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SEXUAL VIOLENCE AGAINST REFUGEE AND ASYLUM SEEKING WOMEN IN THE DADAAB AND KAKUMA REFUGEE CAMPS IN KENYA

Challenges and Prospects for Securing the Duty to Protect

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Research dissertation presented for the approval of Senate in part fulfilment of the requirements for the degree of Master of Laws in International Law in the Department of Public Law

FEBRUARY 2012



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DEDICATIONS

I would like to dedicate this dissertation to my mother and father. I am everything that I am today because of you believe in me and support me in everything that I do. Thank you for inspiring me to be the best that I can be.

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I would like to thank my supervisor, Fatima Khan for all her input into this dissertation.

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ACRONYMS

1951 CONVENTION	Convention Relating to the Status of Refugees
1967 PROTOCOL	Protocol Relating to the Status of Refugees
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR PROTOCOL	Protocol to the African Charter on Human and People's Rights on The Establishment on an African Court on Human and People's Rights
ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AWP	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
BDHR	Bureau of Democracy, Human Rights and Labour
CAT	Convention against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
DEVAW	Declaration on the Elimination of Violence against Women
EX. COMM	United Nations Commissioner for Refugees Executive Committee
GA	United Nations General Assembly
HRC	United Nations Human Rights Committee
HRW GRWHR	Human Rights Watch 'Global Report on Women's Human Rights'
HRW WK	Human Rights Watch 'Welcome to Kenya: Police Abuse of Somali Refugees'

ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
LCHR	Lawyers Committee for Human Rights
NGO	Non Governmental Organisation
OUA CONVENTION	Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa
OUA	Organisation of African Unity
OP CEDAW	Optional Protocol for the Convention on the Elimination of All forms of Violence against Women
OP ICCPR	Optional Protocol to the International Covenant on Civil and Political Rights
PROTOCOL ACJHPR	Protocol on the Statute of the African Court of Justice and Human Rights
SC RES 1325	United Nations Security Council Resolution 1325 (2000) [on women and peace and security]
SC RES 1820	United Nations Security Council Resolution 1820 (2008) [on acts of sexual violence against civilians in armed conflicts]
SERAC	Social and Economic Rights Action Centre
SG	United Nations Secretary General
SCSPI	Save the Children Sweden and Plan International
UDHR	Universal Declaration on Human Rights
UN CHARTER	United Nations Charter
UN	United Nations

UNCHR CRW	United Nations High Commissioner for Refugees ‘Commitment to Refugee Women’
UNHCHR	United Nations High Commissioner for Human Rights
UNHCR HPWG	United Nations High Commissioner for Refugees ‘Handbook for the Protection of Women and Girls’
UNHCR PRSGBV	United Nations High Commissioner for Refugees Prevention and Responses to Sexual and Gender based Violence in Refugee Situations: Inter-Agency Lessons Learned Conference Proceedings
UNHCR PRW	United Nations High Commissioner for Refugees Policy on Refugee Women
UNHCR SGBVG	United Nations Commissioner for Refugees Sexual and Gender Based Violence against Refugees, returnees and Internally Displaced Persons Guidelines for Prevention and Response
UNHCR WVVP	United Nations High Commissioner for Refugees Women Victims of Violence Project
UNHCR	United Nations High Commissioner for Refugees
UNIFEM	United Nations Development Fund for Women

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- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, 85. Entered into force on 26 June 1987.
- Convention on the Elimination of All Forms of Discrimination against Women G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *Entered into force* on 3 September 1981.
- Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, 3. Entered into force on 2 September 1990.
- Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137 Entered into force on 22 April 1954.
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287. Entered into force on 21 October 1950.
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Chapter I

INTRODUCTION: SEXUAL VIOLENCE AGAINST REFUGEE AND ASYLUM SEEKING WOMEN

1. Introduction

One of the biggest issues for a refugee is his/her safety. A refugee is an individual fleeing persecution and violence who has lost the protection of his State and thus needs protection from another entity.¹ However, in many cases, persons who have fled violence in their home countries seem to find themselves confronted with violence in the country of asylum. Those who enjoyed privilege and safety before becoming refugees usually find their security diminished as a result of their refugee experience.² Refugee-hood hence often exposes the already disenfranchised to even greater risks of physical harm.³

Refugee and asylum seeking women and girls are vulnerable to various forms of sexual violence which include but are not limited to rape/marital rape/anal rape and attempted rape/anal rape sexual torture, sexual mutilation, child sexual abuse, defilement and incest, sexual abuse, sexual exploitation, forced prostitution, forced military recruitment, sexual slavery as well as sexual violence as a weapon of war and torture.⁴ These are perpetrated by both state and non-state actors who include soldiers, rebel groups, armed bandits, fellow refugees, family members, nationals in the host community as well as relief workers.⁵ These threats occur at different stages such as: during flight, at frontiers, detention centres, as well as in refugee camps. However evidence suggests that the greatest risk of sexual violence arises once refugees reach the camps where they are, in principle, to be protected.⁶ One of the worst affected countries is currently

¹ UN General Assembly Convention Relating to the Status of Refugees 28 July 1951 United Nations Treaty Series vol. 189 p. 137 at Article 1(A)(2) available at: <http://www.unhcr.org/refworld/docid/3be01b964.html> [Accessed 23 May 2011] (1951 Convention). See J Hathaway *The Law of Refugee Status* (1991) Preface.

² J Hathaway *The Rights of Refugees under International Law* (2005) 439.

³ Ibid.

⁴ UN High Commissioner for Refugees, 'Sexual and Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons. Guidelines for Prevention and Response, May 2003' at 16 available at: <http://www.unhcr.org/refworld/docid/3edcd0661.html> [Accessed 8 June 2011] (UNHCR SGBV). The term refugee women will be used to represent refugee and asylum seeking women and girls.

⁵ Ibid.

⁶ Hathaway (n 2) at 441.

Kenya, where refugees living in camps are subjected to a wide range of security threats; including sexual violence coming from within and outside the camps on a daily basis.⁷

2. Background and Problem Statement

Sexual violence is defined as ‘any act, attempt or threat of a sexual nature that results, or is likely to result, in physical, psychological and emotional harm to women and girls, whether occurring in private or in public’.⁸ The former United Nations Special Rapporteur on Violence against Women, Radhika Coomaraswamy described the occurrence of sexual violence against refugees as a global problem.⁹ Sexual violence against refugees has been documented throughout history particularly from Bosnia, Rwanda, Somalia and Vietnam.¹⁰

In recent years, similar reports have been documented in refugee camps located in Dadaab and Kakuma; in the north east and west of Kenya respectively.¹¹ Kenya is currently host to the largest refugee population in the world of 404 000 refugees:¹² approximately 60 per cent of whom are women.¹³ As a country that enjoys relative peace in a region plagued by protracted

⁷ L Halperin ‘The Physical Security of Refugees in Kenyan Camps: Legal and Human Rights Implications: Master of Arts in Law and Diplomacy Thesis The Fletcher School’ at 10 available at <http://fletcher.tufts.edu/research/2003/Halperin-Liv.pdf> [Accessed 1 May 2011].

⁸ UNHCR SGBV Guidelines (n 4) at 11. See UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104 at Article 1 available at: <http://www.unhcr.org/refworld/docid/3b00f25d2c.html> [Accessed 9 June 2011] (DEVAW).

⁹ B Nowrojee ‘Sexual violence, Gender Roles and Displacement’ in D Hollenbach *Refugee Rights; Ethics, Advocacy and Africa* (2008) 125.

¹⁰ UN High Commissioner for Refugees, ‘Sexual Violence Against Refugees: Guidelines on Prevention and Response, 8 March 1995,’ available at: <http://www.unhcr.org/refworld/docid/3ae6b33e0.html> [Accessed 1 May 2011](Sexual Violence Guidelines).

¹¹ The town of Dadaab houses three refugee camps in North-East Kenya, 80 kilometers away from the Somali border. The town of Kakuma houses the Kakuma refugee camp in the Turkana district situated 95 kilometers south of the Sudanese border in north-west Kenya. This camp was established in 1992, whilst the Dadaab camps were established in 1991. See Human Rights Watch ‘Welcome to Kenya: Police Abuse of Somali Refugees’ at 4 available at <http://www.hrw.org/reports/2010/06/17/welcome-kenya> [Accessed 3 September 2011] (HRW WK).

¹² UN High Commissioner for Refugees ‘2011 UNHCR country operations profile – Kenya’ available at <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e483a16&submit=GO> [Accessed 19 September 2011] (UNHCR Kenya). Dadaab is currently the largest refugee settlement in the world.

¹³ UN High Commissioner for Refugees ‘Refugee Women’ available at <http://www.unhcr.org/pages/49c3646c1d9.html> [Accessed 20 September 2011]. See Tapia E ‘Refugee Women – A Kenya Case Study’ available at <http://www.trocaire.org/resources/tdr-article/refugee-women-kenya-case-study> [Accessed 20 September 2011].

conflict, Kenya has been favoured as a safe destination by refugees from nearly every country surrounding Kenya since the 1980s.¹⁴

Despite Kenya's more than 20 year old history of hosting refugees,¹⁵ Kenya's treatment of refugees has been criticised as 'hostile' and 'sour' by refugee and human rights practitioners, academics and nongovernmental organisations (NGO's).¹⁶ Of particular concern is the fact that the occurrence of sexual violence in Kenyan refugee camps has been described as pervasive and systematic by academics and NGO's.¹⁷ For instance, in May 2003 the Lawyers Committee for Human Rights reported that sexual assault and rape of refugee women in Kakuma camp were a daily occurrence.¹⁸ In some instances Kenyan authorities have been reported as taking inadequate measures to protect refugees from sexual violence, whilst in other instances they have been reported as being actual perpetrators of sexual violence against refugees.¹⁹

Many factors contribute to the vulnerability of refugee and asylum seeking women and girls in Kenyan refugee camps; the first being sex and age. Because the majority of the men and older boys are recruited to fight in their home country's conflicts or killed;²⁰ the majority of the refugees in refugee camps are women and young children unaccompanied by male family

¹⁴ The majority of refugees at Dadaab and Kakuma originate from Somalia, Sudan, Ethiopia and the Democratic Republic of Congo. UNHCR Kenya (n 12). See [S Aronson](#), 'Somali Refugees in Kenya: Security Deficiencies and Public Health Concerns as a Result of Ineffective Policy' available at <http://www.studentpulse.com/articles/563/somali-refugees-in-kenya-security-deficiencies-and-public-health-concerns-as-a-result-of-ineffective-policy> [Accessed 22 September 2011].

¹⁵ [Aronson](#) (n 14).

¹⁶ HRW WK (n 11) at 4.

¹⁷ J Crisp 'A State of Insecurity: the Political Economy of Violence in Refugee-Populated Areas of Kenya' *Evaluation and Policy Analysis Unit of UNHCR Working Paper No. 6* UNHCR, CP2500, CH-211 Geneva 2 Switzerland.

¹⁸ M. Katzarova and A. Korkeakivi, *African Exodus – Refugee Crisis, Human Rights and the 1969 OAU Convention: a Report of the Lawyers Committee of Human Rights* (New York: LCHR, 1995) at 66 available at <http://www.humanrightsfirst.org/our-work/refugee-protection/publications/> [Accessed 4 September 2011] (African Exodus LCHR).

¹⁹ HRW WK (n 11 at 4). See Bureau of Democracy, Human Rights, and Labor, '2010 HUMAN RIGHTS REPORT: KENYA' available at <http://www.state.gov/g/drl/rls/hrrpt/2010/af/154352.htm> [Accessed 20 September 2011].

²⁰ A Farmer 'Refugee responses, state-like behavior, and accountability for human rights violations: a case study of sexual violence in Guinea's refugee camp' (2006) 9 *Yale Human Rights Development Law Journal* 44 at 47.

members.²¹ These women and girls are more frequently targeted by perpetrators of sexual violence than men and boys.²²

According to Human Rights Watch '[w]omen refugees are raped because they are refugees, to because of their actual or perceived political or ethnic affiliations, and because of the disadvantaged status that comes with being a woman.'²³ Refugee women are also raped to instil terror, to dominate or to punish an entire ethnic group.²⁴ The third reason is that of forced dependency as a result of inadequate shelter, food, fuel and income generation.²⁵ Refugee women are often subjected to rape and other forms of sexual exploitation in exchange for obtaining rations and food for themselves and their families, for building materials such as plastic sheeting²⁶ as well as in return for the granting of passage to safety, refugee status or personal documentation.²⁷

However refugee women are at their most vulnerable when they pick firewood in remote environments outside the camps.²⁸ In 1993 most of the rapes of refugee women in Kenyan camps occurred while refugee women picked firewood, and searched for building materials.²⁹ These rapes took place in bushes surrounding the camps and the victims were women and girls of between 12 and 50 years of age.³⁰

Sexual violence against refugee women is in violation of several human rights principles enshrined and regulated by the international refugee law, human rights law and humanitarian law regime. These include but are not limited to the right to life, liberty and security of the person,

²¹ Ibid.

²² UN High Commissioner for Refugees, *UNHCR Handbook for the Protection of Women and Girls*, January 2008, at 199 available at: <http://www.unhcr.org/refworld/docid/47cfc2962.html> [Accessed May 2011] (UNHCR HPWG).

²³ Human Rights Watch *'Human Rights Watch Global Report on Women's Human Rights 1995'* at 98 available at <http://www.wvda.org.au/hrwgolbalrept1.pdf> [Accessed 23 May 2011] (HRW GRWR 1995).

²⁴ Ibid.

²⁵ UN High Commissioner for Refugees '2011 UNHCR country operations profile – Kenya' available at <http://www.unhcr.org/cgi-bin/txis/vtx/page?page=49e483a16&submit=GO> [Accessed 19 September 2011].

²⁶ S Martin 'Justice, Women's Rights, and Forced Migration' in Hollenbach (n 9) at 144.

²⁷ Nowrojee (n 9) at 126.

²⁸ Farmer (n 20) at 54.

²⁹ Crisp (n 17) at 605.

³⁰ Ibid.

freedom from torture, or cruel, inhuman or degrading treatment or punishment as well as the highest attainable standard of physical and mental health.³¹

Many acts of sexual violence - including rape, gang rape, abduction and sexual slavery, constitute torture under customary international law, war crimes and grave breaches of the Geneva Conventions.³² Customary international law refers to unwritten international legal norms which are legally binding on all states; except for states that are 'persistent objectors.'³³ It is widely accepted that certain international human rights law principles are customary international law. Amongst these is the principle of non-refoulement.³⁴ Certain forms of customary international law are also viewed as *jus cogens*. These are universal international norms viewed by states as compelling higher law from which no derogation may be permitted.³⁵ Amongst these are the prohibition against torture, genocide and crimes against humanity.³⁶

Sexual violence also hampers personal development and instils fear, humiliation and shame upon its victims. Kenya has signed and ratified several international and regional human rights instruments which entrench these rights. These include but are not limited to: the International Covenant on Civil and Political Rights,³⁷ the Convention on the Elimination of All

³¹ Farmer (n 20) at 55.

³² International Committee of the Red Cross *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287. Entered into force on 21 October 1950 at Article 3 and Article 27. See International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1331.

Entered into force 7 December 1978 at Article 75(2)(b) and 77(1);

UN General Assembly, *Rome Statute of the International Criminal Court (last amended January 2002)*, 17 July 1998, A/CONF. 183/9 at Article 7 and 8 (2)(b)(Rome Statute)(xxii); and jurisprudence of the [International Criminal Tribunal for the former Yugoslavia \(ICTY\)](#) and of [International Criminal Tribunal for Rwanda \(ICTR\)](#) at International Courts and Tribunals at <http://www.un.org/en/law/> [Accessed 30 August 2011]. Particularly Prosecutor v. Anto Furundzija (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, available at:

at <http://www.icty.org/case/furundzija/4> and AKAYESU, Jean Paul (ICTR-96-4) at <http://www.unictr.org/Portals/0/Case%5CEnglish%5CAkayesu%5Cjudgement%5Cakay001.pdf>.

³³ US Legal 'Customary International Law & Legal Definition' available at <http://definitions.uslegal.com/c/customary-international-law%20/> (Accessed 12 October 2011).

³⁴ Ibid.

³⁵ US Legal 'Jus Cogens Law & Legal Definition' available at <http://definitions.uslegal.com/j/jus-cogens/> (Accessed 12 October 2011).

³⁶ Ibid.

³⁷ International Covenant on Civil and Political Rights GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967)(ICCPR). Entered into force 23 March 1976.

Forms of Discrimination against Women,³⁸ the Convention against Torture,³⁹ the Convention on the Rights of the Child,⁴⁰ the African Charter on Human and People's Rights,⁴¹ the African Charter on the Rights and Welfare of the Child⁴² and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.⁴³

By ratifying the above-mentioned treaties Kenya has an obligation to domesticate them into domestic law. Kenya has a legal obligation under regional and international law to equally protect all persons within its territory, including refugee women.⁴⁴ Kenya has an obligation to prevent, investigate, prosecute and punish perpetrators of violence against women.⁴⁵ It also has an obligation to ensure that victims have a right to an effective remedy.⁴⁶ At the domestic level Kenya's Penal Code prohibits sexual violence.⁴⁷

The United Nations High Commissioner for Refugees (UNHCR) incurs a secondary obligation to protect refugee women from sexual violence. According to the UNHCR Statute, UNHCR has an obligation to provide international protection to refugees and to seek permanent solutions for them.⁴⁸ Action to be taken by UNHCR includes 'advocating for the rights of refugees, advising states on how to adapt their national legislation so it conforms to international standards, and taking actions to minimise the risk of sexual violence.'⁴⁹ However Kenya has

³⁸ Convention on the Elimination of All Forms of Discrimination against Women G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, (CEDAW). Entered into force 3 September 1981.

³⁹ UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, 85 (CAT). Entered into force on 26 June 1987.

⁴⁰ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, 3 (CRC). Entered into force on 2 September 1990.

⁴¹ Organisation of African Unity, *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), (ACHPR). Entered into force on 21 October 1986.

⁴² Organization of African Unity, *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), (ACRWC). Entered into force on 29 November 1989.

⁴³ African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003, (AWP). Entered into force on 11 July 2003.

⁴⁴ ICCPR (n 37) at Article 2.

⁴⁵ AWP (n 43) at Article 11(3). See UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104 (DEVAW) Article 4(c). Entered into force on 23 February 1994.

⁴⁶ H Steiner and P Alston *International Human Rights in Context: Law, Politics, Morals* (2000) 183.

⁴⁷ The Penal Code, Chapter 63 available at <http://www.kenyalaw.org/Downloads/GreyBook/8.%20The%20Penal%20Code.pdf> (Accessed 12 October 2011).

⁴⁸ 1951 Convention (n 1) at Article 1 and 8.

⁴⁹ UNHCR SGBV (n 4) at 9.

largely placed the burden of refugee protection on UNHCR and other intergovernmental and nongovernmental organisations.⁵⁰

3. Hypothesis

This dissertation will argue that the normative and procedural protection framework established under the international refugee law regime is inadequate to provide protection to refugee victims of sexual violence. It will also be argued that the various duty bearers vis-à-vis the right to security of refugee women in Kenya are not living up to their legal obligations at the international and domestic level.⁵¹ This dissertation will further illustrate the potential benefits of utilizing the human rights law regime to enhance the protection of refugee women from sexual violence.

4. Methodology

The study is composed of a detailed analysis of the international and regional treaties, declarations, general comments and resolutions⁵² which make explicit and implicit reference to the right to life, security of person, freedom from torture or cruel, inhuman or degrading treatment and the right to health. It will also draw upon relevant international and regional case law which outlines the obligations of the various duty bearers. Using Kenya as an example, this thesis will investigate the implementation of the duty to protect refugee women from sexual violence. In this regard, an analysis of Kenya's legislative framework will be will be conducted. Reference will be made to research reports produced by the United Nations, the United Nations High Commission for Refugees and other prominent Non-Governmental Organisations which outline the nature, prevalence and consequences of sexual violence against refugee women in

⁵⁰ Aronson (n 14).

⁵¹ The primary duty bearer at the international and regional level is the state whilst international institutions are secondary duty bearers. At the domestic level the primary duty bearer is the government (both local and national). Although other duty bearers at the domestic level include civil society, communities, parents and guardians; this dissertation will focus on the role of the national government.

⁵² It must be noted that although declarations, general comments and resolutions are soft law provisions which are not legally binding, they are still relevant and of high persuasive value.

Dadaab and Kakuma camps in Kenya. The works of prominent academics in the field of refugee law and human rights law will also be referred to.

5. Objects and Purposes

By virtue of being refugees and the most vulnerable of any displaced population; refugee women require higher levels of protection than other displaced persons. In addition to violating several fundamental human rights of women, violence against women has several wide reaching adverse consequences. Whilst these consequences affect individual victims, violence against women also creates permanent scars on any society. The impact of these scars is immeasurable.

Refugee women often lack the protection offered by a functioning society. Thus the impact of sexual violence against refugee women in refugee camps is of a graver nature than that on both other women in general and other displaced persons. Such women are at the risk of various health and psycho-social problems; some of which are long term or fatal.⁵³ They also risk being ostracised for bringing shame upon their communities and failing to preserve their dignity.⁵⁴

This dissertation will examine the challenges and limitations facing various duty bearers when dealing with sexual violence against refugee women in Dadaab and Kakuma camps in Kenya. By virtue of hosting the largest refugee settlement in the world, the majority of whom are women, the mere numbers of refugee women involved justifies the focus on Kenyan refugee camps. Additionally the pervasiveness and systematic nature of the occurrence of sexual violence against refugee women in Kenyan camps justifies this focus. The fact that the perpetrators of sexual violence against refugee women involved include duty bearers whose primary duty is that of protection further illustrates the importance of this thesis. The inadequacies of their responses and their failures to respond to and provide redress to refugee victims of sexual violence will be highlighted.

⁵³ UNHCR SGBV Guidelines (n 4) at 22.

⁵⁴ Tapia (n 13).

This thesis will analyse the effectiveness of the Refugee Law regime in providing protection and redress to victims of sexual violence. It also questions the effectiveness of UNHCR in the exercise of its protection mandate. It will be illustrated that Kenya is not living up to its legal obligation to protect refugee women from sexual violence.

6. Chapter synopsis

This dissertation comprises five chapters. The present chapter is introductory and whose purpose is to outline the background to occurrences of sexual violence against refugee and asylum seeking women and girls, as well as the hypothesis, and objects and purposes, of the dissertation.

Chapter two provides a legal analysis of the international legal framework right to physical security of refugee women in refugee camps as well as the legal framework applicable to the protection of refugee women and girls situated in Kakuma and Dadaab refugee camps. This chapter will identify the duty bearers envisaged under each regime and the nature of their obligations. It will conclude by stating that the normative and procedural components of the human rights law regime provides greater prospects of success in relation to the protection of refugee women from sexual violence. It must be noted that greater emphasis will be placed on the refugee law and the human rights law regime.

Chapter three will examine how the right to security of refugee and asylum seeking women and girls in Dadaab and Kakuma refugee camps has been enforced in practice. This chapter will outline the measures taken by the relevant duty bearers, the challenges that have been faced as well as the shortcomings of their efforts.

Chapter four will proceed to provide a brief overview of the challenges faced by both the international and regional human rights mechanisms in their endeavours to protect refugee women from sexual violence and analyse whether recourse to the United Nations Treaty and

Charter based mechanisms and or the African Regional System mechanisms treaty bodies really provide an adequate remedy for refugee rights.⁵⁵

Chapter five will proffer some recommendations aimed at enhancing access to justice and redress for refugee victims of sexual violence. It will be recommended that a comprehensive and holistic approach that encompasses improvements under the refugee law regime as well as recourse to both the UN Human Rights protection mechanisms and the African Regional Human Rights mechanism is needed to enhance the protection of refugee and asylum seeking women and girls. The following chapter will provide a legal analysis of the international and regional framework for right to security of person of refugee women.

⁵⁵ Saul Takahashi 'Recourse to Human Rights Treaty Bodies for Monitoring the Refugee Convention' *Netherlands Quarterly of Human Rights* (2002) 20 at 56.

Chapter II

INTERNATIONAL LEGAL FRAMEWORK ON VIOLENCE AGAINST REFUGEE WOMEN

1. Introduction

Sexual violence against refugee women impairs a number of human rights principles enshrined in international human rights instruments. These include but are not limited to the right to life, security of the person, freedom from torture, or cruel, inhuman or degrading treatment or punishment as well as the highest attainable standard of physical and mental health.⁵⁶ Many acts of sexual violence - including rape, gang rape, abduction and sexual slavery, constitute torture under customary international law,⁵⁷ war crimes and grave breaches of the Geneva Conventions.⁵⁸

Several international and regional human rights instruments provide for these rights explicitly or implicitly. Reference will be made to treaties, conventions, declarations, resolutions, general comments and other relevant soft law provisions which provide explicit and implicit protection from sexual violence.⁵⁹

2. The Refugee Law Regime

The 1951 Convention⁶⁰ and the 1967 Protocol Relating to the Status of Refugees⁶¹ (1967 Protocol) govern the international refugee law regime. At the regional level the applicable

⁵⁶ Farmer (n 20) at 55.

⁵⁷ Prosecutor v. Anto Furundzija (n 32) at para 165 – 173.

⁵⁸ Fourth Geneva Convention (n 32) at Article 3 and Article 27; Geneva Convention Protocol I (n 32) at Article 75(2)(b), 76(1) and 77(1); Rome Statute (n 32) at Article 7 and 8 (2)(b)(xxii); Prosecutor v. Anto Furundzija (n 32) and AKAYESU, Jean Paul (ICTR-96-4)(n 32) at <http://www.unict.org/Portals/0/Case%5CEnglish%5CAkayesu%5Cjudgement%5Cakay001.pdf>.

⁵⁹ ICCPR (n 37), CEDAW (n 38), CAT (n 39), CRC (n 40), ACHPR (n 41), ACRWC (n 42), AWP (n 43).

⁶⁰ 1951 Convention (n 1).

⁶¹ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267. Entered into force on 4 October 1967.

instrument is the OAU Convention.⁶² The relevant soft law instruments include UNHCR Policy Documents Related to Gender and Women⁶³ as well as several UNHCR Executive Committee Conclusions.⁶⁴ The duty bearers under the refugee law regime are the host state in which the refugee finds himself,⁶⁵ the UNHCR,⁶⁶ other international organisations,⁶⁷ and the international community.⁶⁸ Whilst the responsibility to protect is primarily that of the host state,⁶⁹ the UNHCR performs a complementary function. Chapter 1(1) of the Statute of the Office of the outlines the role of this offices as that of providing ‘international protection to refugees who fall within the scope of the UNHCR Statute.’⁷⁰ At the regional level the Preamble of the OAU Convention

⁶² Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa* ("OAU Convention"), 10 September 1969, 1001 U.N.T.S. 45. Entered into force on 20 June 1974.

⁶³ UNHCR HPWG (n 22) UN Secretary-General, *Secretary-General's Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, 9 October 2003, ST/SGB/2003/13 (SG's Bulletin) available at: <http://www.unhcr.org/refworld/docid/451bb6764.html> [Accessed 16 August 2011]; UNHCR SGBV (n 4) ; UN High Commissioner for Refugees, *UNHCR's Commitments to Refugee Women*, 12 December 2001 (UNHCR CRW) available at: <http://www.unhcr.org/refworld/docid/479f3b2a2.html> [Accessed 16 August 2011] and UN High Commissioner for Refugees, *UNHCR Policy on Refugee Women*, 20 August 1990 (UNHCR PRW) available at: <http://www.unhcr.org/refworld/docid/3bf1338f4.html> [Accessed 16 August 2011]. See also Women's Refugee Commission, *UNHCR Policy on Refugee Women and Guidelines on Their Protection: An Assessment of Ten Years of Implementation*, May 2002, available at: <http://www.unhcr.org/refworld/docid/48aa83220.html> [Accessed 16 August 2011]; UN High Commissioner for Refugees, *Note on certain aspects of sexual violence against refugee women*, 12 October 1993, A/AC.96/822, available at: <http://www.unhcr.org/refworld/docid/4a54bc390.html> [Accessed 16 August 2011]; UNHCR How-to Guide 6: Monitoring and Evaluation of Sexual and Gender-based Violence Programmes (2000) available at <http://www.unhcr.org/refworld/pdfid/479f3b4d2.pdf> (2000) [Accessed 16 August 2011].

⁶⁴ See UN High Commissioner for Refugees ‘Thematic Compilation of Executive Committee Conclusions August 2009, 4th edition, available at: <http://www.unhcr.org/refworld/docid/4a7c4b882.html> [Accessed 21 February 2012]; particularly Executive Committee Conclusion Number 73 (XLIV) on Refugee Protection and Sexual Violence, Number 105 (LVII) 2006 on Women and Girls at Risk, Number 72 (XLIV) on Personal Security of Refugees, Number 102 (LVI) 2005 entitled General Conclusion on International Protection, Number 39 (XXXVI) on Refugee Women and International Protection, Number 54 (XXXIX) on Refugee Women, Number 60 (XL) on Refugee Women, Number 64 (XLI) on Refugee Women and International Protection. Also see Executive Committee Conclusion Number 6 (XXVIII) On Non-Refoulement (1977)7, Number 7 (XXVIII) on Expulsion (1977), Number 22 (XXXII) Protection of Asylum-Seekers in Situation of Large-Scale Influx (1981), Number 85 (XLIX) on International Protection (1998).

⁶⁵ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), Article 2A available at: <http://www.unhcr.org/refworld/docid/3ae6b3628.html> [Accessed 21 February 2012] (UNHCR Statute). Also see OAU Convention (n 62) Article 2(1) and (3) and Ex Comm. Conclusion No. 72 (n 64) at Preamble.

⁶⁶ 1951 Convention (n 1) at Preamble. Also see UNHCR Statute Ibid at Chapter 1(1) and OAU Convention, (n 62) at Preamble, para 11.

⁶⁷ Ex Comm. Conclusion No. 85 (n 64).

⁶⁸ 1951 Convention (n 1) Preamble. See OAU Convention (n 62) Article 2(4).

⁶⁹ Report of the U.N. High Commission for Refugees, 38 UN GAOR Supp. (no. 12) p 8, UN Doc. A/38/12 (1983) cited in Nowrojee (n 9) at 126.

⁷⁰ UNHCR Statute (n 65).

identifies the Organisation of African Unity as an additional duty bearer obliged to perform a collaborative function in assisting host states in the exercise of their duties to refugees.⁷¹

The role played by the international community also appears to be complementary but secondary⁷² in that its role is qualified firstly by large scale influxes, and secondly, it becomes operational only at the request of host states.⁷³ Whilst the obligations of the international community are of paramount importance to the protection of refugee women from sexual violence, it should be noted that for the purposes of brevity, this thesis will not analyse the obligations of the international community.⁷⁴

2.1 Normative Provisions - Treaties and Conventions

The basis of refugee law is that of protection. Accordingly, the preamble to the 1951 Convention recognises that it was borne out of a need to extend the protection offered by the Universal Declaration of Human Rights⁷⁵ and the Charter of the United Nations.⁷⁶ The 1951 Convention was intended to provide substitute protection to persons unable or unwilling to seek protection from their home country because of fear of or actual persecution.⁷⁷ However, both the 1951 Convention and the OAU Convention fail to define the meaning of protection. Additionally, neither contains an explicit provision for the right to physical security.

Academics such as Hathaway have attributed this omission to several factors; the first being that it was obvious to the drafters that refugees had this right.⁷⁸ Mtango is of the opinion that the primary concern of the drafters was the economic and social well being of refugees; with the assumption being that the enforcement of national asylum laws and the international law of

⁷¹ OAU Convention (n 62) at Preamble, para 11.

⁷² 1951 Convention (n 1) Preamble. See Ex Comm. Conclusion No. 22 (n 64) Article IV (1).

⁷³ Ibid

⁷⁴ Ex Comm. Conclusion No. 98 (n 64) para g. Ex Comm. Conclusion No. 67 (n 64) para a and d, and Ex Comm. Conclusion No. 100 (n 64).

⁷⁵ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) (UDHR).

⁷⁶ UN, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI. See 1951 Convention (n 1) at Preamble (UN Charter).

⁷⁷ 1951 Convention (n 1) at Article 1(A)(2). See Hathaway (n 2) at 88 and G Goodwin Gill 'The Language of Protection' (1989) *International Journal of Refugee Law* 1 at 6.

⁷⁸ Hathaway (n 2) at 448.

armed conflict would protect the physical safety of refugees.⁷⁹ However, feminists such as Charlesworth are of the view that because international refugee law was drafted almost exclusively by men it was assumed that men were able to ensure their own physical security; hence the omission of the right to physical security.⁸⁰

Despite this omission, the right to the physical security for refugees is implied from the non-refoulement provision under Article 33(1) of the 1951 Convention and Article 2(3) of the OAU Convention which prohibits states from rejecting, returning or expelling any person to a territory where their life would be threatened. The phrase ‘where his life or freedom would be threatened’ reflects the intention of the drafters of this Convention.

Secondly, the right is implied from the non-discrimination clause of the OAU Convention which bestows all human beings with fundamental rights and freedoms.⁸¹ Additionally, the non-refoulement provision in the same Convention obliges countries of asylum to settle refugees far away from the frontier of their country of origin for security reasons.⁸² Thus it may be deduced that this is in recognition of the fact that failure to do so would constitute a violation of their right to physical security.

2.2 Normative Provisions - Soft Law Provisions

2.2.1 Executive Committee Conclusions

The UNHCR is governed by the Executive Committee, an intergovernmental body made up of 56 States which adopts a number of Conclusions by consensus on current issues of refugee protection.⁸³ These articulate a number of principles to be followed and measures to be taken by the Executive Committee member States as well as by the UNHCR to enhance the protection of women and girls of concern.⁸⁴ The Executive Committee has developed General Conclusions on women and children, as well as conclusions which focus on specific themes, such as preventing

⁷⁹ Ibid at 448.

⁸⁰ H Charlesworth and C Chinkin, ‘Boundaries of International Law: A Feminist Analysis (2000), at 280 – 287.

⁸¹ OAU Convention (n 63) at Preamble, para 6.

⁸² Ibid at Article 2(6).

⁸³ UNHCR HPWG (n 22) at 356.

⁸⁴ Ibid

and responding to sexual and gender-based violence.⁸⁵ These Conclusions, though not legally binding on States, have been described by academics such as Takahashi as reflecting the views of the international community and as therefore being of persuasive influence.⁸⁶

2.2.2 UNHCR Policy Documents

The various UNHCR Policy Documents⁸⁷ developed and adopted by UNHCR for the protection of refugee women from sexual violence are not legally binding on state parties. However, they bind the UNHCR and its operational partners in the exercise of their protection mandate. The Guidelines have been developed for internal use by UNHCR staff and other organisations involved in refugee protection work.⁸⁸ For instance, the Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons Guidelines for Prevention and Response contain practical recommendations on the design of refugee camps and specific activities to prevent and respond to sexual violence.⁸⁹

The UNHCR Handbook for the Protection of Women and Girls is broader in scope and it is aimed at promoting gender equality by using a rights and community-based approach.⁹⁰ Whilst the broad aim of this handbook is to mainstream age, gender and diversity in all UNHCR activities, it too offers practical recommendations for UNHCR which reduce the vulnerability of refugee women from sexual violence.⁹¹ On the other hand, the Secretary-General's Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse prohibits United Nations peacekeeping forces from committing acts of sexual exploitation and abuse. It further adds that such peace keeping forces have a specific duty of care towards women and children.⁹²

⁸⁵ UN High Commissioner for Refugees 'Thematic Compilation of Executive Committee Conclusions (n 64) at Ex Comm. Conclusion No. 6, 7, 22, 30, 85, 102, 105 and 107.

⁸⁶ Takahashi (n 55).

⁸⁷ UNHCR HPWG (n 22), SG's Bulletin: Special Measures for Protection (n 63), UNHCR SGBV Guidelines (n 4), UNHCR CRW (n 63), UNHCR PRW (n. 63), UNHCR Policy on Refugee Women and Guidelines on Their Protection: An Assessment of Ten Years of Implementation (2002) UNHCR Note on Certain Aspects of Sexual Violence against Refugee Women (n 63), UNHCR How-to Guide 6: Monitoring and Evaluation of Sexual and Gender-based Violence Programmes (n 63) Agenda for Protection, Goal No. 6 (n 63).

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ UNHCR HPWG (n 22).

⁹¹ Ibid.

⁹² SG's Bulletin: Special Measures for Protection (n 63) at 9.

This document was drafted in response to the General Assembly resolution 57/306 of 15 April 2003.⁹³

The UNHCR's Commitments to Refugee Women require UNHCR to adopt a community-based approach that equally targets men and women in the prevention and response to sexual violence against refugee women.⁹⁴ They further require all UNHCR operations to design standard operating procedures in each country programme.⁹⁵ Finally, one of the policy objectives of the UNHCR Policy on Refugee Women is aimed at ensuring that responses to sexual violence against refugee women consider the specific protection needs of refugee women.⁹⁶

2.3 Nature of Obligations of Duty Bearers under the Refugee Law Regime

2.3.1 Obligations of Kenya under the Refugee Law Regime

Neither the 1951 Convention, the 1967 Protocol nor the OAU Convention provide explicit obligations for the host state *vis a vis* the protection of refugee women from sexual violence. Therefore the nature of the host state's obligations must be deduced from Article 33(1) of the 1951 Convention and Article 2(3) of the OAU Convention which provide implicit protection to the security of person of refugee women. Consequently, the obligations of the host state may be implied from the phrase 'where his life or freedom would be threatened' as being to ensure the realisation of the right to life and physical security of refugees.

Similarly the UNHCR Statute is silent on the obligations of the host state, however Executive Committee Conclusion Number 73 (XLIV) on Refugee Protection and Sexual Violence⁹⁷ and 72 (XLIV) on Personal Security of Refugees⁹⁸ enjoin host states to ensure the

⁹³ UN General Assembly, *Special measures for protection from sexual exploitation and sexual abuse : report of the Secretary-General*, 18 February 2010, A/64/669, available at:

<http://www.unhcr.org/refworld/docid/4bb453582.html> [Accessed 16 January 2012]

⁹⁴ UNHCR CRW (n 63) at 12. Commitment Number 2 identifies the provision of individual identification and documentation as a tool to enhance individual security; whilst Commitment Number 3 aims to reduce the vulnerability of women and girls from sexual abuse and exploitation by ensuring the participation of women in the decision making processes of food management and distribution.

⁹⁵ *Ibid.*

⁹⁶ UNHCR PRW (n 63) at 20.

⁹⁷ Ex Comm. Conclusion No. 73 (n 64).

right to personal security of all persons within their territory. Host states are to domesticate international legal standards into national laws as well as to undertake ‘concrete measures to prevent and combat sexual violence.’⁹⁹ Concrete measures include the establishment and enforcement of training programmes for law enforcement officers and military forces,¹⁰⁰ the implementation of effective legal remedies which include thorough investigation of complaints and the prosecution of offenders,¹⁰¹ as well as ensuring that the UNHCR has speedy access to all asylum-seekers, refugees and returnees.¹⁰²

2.3.2 Obligations of the United Nations High Commissioner for Refugees under the Refugee Law Regime

The mandate of the UNHCR is two pronged: the first being that of providing international protection to refugees who fall within the scope of the UNHCR Statute and secondly, that of seeking permanent solutions for refugees.¹⁰³ The work of the High Commission is meant to be of a non-political character; and of a humanitarian and social character.¹⁰⁴

Article 8 outlines the protection obligations of the High Commission; these are promotional and diplomatic in nature and include but are not limited to encouraging states to ratify international conventions which protect refugees, monitoring and supervising adherence to these treaties;¹⁰⁵ proposing amendments, encouraging the admission of refugees,¹⁰⁶ as well as ‘co-ordinating the efforts of private organisations concerned with the welfare of refugees.’¹⁰⁷ Conclusion Number 64 on Refugee Women and international Protection provides a wide range

⁹⁸ Ex Comm. Conclusion No. 72 (n 64) para b. See Ex Comm. Conclusion No. 39, 54, 60 and 64.

⁹⁹ Ex Comm. Conclusion No. 73 (n 64) para b.

¹⁰⁰ Ibid at para b (i).

¹⁰¹ Ibid at para b (ii).

¹⁰² Ibid at para b (iii) and f. Also see Ex Comm. Conclusion No. 80 (n 64) para e.

¹⁰³ UNHCR Statute (n 65) Article 1 provides examples permanent solutions to the refugee problem such as voluntary repatriation or assimilation of refugees in new communities. See Ex Comm. Conclusion 52 (n 64) Preamble.

¹⁰⁴ Ibid at Article 2.

¹⁰⁵ Ibid at Article 8 (a).

¹⁰⁶ Ibid at Article 8(h).

¹⁰⁷ Ibid at Article 8 (i). See Ex Comm. Conclusion No. 100 (n 64).

of additional practical institutional and promotional measures to be taken by the UNHCR for the protection of refugees.¹⁰⁸

The UNHCR also incurs negative duties. These include the duty not to violate human rights norms while operating in the host state¹⁰⁹ and a limited duty to prevent others from committing human rights violations.¹¹⁰ Although UNHCR has no criminal law function that would allow it to prosecute individuals, it is obliged to enforce existing policies designed to reduce systematic occurrences of sexual violence.¹¹¹

There are several contestations surrounding UNHCR's role in the protection of refugee women from sexual violence. The major contestation being whether UNHCR's positive obligations encompass providing actual physical protection to refugee women from sexual violence or whether it merely assists the host state in the exercise of this function.

The Statute of the UNHCR is silent on whether UNHCR's positive obligations encompass providing actual physical protection to refugee women from sexual violence. There are two main schools of thought; the first being that UNHCR's role in providing international protection involves ensuring that Governments take the necessary action to protect the refugees within their territory.¹¹² This is in line with the mandate given to the High Commission's Office in 1938, which was to provide 'political and legal protection.'¹¹³

Crisp and Harlepin argue that UNHCR's role in physical protection is only to support host States in their task of providing security and to ensure that refugees are treated in conformity with basic standards.¹¹⁴ Crisp adds that UNHCR has neither the mandate nor the capacity to provide physical protection.¹¹⁵ This is confirmed by a 2009 UNHCR Global Report

¹⁰⁸ Ex Comm. Conclusion No. 64 (n 64.) para a.

¹⁰⁹ Farmer (n 20) at 77.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² UNHCR SGBVG (n 4) at 10.

¹¹³ Goodwin-Gill (n 77) at 7; according to Goodwin-Gill, *legal* protection related to the status of refugees as well as their rights and interests in other countries; whilst *political* protection related to situations where solutions to refugees' problems required presentation to governments at the political level.

¹¹⁴ Crisp (n 17) at 63. See Halperin (n 7).

¹¹⁵ Halperin (n 7).

which described its protection mandate as encompassing policy and operational concerns ‘with the goal of enhancing respect for the rights of people of concern and resolving their problems.’¹¹⁶

Human Rights Watch has actively advocated for the second school of thought which is that UNHCR’s mandate is no longer purely legal and dealing with issues of refoulement and asylum; but instead encompasses the actual physical protection.¹¹⁷ The original mandate of the UNHCR enjoins the UNHCR to provide protection to refugees who fall within the ambit of the UNHCR Statute.¹¹⁸

The High Commission may assist the host state in making effective and appropriate protection arrangements and solutions such as locating refugee camps and settlements at a reasonable distance from the frontier of the country of origin.¹¹⁹ In practice, the UNHCR has developed policies aimed at addressing sexual violence against refugees;¹²⁰ it has conducted trainings to equip its staff with practical skills to assist victims of sexual abuse.¹²¹ Similar trainings have been conducted for law enforcement officials, government personnel, non-governmental organisations.¹²²

¹¹⁶ UNHCR ‘Global Report 2009 - Providing international protection’ at 2, available at <http://www.unhcr.org/4c08f25a9.html>, [Accessed 24 August 2011].

¹¹⁷ Human Rights Watch, ‘Protection of the Rights of Refugee Women’ at 1; available at <http://www.hrw.org/reports/1997/gen3/General-04.htm> [Accessed 22 September 2011]. See UNHCR ‘Protection’ available at <http://www.unhcr.org/pages/49c3646cc8.html>, [Accessed 24 August 2011]. According to UNHCR, its staff ‘promotes or provides legal and physical protection, and tries to minimize the threat of violence’ against refugees. See UNHCR ‘Global Report 2009 (n 116) which states that UNHCR’s international protection function has evolved greatly from being a surrogate for consular and diplomatic protection to ensuring the basic rights of persons of concern to UNHCR.

¹¹⁸ UNHCR Statute (n 65).

¹¹⁹ Ex Comm. Conclusion 48 (n 64) at Article 4 (c).

¹²⁰ Ex Comm. Conclusion No. 98 (n 64) at the Preamble; specific examples which include UNHCR PRW (n 63) the 1993 Policy on Refugee Children and 1994 Refugee Children: Guidelines on Protection and Care, UNCHR SGBV (n 4), UNHCR CRW (n 63) as well as the UNHCR *Guidelines on International Protection, Gender-Related Persecution*, in May 2002.

¹²¹ UNCHR SGBV (n 4).

¹²² Ex Comm. Conclusion No. 72 (n 64) at para e. See Ex Comm. Conclusion No. 64 (n 64) at para a.

In conclusion, although UNHCR's mandated has been extended and evolved over the years,¹²³ it does not include the provision of actual physical protection.¹²⁴ However UNHCR's conduct implies suggests that it has the requisite political willingness to do more to enhance the physical security of refugees.¹²⁵

3. The Human Rights Law Regime

The international and regional human rights system consists of both norms as outlined in treaties and other instruments as well as procedural monitoring mechanisms which ensure implementation of these norms.¹²⁶ The various treaties and conventions identify the host state as the primary duty bearer entrusted with the positive obligation of upholding identified rights and protecting all citizens.¹²⁷ However, International Institutions are often secondary duty holders¹²⁸ whose overall obligation is to oversee the implementation of and investigate alleged violations of human rights obligations¹²⁹ as well as to address selected or substantive human rights problems or specific country human rights situations.¹³⁰

Refugees are entitled to claim the benefits of any international legal provisions which grant the right to life, dignity, physical security and protection from inhuman and degrading treatment in the international human rights law regime. This is confirmed by Article 5 of the 1951 Convention provides which affirms the rights and benefits that refugees possess apart from

¹²³ See UN General Assembly, *Report of the United Nations High Commissioner for Refugees*, 18 December 1961, A/RES/1673, available at: <http://www.unhcr.org/refworld/docid/3b00f1d454.html>, [Accessed 24 August, 2011]. UNHCR's mandate was extended in terms of UNHCR Statute (n 65) Article 9.

¹²⁴ Harlepin, (n 7) at 67.

¹²⁵ Ibid.

¹²⁶ See Zdzislaw Kedzia 'United Nations Mechanisms to Promote and Protect Human Rights' in J Symonides (ed) *Human Rights: International protection, monitoring, and enforcement* (2003) at 5 and Office of the High Commissioner for Human Rights 'The Human Rights Mechanisms' available at www.ohchr.org/Documents/AboutUs/IK_HR_mechanisms_En.pdf - 2010-12-13 [Accessed 18 August, 2011]. See C Heyns 'The African Regional Human Rights System: The African Charter' (2003-2004) 108 *Penn State Law Review* at 698 and Institute for Human Rights and Development in Africa 'Institutions with a Human Rights Protection Mandate' available at <http://www.ihrda.org/african-human-rights-mechanisms/> [Accessed 25 August 2011].

¹²⁷ Steiner and Alston (n 46) at 185.

¹²⁸ Ibid at 182.

¹²⁹ Kedzia (n 126) at 5.

¹³⁰ Ibid at 49.

the 1951 Convention.¹³¹ Additionally, General Comment Number 15 of the Human Rights Committee identifies aliens as rights holders with the right to life, and with protection from torture or cruel, inhuman or degrading treatment or punishment as well as the right to liberty and security of person.¹³²

Although some of the instruments, such as the International Covenant on Civil and Political Rights,¹³³ the Convention against Torture¹³⁴ and the African Charter on Human and People's Rights¹³⁵ make no specific mention of refugee women, their provisions apply to refugees by virtue of the use of the words 'everyone,' 'all individuals,' and 'all peoples.'¹³⁶ Furthermore, the above-mentioned instruments contain non-discrimination clauses which further enhance the application of these rights to refugees.¹³⁷

The following section will identify and analyse the applicable human rights instruments which identify refugee and asylum seeking women and girls as rights holders entitled to protection from sexual violence. Additionally this section will identify the relevant duty bearers and provide a brief overview of the nature of their obligations.

3.1 Normative provisions - Treaties and Conventions

The Preamble to the ICCPR provides for the right to dignity, whilst Articles 6(1), 7 and 9(1)¹³⁸ provide for the right to life, protection from inhuman and degrading treatment and the right to liberty and security of person respectively. Similar provisions are found in Articles 4, 5 and 6 of the ACHPR.¹³⁹

¹³¹ 1951 Convention (n 1) at Article 5.

¹³² UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, available at: <http://www.unhcr.org/refworld/docid/45139acfc.html> [Accessed 9 June 2011], (General Comment No. 15).

¹³³ ICCPR (n 37).

¹³⁴ CAT (n 38).

¹³⁵ ACHPR (n 41).

¹³⁶ ICCPR (n 37) at Preamble, Article 6(1) and Article 7, CAT (n 38) at Preamble para3, ACHPR (n 41) at Article 4 and 5.

¹³⁷ ICCPR (n 37) at Article 2(1), ACHPR (n 41) at Article 2 and 19.

¹³⁸ ICCPR (n 37) at Article 9(1).

¹³⁹ ACHPR (n 41) at Article 4, 5 and 6.

Article 16 of CAT requires contracting State parties to prevent acts of cruel, inhuman or degrading treatment or punishment that are carried out by ‘or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.’¹⁴⁰ It is arguable that the severity of certain forms of sexual violence such as rape amount to torture, cruel, inhuman or degrading treatment when committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Although violence against women is not mentioned in the Convention on the Elimination of all forms of Discrimination against Women,¹⁴¹ General Recommendation 19 of the CEDAW Committee¹⁴² recognizes that gender-based violence is a form of discrimination which inhibits a woman’s ability to enjoy rights and freedoms on an equal basis with men.¹⁴³ In so doing, the General Recommendation provides implicit protection against sexual violence for refugee and asylum seeking women and girls.

A major shortcoming of CEDAW however is that a significant number of State parties to CEDAW have entered reservations to some of its provisions indicating that they will interpret such provisions in a certain way or that they will not be bound by them.¹⁴⁴ This has thus limited the convention’s usefulness.

The AWP¹⁴⁵ provides comprehensive and explicit protection for refugee women against sexual violence. The AWP has a wide reaching definition of violence against women which encompasses threats and actual acts of violence committed in the public and private sphere as well as acts which result in physical, sexual, psychological and economic harm. Article 1(j) further encompasses acts committed in peace time and war time¹⁴⁶ whilst Articles 3(4) and 4(1) provides all women with the right to dignity and respect for her life and the integrity and security

¹⁴⁰ CAT (n 39) at Article 16.

¹⁴¹ CEDAW(n 38).

¹⁴² UN Committee on the Elimination of Discrimination Against Women , *CEDAW General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, 1992 (contained in Document A/47/38)*, 1992, A/47/38, available at: <http://www.unhcr.org/refworld/docid/453882a422.html> [Accessed 9 June 2011].

¹⁴³ UNHCR, HPWG (n 22) at 340.

¹⁴⁴ Ibid at 338.

¹⁴⁵ AWP (n 43).

¹⁴⁶ Ibid at Article 1(j).

of her person. This article further prohibits ‘all forms of exploitation, cruel, inhuman or degrading punishment and treatment’¹⁴⁷ whilst Article 4(2) enjoins states to enact and enforce laws that proscribe sexual violence against women in both the private and public sphere.¹⁴⁸ Article 11(3) should be hailed for specifying asylum seeking women, refugees, returnees and internally displaced persons as rights holders and enjoins states to protect them against all forms of violence, rape and other forms of sexual exploitation.

Both the CRC¹⁴⁹ and the ACRWC¹⁵⁰ contain explicit and implicit provisions which protect the refugee and asylum seeking girls from sexual violence. Article 6 of the CRC and V.1 of the ACRWC enjoin State Parties to ensure the maximum survival and development of the child.¹⁵¹ Sexual violence against refugee and asylum seeking girls clearly amounts to a violation the right to maximum survival and development of the child, inhuman or degrading treatment.

Article 22 of the CRC and Article XXIII of the ACRWC should be hailed for directly identifying accompanied and unaccompanied refugee and asylum seeking children as rights holders. State parties are to provide ‘appropriate protection and humanitarian assistance’ to such children.¹⁵² It is arguable that protection from sexual violence falls within the ambit of the aforementioned ‘appropriate protection.’ Article 2 of the CRC which prohibits discrimination on the basis of sex, birth and other status, further strengthens the obligation on states to protect refugee and asylum seeking girls from sexual violence by affirming that the rights contained in the Convention apply to all children within the host state’s jurisdiction.¹⁵³

The AWP is perhaps the most comprehensive instrument here in that it specifically identifies refugee women as direct rights holders and then it provides the different threats to physical security faced by refugees as examples of prohibited violations. This instrument is also the most comprehensive in terms of outlining the obligations of state parties.

¹⁴⁷ Ibid at Article 4 (1).

¹⁴⁸ Ibid at Article 4 (2).

¹⁴⁹ CRC (n 40).

¹⁵⁰ ACRWC (n 42).

¹⁵¹ CRC (n 40) at Article 6, ACRWC (n 42) at Article V.1.

¹⁵² Ibid at Article 22 and XXIII.

¹⁵³ CRC (n 40) at Article 2.

3.2 Normative provisions - Declarations and Resolutions

Although Declarations and Resolutions are not legally binding on state parties under international law, they reflect the aspirations of states;¹⁵⁴ they are of persuasive value they are of moral force to state parties.¹⁵⁵ Particular mention must be made of the UDHR which was the first instrument to outline a standard of human rights to be upheld by all nations.¹⁵⁶ Today the UDHR is considered to have more moral and political importance than ever before. The UDHR has evolved from a non-binding document to one that is legally binding after attaining the status of customary international law.¹⁵⁷ Thus all nations are bound by the provisions of the UDHR.

Article 3 and 5 of the UDHR provide implicit protection against sexual violence for refugee women.¹⁵⁸ The provisions provide for the right to life, liberty and security of person as well as protection from torture cruel, inhuman or degrading treatment or punishment. Refugee and asylum seeking women and girls are entitled to benefit from these provisions by virtue of the use of the words ‘everyone’ and ‘no one.’ This is further illustrated by the Preamble which recognises all members of the human family as equal and possessing inalienable rights as well as contains a non-discrimination clause in Article 1.¹⁵⁹

Specific mention must also be made of the Declaration on the Elimination of Violence against Women¹⁶⁰ which is the first set of international standards explicitly and wholly dealing with violence against women.¹⁶¹ Despite being a declaration, its importance stems from the fact that it has been described as reflecting norms that are internationally recognised by states as fundamental to efforts to eliminate all forms of violence against women.¹⁶² The UN Special

¹⁵⁴ United Nations Children’s Fund available at www.unicef.org/crc/files/Definitions.pdf [Accessed 18 January 2012].

¹⁵⁵ Ibid.

¹⁵⁶ National Coordinating Committee for UDHR ‘What makes the UDHR so important?’ available at <http://www.udhr.org/Introduction/question6.htm> [Accessed 22 January 2012].

¹⁵⁷ H Hannun ‘Status of the Universal Declaration of Human Rights in National and International Law’ (1995-1996) 25 *Georgia Journal of International and Comparative Law* 287 at 317.

¹⁵⁸ UDHR (n 75) at Article 3 and 5.

¹⁵⁹ Ibid at Preamble and Article 1.

¹⁶⁰ DEVAW (n 45).

¹⁶¹ UNHCR SGBV (n 4) at 37.

¹⁶² Preliminary Report submitted by the Special Rapporteur on violence against women, its causes and consequences, Commission on Human Rights, E/CN/1995/42, para. 95 cited in UNHCR HPWG (n 22) at 350.

Rapporteur on Violence against Women has determined that the obligation of States to prevent and respond to acts of violence against women with due diligence is a principle of customary international law.¹⁶³ Consequently it is potentially legally binding on all states. This instrument is also important in that it acknowledges that refugee women, female children and women in situations of armed conflicts are particularly vulnerable to violence.¹⁶⁴

Brief mention must also be made of the United Nations Security Council Resolution 1325 on Women, Peace and Security¹⁶⁵ and United Nations Security Council Resolution 1820¹⁶⁶ which represent a landmark in the struggle for the respect of the human rights and gender equality of women affected by war.¹⁶⁷ By reinforcing and elaborating on SC Resolution 1325, Resolution 1820 recognises sexual violence as a war crime. Additionally, this is the first legal instrument to recognise the relationship between international peace and security and sexual violence.¹⁶⁸

SC Resolution 1820 has been hailed for identifying a wide range of duty bearers and their corresponding obligations to prevent such acts of sexual violence and for establishing UN procedures to monitor sexual violence in armed conflict.¹⁶⁹ SC Resolution 1820 affirms the Security Council's ability to invoke Article 39 of the UN Charter which enables the Security Council to pass legally binding resolution on all states and declare incidents that are a threat to

¹⁶³Ibid.

¹⁶⁴ DEVAW (n 45) at Preamble.

¹⁶⁵ UN Security Council, *Security Council resolution 1325 (2000) [on women and peace and security]*, 31 October 2000, S/RES/1325 (2000), available at: <http://www.unhcr.org/refworld/docid/3b00f4672e.html> [Accessed 9 June 2011] (SC Res 1325).

¹⁶⁶ UN Security Council, *Security Council resolution 1820 (2008) [on acts of sexual violence against civilians in armed conflicts]*, 19 June 2008, S/RES/1820 (2008), available at: <http://www.unhcr.org/refworld/docid/485bbca72.html> [Accessed 9 June 2011], (SC Res 1820).

¹⁶⁷ SC Res 1325 (n 165) at para 10 and 12. See S Willet 'Introduction: Security Council Resolution 1325: Assessing the Impact on Women, Peace and Security' (2010) 17:2 *International Peace Keeping* 142 at 142. See C Binder, K Lukas, and R Schweiger 'Empty Words or Real Achievement? The Impact of Security Council Resolution 1325 on Women in Armed Conflicts' (2008) 101 *Radical History Review* 22 at 22. See T Tryggstad 'Trick or Treat? The UN and Implementation of Security Council Resolution 1325 on Women, Peace, and Security' (2009) 15:4 *Global Governance: A Review of Multilateralism and International Organizations* 539 at 539.

¹⁶⁸United Nations Development Fund for Women 'Security Council Resolution 1820' available at <http://www.stoprapenow.org/uploads/advocacyresources/1282164625.pdf> [Accessed 22 January 2012] (UNIFEM SC Res 1820). See International Women's Tribune Centre 'United Nations Security Council Resolution 1820: A Preliminary Assessment of the Challenges and Opportunities' available at http://www.iwtc.org/1820blog/1820_paper.pdf [Accessed on 22 January 2012] (IWTC SC Res 1820).

¹⁶⁹ Ibid at 16.

the peace, a breach of peace as well as acts of aggression.¹⁷⁰ This would empower the Security Council to intervene through various methods such as the imposition of sanctions.¹⁷¹

Although both instruments have their weaknesses, the political involvement of the United Nations Security Council means that Resolution 1820 has the potential to meaningfully contribute to the prevention of sexual violence against refugees in situations where it is widespread or systematic, as well as where it is used as a tactic of war and where it amounts to a threat to international peace and security.

3.3 Obligations of Kenya under Human Rights Law

The duty to protect enjoins host states to take positive action to protect all persons within its territory from violations of their human rights perpetrated by state actors, non-state actors¹⁷² as well as other states.¹⁷³ These obligations are three pronged, consisting of the duty to take preventative measures against sexual violence, a reactive element which entails investigating violations, punishing perpetrators and availing appropriate remedies to victims of sexual violence ; and regulating and controlling private actors .¹⁷⁴

In *Commission Nationale des droits de l'Homme et des Libertes v Chad*,¹⁷⁵ the African Commission explored the 'preventative' element of the duty to protect as requiring the government to ensure the safety and liberty of its citizens whilst the Inter-American Court of Human Rights explained this duty as requiring the state to take reasonable legal, political, administrative and cultural steps to prevent human rights violations.¹⁷⁶

¹⁷⁰ UN Charter (n 76) at Article 39.

¹⁷¹ UNIFEM SC Res 1820 (n 168) at 7.

¹⁷² African Commission, *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96 (2001), Banjul at para 59.

¹⁷³ D M Chirwa 'The doctrine of state responsibility as a potential means of holding private actors accountable for human rights' (2004) 5 *Melbourne Journal of International Law* 1 at 11 and 12.

¹⁷⁴ Steiner and Alston (n 46) at 183. See Chirwa (n 174) and ICCPR (n 37) at Article 3 (a).

¹⁷⁵ African Commission, Communication No 74/92 (1995) (*Commission Nationale des droits de l'Homme et des Libertes v Chad*) at para 22.

¹⁷⁶ *Velasquez Rodriguez v. Honduras*, Judgment (IACtHR, 21 Jul. 1989)(Velasquez case) at para 174.

The Executive arm of government is required to establish institutional machinery, a normative system and judicial institutions that provide regulatory and monitoring mechanisms, as well as remedies for victims of sexual violence.¹⁷⁷ The Legislative arm is required to domesticate treaties signed by the Executive. Because Kenya adopted the dualist system of law, Kenya is bound by international treaty law only after Parliament drafts and enacts a separate statute of law which protects refugee women from sexual violence.¹⁷⁸ The Judiciary on the other hand, interprets and applies the laws enacted by Parliament. SC Res 1820 further requires parties to armed conflict to train troops, ensure military discipline, upholding command responsibility and to vet past perpetrators as part of measures to prevent sexual violence against refugee women.¹⁷⁹

In *Commission Nationale des droits de l'Homme et des Libertes v Chad* the reactive element was held to require the government to 'conduct investigations into murders.'¹⁸⁰ In the *Velasquez Rodriguez* case the Inter American Court of Human Rights went a step further by requiring the state to use all possible means to conduct 'serious' investigations, to identify the perpetrators and to impose appropriate punishment and provide adequate compensation to victims.¹⁸¹

The AWP and the DEVAW create the most comprehensive and explicit obligations to protect refugee women from sexual violence. Article 4(2) of the AWP obliges states to identify the causes and consequences of violence, to take measures to prevent and eliminate such violence, to enact and enforce laws prohibiting violence¹⁸² as well as to 'punish perpetrators of violence against women.'¹⁸³ Article 11(3) specifies the need to particularly protect asylum

¹⁷⁷ Ibid.

¹⁷⁸ International Committee of the Red Cross 'Kenya: Constitutional structure and position of IHL in domestic law' available at <http://www.icrc.org/ihl-nat.nsf/162d151af444ded44125673e00508141/94add0c0c00464254125678c00584f84!OpenDocument> [Accessed 26 January 2012].

¹⁷⁹ SC Res 1820 (n 166) at para 7.

¹⁸⁰ *Commission Nationale des droits de l'Homme et des Libertes v Chad* (n 176) at para 22.

¹⁸¹ *Velasquez case* (n 176) at para 175. See DEVAW (n 45) at Article 4

¹⁸² ICCPR (n 37) Article 2(2)

¹⁸³ AWP (n 43) Article 4(2). See DEVAW (n 45) at Article 4.

seeking women and refugees from all forms of violence and to consider such acts as war crimes, genocide and/or crimes against humanity.¹⁸⁴

Additionally, Articles 2, 4, 6, 12, 13, 14 and 16 of CAT provide specific protection and prevention obligations on the part of member states party to the CAT;¹⁸⁵ whilst similar provisions are found in the preamble, Articles 1 and 26 of the ACHPR;¹⁸⁶ Articles 19(1) and 34 of the CRC¹⁸⁷ as well as Articles I, XVI, XXVII and XXXXII of the ACRWC.¹⁸⁸

3.4 The Human Rights protection mechanisms

Currently there are 10 human rights treaty bodies that monitor the implementation of the core international human rights treaties.¹⁸⁹ However the relevant bodies bearing duties to protect refugee women from sexual violence are the Human Rights Committee,¹⁹⁰ the Committee against Torture,¹⁹¹ the Committee on the Elimination of Discrimination against Women¹⁹² and the Committee on the Rights of the Child.¹⁹³

These treaty bodies are quasi-judicial committees composed of independent experts whose mandate is that of monitoring the implementation of their respective Conventions, and guiding States parties in fulfilling their obligations.¹⁹⁴ These experts are individuals of high moral integrity and competence in human rights law. Despite being elected by states, these experts perform their mandates in their independent capacity.

The UN Charter based mechanisms are known as Special Procedures. These were originally established by the Human Rights Commission, but have now been replaced by the

¹⁸⁴ Ibid at Article 11(3) and Article 5.

¹⁸⁵ CAT (n 38) Article 2, 4, 6, 12, 13, 14 and 16.

¹⁸⁶ ACHPR (n 41).

¹⁸⁷ CRC (n 40) at Article 19(1) and 34.

¹⁸⁸ ACRWC (n 42) at Article I, XVI, XXVII and XXXXII

¹⁸⁹ Office of the High Commissioner for Human Rights 'Treaty Based Bodies' at <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>, [Accessed 20 August 2011].

¹⁹⁰ ICCPR (n 37) at Article 28(1).

¹⁹¹ CAT (n 39) at Article 17(1).

¹⁹² CEDAW (n 38) at Article 17 (1).

¹⁹³ CRC (n 40) at Article 43(1).

¹⁹⁴ Takahashi (n 55) at 53.

Human Rights Council.¹⁹⁵ The Special Mechanisms either address specific thematic human rights situations world-wide or country-specific human rights situations.¹⁹⁶ The thematic mandate holders relevant to the protection of refugee women from sexual violence are the Special Rapporteur on Violence against Women, its Causes and Consequences,¹⁹⁷ and the Special Rapporteur on the Question of Torture;¹⁹⁸ whilst various country specific mandate holders exist.¹⁹⁹ They too could play a role in the protection of refugee women from sexual violence.

At the regional level the corresponding human rights mechanisms responsible for the protection of refugee women from sexual violence are the African Commission on Human and People's Rights,²⁰⁰ the African Committee of Experts on the Rights and Welfare of the Child²⁰¹ and the African Court on Human and People's Rights (African Court).²⁰² One of the major flaws of the AWP, however, is its failure to clearly provide for an enforcement mechanism.²⁰³ However, Article 3(1) of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights extends its jurisdiction to all matters involving the interpretation and application of any other relevant Human Rights instrument ratified by the states in question.²⁰⁴ Thus this Court is empowered to adjudicate upon

¹⁹⁵ Office of the High Commissioner for Human Rights 'United Nations Human Rights Council' available at <http://www.ohchr.org/EN/HRBodies/HRC/Pages/HRCIndex.aspx> [Accessed 23 October 2011].

¹⁹⁶ Kedzia (n 126) at 49.

¹⁹⁷ Office of the High Commissioner on Human Rights 'Special Rapporteur on violence against women, its causes and consequences' available at <http://www2.ohchr.org/english/issues/women/rapporteur/> [Accessed 20 August, 2011].

¹⁹⁸ Office of the High Commissioner on Human Rights 'Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' available <http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/SRTortureIndex.aspx> [Accessed 20 August, 2011].

¹⁹⁹ Office of the High Commissioner on Human Rights 'Country Mandates' at <http://www2.ohchr.org/english/bodies/chr/special/countries.htm>, [Accessed 20 August, 2011].

²⁰⁰ ACHPR (n 41) at Article 30. The AWP does not have an enforcement body; thus this function is conferred upon the African Commission. See D Chirwa 'Reclaiming (wo)manity: The merits and demerits of the African Protocol on Women's Rights' (2006) LIII *Netherlands International Law Review* 89.

²⁰¹ ACRWC (n 42) at Article 32.

²⁰² Organization of African Unity, *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights*, 10 June 1998. (Protocol ACHR). See 'African Court on Human and People's Rights' available at <http://www.african-court.org/en/>, [Accessed 21 August 2011]. Article 2 of this Protocol provides that this Court will complement the protective mandate of the Commission under the Charter. C Heyns 'The African Regional Human Rights System: The African Charter' (2003-2004) 108 *Penn State Law Review* at 698.

²⁰³ Chirwa (n 201) at 89 and 90.

²⁰⁴ Protocol ACHR (n 203) at Article 3(1). See AWP (n 43) at Article 27.

violations of the right to security of person of refugee women. It must, however, be noted that on the 1st of July 2001 the African Union Assembly of Heads of State and government adopted the Protocol on the Statute of the African Court of Justice and Human Rights, which once ratified by 15 States, will merge the African Court and the Court of Justice of the African Union.²⁰⁵ Thus once this court is established, it will become an additional duty bearer and it will assume the role played by the African Court on Human and Peoples' Rights.

At the regional level, the African Commission has also appointed six Special Rapporteurs.²⁰⁶ The Special Rapporteurs relevant to the protection of refugee women from sexual violence are the Special Rapporteurs on Refugees and Internally Displaced Persons in Africa²⁰⁷ and on the Rights of Women in Africa.²⁰⁸ Whilst the Special Procedures play an important role in the protection of refugee women from sexual violence, it must be noted that this thesis will not focus on their role in the protection of refugee women from sexual violence.²⁰⁹

²⁰⁵ African Union, *Protocol on the Statute of the African Court of Justice and Human Rights*, 1 July 2008, available at: <http://www.unhcr.org/refworld/docid/4937f0ac2.html> [Accessed 21 August 2011], (Protocol ACJHR). See 'list of countries which have signed, ratified/acceded to the Protocol on the Statute of the African Court of Justice and Human Rights', available at http://www.au.int/en/sites/default/files/9999Protocol_on_Statute_of_the_African_Court_of_Justice_and_HR.pdf, [Accessed 22 August, 2011].

²⁰⁶ African Commission on Human and Peoples Rights 'Special mechanisms' available at http://www.achpr.org/english/info/news_en.html, [Accessed 22 August, 2011].

²⁰⁷ African Commission on Human and Peoples Rights Res.72 (XXXVI) 04: Resolution on the Mandate of the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa, available at http://www.achpr.org/english/doc_target/documentation.html?../resolutions/resolution77_en.html, [Accessed 22 August 2011].

²⁰⁸ African Commission on Human and Peoples Rights /Res.38 (XXV) 99: Resolution on the Designation of the Special Rapporteur on the Rights of Women in Africa (1999) available at http://www.achpr.org/english/doc_target/documentation.html?../resolutions/resolution43_en.html, [Accessed 22 August 2011]. This mandate was renewed by African Commission on Human and Peoples Rights /Res.63 (XXXIV) 03: Resolution on the Renewal of the Mandate of the Term of the Special Rapporteur on the Rights of Women in Africa, available at http://www.achpr.org/english/doc_target/documentation.html?../resolutions/resolution68_en.html, [Accessed 22 August 2011].

²⁰⁹ Kedzia (n 126) at 50 – 52 and Special mechanisms (n 207).

3.5 Obligations of the Human Rights Mechanisms at the International level

At the international level, the Human Rights Committee,²¹⁰ the Committee against Torture,²¹¹ the CEDAW Committee²¹² and the Committee on the Rights of the Child²¹³ use several mechanisms in the exercise of their mandates. They examine obligatory periodical reports delivered by governments,²¹⁴ engage in dialogue with State representatives, and adopt recommendations of how State parties could better implement the provisions of that Convention.²¹⁵ Additionally, these treaty bodies develop jurisprudence in the form of general Comments.²¹⁶ The majority of these treaty bodies have the additional competence to examine individual and state communications on allegations of human rights;²¹⁷ however the CAT has the unique and additional competence to undertake urgent inquiries in response to allegations of systematic torture in any state party's territory.²¹⁸ These bodies therefore have the capacity to enhance the protection of refugee women from sexual violence.

3.6 Obligations of the Human Rights Mechanisms at the Regional level

The broad mandate of the African Commission and the ACERWC is to promote and protect human and people's rights and the rights of the child,²¹⁹ whilst the African Court complements the protective mandate of the Commission.²²⁰ The African Commission, the ACRWC as well as the African Court are composed of 11 commissioners²²¹ and judges who serve in their individual

²¹⁰ ICCPR (n 37) at Article 28(1).

²¹¹ CAT (n 39) at Article 17(1).

²¹² CEDAW (n 38) at Article 17 (1).

²¹³ CRC (n 40) at Article 43(1).

²¹⁴ Kedzia (n 126) at 32.

²¹⁵ Takahashi (n 55) at 53.

²¹⁶ Kedzia (n 126) at 32. General comments deal with fundamental human rights issues; the Committees either give their views on the content of human rights standards or they analyse state practice surrounding the implementation of particular rights.

²¹⁷ Ibid. The Committee on the Rights of the Child does not have this competence whilst the CEDAW Committee's competence is dependent on whether the state in question has opted in to this mechanism; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women G.A. res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49 (Vol. I)(2000), *entered into force* Dec. 22, 2000, Article 1 (OP CEDAW).

²¹⁸ CAT (n 38) at Article 20.

²¹⁹ ACHPR (n 41) at Article 30 and ACRWC (n 42) at Article 32.

²²⁰ Protocol ACHR (n 203) at Article 2.

²²¹ ACHPR (n 41) at Article 31.

capacity.²²² These persons are to be persons of high reputation, moral standing, integrity and impartiality with academic competence and experience in human and people's rights.²²³ Consequently the calibre of individuals serving in these positions has the necessary competence and credibility to enhance the protection of refugee women from sexual violence.

The African Commission's overall aim is to ensure the protection of human and people's rights. Both the African Commission and the ACERWC have the capacity to receive state reports²²⁴ as well as to consider inter-state and individual communications.²²⁵ Similarly both bodies have the competence to carry out investigations into allegations of a series or massive violations of peoples' rights.²²⁶

The African Court has wide jurisdictional competence, comprising of both contentious and conciliatory issues.²²⁷ It is empowered to apply the provisions of any relevant human rights instruments ratified by states;²²⁸ as well as to ascertain whether it has jurisdiction where a dispute arises.²²⁹ This Court is also empowered to grant remedies including fair compensation or reparation where it finds a violation of a human and peoples' rights.²³⁰ Additionally, this court may exercise its discretion to grant provisional measures in cases of 'extreme gravity and urgency, and when necessary to avoid irreparable harm to persons.'²³¹ Unlike the African Commission, the African Court of Human and Peoples Rights provides for monitoring the implementation of its decisions through the Council of Ministers.²³² The proposed ACJHR will replicate these competencies once it comes into force. Details of these and other competencies will be examined in Chapter IV.

²²² Protocol ACHR (n 203) at Article 11(1).

²²³ ACHPR (n 41) at Article 31(1); ACRWC (n 42) at Article 33(1) and Protocol ACHPR (n 203) at Article 11(1).

²²⁴ ACHPR (n 41) at Article 62; and ACRWC (n 42) at Article 43.

²²⁵ ACHPR (n 41) at Article 47 and 55; and ACRWC (n 42) at Article 44.

²²⁶ ACHPR (n 41) at Article 58 (1); and ACRWC (n 42) at Article 44.

²²⁷ Protocol ACHR (n 203) at Article 9.

²²⁸ Ibid at Article 7.

²²⁹ Ibid at Article 3(2).

²³⁰ ACRWC (n 42) at Article 42 (a) (i) and ACHPR (n 41) at Article 45 (a).

²³¹ Protocol ACHPR (n 203) at Article 9.

²³² Ibid at Article 7.

4. Conclusion

This chapter has provided an overview of the international legal framework which provides protection to refugee women from sexual violence. It has illustrated that the refugee law regime consists mostly of implicit references to the right to security of person, whilst the human rights law regime and the international law regime provide explicit references to the right to security of person.

The refugee law regime fails to provide for explicit normative obligations to protect refugee women from sexual violence and an adequate procedural monitoring and enforcement system. Whilst the soft law provisions are far-reaching and comprehensive, they are not legally binding on states.

The advantages of the protective provisions of the human rights law regime is that they provide specific enforcement mechanisms charged with the mandate and capacity to enhance the protection of refugee women from sexual violence at both the regional and international level . The regional mechanisms have the additional advantage of a Human Rights Court, namely the African Court on Human and Peoples' Rights. Despite the existence of this judicial body with binding powers, the regional human rights protection system remains riddled with normative and structural weaknesses.²³³ These and other weaknesses will be analysed in Chapter 4. The following chapter will thus analyse the extent to which the host state and the UNHCR are fulfilling their obligations to protect refugee women from sexual violence in Dadaab and Kakuma camps.

²³³ Protocol ACHPR (n 293) at Preamble para 6. See Makau Mutua 'The African Human Rights Court: A Two-Legged Stool?' (1999) *Human Rights Quarterly* 21 at 342.

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Chapter III

A CRITICAL ANALYSIS OF DUTY BEARER'S FULFILLMENT OF THE OBLIGATION TO PROTECT REFUGEE WOMEN FROM SEXUAL VIOLENCE: ADAAB AND KAKUMA REFUGEE CAMPS IN KENYA

1. Introduction

The previous Chapter illustrated that the norms and the procedural protection mechanisms envisaged under refugee law are inadequate to provide redress to victims of sexual violence and that recourse must be made to the international and regional human rights law regime for enhanced protection. This chapter will analyse the extent to which Kenya and the UNHCR have upheld their obligations under the human rights law regime to protect refugee women from sexual violence.. Taking cognizance of the limited nature of the norms and procedural mechanisms to protect by the refugee law regime, emphasis will be placed on the obligations outlined in the human rights law regime. The following section will analyse Kenya's 'preventative'²³⁴ and 'reactive' obligations²³⁵ to protect refugee women from sexual violence.

2. Kenya's fulfillment of its 'preventative obligations'

In the case of *Velasquez Rodriguez v Honduras*, the state's preventative obligations were held as requiring the state to take reasonable legal, political, administrative and cultural steps to prevent human rights violations.²³⁶ It is thus necessary to firstly analyse whether Kenya has ratified and domesticated the international and regional instruments which provide refugee women with protection from sexual violence. Such actions fall under the legal and political ambit of the obligations outlined in the *Velasquez* case.

²³⁴ Alston and Steiner (n 46) at 180; Chirwa, (n 174) at 11-12 and ICCPR (n 37) at Article 3 (a).

²³⁵ Ibid. See *Velasquez* case (n 177) at para 175 and DEVAW (n 45) at Article 4

²³⁶ *Velasquez* case (n 177) at para 174.

Kenya has acceded to all the relevant conventions under the refugee law regime; namely the 1951 Convention, the 1967 Protocol and the OAU Convention.²³⁷ Under the human rights law regime it has also acceded to the ICCPR, the ACHPR, the CAT and CEDAW; however it has neither signed nor acceded to the first OP ICCPR, the OP CEDAW and the OP CAT.²³⁸ Kenya has also ratified the CRC and the ACRWC but it has merely signed the AWP.²³⁹ Consequently Kenya must refrain from acts that would defeat the objects and purpose of the AWP; however it is not legally bound to implement the provisions of the AWP.²⁴⁰ This is unfortunate in that the AWP contains the most explicit and comprehensive obligations for states to protect refugee women from sexual violence. It identifies refugee women as rights bearers and emphasizes the need to take special measures to protect asylum seeking women and refugees from all forms of violence and to consider such acts as war crimes, genocide and/or crimes against humanity.²⁴¹

Kenya is also bound to the customary international law provisions of the UDHR and DEVAW which provide protection to refugee women from sexual violence.²⁴² Kenya has ratified the Protocol ACHR ; therefore subjecting itself to the jurisdiction of this court.²⁴³ However it is yet to take action regarding the Protocol ACJHR on the .²⁴⁴ This too is unfortunate in that once the Protocol ACJHR comes into force, Kenya will no longer be subjected to the jurisdiction of any regional judicial body with enforcement powers.

Despite having ratified the above treaties, Kenya has not domesticated all of them into its Municipal Law. Nevertheless, the rights to life, dignity, physical security, health and protection

²³⁷ Office of the High Commissioner of Human Rights 'List of Kenya's ratification of international human rights treaties' available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session8/KE/KSC_UPR_KEN_S08_2010_KenyaStakeholdersCoalitionforUPR_Annex3.pdf [Accessed 23 January 2012] (OHCHR Kenya). See African Union 'List of Countries which have signed, ratified/acceded to the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' available at <http://www.africa-union.org/root/au/documents/treaties/treaties.htm> [Accessed 23 January 2012] (AU Kenya).

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ United Nations Enable 'What it means to sign the treaty' available at <http://www.un.org/disabilities/default.asp?id=231> [Accessed 23 January 2012].

²⁴¹ AWP (n 43) Article 11(3). See DEVAW (n 45) at Article 5.

²⁴² Hannun (n 157) at 317.

²⁴³ Protocol ACHR (n 203).

²⁴⁴ Protocol ACJHR (n 206).

from inhuman and degrading treatment have been enshrined in the Constitution of Kenya.²⁴⁵ These provisions equally protect refugee women from sexual violence by virtue of the equality clause in Section 20(4) and Section 19(3) (a) which grants the rights in this Constitution of Kenya to ‘each individual’ in the territory of Kenya²⁴⁶ Section 27 further provides refugee women with the right to equality before the law, equal protection of the law and freedom from discrimination on the basis of several grounds which include race, sex, ethnic or social origin, conscience and culture. This provisions is particularly pertinent for refugee women affected by sexual violence as research as shown that often refugee women are subjected to sexual violence because of these factors.²⁴⁷

Particular mention should be made of Section 21 (1) which obliges all state organs to protect the rights outlined in the Constitution; with particular emphasis on the needs of vulnerable groups such as refugee women.²⁴⁸ Section 22 grants victims of violations with the right to seek redress for violations of rights in the Constitution. This provision is particularly progressive in that it allows a wide range of actors to institute such proceedings on behalf of refugee victims of sexual violence;²⁴⁹ particularly in the Kenyan context where most refugee women are affected by social, economic, political and legal barriers which hinder their ability to seek redress and access justice through the judicial system.²⁵⁰

Unlike the 1951 Convention and the OAU Convention, Section 16(1) (a) of the Refugees Act Chapter 13 of 2006²⁵¹ explicitly grants all refugees with the rights provided in the international treaties that Kenya is party to. Hence, these provisions protect refugee women from sexual violence by granting refugee women with the rights to life, dignity, physical security and protection from inhuman and degrading treatment; as well as the right to effective redress where

²⁴⁵ Kenya Law Reports ‘The Constitution of Kenya, 2010’ available at <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/ConstitutionofKenya2010.pdf>. [Accessed 23 January 2012](Constitution of Kenya) at Section 26, 28, 43 and 29.

²⁴⁶ Ibid at Section 20(4), 19(3)(a) and 20(2).

²⁴⁷ Nowrojee (n 9) at 125.

²⁴⁸ Constitution of Kenya (n 253) at Section 21 (1) and (3).

²⁴⁹ Ibid at Section 22.

²⁵⁰ Nowrojee (n 9) at 135

²⁵¹ Kenya Law Reports ‘Refugees Act Chapter 13 of 2006’ available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php [Accessed 24 January 2012] (Refugees Act).

violations of their human rights occur.²⁵² Similarly, Section 23(1) specifies refugee women and children as rights holders entitled to specific measures which ensure their safety, including the establishment of designated areas.²⁵³ This suggests that the state is enjoined to take specific measures to protect refugee women from sexual violence.

Articles 22, 6 and 2 / of the CRC and XXIII and V.I of the ACRWC which protect refugee children from sexual violence have been domesticated into the Children's Act, No. 8 of 2001.²⁵⁴ Particular mention should be made of S 119 (n) and (p) which specifies refugee children who have been sexually abused as rights holders. These sections define children who have been sexually abused and children who have been displaced as a consequence of war, civil disturbances or natural disasters as children in need of care; whilst S 120(2) entitles such children to a place s safety. Section 73(c) of this Act establishes Children's Courts with the competence to hear charges against persons accused of offences specified under the Act, including sexual violence against refugee children. The Children's Courts are likely to be better equipped to ensure access to justice for refugee children than ordinary courts are because of the specialized nature of its presiding officers and its procedural rules.

The Sexual Offences Act No. 3 of 2006 also protects refugee women from sexual violence by criminalising various forms of sexual violence against women, such as rape, attempted rape, sexual assault, defilement, attempted defilements and gang rape.²⁵⁵

Kenya's preventative obligations also include administrative measures such as establishing institutional machinery and monitoring mechanisms.²⁵⁶ In fulfilment of the requirement of monitoring mechanisms, Section 59 of the Kenyan Constitution establishes the Kenya National Human Rights and Equality Commission. This Commission's mandate includes promoting the observance of human rights, monitoring, investigating and reporting on the

²⁵² Ibid at Section 16(1).

²⁵³ Ibid at Section 23(1).

²⁵⁴ Kenya Law Reports 'Children's Act No. 8 of 2001' available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php [Accessed 23 January 2012] Section 4, 5,9,13 and 18.

²⁵⁵ Kenya Law Reports 'Sexual offences Act No. 3 of 2006' available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php [Accessed 24 January 2012] Section 3 – 10.

²⁵⁶ Velasquez case (n 177) at para 174.

observance of human rights, receiving and investigating complaints of human rights abuses as well as securing redress to victims of such violations.²⁵⁷

3. Kenya's fulfillment of its 'reactive obligations'

In the cases of *Velasquez Rodriguez v Honduras* and *Commission Nationale des droits de l'Homme et des Libertes v Chad*, the reactive element of a state's obligations to protect was held to enjoin the state to conduct 'serious' investigations, to identify the perpetrators and to impose appropriate punishment and adequate compensation to victims.²⁵⁸ The duty bearers involved are mainly the National Police Service,²⁵⁹ and the Judiciary.²⁶⁰ This section will analyse the extent to which these duty bearers facilitate the filing of complaints, conduct serious investigations, prosecute offenders and ensure adequate compensation for victims of sexual violence.

Women in Kenyan refugee camps face many difficulties in filing complaints of sexual violence. Refugees often risk further sexual abuse *en route* to the police stations or at the police station by the police themselves. Additionally, refugee women are often impoverished, they face language barriers and they are terrified of interacting with authorities.²⁶¹ This fear stems from factors such as past abuse by police, lack of confidence in the formal justice delivery system as well as fear of revenge attacks by perpetrators.²⁶²

Refugee women are also discouraged by other refugees, including their families, from taking complaints about sexual violence to the local police or the courts. Often women who lodge cases through the formal justice delivery mechanisms face stigmatisation and blame from the refugee community.²⁶³ Seeking the intervention of such official judicial structures is perceived as bringing shame upon the family and is a cause for a woman to be ostracized.²⁶⁴

²⁵⁷ Constitution of Kenya (n 253) at Section 59.

²⁵⁸ *Velasquez* case (n 177) at para 175. See *DEVAW* (n 45) at Article 4; *Alston and Steiner* (n 46) at 180; *Chirwa* (n 174) at 11 and *ICCPR* (n 37) at Article 3(a).

²⁵⁹ Constitution of Kenya (n 253) at Section 239 (1)(c).

²⁶⁰ *Ibid* at Chapter 10.

²⁶¹ *Nowrojee* (n 9) at 125.

²⁶² *HRW WK* (n 11) at Part V.

²⁶³ *Ibid*.

²⁶⁴ *Ibid*.

Despite the fact that Dadaab and Kakuma camps are subject to the Constitutional and legislative provisions governing Kenya; in practice refugees often resort to their own justice machinery based on custom and tradition.²⁶⁵ Consequently, refugees in these camps have been allowed to establish traditional courts.²⁶⁶ These courts are presided by a community group of elders, mostly male refugees who use Sharia law to resolve disputes.²⁶⁷

The refugee-run community based system is inadequate to provide redress to refugee victims to sexual violence. Despite the fact that this system lacks enforcement powers, incidents of sexual violence are criminal matters that are beyond the jurisdictional powers of any community based system.²⁶⁸ It is also worth noting that it remains unclear which authority within the camps has jurisdiction over which cases. Verdirame reports that the gravity of a reported case determines whether Security personnel at Kakuma camp refer it to the refugee leaders' court or to UNHCR which in turn refer such cases to the Kenyan police²⁶⁹ Consequently Kenyan police seldom intervene in camp security unless they are requested to do so by UNHCR.²⁷⁰

Research conducted by Human Rights Watch has revealed that Kenyan police are both unable and in some instances unwilling to conduct investigations into reported cases of sexual violence against refugee women.²⁷¹ A study conducted by Human Rights Watch revealed that after victims of sexual violence report their cases to the police, no further action was taken in most instances. The police were reported to turn away victims who make follow ups, as well as

²⁶⁵ Nowrojee (n 9) at 125.

²⁶⁶ G Verdirame 'Human Rights and Refugees: the Case of Kenya' (1999) 12 *Journal of Refugee Studies* at 62.

²⁶⁷ Njari Gitonga, 'Tribal, Modern Law Differences Cause Trouble', available at <http://www.msscedu/international/mccaleb/kenya/tribal.htm>, cited in Malinda M. Schmiechen 'Parallel lives, uneven justice: An analysis of Rights Protection and redress for refugee and internally displaced women in camps', *Saint Louise University Public Law Review* (2003) 22 at 491.

²⁶⁸ Verdirame (n 274) at 63.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹ Schmiechen (n 275) at 493. See Crisp (n 17) at 602.

simply refusing to issue victims with forms to report their claims.²⁷² The interviewees also revealed that they were told to provide witnesses to enable the police to investigate, and at times to return to the police station only after they identified or apprehended the perpetrator.²⁷³ In other instances the police have accused victims of not filing their complaints in time to enable them to conduct investigations.²⁷⁴ In response to these allegations, Julius Sunkuli, a Minister in the President's Office accused refugee women of fabricating their claims to 'give the government negative publicity.'²⁷⁵ Similarly, another official in Dadaab was later reported to have said that 'it was up to Somalis to sort out the problem for themselves and that it was not Kenya's responsibility to investigate.'²⁷⁶

Nevertheless, the Kenyan police also suffer from a shortage of financial, material and human resources to effectively carry out their duties. Additionally these officers are susceptible to corruption, whilst in some instances they lack awareness of the seriousness of such abuses. Consequently the low levels of training and professionalism affect their ability to perform their duties effectively²⁷⁷

In 1998 Crisp reports that the Dadaab and Kakuma camps required at least 30 police officers however a number of 10 to 20 officers manned the camps.²⁷⁸ In a 2010 Human Rights Watch interview with UNHCR, UNHCR reported a deficit of 150 police officers in order for the camps to meet international policing standards.²⁷⁹ Refugees reported that the presence and availability of the officers was inconsistent and unreliable whilst vehicles provided to the police were reported to be out of service or diverted for their personal use.²⁸⁰ Consequently investigations are seldom conducted and intelligence is seldom gathered.

²⁷² HRW WK (n 11) at 12.

²⁷³ Ibid .

²⁷⁴ P Kagwanja 'Ethnicity, gender and violence in Kenya' available at <http://www.fmreview.org/FMRpdfs/FMR09/fmr9.8.pdf> [Accessed 3 February 2012].

²⁷⁵ Nation (Nairobi), July 29, 1993; Standard (Nairobi), July 29, 1993 cited in African Exodus LCHR (n 18) at 67.

²⁷⁶ Verdirame (n 274) at 57.

²⁷⁷ Crisp (n 17) at 22.

²⁷⁸ Ibid.

²⁷⁹ HRW WK (n 11) at 14.

²⁸⁰ Ibid.

Interviews conducted by Human Rights Watch revealed that 80% of suspects that were arrested on allegations of sexual violence against refugee women were released within hours or days.²⁸¹ Their cases were similarly dropped within days; often after receiving bribes from the perpetrators.²⁸² This has resulted in victims losing confidence in filing complaints whilst perpetrators gain confidence in committing crimes without consequence. The police have also been reported as being unwilling to investigate implicated colleagues, the military or immigration officials.²⁸³

Despite the establishment of a mobile court in Dadaab in 1998, a meagre arrests and prosecutions have been made. In 1997 and 1999 a mere five persons were convicted for rapes in Dadaab whilst in 2002 only 3 persons were convicted.²⁸⁴ However in 2009 the number of prosecutions rose to 16 with 7 convictions and 6 acquittals.²⁸⁵ The lack of finances for legal representation, the lack of witness protection services; as well as the stigma attached to refugee victims of sexual violence result in refugee victims losing confidence in the police. This in turn contributes to the low number of convictions at Dadaab.²⁸⁶ It is also worth noting that despite the provision for Children's Courts in the Constitution of Kenya, the Nairobi Children's Court is the only physically separate child friendly court in the country. It is not clear whether the mobile courts operate as Children's Courts.²⁸⁷

In addition to the mobile court which sits at Dadaab once a month, the establishment of Gender Desks which deal with sexual violence cases has enhanced the prospects of successful convictions of perpetrators of sexual violence.²⁸⁸ The government has since introduced helicopter patrols and deployed more police officers to Dadaab and Kakuma camps.²⁸⁹

²⁸¹ Ibid at 12.

²⁸² Ibid.

²⁸³ Nowrojee (n 9) at 125.

²⁸⁴ Crisp (n 17) at 22

²⁸⁵ HRW WK (n 11) at 13.

²⁸⁶ Ibid at 11.

²⁸⁷ Constitution of Kenya 9n 253) a Section 73(c); and Yale Law School 'Representing Children Worldwide: Kenya' available at <http://www.law.yale.edu/rcw/rcw/jurisdictions/afe/kenya/frontpage.htm> [Accessed 23 February 2012].

²⁸⁸ HRW WK (n 11) at 11.

²⁸⁹ Kagwanja (n 282).

Despite these developments, the majority of refugee women in Dadaab and Kakuma continue to resort to the community based justice system. However this system does not have the capacity or the mandate to prosecute perpetrators of sexual violence against refugee women. Unlike the formal criminal justice system which places little emphasis on compensation for victims, the community based system heavily relies on compensation without punitive implications on the perpetrator. There have been reports of elders ordering perpetrators to give the victim a mere cloth, or a hen in compensation for the violation, whilst in some instances victims are forced to marry the perpetrator.²⁹⁰ This is because as a victim of sexual violence is considered ‘unmarriageable,’ hence being married to the perpetrator will avoid bringing shame upon her family.²⁹¹

Whilst in some instances the presiding elders conduct investigations, there is no knowledge of what becomes of these investigations initiated by the elders. Decisions reached tend to not to be victim-based, they are inadequate, subject to abuse of power and at times inappropriate.²⁹² For instance Human Rights Watch has documented that there have been incidences where a woman that complains of sexual violence is moved to another part of the camp or to a different camp completely to ‘remedy’ the situation.²⁹³ It may thus be concluded that such decisions are not only difficult to enforce;²⁹⁴ but most importantly, they fail to hold perpetrators accountable and deliver justice to the victim of sexual violence.²⁹⁵

4. UNHCR’s fulfillment of its protection obligations in Dadaab and Kakuma refugee camps

UNHCR’s fulfilment of its obligation to protect refugees from sexual violence in Dadaab and Kakuma camps has been both positive and negative. UNHCR has undertaken preventative and reactive work in the exercise of its protection mandate. Its preventative work has focused on

²⁹⁰ Crisp (n 17) at 127.

²⁹¹ UNHCR Evaluation and Policy Analysis Unit ‘Evaluation of the Dadaab firewood project, Kenya’ at para 90 at available at http://www.fuelnetwork.org/index.php?option=com_docman&task=doc_download&gid=143 [Accessed 4 February 2012] (UNHCR Dadaab firewood project).

²⁹² Verdirame (n 274) at 63. ‘

²⁹³ Ibid.

²⁹⁴ Schmiechen (n 275) at 485.

²⁹⁵ Nowrojee (n 9) at 133.

changing attitudes and behaviour, designing services and facilities which reduce the occurrence of sexual violence, ‘ensuring that the formal and community based justice mechanisms conform with international human rights standards as well as monitoring and documenting incidents of sexual and gender-based violence.’²⁹⁶

UNHCR has developed policies and guidelines with practical recommendations aimed at reducing the occurrence of sexual violence against refugee women.²⁹⁷ Some of these guidelines are binding on UNHCR, and their effective implementation has proven to reduce the occurrence of cases of sexual violence reported to the Kenyan National Police service and to UNHCR.²⁹⁸ For example, UNHCR’s implementation of Executive Committee Conclusion 73’s recommendation to raise awareness of refugee rights in Dadaab has improved the number of sexual violence reports and the speed at which they are reported.²⁹⁹

UNHCR has also implemented measures which enhance the physical security of refugee women, such as the provision of fuel through the Dadaab firewood project³⁰⁰ and the construction of thorn-bush fencing within and around the Dadaab camp through UNHCR’s Women Victims of Violence Project, established in 1993.³⁰¹ These projects were in response to findings which showed that firewood collection was the biggest cause of rape of refugee women;³⁰² and the lack of security walls and gates exposed refugee women to attacks by assailants. Research has shown that these interventions resulted in reduced incidences of rape within the camp; for instance the 2000 Final Progress Report for the Dadaab firewood project

²⁹⁶ UNHCR SGBVG (n 4) at 33.

²⁹⁷ UNHCR HPWG (n. 22, SG’s Bulletin: Special Measures for Protection (n 63), UNHCR SGBV Guidelines (n 4), UNHCR CRW (n 23), UNHCR PRW (n 23), UNHCR Policy on Refugee Women and Guidelines on Their Protection: An Assessment of Ten Years of Implementation (2002) UNHCR Note on Certain Aspects of Sexual Violence against Refugee Women (1993), UNHCR How-to Guide 6: Monitoring and Evaluation of Sexual and Gender-based Violence Programmes (2000) Agenda for Protection, Goal No. 6.

²⁹⁸ Ex Comm. Conclusion No. 98 (n 64) at para b(i).

²⁹⁹ UNHCR, ‘UNHCR’s Women Victims of Violence Project in Kenya: An Evaluation Summary EC/1995/SC.2/CRP.22’ available at <http://www.unhcr.org/3ae68bf90.html>, [Accessed 4 February 2012] (UNHCR WVVP).

³⁰⁰ UNHCR Dadaab firewood project (n 299).

³⁰¹ UNHCR WVVP (n 307) at 3.

³⁰² UNHCR Dadaab firewood project (n 308) at 66.

documented a drastic reduction in reported cases of sexual violence from the numbers document between 1994 and 1995.³⁰³

UNHCR has played an instrumental role in assisting the Kenyan National police to enhance its capacity and efficacy to address sexual violence within Dadaab camp.³⁰⁴ UNHCR has provided material and financial support including vehicles,³⁰⁵ the construction of police posts,³⁰⁶ as well as payment of incentive to encourage police officers to conduct night patrols.³⁰⁷ UNHCR has also assisted by establishing camp zones, each with a separate security system and refugee guards, equipped with radio handsets and uniforms.³⁰⁸

Capacity building, awareness-raising and trainings on sexual violence, human rights law and refugee law have been conducted by UNHCR targeting the police, refugees, government officials and other non-governmental organizations involved in refugee protection work.³⁰⁹ These activities have been conducted in terms of the obligations outlined in Executive Committee Conclusion 72.³¹⁰ The trainings for refugees resulted in the creation of various committees such as “security committees,” “anti-violence committees” and “anti-rape committees, as well as the publication of a refugee newsletter.³¹¹ The anti-rape committees for instance, play a pivotal role in engaging traditional leadership to discourage the use of Sharia law in the resolution of sexual violence cases as well as in raising such awareness amongst fellow refugees.³¹²

³⁰³ Ibid at 67.

³⁰⁴ Ibid.

³⁰⁵ UNHCR Mid-Year Progress Report 2002. available at <http://www.unhcr.org/3daabeffe.html> [Accessed 24 January 2012] (UNHCR Progress Report 2002).

³⁰⁶ Ibid.

³⁰⁷ Crisp (n 17) at 10.

³⁰⁸ Information received from Kofi Mable, Head of UNHCR Sub-Office in Kenya responsible for Kakuma camp, October 24, 2002, Famine Center, Tufts University cited in Halperin, (n 7) at 17.

³⁰⁹ UNHCR WVVP (n 307) at 2. See UNHCR Prevention And Responses To Sexual And Gender Based Violence In Refugee Situations: Inter-Agency Lessons Learned Conference Proceedings 27-29 March 2001 – Geneva at 8 available at <http://Action.Web.Ca/Home/Cpcc/Attach/Prevention%20and%20responses.Pdf> [Accessed 24 August 2011] (UNHCR PRSGBV) See UNHCR ‘UNHCR Global Report 2007: Kenya’ available at <http://www.unhcr.org/4dfdbf4a0.html>, [Accessed 25 January 2012] at 224.

³¹⁰ Ex Comm. Conclusion No. 72 (n 64) at para e.

³¹¹ UNHCR WVVP (n 307) at 3.

³¹² UNHCR PRSGBV (n 317) at 8.

UNHCR reported that as a result of the awareness campaigns, more than 75% of rape survivors at Dadaab reported the cases within three days and there was a 50% decrease in rape incidents between 1998 and 1999.³¹³ These campaigns have also resulted in increased women's representation in leadership structures; which in turn has increased the prioritization of sexual violence prevention interventions.³¹⁴

UNHCR's reactive interventions have revolved around trainings on how to assist victims of sexual violence, data collection, referrals, monitoring and evaluation, medical and psycho-social support, legal protection and ensuring access to justice for victims.³¹⁵

UNHCR has trained male and female refugees as counsellors for survivors of sexual violence and their family members.³¹⁶ Victims of rape and their families have been provided with counselling, relocation to a different camp or in extreme instance, with resettlement.³¹⁷ Additionally, UNHCR has enhanced victims' access to justice through legal representation and assisting the Kenyan government to establish mobile courts inside the camps. This was partly in response to the realization that those women that attempted to access the formal court systems outside the camps were often subjected to more sexual violence and other crimes en route.³¹⁸ UNHCR has reported an increasing number of sexual violence cases being tried and convicted after the establishment of the mobile courts.³¹⁹ The mere presence of this court has encouraged refugees to assist the police with investigations which have led to several convictions.³²⁰

Whilst the above analysis illustrates that UNHCR has made positive progress regarding its preventative obligations to protect refugee women from sexual violence, its interventions have also been riddled with limitations and weaknesses. The UNHCR has been criticized for taking inadequate measures, and in some instances, for being 'an intrinsic part of the security

³¹³ Ibid.

³¹⁴ Ibid at 9.

³¹⁵ UNHCR SGBVG (n 4) at 53.

³¹⁶ UNHCR Progress Report 2002 (n 313)

³¹⁷ UNHCR PRSGBV (n 317) at 9. See Ex. Comm. Conclusion 73 (n 64) para f and Ex Comm. Conclusion 64 (n 64) para(vi).

³¹⁸ Nowrojee (n 9) at 35.

³¹⁹ UNHCR PRSGBV (n 317) at 24.

³²⁰ Ibid.

problem.³²¹ The following section will give a brief overview of the criticisms labelled against UNHCR in the exercise of its mandate.

Article 2(1) of the UNHCR Statute describes UNHCR's protective mandate as non – political. However, the UNHCR has been criticised for failing to uphold its political independence. The Executive Committee, which governs the work of the UNHCR is composed of governments, some of which are not party to the 1951 Convention.³²² States that are not party to the 1951 Convention have no legal, political, moral or other obligations to uphold the provisions of the treaty; therefore these representatives further the political interests of their own states.³²³

Additionally, 97 percent of UNHCR's operation funding comes from voluntary state contributions.³²⁴ UNHCR's priorities are therefore in conformity with those of the donor countries. Illustrative of this is the fact that three times more funds for refugee protection were allocated to Europe than to Africa, Asia and the Middle East in 1993.³²⁵

Article 35(1) of the 1951 Convention and Article 8(iv) of the UNHCR Statute enjoin UNHCR to supervise the application of the 1951 Convention and its Protocol³²⁶ whilst Executive Committee Conclusion 98 extends this monitoring duty to programs for prevention and protection from sexual abuse and exploitation.³²⁷ However, it is not clear what UNHCR's supervisory duties entail. Neither of these instruments outlines any supervisory activities nor procedures to be undertaken by the UNHCR.³²⁸ Additionally, no enforcement mechanism is

³²¹ Crisp (n 17) at 20.

³²² Takahashi (n 55) at 58 and 59.

³²³ Ibid.

³²⁴ Ibid.

³²⁵ UNHCR 'Report of the United Nations High Commissioner for Refugees, 1994 A/49/12' available at <http://www.unhcr.org/3ae68c3e4.html> [Accessed 28 January 2012].

³²⁶ 1951 Convention (n 1) at Article 35; UNHCR Statute (n 65) at Article 8 (iv) and 1967 Convention (n 61) at Article II(1).

³²⁷ Ex Comm. Conclusion No. 98 (n 64) at para b (ii).

³²⁸ UN High Commissioner for Refugees, 'Statement by George Okoth-Obbo, Director, Division of International Protection Services, at the Thematic Session on the "Governance of Refugee Law: Suggestions and Perspectives" 26 June 2008,' available at: <http://www.unhcr.org/refworld/docid/4869e25e2.html> [Accessed 28 January 2012]. (Annual UNHCR / NGO Consultations 2008).

established.³²⁹ Supervision by international agencies has generally been viewed as political and lacking independence, objectivity and due process.³³⁰

UNHCR has adopted a quiet diplomatic stance in the exercise of its monitoring and supervisory role.³³¹ Instead of being publicised, reports compiled by the UNHCR on the status of refugee protection in individual countries are solely UNHCR's internal use.³³² Effective monitoring requires public exposure of states which violate their protection obligations; and UNHCR's findings and recommendations should be publicized. It is thus arguable that UNHCR cannot effectively discharge a supervisory role alongside that of maintaining relations with the host state which allows it to operate.³³³

Executive Committee Conclusion 64 obliges UNHCR to identify and prosecute perpetrators of sexual violence.³³⁴ This enjoins UNHCR to facilitate and ensure that Kenya conducts investigations and prosecute offenders as well as to hold Kenya accountable where it fails to do so. UNHCR may also initiate private criminal prosecutions or file civil suits for damages; this is especially pertinent where the perpetrators of sexual violence are part of the state's security machinery or refugee community leaders.³³⁵ According to Lawyers Committee for Human Rights, UNHCR has been reluctant to explore these avenues.³³⁶ Consequently academics such as Crisp and Verdirame have criticized UNHCR for failing to effectively and consistently exercise its mandate.³³⁷

³²⁹ Ibid.

³³⁰ UN High Commissioner for Refugees, 'UNHCR's Supervisory Responsibility, Volker Turk Working paper No. 67,' available at <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3dae74b74&query=Volker%20Turk> [Accessed 28 January 2012].

³³¹ Takahashi (n 55) at 62.

³³² Annual UNHCR/NGO Consultations 2008 (n 336) at 2.

³³³ Ibid at 4.

³³⁴ Ex Comm. Conclusion No. 64 (n 64) at para (vii).

³³⁵ African Exodus LCHR (n 18) at 68.

³³⁶ UNHCR 'UNHCR Fundraising Reports: Kenya' available at <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=49e483a16&coi=KEN&scid=49aea93a73&keywords=operations> (Accessed 23 January 2012)(UNHCR FR: Kenya). See UNHCR's Global Reports on Kenya for 2007 – 2010; all of which are silent on private criminal prosecutions or the filing of civil suits against perpetrators by UNHCR.

³³⁷ Crisp (n 17) at 12. See Verdirame (n 274) at 75.

According to Kagwanja, even where the perpetrators were not part of the security forces, UNHCR has been reluctant to initiate private prosecutions or file civil suits for damages.³³⁸ Such actions render UNHCR's interventions as inadequate for the protection of refugee women from sexual violence.³³⁹ UNHCR has opted not to confront and antagonize the government in order to preserve its diplomatic relations at the expense of hundreds of women victims of sexual violence.³⁴⁰ Instead, it has limited itself to assisting Kenya to establish and support mobile courts; yet this on its own will not ensure that convictions will be secured against perpetrators or that victims will receive adequate compensation. This intervention falls short of UNHCR's duty to ensure that refugees are treated in conformity with international human rights treaties.³⁴¹

Closely related is UNHCR's failure to provide victims of sexual violence with effective and consistent legal assistance and court attendance. This is confirmed by UNHCR's Global Reports for the period 2007 to 2009 which are silent on any legal assistance for victims of sexual violence.³⁴² A refugee interviewed by Human Rights Watch had the following to say:

'There is no office to report things to. If you report you might get yourself into trouble... Last time the field officer told us: "[t]he government of Kenya is responsible and they know exactly what is happening so don't come and talk to me about it every day." We were advised by the field officer not to sleep during the night, but to gather somewhere and shout. We pray to God.'³⁴³

However UNHCR's Global Report on Kenya for 2010 signals a distinct and marked improvement. It highlights security from violence and exploitation as one of UNHCR's focus areas, with 894 cases of sexual violence being reported and legal assistance being provided for the victims.³⁴⁴ Nevertheless, the report is also silent on the number of convictions secured against perpetrators of violence, as well as whether victims are receiving adequate compensation.

³³⁸ Kagwanja (n 282) at 24.

³³⁹ African Exodus LCHR (n 18) at 64 – 71.

³⁴⁰ Kagwanja (n 282) at 24.

³⁴¹ Harlepin (n 7) at 65.

³⁴² UNHCR FR: Kenya (n 345).

³⁴³ African Rights, in 'The Nightmare Continues,' cited in African Exodus LCHR (n18) at 69.

³⁴⁴ UN High Commissioner for Refugees 'UNHCR Global Report 2010: Kenya' available at <http://www.unhcr.org/4dfdbf4a0.html>, [Accessed 25 January 2012].

Executive Committee Conclusion 98 requires UNHCR to fully implement all UNHCR policies, codes of conduct and guidelines on sexual violence.³⁴⁵ However UNHCR has been criticized by critics such as Farmer and Human Rights Watch for its inconsistent implementation, and in some cases, non-implementation of these guidelines.³⁴⁶ An example is UNHCR's failure to ensure that women have equal and direct access to food distribution and the failure to effectively monitor sexual violence cases.³⁴⁷

5. Conclusion

Despite having ratified numerous treaties protecting refugee women from sexual violence, Kenya's failure to ratify the AWP diminishes the potential for certain forms of sexual violence to be considered as war crimes or crimes against humanity.³⁴⁸ Additionally, Kenya has not domesticated all the treaties into national law. Despite enacting a progressive Constitution with strong protection provisions, as well as the Sexual Offences Act, the Children's Act and the Refugees Act; refugee women continue to be subjected to sexual violence.

Rape awareness campaigns have resulted in more reports of sexual violence being made to the formal justice delivery system as opposed to the community based system through UNHCR and the police.³⁴⁹ UNHCR has attributed this to the awareness campaigns being implemented in the camps. Despite increased reporting, the number of convictions has not been proportional. The police are unwilling and in some instances lack the capacity to conduct serious investigations and ensure the prosecutions of perpetrators.

More worrying, is the fact that members of the national security apparatus continue to be amongst the perpetrators of sexual violence, in violation of their Constitutional duty to comply with 'constitutional standards of human rights and fundamental freedoms.'³⁵⁰ Furthermore, the

³⁴⁵ Ex Comm. Conclusion 98 (n 64) at para b(i).

³⁴⁶ Farmer (n 20) at 66.

³⁴⁷ Ibid.

³⁴⁸ AWP (n 43) at Article 71(3).

³⁴⁹ Bureau of Democracy, Human Rights, and Labor 2010 Human Rights Report: Kenya available at <http://www.state.gov/j/drl/rls/hrrpt/2010/af/154352.htm> (Accessed 27 January 2011)(BDHR Kenya 2010).

³⁵⁰ Ibid. See Human Rights Watch 'WORLD REPORT 2011 KENYA' available at <http://www.hrw.org/world-report-2011/kenya> (Accessed 27 January 2012). See Constitution of Kenya (n 253) at Section 244 (c).

police are reluctant to investigate and institute prosecutions against fellow police and security forces. This has resulted in increased levels of impunity and absence of the rule of law.³⁵¹ The absence of a witness protection system as well as the requirement for victims to confront suspects in a police line-up further contributes to the low number of convictions.³⁵² Other contributing factors include the requirement for victims to be examined by a police physician, fear of retribution and stigmatization, cultural practices which shun public discussions of sex as well as the absence of doctors to provide the requisite evidence for conviction.³⁵³

In 2010 the Kenya National Human Rights and Equality Commission was established with the mandate to monitor, investigate and report on the observance of human rights. This body could play a pivotal role in ensuring convictions of perpetrators of sexual violence as well as providing redress for victims.

UNHCR has made significant strides to reduce the levels of sexual violence at Dadaab and Kakuma camps; namely through the firewood project, the thorn bush project, the establishment of various committees as well as through awareness campaigns. UNHCR has enhanced the efficacy of the Kenyan police service as well as enhanced access to justice for refugee victims through the establishment of the mobile court. UNHCR's responsive role has been commendable, with victims increasingly accessing medical and psychosocial support,

However one of UNHCR's major flaws is its failure to file civil suits for damages and to initiate private criminal prosecutions. Provision of legal assistance has been inconsistent and insufficient, and this on its own will not result in justice and redress for victims of sexual violence

UNHCR's failure to uphold its political independence as well as its failure to rebuke the government of Kenya for the low number of convictions secured against perpetrators of sexual violence. The lack of clarity surrounding UNHCR's monitoring and supervisory role further exacerbates the situation as it is difficult to hold UNHCR accountable in the absence of clear enforcement mechanism.

³⁵¹ Bureau of Democracy, Human Rights, and Labor 2008 Human Rights Report: Kenya available at <http://www.state.gov/j/drl/rls/hrrpt/2008/af/119007.htm> (Accessed 25 January 2012)(BDHR Kenya 2008).

³⁵² Ibid.

³⁵³ BDHR Kenya 2010 (n 358).

The following chapter will analyse the potential of the international and regional human rights monitoring mechanisms to enhance the protection of refugee women.

Chapter IV

MONITORING AND ENFORCEMENT UNDER THE HUMAN RIGHTS CONVENTIONS

1. Introduction

The previous chapter argued that whilst Kenya and the UNHCR have taken some strides to protect refugee women from sexual violence, these measures have been inadequate to protect refugee women from sexual violence and provide effective redress to them. It was also illustrated that the UNHCR's monitoring and supervisory role is inadequate and ineffective in holding Kenya accountable for sexual violence against refugee women in Dadaab and Kakuma camps. Similarly, lack of prioritization of refugee issues by the Kenya National Commission on Human Rights suggests that the recently formed Kenyan National Human Rights and Equality Commission will do little to hold Kenya accountable for sexual violence against refugee women or to ensure redress for such victims.³⁵⁴

This section will outline the mechanisms used by the international and regional human rights monitoring and enforcement mechanisms in the exercise of their mandates. It will further analyse whether any interventions have been initiated by these bodies to protect refugee women in Kenya from sexual violence. The strengths and shortcomings of these bodies will also be highlighted; however it will be argued that the potential benefits of these processes outweigh these shortcomings. It will be concluded that a holistic approach which strengthens the capacity of the relevant arms of the Kenyan government and the UNHCR but simultaneously capitalizes on the strengths of the regional and international human rights monitoring and enforcement mechanisms is required to enhance the protection of refugee women from sexual violence.

³⁵⁴ Constitution of Kenya (n 253) at Section 59 (2).

2. International Human Rights Monitoring Mechanisms

Whilst the international human rights monitoring mechanisms are composed of several components, for the purpose of brevity, emphasis will be placed on the UN Treaty based mechanisms. The Human Rights Committee, the Committee against Torture, the CEDAW Committee and the Committee on the Rights of the Child have the competence to examine state reports and develop General Comments.³⁵⁵ The Committee on the Rights of the Child is the only body that lacks the competence to receive individual communications on violations of the CRC, whilst the CEDAW Committee lacks the competence to receive interstate communications of violations of the CEDAW.³⁵⁶ The Committee against Torture and the CEDAW Committee have the additional competence of initiating inquiries on allegations of systematic torture³⁵⁷ or violations of the provisions of CEDAW.³⁵⁸

The procedures and outputs of these committees have made significant contribution to promotion and protection of human rights.³⁵⁹ They provide authoritative guidance on the meaning of international human rights standards, on the application of treaties and on the steps to be taken by states to ensure full implementation of human rights.³⁶⁰ Despite not being legally binding, individual complaints procedures often result in individual redress for victims.³⁶¹ Additionally, the General Comments have increasingly been referred to by national and regional courts and tribunals for guidance on the interpretation and application of human rights treaties.³⁶²

The majority of the challenges faced by the treaty bodies are linked to the growth in human rights treaty bodies and the increasing number of States formally assuming international

³⁵⁵ Office of the United Nations High Commissioner for Human Rights 'Human Rights Bodies: General Comments' available at <http://www2.ohchr.org/english/bodies/treaty/comments.htm>, [Accessed 11 February 2012].

³⁵⁶ ICCPR (n 37) at Article 41(1) and CAT (n 38) at Article 21(1).

³⁵⁷ CAT (n 38) at Article 21(1).

³⁵⁸ OP CEDAW (n 218) at Article 8.

³⁵⁹ M O'Flaherty and C O'Brien 'Reform of UN Human Rights Treaty Monitoring Bodies: A Critique of the Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body' (2007) *Human Rights Law Review* 141 at 141.

³⁶⁰ United Nations High Commissioner for Human Rights 'Concept paper on the high Commission's proposal for a unified standing treaty body', Report by the Secretariat HRI/MC/2006/CRP.1, 14 March 2006 (UNHCHR Concept Paper) at 6.

³⁶¹ Ibid.

³⁶² Ibid.

legal obligations.³⁶³ These include financial, administrative and human resource constraints; whilst other reasons stem from States' lack of capacity or political will.³⁶⁴

An additional weakness of the treaty body mechanisms is their lack of consistency in taking up refugee matters. While the Committee against Torture generally examines refugee issues in the context of Article 3, it is not always consistent in commenting on a State's performance under this article, even if there is abundant evidence in the public domain that there are problems.³⁶⁵ For instance, the committee made no mention of refugee protection issues in Japan in its Concluding Observations on Japan's report in 1998.³⁶⁶ This inconsistency is problematic *vis-a-vis* the protection of refugee women against sexual violence. The Committees have similarly been inactive in addressing refugee issues in the context of Kenya.

2.1 The Reporting Mechanism

States often delay or fail to submit reports to the committees.³⁶⁷ Additionally, these committees have a high backlog in report consideration; hence even if states submitted all overdue reports, the committees lack the capacity to consider them.³⁶⁸ For instance, the Human Rights Committee's report to the GA in 2000 shows that 19 states were yet to submit initial reports and 42 countries have reports overdue for more than five years.³⁶⁹

Kenya failed to outline specific measures that it has undertaken to protect refugee women from sexual violence in its 2005, 2007 and 2008 and reports to the Human Rights Committee, the Committee on the Rights of the Child and the Committee against Torture.³⁷⁰ Despite highlighting

³⁶³ Ibid at 7.

³⁶⁴ O'Flaherty and O'Brien (n 359) at 141.

³⁶⁵ Takahashi (n 55) at 69. Takahashi notes that in November **1998**, the Committee made no mention of refugee issues in its Conclusions on the United Kingdom, despite long standing and serious criticism **by** numerous organizations, including the **UNHCR**, of many aspects of the country's asylum procedure.

³⁶⁶ Ibidat 70.

³⁶⁷ M O'Flaherty and C O'Brien (n 359) at 141.

³⁶⁸ UNHCHR Concept Paper (n 360) at 7.

³⁶⁹ Takahashi (n 55) at 72.

³⁷⁰ Office of the High Commissioner on Human Rights 'Concluding observations of the Human Rights Committee: Kenya. 04/29/2005.CCPR/CO/83/KEN.(Concluding Observations/Comments)' available at <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/CCPR.CO.83.KEN.En?Opendocument> [Accessed 11 February 2012] (HRC Kenya 2005); Committee On The Rights Of The Child 'Consideration Of Reports Submitted By States

the scourge of domestic violence and need for all individuals subject to its jurisdiction to have equal access to judicial and other remedies, the Human Rights Committee does not specifically mention sexual violence against refugee women.³⁷¹

The Committee on the Rights of the Child should however be hailed for recommending that Kenya documents information and takes necessary preventative and reactive measures to protect refugee children from police brutality. Although the committee fails to specifically mention sexual violence against refugee children, it is assumed that such violations fall under this ambit of ‘police brutality.’ The CEDAW Committee should be hailed for recommending that Kenya protects refugee and asylum seeking women from all forms of violence.³⁷² It adds that Kenya should avail mechanisms for redress and rehabilitation as well as for Kenya to ‘investigate, prosecute and punish all perpetrators of violence against refugees and internally displaced women.’³⁷³

A weakness of the recommendations made by treaty bodies is that they are not legally binding; hence their implementation is based on the political will of the contracting State.³⁷⁴ It is clear what steps have been taken by Kenya thus far to implement these recommendations, however it is hoped that positive steps will be made by Kenya.

2.2 General Comments

Various General Comments which have been generated by the treaty bodies however none specifically relate to sexual violence against refugee women. Nevertheless, several of these General Comments provide guidance on measures that states could take to protect refugee women from sexual violence as well as to ensure that they enhance access to redress for such

Parties Under Article 44 Of The Convention Concluding Observations: Kenya’ available at <http://daccess-dds-ny.un.org/doc/undoc/gen/g07/425/08/pdf/G0742508.pdf?openelement> [Accessed 11 February 2012] (CRC Kenya 2007).

³⁷¹ Ibid.

³⁷² Committee on the Elimination of Discrimination against Women ‘Concluding observations of the Committee on the Elimination of Discrimination against Women: Kenya 17 January – 4 February 2011’ available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/418/57/PDF/G1141857.pdf?OpenElement> , [Accessed 11 February 2012] at 11.

³⁷³ Ibid.

³⁷⁴ UNHCHR Concept Paper (n 360) at 10.

victims.³⁷⁵ Particular mention should be made of CEDAW's General Comment Number 19 which states that violence against women impairs or nullifies the enjoyment by women of human rights and fundamental freedoms.³⁷⁶ It adds that violence against women is a form of discrimination and enjoins states to take measures to prevent this discrimination by state and non-state actors.³⁷⁷

2.3 Individual and Inter-state Communications

The individual complaints mechanism is a potentially useful mechanism; however it is an underutilized, lengthy and cumbersome process.³⁷⁸ The Committees require approximately 30 to 33 months to pronounce a final decision.³⁷⁹ This hinders the committees' ability to provide redress to victims who submit urgent communications involving potentially irreparable harm.

Articles 1, 22(1) and 2 of the OP ICCPR, CAT and the OP CEDAW provide for individual communications mechanism under which victims alleging violations of the rights set out in these instruments may lodge complaints with the relevant committees.³⁸⁰ Similarly, Articles 41(1) and 21(1) of the ICCPR and CAT provide for inter-state communications against violating states. Although Kenya is yet to ratify the OP ICCPR and the OP CEDAW, it is worth highlighting the potential that these instruments have to enhance the protection of refugee women from sexual violence.

³⁷⁵ See UN Human Rights Committee, General Comment No. 15 (n 132); UN Human Rights Committee, CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, available at: <http://www.unhcr.org/refworld/docid/453883fb0.html> [Accessed 12 February 2012]; UN Human Rights Committee, CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons), 30 June 1982, No. 8, available at: <http://www.unhcr.org/refworld/docid/4538840110.html> [Accessed 12 February 2012]; CEDAW General Recommendations Nos. 19 and 20 (n 142); UN Committee on the Elimination of Discrimination Against Women, CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health), 1999, A/54/38/Rev.1, chap. I, available at: <http://www.unhcr.org/refworld/docid/453882a73.html> [Accessed 12 February 2012] and UN Committee on the Rights of the Child, CRC General Comment No. 2: The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child, 15 November 2002, CRC/GC/2002/2, available at: <http://www.unhcr.org/refworld/docid/4538834e4.html> [Accessed 12 February 2012].

³⁷⁶ CEDAW General Comments Nos. 19 and 20 (n 142) at Article 1 and 2(e).

³⁷⁷ Ibid.

³⁷⁸ UNHCHR Concept Paper (n 360) at 8.

³⁷⁹ Ibid.

³⁸⁰ OP ICCPR (n 245) at Article 1; CAT (n 38) at Article 22(1) and OP CEDAW (n 218) at Article 2.

The OP CEDAW is unique in that it allows for a wider range of persons to submit communications of violations. These persons include individuals, groups, or persons on behalf of individuals.³⁸¹ This is progressive in that victims of human rights violations in most need of redress are often the least able to come forward and seek redress.³⁸² They are often unaware of existing domestic legal remedies, let alone international ones. Additionally they face various complex language, financial, political and other barriers; particularly in the context of refugee women.³⁸³

A weakness of this instrument is that unlike other international human rights instruments, the victim's consent is required where a communication is submitted on the victims' behalf.³⁸⁴ This is particularly detrimental to the prospects of success that NGO's would have in submitting communications of sexual violence against refugee women to the CEDAW Committee. In addition to the above factors, refugee victims of sexual violence suffer additional psychological trauma and fear social stigma.³⁸⁵ This further hinders them from seeking redress at the domestic level, let alone the international level. Thus human rights defenders and NGO's play a crucial role in facilitating for refugee women to claim their rights.³⁸⁶

All the treaty bodies require the victim to exhaust local remedies and the matter must not have been submitted to another procedure of international investigation or settlement at the time of submission of the communication.³⁸⁷ The CEDAW Committee has the additional competence of issuing provisional measures requesting the state from doing irreparable harm to the victim whilst it considers the communication.³⁸⁸ This progressive provision is especially useful in emergency situations or where widespread and systematic violations are taking place.

³⁸¹ OP CEDAW (n 218) at Article 2.

³⁸² F Go`mez Isa 'The Optional Protocol for the Convention on the Elimination of All Forms of Discrimination: Strengthening the Protection mechanisms of Women's Human Rights' (2003) 20 *Arizona Journal of International and Comparative Law* 291 at 312.

³⁸³ Nowrojee (n 9) at 127.

³⁸⁴ OP CEDAW (n 218) at Article 2.

³⁸⁵ UNHCR SGBV Guidelines (n 4) at 24.

³⁸⁶ Go`mez Isa (n 382) at 311.

³⁸⁷ OP ICCPR (n 218) at Article 2; CAT (n 38) at Article 22(4) and OP CEDAW (n 218) at Article 4.

³⁸⁸ OP CEDAW (n 218) at Article 5.

The findings made by the committees are published in their annual reports which are transmitted to the GA.³⁸⁹ Whilst the findings and recommendations of the committees are not legally binding, they have political influence. States prefer to avoid being publicly humiliated for failing to uphold their human rights violations; particularly at high level forums such as the GA. Consequently, publicizing the committee's findings at the GA is likely to have a deterrent effect on errant states.

In practice it is unfortunate that the Committee against Torture is yet to receive any communications against Kenya for sexual violence against refugees.³⁹⁰ Similarly, the inter-state communication mechanism is yet to be used against Kenya by any state party alleging violations of sexual violence against refugee women.³⁹¹ Despite the fact that refugee advocates have increasingly turned to the treaty bodies to advance the cause of refugees, none of these interventions have been based on allegations of sexual violence against refugee women.³⁹² The reasons for this are unclear. It is arguable that because the right to physical security of refugee women is implied in the non refoulement provisions of Article 3(1) and 7 of CAT and the ICCPR, refugee advocates should be able to utilise the communications procedures of both treaty bodies to advance the protection of refugee women from sexual violence.

2.4 The Inquiry Mechanism

Articles 20(1) and 8 of the CAT and the OP CEDAW establish an inquiry mechanism which enables the Committee against Torture and the CEDAW Committee to initiate an inquiry into allegations of grave and systematic violations of the provisions of these instruments where the

³⁸⁹OP ICCPR (n 37) Article 6; CAT (n 38) Article 24; ICCPR (n 37) Article 41(1); CAT (n 38) Article 21(1).

³⁹⁰ Office of the United Nations Commissioner for Human Rights 'Statistical Survey of individual complaints considered' available at <http://www2.ohchr.org/english/bodies/cat/procedure.htm> [Accessed 10 February 2012].

³⁹¹ Office of the United Nations High Commissioner for Human Rights 'Human Rights bodies: complaints procedures' available at <http://www2.ohchr.org/english/bodies/petitions/index.htm#interstate>, [Accessed 10 February 2012].

³⁹² Takahashi (n 55) at 67. The majority of individual communications submitted to the Committee against Torture concern asylum seekers who have had their refugee claims rejected in their country of asylum, and who face refoulement. For example, of the 17 cases reviewed by CAT and reported on to the General Assembly in 2000, only 1 did not concern an asylum seeker alleging a violation of Article 3. The Committee against Torture regularly examines States refugee policies to ensure compliance with Article 3 of the ICCPR; see UN Committee Against Torture (CAT), *Report of the UN Committee against Torture: Twenty-third Session (8-19 November 1999) and Twenty-fourth Session (1-19 May 2000)*, 2 January 2000, Supplement No. 44 (A/55/44), available at: <http://www.unhcr.org/refworld/docid/453776b50.html> [Accessed 28 August 2011] at para 41 to 212.

‘accused state’ consents.³⁹³ Such an inquiry may include a visit into the territory of the accused state; however a major weakness of this mechanism is that investigations carried out under these provisions are confidential.³⁹⁴ Unfortunately the Committee against Torture is yet to conduct any inquiries in Kenya for violations of sexual violence against refugee women,³⁹⁵ and Kenya is yet to ratify the OP CEDAW.

Furthermore, in the event that Kenya ratified the OP CEDAW, a further weakness of this instrument is the fact that the CEDAW Committee is only empowered to ‘communicate its conclusions, comments, and recommendations to the State Party involved.’³⁹⁶ As with the other mechanisms, these findings are not legally binding on a violating state. This is further compounded by the fact that these findings are only published where the accused state consents and the fact that this mechanism is an ‘op-out’ mechanism. Thus violating states are less likely to ratify the OP CEDAW, for fear of the repercussions that could arise from being found wanting in its duty to protect refugees from sexual violence. This severely limits the usefulness of this mechanism.

3. Regional Human Rights Monitoring and Enforcement Mechanisms

Theoretically, regional human right mechanisms should be better placed to provide effective monitoring and protection of human rights because state practice has shown that states are more inclined to conform to regional as opposed to international initiatives.³⁹⁷ However this section will illustrate that the African human rights enforcement mechanisms also face challenges and they too have shortcomings. It will further illustrate that currently these mechanisms have not prioritized refugee issues in the exercise of their mandates.

³⁹³ CAT (n 38) at Article 20(1) and OP CEDAW (n 218) at Article 8.

³⁹⁴ Ibid at Article 20(2) and Article 8(3).

³⁹⁵ Office of the United Nations High Commissioner for Human Rights ‘Confidential Inquiries under Article 20 of the Convention Against Torture’ available at http://www2.ohchr.org/english/bodies/cat/confidential_art20.htm, [Accessed 11 February 2012].

³⁹⁶ OP CEDAW (n 218) Article 8 para 3.

³⁹⁷ R Smith *Textbook on International Human Rights* (2003) at 85.

The strengths of the African Human Rights system lie in its innovative normative provisions, whilst its weaknesses stem from its ineffective enforcement mechanisms.³⁹⁸ Examples of the systems' strengths include the ACHPR's extensive elaboration of the concept of individual duties,³⁹⁹ the codification of all three generations of human rights, including the introduction of the concept of people's rights which were previously not codified in any regional human rights instruments.⁴⁰⁰

The regional monitoring and enforcement mechanisms have similar mechanisms to those of the international mechanisms.⁴⁰¹ Articles 62 and 43 of the ACHPR and the ACRWC provide for the reporting mechanism;⁴⁰² whilst the inter-state and individual communications are provided for under Articles 47 and 55 of the ACHPR, as well as Article 44 of the ACRWC.⁴⁰³

Furthermore, the African Court of Human and People's Rights⁴⁰⁴ and the proposed African Court on Justice, Human and People's Rights⁴⁰⁵ have the additional competence of adjudicating over cases and enforcing human and peoples' rights. The drafting of the Protocol ACHPR was initiated in a bid to cure the deficiencies of the African Commission's enforcement mechanisms and to strengthen the capacity of the ACERWC.⁴⁰⁶ It was also necessitated by the African Commission's failure to hold violating states accountable for human rights atrocities committed in various countries such as Rwanda, and more recently in Sudan, Sierra Leone, and

³⁹⁸ M Mutua 'The African Human Rights Court: A Two Legged Stool? (1999) 21 *Human Rights Quarterly* 342 at 343. The weaknesses of the regional monitoring and enforcement mechanisms will be analysed in greater detail in the section to follow.

³⁹⁹ ACHPR (n 41) Articles 22(3), 27(1), 28 and 29.

⁴⁰⁰ The ACHPR is the first regional treaty to codify social and economic rights, and people's rights such as the right to self determination, development and the right to peace and international security. See Articles 16,17, 20(1), 22(3), and 23(1)

⁴⁰¹ ACHPR (n 41) at Article 45(1)(a); ACRWC (n 42) at Article 42.

⁴⁰² ACHPR (n 41) at Article 62 and 43; ACRWC (n 42) at Article 43 and 44.

⁴⁰³ ACHPR (n 41) at Article 47 and 55; ACRWC (n 42) at Article 44.

⁴⁰⁴ The Protocol ACHPR came into force on 25 January 2004, whilst the Court began its operations in November 2006. See African Court on Human and people's Rights 'Institutional Background' available at <http://www.african-court.org/en/court/about-the-court/institutional-background/> [Accessed 17 February 2012].

⁴⁰⁵ The African Court of Justice, Human and People's Rights will come into force once its protocol has been ratified by 15 member states.

⁴⁰⁶ Protocol ACHPR (n 203) preamble, para 6. See F Viljoen *International human rights law in Africa* (2007) 425.

the Democratic Republic of the Congo.⁴⁰⁷ These atrocities further highlighted the ineffectiveness of the African Commission as a protector of human rights.

3.1 The Reporting Mechanism

The African Commission and the ACERWC face similar problems to those faced by their international counterparts; particularly in relation to States' failure or delays in submitting obligatory reports.⁴⁰⁸ Additionally, the quality of reports often fails to meet the required reporting standards. For instance, Kenya's first report to the African Commission is silent on any efforts made by Kenya to protect refugee women from sexual violence.⁴⁰⁹ There is scant mention of violence against women as a continued obstacle, but refugee women are not mentioned.⁴¹⁰ This suggests that sexual violence against refugee women is not a priority to the government of Kenya.

The African Commission has also paid insufficient attention to refugee issues. Despite mentioning that sexual violence is on the increase in Kenya, the Concluding Observations issued by the Commission in 2007 make no mention of sexual violence against refugee women.⁴¹¹ The only mention of refugees by the Commission is its concern of Kenya's violation of the non-refoulement provisions by closing border to Somali refugees.⁴¹² Nevertheless, the Commission recommends that Kenya ratifies and domesticates the AWP.⁴¹³ Whilst this would enhance the protection of refugee women from sexual violence, the Commission's failure to specifically address the issue remains disappointing.

⁴⁰⁷ Mutua (n 398) at 344.

⁴⁰⁸ Heyns (n 126) at 696. See African Commission on Human and People's Rights, 'Status on Submission of State Periodic Reports to the African Commission on Human and People's Rights' available at http://www.achpr.org/english/info/status_submission_en.html [Accessed 11 February 2012].

⁴⁰⁹ Republic of Kenya 'Report on the African Charter on Human and People's Rights June 2006' available at http://www.achpr.org/english/Archives/State%20reports/eng/Kenya/Kenya%20Report_1_eng.pdf, [Accessed 11 February 2012]

⁴¹⁰ Ibid at para 156.

⁴¹¹ African Commission 'Concluding Observations Of The African Commission *On Human And Peoples' Rights On The Initial Report Of The Republic Of Kenya Adopted At Its 41st Ordinary Session Held In Accra, Ghana From 16-30 May 2007*' available at [Http://Www.Chr.Up.Ac.Za/Images/Files/Documents/Ahrdd/Kenya/Kenya_Concluding_Observations_2007.Pdf](http://Www.Chr.Up.Ac.Za/Images/Files/Documents/Ahrdd/Kenya/Kenya_Concluding_Observations_2007.Pdf) [Accessed 11 February 2012] at para 17.

⁴¹² Ibid at para 23.

⁴¹³ Ibid at para 26(b).

The ACERWC should be hailed for adjusting its reporting requirements and integrating them with those of the UN Committee on the Rights of the Child in a bid to reduce the reporting burden on state parties. The ACERWC has requested states to ‘highlight the areas of rights that are specific to the Children’s Charter’ and to outline the steps taken to implement the recommendations and concluding observations of the ACERWC and the Committee on the Rights of the Child.⁴¹⁴

In its 2007 report to the ACERWC, Kenya highlights various issues affecting refugee children that it has addressed, but surprisingly there is no mention of steps it has taken to address sexual violence against refugee children.⁴¹⁵ Nevertheless the report does suggest that there is special attention given to the refugee girl child.⁴¹⁶ Similarly, the ACERWC mentions its concern over high levels of sexual abuse of children, but it makes no specific mention of need for Kenya to uphold rights of refugee children who are more susceptible to sexual violence.⁴¹⁷

3.2 Inter-state and individual communications

The communication mechanisms of the African Commission⁴¹⁸ and the ACERWC⁴¹⁹ function in more or less the same manner as those of the international treaty bodies. However, a major weakness of the mechanism under the ACHPR stems from the fact that communications on allegations violations of human and peoples’ rights may only be entertained by the African Commission where serious or massive violations occur.⁴²⁰ Furthermore it is not clear which actors have locus standi to bring communications to the Commission and victims of such

⁴¹⁴ Save the Children Sweden and Plan International, ‘Advancing Children’s Rights: A Guide for Civil Society Organisations on How to engage with the African Committee of Experts on the Rights and Welfare of the Child’ 2nd ed (2010) at 49 (SCSPI Guide).

⁴¹⁵ Republic Of Kenya ‘Initial Report to the African Union on the Implementation of the African Charter on the Rights and Welfare Of The Child-2003 To 2007’ available at <http://www.acerwc.org/wp-content/uploads/2011/03/acerwc-state-report-kenya-initial-english.pdf> [Accessed 11 February 2012] at 76.

⁴¹⁶ Ibid.

⁴¹⁷ Child Rights International Network ‘ACERWC Concluding Observations for Kenya’ available at <http://www.crin.org/resources/infodetail.asp?id=23051>, [Accessed 11 February 2012] at 4.

⁴¹⁸ ACHPR (n 41) at Article 47-56.

⁴¹⁹ ACRWC (n 42) at Article 44.

⁴²⁰ Heyns (n 216) at 696.

violations are required to exhaust local remedies before approaching the Commission. These requirements are excessively high, given the peculiar circumstances that victims of human rights violations on the African continent face. The additional barriers that refugee victims of sexual violence face further hinder their prospects of accessing the African Commission's mechanisms to see redress.

As at the international level, currently no state has brought a communication against Kenya alleging sexual violence against refugee women.⁴²¹ Whilst the African Commission has thus far received 8 individual communications alleging human rights violations against Kenya, none of these have been relating to sexual violence against refugee women.⁴²² Similarly, the ACERWC has received two individual communications thus far, one of which was against Kenya; however this communication did not contain allegations of sexual violence against refugee children.⁴²³ It must be noted that the ACERWC is the only treaty body in the world with the competence to receive communications on allegations on violations of children's rights. This committee receives communications from a wide range of actors including any person, group or nongovernmental organisation recognized by the Organization of African Unity, by a Member State, or the United Nations.⁴²⁴

3.3 The Inquiry Mechanism

A major weakness of this mechanism under ACHPR is that inquiries may only be undertaken where there are massive human rights violations, including in the case of emergencies.⁴²⁵

Further, the Commission is only empowered to undertake inquiries where the Assembly of Heads

⁴²¹ African Commission on Human and People's Rights 'Communications brought against Kenya' available at http://www.achpr.org/english/info/index_Decision_Kenya.html [Accessed 11 February 2012].

⁴²² Ibid.

⁴²³ ACERWC 'Communications' available at <http://www.acerwc.org/communications/> [Accessed 11 February 2012]. See Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v. The Government of Kenya Decision: No 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child, 22 March 2011. Kenya was found to be in violation of the rights of Nubian children to non-discrimination, nationality and protection against statelessness in March 2011.

⁴²⁴ ACERWC (n 42) at Article 44(1).

⁴²⁵ ACHPR (n 41) at Article 58(2).

of State and Government has consented.⁴²⁶ State practice has shown that states often lack the political will to expose each other and hold each other accountable for human rights violations; hence this requirement has further limited the Commission's capacity to effectively carry out its protective mandate.

Whilst the African Commission requested to conduct a fact finding mission in Kenya in the aftermath of the 2007 elections, no mention was made of sexual violence against refugee women.⁴²⁷ Similarly, the ACERWC is yet to conduct an inquiry in Kenya.⁴²⁸ As yet the Committee's only inquiry was conducted in northern Uganda in 2005.⁴²⁹

3.4 The African Court on Human and People's Rights (The African Court)

The African Court has the competence to adjudicate cases and disputes stemming from the application of the ACHPR and any other relevant instrument ratified by the parties in question; therefore this court is empowered to borrow jurisprudence of other treaty bodies in the exercise of its mandate.⁴³⁰ In practice the African Court is yet to borrow jurisprudence from other treaty bodies.⁴³¹ It is hoped that the Court will utilize this aspect of its competence when an opportunity arises.

This court has the further competence to provide advisory opinions at the request of a wide range of actors which include the OAU, its organs and member states as well as any

⁴²⁶ Ibid at Article 58(3).

⁴²⁷ African Commission on Human and People's Rights 'Activity Report of The African Commission on Human and Peoples' Rights, submitted in conformity with Article 54 of the African Charter on Human and Peoples' Rights' available at

http://www.chr.up.ac.za/images/files/documents/ahrdd/theme02/african_commission_23rd_24th_activity_report.pdf [Accessed 11 February 2012] at p 5.

⁴²⁸ ACERWC (n 42) at Article 45.

⁴²⁹ SCSPI Guide (n 414) at at 89. See African Committee of Experts on the Rights and Welfare of the Child 'Investigation Missions' available at <http://www.acerwc.org/investigations/>, [Accessed 11 February 2012].

⁴³⁰ Protocol ACHPR (n 41) at Article 3 and 7.

⁴³¹ To date the African Court has delivered one judgment in which it ruled that it lacked jurisdiction to entertain the application. See African Court on Human and People's Rights 'Judgments and Orders' available at <http://www.african-court.org/en/cases/judgments-and-orders/> [Accessed 18 February 2012].

organization recognized by the OAU.⁴³² The African Court on Human and Peoples' Rights grants access to a wide range of actors, including NGOs with observer status and individuals where a State has 'opted in' to the Article 34(6) of the Protocol.⁴³³ Whilst this provision is progressive in that it takes cognizance of the lived realities of refugee victims of sexual violence who face greater barriers than other victims in accessing justice and seeking redress; in practice the majority of African states, including Kenya have not made a declaration under Article 5(3) of the Protocol ACHPR which grants direct access to the African Court to these actors.⁴³⁴ Consequently, NGO's with observer status and refugee victims of sexual violence cannot directly access the African Court to hold Kenya accountable for sexual violence against refugee women or to seek redress for these violations.

Unlike the African Commission, the African Court has the competence to grant remedies to refugee victims of sexual violence and ensure their implementation.⁴³⁵ Additionally, this court may order provisional measures in urgent circumstances to avoid irreparable harm to these victims.⁴³⁶ In so doing this court clarifies the uncertainty which existed under the ACHPR surrounding the steps that states are to take to implement its judgments.⁴³⁷ It also renders the ACHPR more efficient than the African Commission which lacked the capacity to respond to urgent situations without the permission of the AU Assembly of Heads of State and Government.⁴³⁸ The Court issued its first order for provisional measures against Libya on the 25th of March 2011 in a bid to avoid further loss of human life after the Libyan security forces' excessive use of heavy weapons and machine guns against the population which resulted in the killing of many people.⁴³⁹ Whilst the issuance of this order did not prevent the Libyan government from continuing to perpetrate massive human rights violations against civilians, the

⁴³² Protocol ACHPR (n 41) at Article 4.

⁴³³ Ibid at Article 5(3).

⁴³⁴ Ibid at Article 5(3) and 34(6). Currently only 5 states have entered a declaration under Article 5(3). See African Court on Human and Peoples' Rights 'Protection of human rights in Africa' available at <http://www.african-court.org/eng/> [Accessed 18 February 2012].

⁴³⁵ Protocol ACHPR at Article 27(1).

⁴³⁶ Ibid at Article 27(2).

⁴³⁷ Viljoen (n 406) at 425.

⁴³⁸ Ibid at 428.

⁴³⁹ In the Matter of *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*, Application No. 004/2011, African Court on Human and Peoples' Rights, 25 March 2011, available at: <http://www.unhcr.org/refworld/docid/4da59c082.html> [Accessed 17 February 2012], at para 25.

African Court should be hailed for setting this precedence. It is hoped that future provisional measures will have a deterrent effect on errant states.

A major weakness of the African Commission is the requirement that all measures undertaken by it remain confidential unless approved by the AU Assembly. In practice this requirement further compounded the Commission's ability to ensure the protection of human rights on the continent. The ACHPR Protocol cures this deficiency by requiring all processes of the African Court, including the reading of judgments to be done publicly⁴⁴⁰ save for where individuals' lives are seriously threatened.⁴⁴¹

Findings made by the African Commission are non-binding and the enforcement of remedies under the ACHPR has been weak.⁴⁴² Article 28(2) of the ACHPR Protocol remedies this by rendering decisions of the African Court final and binding. These decisions are not subject to appeal or political confirmation and state parties to this protocol undertake to implement the findings of the Court and remedies ordered.⁴⁴³ To date the African Court has delivered one judgment. Unfortunately the Court dismissed the application for lack of jurisdiction on the part of the respondent state, Senegal which has not entered a declaration under Article 5(3) of the ACHPR Protocol. Therefore the Court is yet to order any remedies to victims of human rights violations.⁴⁴⁴

The African Court Protocol should be hailed for establishing a Council of Ministers empowered with monitoring the execution of the Court's judgments.⁴⁴⁵ The Council of Ministers may report incidences of non-compliance with the Court's judgments to the AU Assembly which may in turn result in sanctions being imposed on the errant state.⁴⁴⁶ However it must be noted

⁴⁴⁰ Protocol ACHR (n 203) at Article 28(5).

⁴⁴¹ Viljoen (n 406) at 428.

⁴⁴² Ibid at 426.

⁴⁴³ Protocol ACHR (n 203) at Article 28(2) and 30.

⁴⁴⁴ Michelot Yogogombaye v. Republic of Senegal. App. No. 001/2008. Judgment at <http://www.african-court.org/en/cases/latest-judgments/>.

African Court on Human and Peoples' Rights, December 15, 2009 (Yogogombaye case).

⁴⁴⁵ Protocol ACHPR (n 203) at Article 29(2).

⁴⁴⁶ Viljoen (n 406) at 428.

that since the African Court is yet to deliver a judgment outlining remedies to be made by a state the Council of Ministers is yet to exercise its duty to monitor and execute the court's judgments.

It is also worth noting that the African Court has been designed to improve the time frame within which remedies to human rights violations are issued. The African Commission was particularly slow at reaching decisions; with findings being made in no less than three years.⁴⁴⁷ Article 28(1) of the African Court Protocol seeks to remedy this by requiring the court to reach a judgment within 90 days.⁴⁴⁸ It is however disappointing to note that the African Court took 16 months to reach its decision in the *Yogogombaye* case; particularly since the Court did not go into the merits of this application.⁴⁴⁹ The reasons for this delay are not clear, however it is hoped that in the future the Court will be able to make judgments within the stipulated 90 day period.

3.5 African Court on Justice, Human and People's Rights

The functions of the African Court as outlined above will be assumed by the African Court on Justice, Human and People's Rights once it has been ratified by 15 states. Although this court was also established to complement and enhance the protective mandates of the African Commission and the ACERWC, it was largely necessitated by the need to save financial and human resources of the African Court and the African Court of Justice.⁴⁵⁰ An additional reason was to avoid the risk of conflicting jurisprudence emanating from the African Court and the African Court of Justice. Thus the unified court offers an opportunity for developing a unified, integrated and cohesive indigenous jurisprudence for Africa.

For the purposes of brevity, this section will not elaborate on the normative and procedural provisions of this court; however it should be noted that the Protocol ACJHPR maintains and in some instances elaborates on the progressive provisions of the Protocol

⁴⁴⁷ The Commission took 5 years and 7 months to deliver a judgment in the case of *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60(ACHPR 2001). See Viljoen (n 407) at 429.

⁴⁴⁸ Protocol ACHR (n 203) at Article 28(1).

⁴⁴⁹ *Yogogombaye* case (n 444) at para 1, 37 and 46.

⁴⁵⁰ Protocol ACJHPR (n 206) at preamble para 6.

ACHPR.⁴⁵¹ For instance, a wider range of actors have access to the ACJHPR than those provided for under the Protocol ACHPR, and the jurisdiction of the ACJHPR is wider than that of the ACHPR.⁴⁵²

4. Conclusion

This chapter has illustrated that Kenya's conduct at both the regional and international treaty bodies suggests that it lacks the political will to prioritise refugee issues, as well as to ensure the prosecution of perpetrators of sexual violence and provide redress to victims. It has also been shown that the UN Treaty bodies have not prioritised refugee issues in the exercise of their mandates; they lack the capacity to ensure actual enforcement of their recommendations and they have no judicial authority to sanction punitive measures for non-compliance by states. An additional but critical shortcoming of the UN treaty bodies is their invisibility to victims of human rights violations.

Academics have called for the establishment of a unified monitoring body for all the UN treaties to address their shortcomings and enhance their effectiveness.⁴⁵³ Similar calls have been made in various UN channels⁴⁵⁴ and these have culminated into a UN concept paper developed in 2006.⁴⁵⁵ This paper outlines the principle objectives of the unified body and proffers several advantages of such an institution. Its main advantage would be that it would be a 'unified single, visible and accessible entry point for rights holders' that is 'permanently available to victims and better able to rapidly respond to urgent matters.'⁴⁵⁶ Implementation of the 1951 Convention could also be reviewed through this mechanism. Whilst a unified body would enhance the effectiveness of the UN Treaty Bodies, it will not grant enforcement powers or the ability to take

⁴⁵¹ Ibid at Article 28, 29, 30, 35 and 36.

⁴⁵² Ibid.

⁴⁵³ See (A/44/668), (A/CONF.157/PC/62/Add.11/Rev.1), (E/CN.4/1997/74), (E/CN.4/1998/85 and E/CN.4/200/98) cited in UNHCHR Concept paper (n 360) at 4.

⁴⁵⁴ M Bowman 'Towards a Unified Treaty Body for Monitoring Compliance with UN Human Rights Conventions? Legal Mechanisms for Treaty Reform' (2007) 7 *Human Rights Law Review* at 225.

⁴⁵⁵ UNHCHR Concept paper (n 360) at 4.

⁴⁵⁶ Ibid at 11. See Bowman (n 454) at 225 – 249.

punitive measures on errant states. Hence, fulfilment of states' obligations to the UN Treaty bodies will remain dependant on their political will.

Similar efforts have been made at the regional level to enhance the effectiveness of the Regional Human Rights mechanisms. These efforts culminated in the establishment of the African Court on Human and Peoples' Rights. The decisions of the African Court on Human and Peoples' Rights are final and legally binding, as opposed to the recommendatory nature of the findings of the African Commission.⁴⁵⁷ This court creates a comprehensive implementation system as opposed to the ad hoc one established by the African Commission. This court abandons the confidentiality principle established under the African Commission and it has the capacity to issue provisional measures as deemed necessary in cases 'of extreme gravity and urgency to avoid irreparable harm to persons.'⁴⁵⁸ Additionally it has enhanced visibility as opposed to the obscurity of the African Commission and it delivers immediate as opposed to delayed justice.⁴⁵⁹

Thus, the African Court rights presents better prospects of holding Kenya accountable for failing to protect refugee women from sexual violence. It also has the potential to deliver effective remedies to such women; however the challenge that remains is in Kenya's failure to enter a declaration under Article 5(3) of the Protocol ACHPR which grants NGO's with observer status and individuals with direct access to the African Court. Thus the fate of refugee women currently lies in the hands of other actors that have access to the African Court. These include the African Commission, African Intergovernmental Organisations and states that have an interest the occurrence of sexual violence against refugee women.⁴⁶⁰

Whilst the enforcement mechanisms of the African Human Rights system are more favourable than those of the UN treaty bodies, the UN treaty body mechanisms should not be completely disregarded. Although they have failed to prioritise refugee issues, refugee advocates,

⁴⁵⁷ Protocol ACHR (n 203) at Article 10. See Viljoen (n 406) at 424.

⁴⁵⁸ Ibid.

⁴⁵⁹ Viljoen (n 406) at 429. See Kithure Kindiki 'The proposed Integration of the African Court of Justice and the African Court of Human and Peoples' Rights: legal Difficulties and Merits', (2007) 15 *African Journal of International and Comparative Law* at 138.

⁴⁶⁰ Protocol ACHR (n 203) at Article 5 (1)(a), (e) and 5(2).

the UNHCR and NGO's could play a greater role in bringing refugee issues to the attention of the committees. The last chapter of this dissertation contains concluding remarks as well as some recommendations aimed at enhancing the protection of refugee women from sexual violence.

Chapter V

CONCLUDING REMARKS AND RECOMMENDATIONS

1. Introduction

This thesis has illustrated that the normative framework provided by the refugee law regime is inadequate to protect refugee women from sexual violence. It has also illustrated that this regime fails to provide for an effective monitoring and enforcement mechanism capable of holding Kenya accountable for sexual violence against refugee women and ensuring that perpetrators of these violations are prosecuted. Similarly, this regime does not provide for a clear monitoring and supervisory role for the UNHCR. Consequently, UNHCR's efforts to protect refugee women from sexual violence in Dadaab and Kakuma camps have been inconsistent and ineffective.

The advantages of relying on the human rights law regime are that this regime provides various normative provisions that extend explicit protection to refugee women from sexual violence. Furthermore, the protection obligations to be fulfilled by states are extensively outlined in various treaties. More importantly this regime provides for a monitoring mechanism at both the international and regional level. The African human rights system has the additional competence to ensure the enforcement of Kenya's obligations through the African Court and the proposed ACJHR.

While there are numerous advantages in relying on the UN treaty based mechanisms and the African human rights mechanisms, they too have their shortcomings. However the usefulness of these mechanisms should not be easily disregarded. The potential benefits of relying on the human rights law regime outweigh the shortcomings of solely relying on the refugee law regime. Additionally, efforts are already underway to cure the deficiencies of these mechanisms at both the international and regional level.

It has also been illustrated that whilst some positive measures have been taken by Kenya and the UNHCR, overall current efforts by these duty bearers fall short of providing adequate protection to refugee women, ensuring that perpetrators are held accountable and providing effective redress to victims. Kenya has not ratified the OP CEDAW, OP ICCPR and the AWP which enhance the protection of refugee women from sexual violence. Furthermore, Kenya is yet to domesticate several treaties into municipal law. Current efforts to monitor Kenya's protection of refugee women from sexual violence by the Kenya National Human Rights and Equality Commission, the Kenya National Council for Children's Services, the UN treaty bodies as well as the African treaty bodies have been inadequate. Refugee issues, including sexual violence have not been prioritized and consistently addressed.

Although the African Court presents the greatest prospects of success for holding Kenya accountable and issuing remedies for refugee victims of sexual violence, this court is yet to receive any communications citing violations of sexual violence against refugee women in Dadaab and Kakuma camps. Consequently it is yet to take action against Kenya for its failure to fulfil its duty to protect. Despite the fact that individuals and NGO's with observer status do not have direct access to this Court, the African Commission, the ACERWC, African Intergovernmental Organisations and states with an interest in the violations have the competence to institute proceedings against Kenya. It is not clear why none of these actors have initiated proceedings against Kenya at the African Court. The remaining section will conclude by providing brief recommendations to Kenya, the UNHCR and the regional and international monitoring and enforcement mechanisms.

2. Recommendations for Kenya

Kenya should prioritise the protection of women from sexual violence. Kenya should ratify and domesticate the outstanding treaties which protect refugee women from sexual violence into its municipal law.⁴⁶¹ There is a need for Kenya to systematically implement the recommendations

⁴⁶¹ OP CEDAW (n 218), OP ICCPR (n 218), AWP (n 43).

made by both the regional and international treaty bodies.⁴⁶² These recommendations should be publicized amongst the relevant government departments involved in refugee protection. Similarly Kenya should implement the recommendations made by relevant UN studies such as the United Nations Secretary-General's Study on violence against Children.⁴⁶³

Kenya should ensure that all actors involved in refugee protection work receive rigorous and systematic training to ensure that they are aware of all forms of violence against women and may provide adequate gender-sensitive support to victims.⁴⁶⁴ These actors include but are not limited to law enforcement officials, teachers, health service personnel, social workers, judges, magistrates, lawyers and prosecutors.⁴⁶⁵ It is imperative that these actors are adequately equipped with the necessary financial, human and other resources required to ensure the protection of refugee women.

Greater efforts need to be made to enhance the capacity of law enforcement officials to investigate crimes and collect adequate evidence for prosecution. A sufficient number of police stations and police should be availed in the Dadaab and Kakuma camps. Kenya should ensure that these officials carry out adequate policing within the camps. Where necessary, Kenya should seek technical assistance from the UNHCR, Office of the High Commissioner for Human Rights, United Nations Children's Fund, and the World Health Organisation.

Kenya should ensure the independence of the Kenya National Human Rights and Equality Commission to allow it to effectively carry out its function. This is particularly important in circumstances where state officials are amongst the perpetrators of sexual violence

⁴⁶²See UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women - Kenya*, 5 April 2011, CEDAW/C/KEN/CO/7, available at: <http://www.unhcr.org/refworld/docid/4eeb60b12.html> [Accessed 20 February 2012] (CEDAW Kenya 2011) at para 9.

⁴⁶³ UN Human Rights Council, *Annual report of the Special Representative of the Secretary-General on Violence against Children*, 13 January 2012, A/HRC/19/64, available at: <http://www.unhcr.org/refworld/docid/4f3920e02.html> [Accessed 20 February 2012]. See UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Kenya*, 19 June 2007, CRC/C/KEN/CO/2, available at: <http://www.unhcr.org/refworld/docid/4682102b2.html> [Accessed 20 February 2012] (CRC Kenya 2007) para 44.

⁴⁶⁴ CEDAW Kenya 2011 (n 462) at para 24.

⁴⁶⁵ *Ibid* at para 14 (c).

against refugees. This Commission should be provided with sufficient financial, material and human resources to enable it to conduct truly for independent monitoring.⁴⁶⁶ As recommended by the Committee on the Rights of the Child, Kenya should ensure that this commission operates in line with the Principles Relating to the Status of National Institutions.⁴⁶⁷

Additionally, Kenya should ensure that independent human rights institutions pay special attention to the concerns of children, through strategies such as the establishment of a children's rights unit.⁴⁶⁸ Sufficient measures should also be taken to ensure the power and visibility of such institutions, as well as their capacity to coordinate the interventions of all actors at local and national level.⁴⁶⁹ This includes strengthening collaborations between Kenya and NGOs working to protect refugee children.⁴⁷⁰ Similarly, all relevant government budgets should allocate sufficient resources to institutions involved in refugee protection work. These include the budgets of institutions such as the National Council for Children's services.⁴⁷¹

As part of Kenya's efforts to change cultural attitudes and beliefs of the refugee community, particular efforts should be made to monitor and regulate the activities of the community based refugee courts to ensure that they don't adjudicate cases of sexual violence against refugee women. These efforts should be accompanied with adequate and consistent civic education and training of refugees and refugee leadership on human rights law and women's law.

Kenya should address barriers that hinder refugee women from accessing justice. Legal aid should be availed to all refugee women; and this should be accompanied by awareness

⁴⁶⁶ UN Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations, Kenya*, 29 April 2005, CCPR/CO/83/KEN, available at: <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/CCPR.CO.83.KEN.En?Opendocument> [Accessed 20 February 2012] para 4.

⁴⁶⁷ CRC Kenya 2007 (n 463) at para 13.

⁴⁶⁸ CRC General Comment Number 2 (n 375).

⁴⁶⁹ CEDAW Kenya 2011 (n 462) at para 16 (b).

⁴⁷⁰ CRC Kenya 2007 (n 463) at para 19

⁴⁷¹ Ibid at para 15. See Republic Of Kenya 'Initial Report to the African Union on the Implementation of the African African Charter on Human and People's Rights June 2006' available at http://www.achpr.org/english/Archives/State%20reports/eng/Kenya/Kenya%20Report_1_eng.pdf, [Accessed 11 February 2012] at para 156.

campaigns aimed at raising legal literacy levels including information on the contents of the law, available legal remedies as well as how to access these remedies.⁴⁷²

Kenya should take specific steps to ensure that the judiciary prosecutes and convicts perpetrators of sexual violence. Current convictions secured against perpetrators of sexual violence are extremely low, with a mere 4 cases involving sexual violence against refugees being available on the Kenyan Law Reports website.⁴⁷³ Equally worrying is the lack of clarity surrounding the remedies that have been ordered for the victims of sexual violence.⁴⁷⁴

Effective witness protection services need to be established for all victims of sexual violence. This is particularly relevant for refugee victims of sexual violence who face possible retribution after lodging complaints or instituting legal action against perpetrators of violence. Specific efforts should be made to ensure that children victims of sexual violence receive the protection required by the CRC, the ACRWC and the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.⁴⁷⁵ Closely related is the need for refugee victims of sexual violence to be provided with appropriate medical, recovery and reintegration services as well as psychosocial support and shelter by Kenya.⁴⁷⁶ Currently it appears that the UNHCR has played a leading role in the provision of such services.

In the medium to long-term, Kenya should abolish its long-term encampment policy in line with the UNHCR Policy on Refugee Protection and Solutions in Urban Areas⁴⁷⁷ and the CRC Committee recommendation made in its 2007 concluding observations.⁴⁷⁸

⁴⁷² CEDAW Kenya 2011 (n 462) at para 14(c).

⁴⁷³ See the cases of Peter Etabo v Republic Criminal Appeal 71 of 2009; Erupe Napao and CHRISTOPHER EKEN v Republic Criminal Appeal 81 and 82 of 2009 ; Thomas Nanok v Republic and M Mulima v Republic; Kenya Law Reports 'sexual violence against refugees' available at <http://www.kenyalaw.org/CaseSearch/> [Accessed 29 February 2012].

⁴⁷⁴ HRC Kenya 2005 (n 370) at para 9.

⁴⁷⁵ CEDAW Kenya 2007 (n 462) at para 32. See UN Office on Drugs and Crime, *Justice in Matters involving Child Victims and Witnesses of Crime. Model Law and Related Commentary*, April 2009, available at: <http://www.unhcr.org/refworld/docid/4a096ce42.html> [Accessed 20 February 2012].

⁴⁷⁶ *Ibid* at para 33 (c).

⁴⁷⁷ UN High Commissioner for Refugees, *UNHCR Policy on Refugee Protection and Solutions in Urban Areas*, September 2009, available at: <http://www.unhcr.org/refworld/docid/4ab8e7f72.html> [Accessed 20 February 2012]

⁴⁷⁸ *Ibid*. See CRC Kenya 2007 (n 370) at para 60.

3. Recommendations for the UNHCR

Some of the shortcomings of UNHCR's protective interventions in Dadaab and Kakuma camps stem from weaknesses in UNHCR's governance system at the global level. Examples include UNHCR's failure to uphold its political independence, UNHCR's quiet diplomacy as well as the lack of clarity surrounding UNHCR's supervisory role. Recommendations aimed at curbing these deficiencies are more relevant in the long term than in the immediate short term.

Additionally, external factors including those of a political and financial nature will determine whether or not these deficiencies will be cured. Consequently it may be years until such recommendations enhance the protection of refugee women from sexual violence. Therefore, this section will place greater emphasis on recommendations at the national level which require less 'political interventions' and have greater prospects of enhancing the protection of refugee women in the short term. Brief mention will be made of long term recommendations aimed at remedying UNHCR's governance weaknesses.

In terms of the provision of physical security, UNHCR lacks has neither the capacity nor the legal mandate to provide victims with actual 'physical security.' However UNHCR must effectively and consistently implement UNHCR policies and Guidelines which contain practical recommendations aimed at reducing the vulnerability of refugee women from sexual violence. Examples include recommendations aimed at improving the camp structure and design to reduce women's vulnerability to sexual violence. UNHCR employees need to be trained on their duty to protect refugees from sexual violence as outlined in these Guidelines. They should also be trained on the applicable law in the host state as well as the regional and international provisions providing protection to refugees from sexual violence under both the refugee and human rights law regimes.

Because UNHCR performs state-like functions in the exercise of its protective mandate., including the 'governing' of refugee camps, the due diligence test should equally apply to UNHCR in the same manner that it applies to states. An effective accountability mechanism must be established to hold UNHCR accountable to its duty to protect. Farmer suggests that this mechanism could take the form of an Ombudsman established with the assistance of an

independent NGO.⁴⁷⁹ He or she would be mandated with assisting refugee women to lodge complaints against UNHCR and receive effective and timely redress through this mechanism. This Ombudsman must be a person of the highest reputation, of high moral standing, integrity and impartiality and with no links to the Kenyan government. He or she should have expertise in refugee law and human rights law. UNHCR must prove that it has taken all reasonable steps to prevent or react to acts of sexual violence against refugee women outlined in the UNHCR Guidelines.

UNHCR should continue to provide financial and technical support to law enforcement personnel and other government officials involved in refugee protection work. UNHCR should pressurize Kenya to deploy more police officers within the camps, as well as to provide material support such as uniforms, motor vehicles, building material for additional police posts to enhance their efficiency.

Additionally, UNHCR must actively follow up on cases reported to the police on behalf of refugee victims of sexual violence. It must ensure that the host state has conducted investigations; that it has held the perpetrators accountable and that victims are adequately compensated.⁴⁸⁰ Where the police in the host state fail to perform these duties, UNHCR should first follow this up within the relevant administrative channels. Where these efforts are not fruitful UNHCR should initiate legal action against the police for its failure to exercise due diligence.⁴⁸¹ As part of these efforts, UNHCR should provide adequate and consistent legal assistance which includes court representation to refugee victims of sexual violence.

It is recommended that where domestic remedies have been exhausted and proven to be inadequate, UNHCR should utilise the human rights mechanisms established under the regional and international mechanisms to hold the host state accountable for its failure to protect. Where occurrences of sexual violence are widespread and systematic, UNHCR could lodge communications with the African Commission, ACERWC but most importantly, with the

⁴⁷⁹ Farmer (n 20) at 82.

⁴⁸⁰ Velásquez Case (n 177) at para 172 and 174.

⁴⁸¹ African Exodus LCHR (n 18).

African Court. NGOs and the wider international community should actively assist UNHCR in this regard. They should similarly hold UNHCR accountable where it has failed its due diligence.

Measures to be taken in the medium term by UNHCR include pressurizing Kenya to adopt and ratify outstanding treaties which enhance the protection of refugee women from sexual violence, publicizing its annual protection reports for Kenya and publicly denouncing Kenya's failure to protect refugee women at the international level. In the long run, States that are not party to the 1951 Convention should not be eligible as members of the Executive Committee. There is a need for an additional Protocol to both the 1951 Convention and the OAU Convention which outlines fundamental rights such as the right to security of person. This Protocol should also revise and clarify the protective and supervisory mandate of the UNHCR with specific and tangible obligations, including an enforcement mechanism. Additionally, pending the establishment of the proposed unified UN Treaty body, a separate Treaty body should be established to monitor the enforcement of states' duty to protect. UNHCR should also encourage Kenya to move away from the concept of refugee camps in line with the UNHCR Policy on Refugee Protection and Solutions in Urban Areas.⁴⁸²

4. Concluding Remarks

The recommendations proffered above are not conclusive. An effective solution requires a holistic approach which enhances the capacity of both the Kenyan government and the UNHCR to protect refugee women from sexual violence but concurrently utilises the regional and international human rights monitoring and enforcement mechanisms. The recently established African Court is yet to pass a judgment against a state, and it is too early to dismiss its potential to enhance the protection of refugee women from sexual violence.

⁴⁸² UN High Commissioner for Refugees, *Policy on Refugee Protection and Solutions in Urban Areas*, September 2009, available at: <http://www.unhcr.org/refworld/docid/4ab8e7f2.html> [Accessed 20 February 2012].

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