to refugees and should not be denied. Otherwise, it is expressly shown that a right is available only to citizens. One could, thus, see that refuges are protected and can avail themselves of the guarantees given by the constitution.

Ethiopia has adopted a refugee proclamation that specifically deals with issues of asylum seekers and refugees. Though not a sophisticated and comprehensive instrument, the proclamation touches upon and regulates a number of refugee issues. Taking this legislative measure to regulate issues of asylum seekers and refugees with a view to protect them is what is expected to be undertaken under international refugee instruments by all state parties.

4.2.5 Implementation Drawbacks

International refugee law and International human rights law do guarantee refugees a range of important civil, political, economic, social and cultural rights. Unfortunately, in Ethiopia these

[122] Proclamation No. 6/1995, A Proclamation to provide for the establishment of THE SECURITY, IMMIGRATION AND REFUGEE AFFAIRS AUTHORITY, establish the power and duties: to cooperate with the appropriate organs, to investigate and cause decisions to be taken on the cases of persons who apply for asylum and Ethiopian nationality; and in cooperation with the appropriate organs and international organizations such as UNHCR), to be responsible for matters relating to refugees.

[123] Article 14 (2) (e) and Article 17 (2) of the Refugee Proclamation

rights are limited for refugees. As the basic treaty on states obligations vis-a-vis refugees, the 1951 Convention relating to the Status of Refugees includes provisions on the treatment that states parties must provide to refugees in their territory. At a minimum, the Convention requires states to treat refugees as they treat aliens generally and to refrain from discriminating between refugees on the basis of their race, religion or country of origin. In addition, the Refugee Convention obliges states to provide refugees with administrative assistance, identity papers and travel documents. Many of these obligations have been reinforced by statements from UNHCR's Executive Committee.

The current data shows Ethiopia is one of the biggest UNHCR partner in Africa hosting more than 734,000 refugees from South Sudan, Somalia, Eritrea, Sudan, Yemen and other countries. As we are speaking about the generosity Ethiopia has extended towards refugees from troubled regions of neighboring countries, there are certain standards that country needs to fulfill in treatment of these refugees. One among many others is to ensure the freedom and rights of movement of every recognized refugee. This is mainly because freedom of movement is an especially important issue with regard to protracted refugee situations in countries like Ethiopia, with limited national resources and/or limited legal frameworks for protecting refugees who nonetheless host large refugee populations. The reality is that refugees don't have (only limited) access to employment and education as they are confined in 24 different refugee camps in the country.

This key right of refugees, freedom of movement within their host country is well described in major international human rights treaties. For instance, International Covenant on Civil and Political Rights, Article 12 and Article 26 of the 1951 Convention provides that States shall afford refugees the right to choose their place of residence within the territory and to move freely within the State. The 2004 Ethiopian refugee proclamation obviously puts the country among those who doesn't respect this right. It specifies that the movement of refugees throughout the country may be restricted and that refugees may be limited to living in designated areas, namely refugee camps.[124]

[124] Ethiopian Refugee Proclamation No. 409/2004

Meanwhile, Article 28 obliges States Parties to issue refugees travel documents permitting them to travel outside the State "unless compelling reasons of national security or public order otherwise require." Well, the Ethiopian law allows refugees to hold a refugee travel document for international travel, although the implementation of this law seems to have ambiguity. The rules governing the issuance of travel documents and foreigners' entry to and exit from Ethiopia are contained in the Proclamation Regulating the Issuance of Travel Documents and Visas, and Registration of Foreigners in Ethiopia, No. 271/1969, 22 July 1969 and Issuance of Travel Documents and Visas Regulations 1971 (date of entry into force: 23 April 1971).

Article 10

Refugee Travel Document.

(1)A refugee travel document shall be issued to refugees residing in Ethiopia with the consent of the Minister of Foreign Affairs.

(2)Prior to the issuance of refugee travel documents the travel forms for refugees issued by the United Nations High Commissioner for Refugees shall be filled out and the necessary formalities shall be complied with; refugee travel documents may serve for exit or round trip in conformity with the request of said High Commissioner.

What I found troubling about these laws are they haven't changed since the very day of their enactment during the Emperor HaileSelasie I era. They need to get updated and amended to fit with the current political structure of the country. For instance, Ministry of Foreign Affairs is not anymore responsible in issuing any kind of passport in the country, as the task took over by the Main Department of Immigration and Nationality Affairs. Moreover, this law seems inactive in general and there is no clear guideline available to refugee who wants to access this right? Unfortunately, it isn't possible for the writer to access the statics with The Main Department of Immigration and Nationality Affairs regarding number of Refugee Travel Documents that have been issued by Ethiopian government or any sort, except the one that I mentioned above.

The limitations on freedom of movement couples with lack opportunities for gainful employment in Ethiopia prompts many refugees to engage in risky secondary movements to other countries. The only exceptional case is the 2010 refugee policy specifically towards Eritrean refugees, by establishing the 'out-of-camp' scheme through which Eritreans are allowed to live and study

outside the camps if they are able to sustain themselves independently (usually through relatives or remittances). This policy allows Eritrean refugees with no criminal record, and who are now living in the camps, to move to any part of Ethiopia, provided they are able to sustain themselves financially or have sponsors willing to support them. Eritrean refugees are even allowed to access higher education, through an agreement with the Ethiopian Administration for Refugees and Returnee Affairs (ARRA). About 3,000 Eritrean refugees have benefited from the scheme so far and the initiative has been widely praised as a welcome step beyond a strict camp policy. The problem is it ignores the vast majority of refugee groups in Ethiopia which happened to be South Sudanese and Somali refugees for unknown reason (maybe for political reasons). It only benefits Eritrean refugees and they are the third largest refugees in the country with a total numbers of about 147,000 thousand.

Chapter Five

Identifying refugee camp responsibility: Host state and UNHCR

5.1 The Primary Rules and Host States

The primary responsibility for the physical safety of refugees and internally displaced persons, and the maintenance of the civilian and humanitarian character of refugee camps, is generally perceived to rest with the host state. This responsibility is in part based on the principle of state sovereignty, which for centuries has been the basis of international law.[125] Refugee camps are normally established with the consent of the host state (see Chapter Three), and while the administration of refugee camps by UNHCR and its implementing partners may deprive the state of the capacity to govern a certain part of its territory, in a strictly legal sense, these camps do not challenge the host state's sovereignty. Yet, as we will be emphasizing later throughout this chapter, evidence suggests that the host state is often unwilling or unable to adequately protect the refugees in these camps. A few examples illustrate this conundrum:

5.1.1 Pugnido Camp in Ethiopia

Pugnido is the oldest refugee camp in the Gambella Region of Western Ethiopia, and is hosting both refugees that arrived twenty years ago (since 1993) and those who arrived within recent months (after 15th December 2013). There are also refugees who arrived in 2012 following 2011 tribal conflict in Jonglei Sate of South Sudan. Since 18 Nov, 2014, some 16,183 refugees relocated from different entry points arrived in Pugnido of which 14,746 have been fully registered (level II).

The UNHCR field office in Pugnido is responsible for the overall coordination and supervision of refugee assistance programs in the camp. It provides guidance and support to all the other implementing partners in the camp. The UNHCR office is represented by a field officer, who leads the UNHCR activities in the camp together with a protection, community service and registrations associates and assistants.

[125] See Island of Palmas (Neth. v. u.s.) P.c.I.].. 2 RIAA 829 (1928). at 838; R. Jennings & A Watts (eds.), OPPENHEIM'S INTERNATIONAL LAw: PEACE (2008). at 122.

At the top level, UNHCR, together with ARRA will enter into tripartite agreements with ministries and agencies at the federal and regional level and with relevant local and international agencies to implement and/or fund any kind of refugee programme in Ethiopia. On behalf of the Government of the Federal Republic of Ethiopia, the Administration for Refugee and Returnee Affairs (ARRA) is entrusted by National Intelligence and Security Affairs Authority to play both the role of the government and implementing partner of UNHCR Representation in Ethiopia. ARRA in close co-operation with UNHCR Representation in Ethiopia assumes the responsibility of overall International Protection and Co-ordination of the refugee and returnee assistance programme in Ethiopia.

Protection & Community Services Activities are distributed to different actors in Pugnido. Camp management and security is assigned to the main government partner ARRA. Other protection related activities such as, sexual and gender based violence (SGBV) prevention and response services, support for person with disability and other vulnerable groups to one of the local NGO's called RaDO (Rehabilitation and Development Organization), Child Protection to Save the children (SCI), Capacity building trainings on SGBV by a UNHCR field office and RaDO.

UNHCR in coordination with ARRA conducts a joint regular monitoring exercise of the overall project implementations carried out in Pugnido refugee camp. ARRA will also provide monthly and quarterly reports to UNHCR Field Unit and Sub-Office and jointly conduct mid-year review and annual evaluation. In most of the cases, ARRA and UNHCR jointly monitor the project implementations carried out by other actors.

The writer of this thesis went to Pugnido Camp in a UNHCR assignment and stayed there for about a year. During my times there, I have witnessed the several attacks at Pugnido refugee camp in Ethiopia's Gambella that were sparked by ethnic tensions between the local Agnuak tribes and South Sudanese refugees who belong to Nuer tribe. The Ethiopian government and UNHCR have been trying to mitigate the tension in different ways. I have been part of some of the discussions that put forward some recommendations for a long term solutions following the violent ethnic attacks who claimed lives of innocent refugees. Ethiopian government has reportedly charged to court those accused of the killings. At some point, UNHCR tried to relocate refugees to new site at Odier in western Ethiopia. The site chosen based on its

accessibility, proximity to administrative and security establishments, and the tribal composition of local residents. Although, it didn't seem enough to halt potential attacks on refugees. Just in the first month of 2016, deadly clashes occurred in the Ethiopian region of Gambella between the two major communities of Nuer and Anyuak in the area. Armed youth groups from Anyuak community from Gok Woreda of Gambella region stormed Pugnido Refugees Camp – inhabited by Nuer refugees – in a rampant killing of unarmed Nuer refugees in what is viewed as the continuation of Gambella incident where the Anyuak killed the Nuer in a fight triggered by the land dispute. The blocks in the camp occupied by Lou Nuer and Gajiok Nuer were the ones hit the hardest by rowdy Anyuak youth.

5.1.2 Other Security Breach Examples

The under mentioned examples didn't happen in Ethiopia, although I wanted them to include here for two main reasons. Ethiopia has its own refugee proclamation and deals with hundreds of thousands of refugees in its own way. However, the underlining facts about refugee camps situations and the politico-security atmosphere are not yet different from the countries that the other incidents happened. Hence, by taking those high profile examples from the region we can easily relate to our situation in Ethiopia and make our point. And the other importance is that by drawing a distinction between these examples we will be able to determine to what extent these actors lays a responsibility to the State, UNHCR and its partners.

In August 2008, members of the Sudanese Government's security forces attempted to enter Kalma IDP camp in South Darfur, Sudan. The forces were trying to execute a search warrant, but were prevented from doing so by a crowd of IDPs of which many were children. Following this resistance, the security forces fired shots in the air and thereafter opened fire on the crowd, killing at least 32 civilians and injuring 108.[126] That couldn't be justified in any circumstance and those who perpetrated these horrible acts should have been faced justice. Shouldn't be the Sudanese government held accountable? How was it possible for them to get away with it?

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[126] See UN OHCHR. Eleventh Periodic Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in the Sudan: Killing and injuring of civilians on 25 August 2008 by government security forces: Kalma lDP camp, South Darfur; Sudan (2009). See also K. Reyes. Right and Responsibilities in Darfur. FMR 33 (2009). at 67; AI. Sudan: Amnesty International Deplores Loss of Life in Kalma Camp, Darfur. AI Index: AFR 54/038/2008 (2008).

Four years earlier, on the night of 13 August 2004, a UNHCR administered camp housing Congolese refugees at Gatumba, in Burundi, was attacked by a group of armed individuals.[127] Despite the fact that more than 100 Burundian soldiers had been alerted at the beginning of the attack and were stationed in the camp's immediate proximity, a total of 152 Congolese refugees were killed and more than 100 were wounded.[128]

Two years before the Gatumba massacre, in August 2002, Achol-pii camp in northern Uganda was attacked by rebels from the Lord's Resistance Army (LRA).[129] More than 55 Sudanese refugees were killed and many more injured or abducted, including staff of UNHCR's implementing partner, the International Rescue Committee (IRC). Prior calls to relocate the camp population, which had suffered repeated rebel attacks over the years, had fallen on deaf government ears, and the remaining Achol-pii refugees were forced to choose between remaining in the camp or returning to conflict-stricken Sudan - from where they initially had fled. Following the attack in 2002, the refugees fled Achol-pii and sought refuge in Kiryandongo camp, in Masindi, a safer district of Uganda. However, the following year the Ugandan government forcibly relocated 16,000 refugees back to camps in the country's volatile north. In addition to these armed attacks and forced relocation, the Ugandan government tolerated, and at times even assisted, SPLA's militarization of the northern Ugandan refugee camps, a practice which had severe effects on the basic rights of the Sudanese refugees.

Apart from demonstrating the necessity of upholding the civilian and humanitarian character of refugee camps, what, then, do the above examples illustrate? The examples trigger a number of important questions with regard to the responsibility of host states, and, not the least, questions concerning the responsibility of, on the one hand, the unable state, and, on the other hand, the unwilling state. The above examples exemplify that refugees and IDPS have suffered human rights violations in the hands of non- state actors, conduct which the host state may choose to tolerate or neglect. Thus, the first question to be attended to in this chapter is essentially *when is a conduct or wrongdoing attributable to the host state?* More specifically, under what circumstances shall the state be held accountable for the acts of its security forces, such as in the

[127] See generally UNSC. UN Doc. no. S/2004/821 (2004); HRW. Burundi: The Gatumba Massacre (2004).
[128] See UNSC, id. at 16, paras. 79-80.
[129] See generally T. Kaiser, The Experience and Consequence of Insecurity in a Refugee Populated Area in Northem Uganda 1996-7, 19 RSQ 1 (2000),38-53.

Kalma camp situation? What if these forces acted ultra vires? And shall the state really be responsible for the conduct non-state actors who attack refugee camps, as in the examples of Pugnido, Gatum and Achol-pii?

It is arguable that issues of responsibility for human rights violations in refugee camps may best be explored through an application of the rules of state responsibility. The principles regarding state responsibility, considered part of customary international law,[130] regulate the circumstances under which a state can be held accountable for a breach of an international obligation and were in 2001 adopted in the International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA or Articles on State Responsibility).[131] According to these rules, the international responsibility of a state arises from the commission of an internationally wrongful act and, in order to determine whether there has been such a breach, two strands of inquiry must be pursued: firstly, whether there is conduct consisting of action or omission that is attributable to a state under international law, and secondly, whether this conduct also constitutes a breach of the international obligations of the state,[132] This chapter will discuss on questions of attribution, and as such, is based upon a presumption that an internationally wrongful act has been committed.[133]

In view of the many cases in which host states have proved unwilling or unable to provide adequate protection, it is furthermore necessary examine whether there are any possible justifications or excuses which may preclude responsibility. This chapter asks: does international law impose full responsibility for refugee protection upon states regardless of the state's capacity to fulfill these obligations? Can there not be circumstances in the above examples of Sudan, Uganda or Ethiopia, which may absolve the host state from this responsibility? In short: when a violation has occurred, do the international laws on responsibility distinguish between a state unable to provide protection, and a state unwilling to do so? While the above example seem to

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[130] See R. McCorquodale & P. Simons, Responsibility beyond Borders, 7 MLR 4 (2007), 598-625 at 601; E. Lauterpacht & D. Bethlehem, The Scope and Content~ the Principle of Non-refoulement: Opinion, in E. Feller et al. (eds.), REFUGEE PROTECTION INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION (2003),87-177 at 115.

[131] ILC, Report of the ILC, 53rd Session, YILC II, part 2, 2001, at 26-143. See also example J. Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON SUTE RESPONSIBJUTI TEXT AND COMMENTARIES (2002).

[132] See ARISWA, Article 12,2.

[133] Maja Janmyr, PROTECTING CIVILIANS IN REFUGEE CAMPS: Unable and Unwilling States, UNHCR and International Responsibility, International Refugee Law series, Section 3.4.

give evidence of a lack of will on the part of the state to adequately protect the lives of individuals on its territory, in other cases many states simply lack the capacity or resources to adequately attend to insecurity or violations within refugee camps. After all, an ever-increasing proportion of the refugee protection burden is currently carried by financially weak states in the majority world, such as Kenya and Ethiopia.[134] Moreover, the states to which refugees flee are often close to or bordering on the states of origin and may also suffer from instability or conflict, which may further aggravate the host state's capacity to respond to refugee insecurity.

This reality leads us to another issue to be dealt with in this chapter, namely that concerning shared responsibility. Human rights, including refugee protection, are no longer considered solely the internal affairs of each sovereign state; refugee protection in its very essence challenges state sovereignty in that it provides a safety net to those who have been denied protection from their state of origin.[135] Goodwin-Gill articulates this actuality as follow:

> *The refugee in international law occupies a legal space characterized, on the one hand, by the principle of state sovereignty and the related principles of territorial supremacy and self-preservation; and, on the other hand, by competing humanitarian principles deriving from general international law ... and from treaty.*[136]

Because the roles of actors other than the host state are critical when it comes to refugee protection, I ask, under what circumstances can the host state's primary responsibility be shared with other actors, i.e. UNHCR or non-governmental organizations, present in the refugee camps? Before I embrace these interesting questions, however, I will expound upon the system of state responsibility more generally.

As highlighted in chapter two of this paper, within the system of international responsibility, "state responsibility" covers the field of the responsibility of states for internationally wrongful

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[134] According to UNHCR, 22 percent of the global refugee population had in 2006 sought asylum in the 50 Least Developed Countries, and 80 percent of the world's refugees were in 2009 hosted by states in the majority world. See UNHCR, STATISTICAL YEARBOOK 2009: 'TRENDS IN DISPLACEMENT, PROTECTION AND SOLUTIONS (2010), at 7; UNHCR, STATISTICAL YEARBOOK 2006: TRENDS IN DISPLACEMENT, PROTECTION AND SOLUTIONS (2007), at 8.

[135]Refugees have, however, crossed borders and are outside their states of origin. On the other hand, the situation for internally displaced persons differs in that these IDPS remain within the territory of the state, and their protection is in principle a function of domestic jurisdiction.

[136] G. Goodwin-Gill, THE REFUGEE IN INTERNATIONAL LAw (1996), at V.

conduct. It is thus understood as the body of principles which determines when and how one state may be liable to another for breach of an international obligation. The rules of state responsibility do not set forth any particular obligations but rather determine when an obligation has been breached and the legal consequences of that violation. The rules are as such "secondary" that address basic issues of responsibility and remedies available for breach of "primary" or substantive rules of international law (see Chapter two). They establish the conditions for an act to qualify as internationally wrongful; the circumstances under which actions of officials and other actors may be attributed to the state; general defenses to liability; and the consequences of liability.

What is a breach of international law by a state depends on what its international obligations are. The state's obligation may derive either from treaty or customary international law. Together with the doctrine of equality, the principle of state sovereignty provides that all states have the same rights and obligations, and, in addition to rules of a customary law character, each state is only bound by a legal obligation to which it has submitted.[137] In the Rainbow Warrior case, the arbitral tribunal explained that:

> *The general principles of International Law concerning State responsibility are equally applicable in the case of breach of treaty obligation ... so that any violation of a State of any obligation, of whatever origin gives rise to State responsibility.*[138]

This, then, seems to imply that a state which is in breach of any obligation to which it is bound under international law, can be held responsible under the general principles of state responsibility. In addition to the provisions found in the specific legal conventions pertaining to human rights and refugees, the most basic norms of international humanitarian and international human rights law are today considered part of international customary law, binding on all states. Specific protection standards for refugees are established primarily by the 1951 Refugee

[137] Consequently, each sovereign state possesses tile full capacity to enjoy tile following attributes of its sovereignty; tile right to conclude treaties (jus tractatuum), the right to accredit diplomats (jus legationis), the right to declare war (jus belli), and tile right to be party to legal proceedings (in particular tile Court of Justice). See also D. Shelton, Introduction: Law, Non-Law and the Problem of'Soft Law', in D. Shelton (ed.), COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (2000),1-42 at 5.
[138] Rainbow Warrior case (NZ. v. Fr.) (1990),20 RlAA 215, at 251 (para. 75).

Convention,[139] but are also found in regional instruments such as the 1969 OAU Refugee Convention and the Cartagena Declaration on Refugees. The state's responsibility to uphold the civilian and humanitarian character of refugee camps is articulated in a number of legal fora, ranging from treaty law and Security Council resolutions to material of a more soft law character, such as conclusions by UNHCR's Executive Committee and UNHCR's own handbooks.[140] Thus, there appears to be a wide legal framework holding states responsible for the human rights protection of all individuals, even those in refugee camps, within its territory.

As a result of such responsibility, the wrongdoing state is also under a secondary obligation to cease the wrongful conduct and to make full reparation for any injury caused thereby.[141] To the extent that a wrongdoing state does not acknowledge its responsibility for an internationally wrongful act and therefore fails to comply with the secondary obligations resulting from that responsibility, two methods of implementing state responsibility contemplated in the ARSIWA are (i) the invocation of responsibility and (ii) the adoption of counter measures.[142] A formal invocation of state responsibility includes (but is not limited to) filing an application before a competent international tribunal.

Although the Articles on State Responsibility are general in coverage, they do not necessarily apply in all cases.[143] Particular treaty regimes have established their own special rules of responsibility and contain tailor-made rules on the legal consequences of breach. The ARSIWA open the door to such special sets of rules in Article 55:

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content implementation of the international responsibility of a State are governed by special rules of international law.

The ILC introduced this *lex specialis* principle as a tool for connecting ill rules of state responsibility with other regimes of international law. However, it has become one of the most debatable provisions of the ARSIWA. The distinction between primary and secondary rules has

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[139] As we know, however, none of these standards explicitly relate to the physical security of refugees, but rather deal with issues such as religious freedom, employment, education and social security. See for instance, Article 7 of the 19S1 Refugee Convention.

[140] See the Kampala Convention, Article 9(2)(g); UNSC, UN Doc. no. S/RES/1208 (1998); S/RES/126S (1999); 1674 (2006). See also UNGA, UN Doc. no. A/RES/SO/1S2 (1996); A/RES/S9/172 (200S); A/RES/60/128 (2006).

[141] ARISWA, Article 30(A) and 31.

[142] ARISWA, part 3.

[143] See Crawford, The International Law Commission's, supra note 7, at 124.

not always been easy to apply, and discussions have concerned whether or not certain aspects of the rules on state responsibility, notably circumstances precluding wrongfulness and countermeasures, in fact are primary rules.[144] The application of the *lex specialis* principle has also been controversial with regard to subsystems that have attained a particularly high degree of autonomy.[145] The more the system is "closed" towards its international law environment, the less likely it is to fall back on the rules on state responsibility. As Simma and Pulkowski correctly ask, when exactly can it be said that one rule is more special than another, and how far does the specialty extend.[146] While it appears generally accepted that the generalia rule can only apply where both the specific and general provision concerned deal with the same subject matter, determining whether a special norm relates to the same subject-matter as ARSIWA can be problematic. And if a special norm is considered to concern the same subject matter as ARSIWA, how far does the specialty of that particular norm extend?

Simma and Pulkowski suggest that one applies a sliding scale of specialty where at the one end there is a legal provision that is only designed to replace a single provision of the ARSIWA, and at the other end, a strong form of *lex specialis* could exclude the application of ARSIWA altogether. This latter form of Lex specialis is often denoted as a "self-contained regime," a term coined by the Permanent Court of International Justice in the *SS Wimbledon case*.[147] The main characteristic of such a self-contained regime appears to be its intention to exclude completely the application of the ARSIWA. In practice, however, it appears as if few treaty regimes, if any at all, actually contain a catalogue of secondary rules that would consistently correspond with the secondary rules provided in the ARSIWA. It is therefore arguable that the ARSIWA are largely applicable also to violations of international human rights-, humanitarian-, and refugee law.[148] Without discussing closer whether or not international human rights-, humanitarian- and refugee law constitute self-contained regimes and thus include far-reaching *leges speciales vis-a-vis ARSIWA*, this following section offers an overview of how the various fields of law may serve as tools for state responsibility, independent of the ILC'S rules on state responsibility.

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[144] For this discussion, see E. David, Primary and Secondary Rules, in J. Crawford et al. (eds.), THE LAW OF INTERNATIONAL RESPONSIBILITY (2010), 27-33 at 29ff.
[145] B. Simma & D. Pulkowski, Leges Speciales and Self-Contained Regimes, in J. Crawford et al. (eds.), THE LAW OF INTERNATIONAL RESPONSIBILITY (2010). at 139-140.
[146] Ibid, at 141.
[147] Ibid, at 142.
[148] S.S. Wimbledon case, 1923, PCl] REPORTS, Series A, at 15, 24

5.1.3 Attribution of Conduct to the State

A state is accountable first of all for the conduct of all its organs. This general rule is found in Article 28 of the ICESCR and Article 50 of the ICCPR, which stipulate that their provisions extend "to all parts of federal states without any limitations or exceptions." Article 3 of the Fourth Hague Convention and Article 91 of Additional Protocol I similarly provide that a state is responsible for all acts committed by persons forming part of its armed forces. For our case examples of non-international armed conflict, the rule that would be appropriate is going to be Rule 149 of ICRC's study on Customary law:

Rule 149. A State is responsible for violations of international humanitarian law attributable to it, including:

(a) violations committed by its organs, including its armed forces;

(b) violations committed by persons or entities it empowered to exercise elements of governmental authority;

(c) violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and

(d) violations committed by private persons or groups which it acknowledges and adopts as its own conduct.

[IAC/NIAC]

The ARSIWA reflects these rules and stipulates that a state will normally only be liable for the conduct of its organs or officials, acting as such. Specifically:

The conduct of any state organ shall be considered an act of that state under international law, whether the organ exercises legislative, executive judicial or any other functions, whatever position it holds in the organization of the state, and whatever its character as an organ of the central government or of the territorial unit of the state

An organ includes any person or entity which has that status in accordance with the internal law of the state. Therefore, in the Kalma camp incident of 2008, the state of Sudan is clearly responsible for the conduct of its own security forces. Whether the use of legal force was necessary and proportionate, as the government argued, is another matter (refer chapter two). In the case of Pugnido and Gatumba, states have an obligation to guarantee the safety of the refugees. Otherwise the sates who failed to protect refugees could be blamed.

5.2 UNHCR

5.2.1 Mandate and Autonomy

In 1946, the UN General Assembly established the International Refugee Organization (IRO) as a Specialized Agency of the United Nations of limited duration. Having regard to the prospective termination of the mandate of the IRO and the continuing concerns over refugees, the United Nations General Assembly, by Resolution 319 (IV) of 3 December 1949, decided to establish a High Commissioner's Office for Refugees 'to discharge the functions enumerated [in the Annex to the Resolution] and such other functions as the General Assembly may from time to time confer upon it'. By Resolution 428 (V) of 14 December 1950, the United Nations General Assembly adopted the Statute of the Office of the United Nations High Commissioner for Refugees. UNHCR was thus established as a subsidiary organ of the United Nations General Assembly pursuant to Article 22 of the UN Charter. Paragraph 1 of the UNHCR Statute describes the functions of the UNHCR as follows:

The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.

Paragraph 6 of the Statute identifies the competence of UNHCR *ratione personae* as extending to any person:

who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.

Paragraph 7 of the Statute indicates exceptions to the competence of UNHCR including any person in respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of

the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights.

The function and competence of UNHCR is thus determined by reference to the particular circumstances of the persons in need of international protection. It is not determined by reference to the application of any treaty or other instrument or rule of international law, by any temporal, geographic, or jurisdictional consideration, by the agreement or acquiescence of any affected State, or by any other factor.

UNHCR's mandate is to provide international protection *inter alia* to persons who are outside their country of origin in consequence of a well-founded fear of persecution and who come within the other requirements of paragraph 6B of the Statute and are not otherwise excluded from UNHCR competence by the terms of paragraph 7 of the Statute.

Paragraph 9 of the Statute provides that UNHCR 'shall engage in such additional activities . . . as the General Assembly may determine'. The General Assembly has over the past several years extended UNHCR's competence to encompass all categories of persons in need of international protection who may not fall under the Statute definition and has affirmed the breadth of the concept of 'refugee' for these purposes. For example, initially through the notion of UNHCR's good offices but later on a more general basis, refugees fleeing from generalized situations of violence have been included within the competence of the UNHCR.

By 1992, a Working Group of the Executive Committee of the High Commissioner's Programme was able to describe UNHCR's mandate in the following terms:

The evolution of UNHCR's role over the last forty years has demonstrated that the mandate is resilient enough to allow, or indeed require, adaptation by UNHCR to new, unprecedented challenges through new approaches, including in the areas of prevention and in-country protection. UNHCR's humanitarian expertise and experience has, in fact, been recognized by the General Assembly as an appropriate basis for undertaking a range of activities not normally viewed as being within the Office's mandate. The Office should continue to seek specific endorsement from the Secretary-General or General Assembly where these activities involve a significant commitment of human, financial and material resources.

The Working Group confirmed the widely recognized understanding that UNHCR's competence for refugees extends to persons forced to leave their countries due to armed conflict, or serious and generalized disorder or violence [even though] these persons may or may not fall within the terms of the 1951 Convention relating to the Status of Refugees or its 1967 Protocol. From the examination of the common needs of the various groups for which the UNHCR is competent, it is clear that, with protection at the core of UNHCR's mandate, displacement, coupled with the need for protection, is the basis of UNHCR's competence for the groups. The character of the displacement, together with the protection needed, must also determine the content of UNHCR's involvement.

The Working Group considered that the same reasoning held true for persons displaced within their own country for refugee-like reasons. While the Office does not have any general competence for this group of persons, certain responsibilities may have to be assumed on their behalf, depending on their protection and assistance needs. In this context, UNHCR should indicate its willingness to extend its humanitarian expertise to internally displaced persons, on a case-by-case basis, in response to requests from the Secretary-General or General Assembly.
Although UNHCR is accorded a special status as the guardian of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, it is not limited in the exercise of its protective functions to the application of the substantive provisions of these two treaties. UNHCR may therefore rely on whatever instruments and principles of international law may be pertinent and applicable to the situation which it is called upon to address.

5.2.2 UNHCR's International Responsibility and ARIO

Some of the questions we are going to pose in this part of the paper are: under what circumstances may UNHCR bear international responsibility under the ILC'S Articles on the Responsibility of International Organizations for human rights violations in the context of refugee camps? For instance, does UNHCR hold any independent responsibility or shall responsibility be attributed to the UN as a whole? Can this responsibility be shared with other actors?

The International Law Commission's Articles on the Responsibility of International Organizations (ARIO) were adopted by the ILC in the summer of 2011 following a ten year

process.[149] In December 2011, the UN General Assembly annexed the ARIO to Resolution 66/100, in which it also welcomed the conclusion of the ILC'S work in this regard and its adoption of the ARIO and a detailed commentary on the subject.[150]

The ARIO are as such a relatively new type of laws in the landscape of international law and the ILC'S efforts to develop ARIO have been the subject of much critical commentary by states, international organizations and scholars alike. The main criticisms of the Articles concern on the one hand the diversity of international organizations today, and, on the other hand, the general lack of practice to support the contents of the ARIO.[151] Unlike states, which are "juridically equal," international organizations are diverse in their size, function and mandate. International organizations have for this reason argued that it will be difficult to elaborate a "one size fits all" set of principles that can apply for all international organizations.[152] Nevertheless, such views hold little water - after all, states are also extremely diverse. What states have in common, however, is their "statehood" and the fact that they are subjects of international law. International organizations as defined in the ARIO also have something in common; they are intergovernmental in their character and subject of international law, which means that they concentrate otherwise independent state functions.[153] In fact, d'Aspremont and Ahlborn have found that the ARIO

... strike a reasonably astute balance between institutional heterogeneity and the need for overarching secondary rules governing the responsibility of all institutional subjects of international law.[154]

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[149] On ILC'S work on state responsibility, see Chapter 4. See lLC, Report of the International Law Commission on the Work of Its Sixty-Third Session (26 Apr.-3June and 4JUIy-12 Aug. 2011), UN Doc. no. A/66/w (20n), para. 87; UNGA Res. 66/100 (2012); UNGA Res. 66/98 (2012).
[150]UNGA, UN Doc. no. A/RES/66/wo (2012), para. 1. See also UNGA, UN Doc. no. A/RES/66/98 (2012), para. 4.
[151] See generally K Boon, New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organizations, 37 YJIL ONLINE.
[152] See, for instance, comments of the European Commission in Report of the ILC, Responsibility of International Organizations: Comments and Observations Received from International Organizations, 63rd Session, 1Z, UN Doc. no. A/CN.4/637 (Z011), at 7.
[153] Nevertheless, the ILC Commentary to ARIO also acknowledges this diversity and asserts that the ".. articles where appropriate give weight to the specific character of the organization, especially to its functions, as for instance art. 8 on excess of authority or contravention of instructions" See ILC Commentary, in ILC, Report on the Sixty-Third Session (Z011), supra note 1, para. 7.
[154] See J. Aspremont & c. Ahlborn, The International Law Commission Embarks on the Second Reading of Draft Articles on the Responsibility of International Organizations, EJIL TALK (16 May Z011).

A more pressing matter concerns the lack of practice to support the rules and the ARIO'S resemblance to the ILC'S work on state responsibility. In contrast to the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), which referred to existing rules and largely codified customary international law, the ARIO were drafted without extensive practice to draw from. This is largely due to the fact that because international organizations enjoy generous grants of immunity both as institutions and for their individual agents, there are few cases where principles of responsibility have been invoked before any national or international courts. National courts generally recognize the immunity of international organizations under binding treaties, such as the UN Convention on the Privileges and Immunities of the United Nations of 1946, which grants the UN absolute immunity. It is thus difficult for claimants to secure a judicial remedy against officials of international organizations.[155] Furthermore, only states can be parties to cases before the International Court of Justice, and the only rare example of an international organization being sued in court is probably suits against EU institutions within the European Court of Justice. For these reasons, some have argued that the lack of practice when it comes to the responsibility of international organizations encouraged the ILC to replicate large parts of ARSIWA. In the view of Alvarez, the ILC sometimes simply replaced "state" with "international organization, the rationale for this being the "ILC'S assumption that since states and International Organizations are both legal persons or subjects of international law, the same rules should presumptively apply to both,"[156] The effects of such a "cut and paste" operation have been feared by some to be far-reaching, in particular since the results of applying the rules on countermeasures, force majeure and necessity to international organizations are indefinite.[157] Others, however, have argued that the ARIO only partly mirror the ARSIWA and that "the differences between the two are too often underestimated."[158]

[155] See A. Reinisch, The Immunity of International Organizations and the jurisdiction of Their Administrative Tribunals, 7 CJIL Z (zoo8), 285-306. See also Mendaro v. World Bank, 717 F.2d 610 (D.C. Cir.1983).
[156] See J. Alvarez, Misadventures in Subject hood, EJIL TALK (Z9 Sept. ZOI0). But for a view suggesting the opposite, see P. Sands et al., BOWTT's LAw OF INTERNATIONAL INSTITUTIONS (2OO1), at 5Z3-5Z4.
[157] See generally Boon, supra note 3; Alvarez, Misadventures, id.
[158] It is interesting to note that the comments made by states and international organizations in reaction to the ARIO have largely focused on those provisions that do not or only partly resemble the ARSIWA, such as the definitions of the terms "rules of the organization" and "agent" respectively, and the rules on the test of effective control, counter-measures, and lex specialis. See Aspremont & Ahlborn, supra note 6.

5.2.3 UNHCR's Implementing Partners

In fulfilling its protection mandate in general, and administering refugee camps in particular, UNHCR relies to a large extent on "partnership" with a wide spectrum of actors. These actors include governments and its agencies, United Nations sister agencies, international organizations and non-governmental organization. Implementing partners in Ethiopia includes Government agencies such as, Administration for Refugee Returnee Affairs, Bureau of Agriculture, Natural Resources Development and Environmental Protection. UNHCR implementing partner NGOs in Ethiopia are; Action Contre la Faim – France, African Humanitarian Action, African Humanitarian Aid and Development Agency, Danish Refugee Council, Development Inter-Church Aid Department. Orthodox Church Ethiopia, GOAL, HelpAge International, International Medical Corps - USA, International Rescue Committee – USA, Jesuit Refugee Service, Lutheran World Federation – Switzerland, Mother and Child Development Organization – Ethiopia, Mothers and Children Multisectoral Development Organization, Norwegian Refugee Council, Opportunities in Industrialization Centre – Ethiopia, Organization for Sustainable Development, Oxfam – GB, Partner for Refugee Services, Partnership for Pastoralist Development Association, Pastoralist Welfare Organization, Rehabilitation Development Organization – Ethiopia, Save the Children International, Save the Environment, Tselemet Woreda Agriculture and Rural Development Office, World Vision International, Zoa Vluchtelingenzorg/Refugee Care – Netherlands, IOM, UNOPS, UNV

In order to ascertain UNHCR's responsibility for the conduct of its implementing partners, it is important to understand the process of delegation and contractual relationship between UNHCR and the NGO. Article 10 and 12 of the UNHCR Statute specifically establish the basis for these implementing partnerships.[159] However, this doesn't clarify the ambiguity regarding UNHCR's mandate to delegate international protection to Implementing Partners.[160]Although the operational conduct of UNHCR indicates that such delegation *de facto* takes place in the field, the 'standing committee's'[161] background note to the Executive Committee's fifth session

[159] UNHCR, NGO partnership in Refugee Protection, Questions and Answers (2007)
[160] See [160] Maja Janmyr, PROTECTING CIVILIANS IN REFUGEE CAMPS: Unable and Unwilling States, UNHCR and International Responsibility, International Refugee Law series, Section 7.4.
[161]In October 1995, ExCom established a Standing Committee to replace sub-committees on international protection and on administrative and financial matters. The chairing of the Standing Committee is shared by the ExCom

particularly stands out as a clear example that UNHCR is not permitted to delegate its function of international protection.[162]

We will see the circumstances that the conduct of Implementing Partner NGOs conduct attributed to UNHCR. The ARIO specify that the conduct of organs or agents in the performance of their functions shall be considered an act of the organization. The ILC'S definition of the term agent, to mean "an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts," implies that the conduct of UNHCR'S implementing partners shall be attributed to the organization.

The conduct of UNHCR’s NGO implementing partners could potentially engage UNHCR’s international responsibility and would therefore be attributable to the organization itself. Under the ILC’s ARIO, if it is shown that an international organization is acting through private subcontractors has primarily been considered in relation to private security companies (PMC), there is an increasing recognition that the ILC rules on attribution also may apply to acts of non-governmental organizations sub-contracted by an international organization for the delivery of particular tasks.[163]

5.2.4 Attribution of Conduct to UNHCR

Articles 6-9 of the ARIO contain rules on attribution of conduct.[164] The general rule, found in Article 6, addresses the conduct of organs and agents of the organization, while Article 7 deals with the attribution of the conduct of a state organ placed at the disposal of an international organization, Article 8 the attribution of ultra vires conduct, and Article 9 the attribution of conduct subsequently adopted by an international organization. While institutional and judicial practices seem far from consolidated in the area of attribution,[165] there seems to be a general

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chairperson and the vice-chairperson. The Standing Committee is scheduled to meet three times a year. At its periodic meetings, it examines thematic issues included by the plenary in its programme of work; reviews UNHCR's activities and programmes in the different regions (as well as its global programmes); adopts decisions and conclusions, as it deems appropriate, on issues included by the plenary in its programme of work; and discusses other issues that it deems of concern.

[162] Ibid

[163] See most notably Verdirame, supra note 157, at 101.

[164] See ARIO, supra note 30.

[165] See G. Verdirame, The UN AND HUMAN RIGHTS, WHO GUARDS THE GUARDIAN? (2011), at 99.

agreement among states and commentators alike that third parties dealing with international organizations ought to be protected from harm in their relationship with international organizations. In the Cumaraswamy advisory opinion the ICJ notably stated that the UN "may be required to bear responsibility for the damage incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity."[166] Thus, the basic principle is the attribution to the organization of acts of its organs and agents.

Under the ARIO, UNHCR would be responsible for internationally wrongful acts when conduct consisting of an action or omission is attributable to the organization and which constitutes a breach of an international obligation. This would mean that, because UNHCR'S international law obligations seem to require the organization to maintain the civilian and humanitarian character of refugee camps and to provide physical safety to the camp population, a failure on the part of UNHCR to do so could under certain circumstances amount to an internationally wrongful act.

In the above examples the extent in which UNHCR will be held responsible varies. In Pugnido case, what I would argue is that, given UNHCR's supervision role in the camp, it has a responsibility to protect refugees. Although it is hard to blame UNHCR in Kalma case, we couldn't spare our criticism of the un-effective intervention by UN and its security council. The same goes to Gatumba massacre, UNHCR's supervisory role would put it in the list of responsible bodies, and it's the offices primary obligation to guarantee the safety of refugees.

When UNHCR administers refugee camps where the overall conditions amount to a violation of the prohibition against torture and ill-treatment, this administration amounts to ultra vires conduct for which the organization could be held internationally responsible. In the above examples, two separate internationally wrongful acts arise - UNHCR would breach both a rule of the organization that possesses an international law character, as well as the international law rule prohibiting torture and ill-treatment. However, while UNHCR in many respects may be likened to a state when performing its functions in refugee camps, it is important to remember that it does not have the institutions normally within the auspices of a state to afford the population effective human rights protection. In order to fulfill its human rights obligations, it is

[166] Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights, ICJ REPORTS (1999), at 62, 88-89, para.66.

nevertheless arguable that UNHCR must enforce the existing human rights framework to the fullest of its capabilities.

If however, the persons or entities through whom the organization acts are organs of a state and are placed at the disposal of the international organization, then Article 7 applies. This would be Ethiopia case, where government agencies act as UNHCR implementing partners. In this regard, the ARIO adopts the test of effective control to determine attribution of conduct.[167]

Article 8 of the ARIO, analogous to Article 7 of the ARISWA, provides that the *ultra vires* conduct of an organ or agent is attributable to the organization, provided that the organ or agent acted "in the capacity." A failure to respect an organization's limitations on competence could lead to an organization's conduct being *ultra vires*. Verdirame has noted how *ultra vires* conduct can result in two separate wrongful acts whenever it breaches both a rule of the organization that possesses an international law character and another rule of international law.[168] While human rights violations will often include a breach of both these types of rules, Verdirame is of the opinion that UNHCR's encampment policy in itself constitutes a violation of both the rules of the organization and of UNHCR's human rights obligations, primarily since it arbitrarily deprives individuals of their freedom of movement, as we have witnessed in Ethiopia. In the view of Verdirame, because it is "inherently incompatible with international human right law," the *de facto* administration of refugee camps normally represents an international illegality.[169]Further support for this argument may be found in the practice of ECtHR, where the court found the overall conditions in the Kenyan Dadaab camps, which are quite similar with Ethiopian camps, to amount to a violation of the prohibition against torture and inhuman or degrading treatment as embedded in Article 3 of the ECHR.[170]

5.2.5 Shared/Joint Responsibilities

There is an opportunity under current international law to attribute responsibility to multiple actors. While the notion of shared responsibility under international law would have met tough

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[167] See ILC, second report on responsibility of International Organizations (prepared by G. Gaja, Special Rapportteur), 56 session, UN Doc. no.A/CN.4/541(2004) para 40.
[168] Verdirame, supra note 157, at 125
[169] Ibid at 232.
[170] Sufi & Elmi v. UK, 8319/07 [2011] EctHR 1045 (28 June 2011), specifically paras, 278 – 292.

criticism in previous decades, developments in human rights law have made the idea of attributing responsibility among several entities appear less of a novelty. It is thus suggested that, while the host state generally retains responsibility for human rights violations taking place in the refugee camp context, other entities, notably UNHCR, and perhaps also the UN by virtue of its parenthood over UNHCR, may hold varying degrees of responsibility. When ascertaining the degree of responsibility to be attributed to each actor it is suggested that we employ a multi-layered and hierarchical ladder of responsibility, where the weight is portioned according to which actor(s) have effective control. Importantly, however, UNHCR'S international responsibility will depend upon the ability and willingness of the host state to provide effective protection. In cases where the host state is (willing but) unable, for example owing to limited resources or weak institutions, to provide effective protection to refugees in camps, UNHCR should have shared responsibility, or perhaps even the entire responsibility for the situation in these camps.

The fact that UNHCR retains responsibility when protection tasks are implemented by its partners doesn't imply that these NGOs are absolved from any eventual responsibility of their own. The emerging discussions of the role and responsibilities of NGOs in the international legal arena may in time bring about a development which would incur shared responsibility for international ally wrongful acts committed in refugee camp settings for a number of different actors, the final report of the International Law Association's (ILA) conference on accountability of international organizations, for instance, explicitly recognized that "[i]ssues of shared or joint accountability arise when NGO-s are acting as implementing partners for agencies of IO-s in areas of development or humanitarian assistance."[171]

[171] It is noteworthy that "accountability" not necessarily translate into "responsibility." see ILA, Accountability of International Organizations. Final Report (Berlin Conference, 2004), at 17.

Chapter six

Conclusion

Throughout the foregoing five chapters, I have examined the allocation of international responsibility for human rights violations in refugee camps. I have also dealt with, how refugee camp protection is permeated by a large degree of de jure and de facto delegation of power and authority over these spaces, primarily between the host state and UNHCR, and between UNHCR and its implementing partners. We also pointed out that, no distinct actor(s) fully take on responsibility for the human rights situation. And by the same token I highlighted how a number of actors can be simultaneously responsible under both the ILC'S Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) and its emerging Articles on the Responsibility of International Organizations (ARIO).

This paper has questioned the fundamental question of when precisely a host state can accurately be considered to be unwilling/unable state. As a state's willingness and ability to provide effective protection may not be easily observable, the host state's willingness and ability should be determined as an integral part of the determination of UNHCR'S international responsibility.

More concretely, there are perhaps two ways of dealing with the current problem in which an abundance of actors contribute to the human rights violations in refugee camps. The first approach is the easy one - it more or less means accepting the current state of affairs with a few, but not fundamental, changes. This approach stresses the primary responsibility of the host state and turns away from the eventual responsibility of UNHCR and others. As such it essentially promotes a transfer of the protection burden back to the sovereign state, who traditionally has been the sole responsible actor and who in many cases has the de facto greatest potential to provide protection. This approach is appropriate when the host state is able but unwilling to provide effective protection in refugee or IDP camps. In such situations, the host state alone shall be held internationally responsible.

The second option and probably the one that I believe goes along with the case in Ethiopia, puts more emphasis on the influence of UNHCR in providing such protection, acknowledging its important role in practice and the fact that the power it holds vis-a-vis refugees and others is a

phenomenon that most likely is here to stay. This triggers a situation of shared responsibility between the host state and UNHCR, rather than a situation in which only one actor is exclusively responsible. In cases where the host state is (willing but) unable, for example owing to limited resources or weak institutions, to provide effective protection to refugees in camps, when UNHCR administers these camps, the Organization should have shared responsibility. In extreme cases where a host state is clearly willing but unable, UNHCR might have to bear the whole responsibility burden. Indeed, UNHCR is bound to human rights of a customary law character stemming from its legal personality and the UN Charter, but as this paper has highlighted, the scope of UNHCR's mandate of international protection also includes the provision of physical security and the maintenance of the camp's civilian and humanitarian character. Without establishing a basic level of security in the camps, it would be impossible for UNHCR to fulfill either its broader protection or solution seeking mandates; thus, UNHCR holds an affirmative duty to act and intervene to secure the basic human rights of refugees. Finally, in the last part of this paper I also suggested that, under the ARIO, UNHCR would be responsible for the conduct of its NGO implementing partners, even in those instances when it has attempted to free itself of responsibility by including certain clauses in its contracts with these NGOS. Few changes has to be made in the relationship between UNHCR and its implementing partners with the view that these strengthen the protection of refugees and clarify the issue of international responsibility. It’s also good to ask whether or not placing refugees in camps is beneficial to their protection.

UNHCR clearly occupies a challenging place in the internationally as it has both mandate and also frequently caught in a vice between the preferences of actors such as donor governments and host states. It is to be a norm entrepreneur, supervisor and enforcement agency of refugee rights at the same time as it is expected to be a cooperative partner to states and NGOS, and the ultimate provider of material assistance, so much is the case in Ethiopia. This multitude of roles and its implication for refugee protection is perhaps most clearly evidenced in our Ethiopian case study. UNHCR'S protection role has become increasingly pragmatic, focusing more on the provision of food and shelter, and refugee security has as such had to give way for other competing priorities.

UNHCR appears to believe that if it "flaunts" its own responsibility, this risks detracting attention from the responsibilities of host states, who, after all, have the primary responsibility to protect refugees on their territory. However, because it surfaces at the crossroads between state sovereignty and international human rights, refugee security is generally considered to be "high politics" and exposes a tension between human rights norms and real politics. Organizations such as UNHCR tend to view attention to physical protection issues as a threat to their neutrality, impartiality and independence. Thus, for fear of jeopardizing relationships with governments, UNHCR appears to emphasize "soft diplomacy" and prioritize less controversial tasks, such as the provision of material assistance, in the face of "hard" human rights concerns. But, as even UNHCR itself has noted, it has a duty to fulfill its mandate regardless of "political circumstances and imperatives, UNHCR's challenge thus lies in staying true to its main principles, and not throwing them overboard as soon as it meets resistance. This logically means that UNHCR also cannot expect to please all sides.

Without downplaying the fact that UNHCR often has to make choices between bad and less bad options on the ground, it is arguable that without an increased focus on basic human rights, UNHCR runs a real risk of "simply administering human misery. More importantly, ignoring refugee security arguably affects the situation as much as confronting it.

This paper has highlighted the legal system in Ethiopia and how the applicable laws in the land favors the protection of refugees. It all starts from the constitution of the Federal Democratic Republic of Ethiopia to the specifically enacted refugee proclamation and establishment of Government agency who mandated on refugee issues. Although Ethiopia's Administration for Refugee and Returnee Affairs (ARRA) is the agency responsible for majority of sectors such Health and Nutrition, Primary Education, Protection, Logistics and General Camp Administration, it's surprisingly funded hundred percent by UNHCR. As I learned from my stay at Pugnido/Gambella refugee camp in Ethiopia, ARRA is fully mandated in providing international protection and material assistance to the existing refugees.

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