Refugee Coloniality: An Afrocentric Analysis of Prolonged Encampment in Kenya

by

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Declaration

This is to certify that all work contained in this thesis is original and my own. This thesis does not incorporate without acknowledgement any material previously submitted to any university; and to the best of my knowledge it does not contain any material previously published or written by another person except where due reference is made in the text. Editors have been used in the development of this thesis.

Bosco Odoloma Opi

1 March 2021

Acknowledgements

As the African saying goes: ‘it takes a village to raise up a child’. Indeed, many people contributed in building up this thesis. Special thanks go to my fellow refugees with whom I share the same unforgettable refugee experience in Dadaab and Kakuma camps in Kenya, a state of limbo that spanned over a decade. The two camps host over half a million refugees with fourth generation refugees being born there. This thesis represents their voices with the hope of bringing an everlasting change which ends prolonged encampment. It is their unheard story that motivates me to write this thesis.

The final product of this thesis is the result of once-in-a-lifetime experience which I liken to laying a foundation of a house. Being the first person in my family lineage to reach the height of this academic ladder, I am indebted to all my family members (the Jabakan family) deceased and living. Too many to be named. They stood rock-solid during the entirety of my academic journey which spans over two decades from the first day I enrolled in primary school. Combined, they provided a unique sense of collegiality and shared intellectual upbringing. They have been a constant source of emotional, moral and financial support to me. Most importantly, I owe my kids: Chris, Irene, Betty, Noel, and Eva a debt of gratitude. They have been a constant source of joy associated with my doctoral journey. As I have set the bar high for my them, it is my hope that they will grow up to appreciate the value of my scholarship. This thesis is for them.

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Abstract

This thesis is a critical examination of 'prolonged' refugee encampment in Kenya. By foregrounding encampment in Kenya, the thesis demonstrates how the camp – a temporary solution to the refugee phenomenon – has become a permanent institution for the concentration of so many refugees. With 33 of 54 African nations establishing some of the largest refugee camps in the world, millions of refugees have effectively become *in situ,* trapped in prolonged encampment. Current approaches such as the institutionalisation of the camp and the securitisation of borders, are critically analysed by placing the problem of refugee encampment against the context of colonial relations in Africa. Refugee encampment prevents free movement across borders and those borders must be understood, this thesis argues, as part of the legacy and persistence of colonial power.

Methodologically, this thesis is an interdisciplinary undertaking; a critical legal analysis of the 1951 Convention Relating to the Status of Refugees (the 1951 Convention), the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (the 1969 Convention), and Kenyan domestic legislation relevant to refugees. It uses the socio-political and cultural frameworks of the camp, and key themes such as securitisation, sovereignty, borders, *campzenship* and *Ujamaa* to reveal the colonial/imperial continuity embedded within encampment paradigm. The interdisciplinary methodology applies diverse theoretical and conceptual frameworks to the legal texts/laws that regulate the existence and persistence of the camp as a permanent security architecture.

Addressing encampment as emanating from colonially bordered Africa reveals the continuation of the colonial logics structuring prolonged encampment while also highlighting that current theoretical and practical approaches to resolve the problem have failed. As such, this thesis makes a significant contribution to knowledge by enriching scholarly understanding of the camp. This thesis offers a detailed and nuanced reading of the role played by international refugee law in producing the problem of prolonged encampment in Africa. Inspired by my own embodied history of encampment in Kenya, this thesis models and advances an Afrocentric approach to understanding prolonged encampment in Africa.

Chapter 1: Introduction

1.1 My story

I begin by narrating my refugee journey as a lead into the broader theoretical and conceptual analysis of this thesis. My refugee journey inspired me to write this thesis, so it sits alongside my scholarly work. I am a South Sudanese-Australian and third generation refugee. My grandparents and parents were once refugees in the 1960s and 1980s respectively. My refugee journey began in 1992, when I was initially displaced within South Sudan. Eventually, I fled the devastating civil war and sought asylum in Kenya where I lived in a refugee camp for about a decade. I will never forget my sojourning which included navigating armed personnel at numerous border checkpoints along the way to the refugee camp. Although there was no official restriction to entry into Kenya, the right to entry is never guaranteed as the Kenya-South Sudan border was often closed during mass exoduses. For a very good reason, I bypassed Kakuma refugee camp which is located near Kenya-South Sudan border. My destination was Dadaab refugee camp near the Kenya-Somalia border, about a thousand kilometres away. Established in 1991, Dadaab camp is home to over two hundred thousand refugees, the majority from Somalia with only a handful from South Sudan. I had followed my twin sister whom I got separated from for over five years at the time. After a long search among the crowd in the camp, I did not find her. I feared she was dead. A few years later, I learnt that she had already been resettled in the USA. A big relief.

When I arrived in Dadaab camp, the UNHCR had already ceased registration for new refugees from South Sudan for fear of pull factor. This camp was initially designated only for Somali refugees. I had nowhere else to go, but had to stay put. I continued living in this camp for over three years. During this entire period, the UNHCR did not recognise my presence, although I met all the refugee convention criteria. I was among about 3000 South Sudanese refugees who were part of a *prima facie* case load. We were stateless. I felt alien and alienated. As most encamped refugees would testify, one of the means of legitimising my presence was to accept my non-status, of not being recognised as a refugee. Further, maintaining the good discipline of ‘a starving beggar’ became our survival strategy to reinforce

the view that outside help was needed. We had hoped that this strategy would attract attention, but to no avail. We constructed tents within the camp's thorny fence and began our 'normal' life. We were neither *refouled* nor recognised as refugees. We lacked basic services such as water, food, healthcare, and sanitation. We were not in war a zone where the delivery of humanitarian aid is often a complex undertaking. We were in the camp, and there was no justification in denying us our fundamental rights. The way in which both the Kenyan government and the UNHCR neglected us for all that period is so incomprehensible that years later, I am still trying to comprehend the experience and the logic behind it.

For our daily survival, we resorted to hunting wild animals such as pigs, antelopes, guineafowls, and quails. We took this risk knowing that this desert part of Kenya was a no man's land and notoriously known to be a breeding ground for armed bandits. One Friday morning, we went hunting as usual, but this time we ventured further afield, deeper into the semi-arid desert. We were seven hungry men. Suddenly we heard loud gunfire. A steep reminder of my country's bitter civil war. We were already in enemy territory. Ambushed. By instinct, we all went flat to the ground. Too late. We were already surrounded by armed bandits who demanded a ransom. We were held hostage. When we failed to return to the camp at sunset as usual, the entire camp was in a state of emergency. The matter was reported to the UNHCR, but there was no response. Recall that the refugee agency did not recognise us as refugees in the first place. Just a few months earlier, armed bandits kidnaped four UNHCR officials in the same area. After over ten hours of limbo, the bandits finally released us because we could not offer what they were looking for. They warned us never again to set foot into their territory. That was pure luck. On another day, it could have been a different story. After our release, we went back to the safety of the camp, but in Dadaab camp, no one is safe. As for me, that was a turning point.

That same week, I relocated to Nairobi, the capital city, where I lived clandestinely as an undocumented refugee. On several occasions, I approached the UNHCR office in Nairobi for assistance. I was told the UNHCR provides assistance, but only to encamped refugees. I had just returned from the camp where I had lived for over three years and received no assistance. Due to constant harassment and threat of arrest by the Kenyan police, I had no other option, but to relocate to Kakuma camp

situated about 450 kilometres from the capital city Nairobi, and some 120 kilometres from the Kenya-South Sudan border. Recall that I initially resisted seeking registration in Kakuma camp for fear of being repatriated at the time when the civil war back home was at its peak. As refugee registration does not take place outside the camp, Kakuma camp would become my home for unforeseeable future. The difficulty was that I had no document to show that I was a refugee in Kenya. This meant, I had to navigate my way through many police roadblocks to the camp. I did. On arrival, the immediate boomerang view of Kakuma camp are the large billboards pitched along the highway with letters 'USA', 'Canada', 'UK', and their donor agencies 'CRS', 'WFP', 'LWF', 'CARE', signifying who wields the power in this camp. Having lived in active armed conflict situation before, a police post located at the entry of the camp drew my attention. The police patrolled the camp day and night sometimes with armoured vehicles; reminiscent of a colonial camp. This meant that the camp as I experienced it was locked in a constant state of emergency.

The camp space is demarcated into fenced blocks of about three hectares lined up in clusters, to allow free passage for the vehicles of the police and healthcare workers. The policing of emergency, the here and now of the camp, means that Kakuma assumes no past and no future, but a constant present. Each block strictly hosts specific ethnic groups with 150-200 refugees crammed into a shantytown-like setting. It is the UNHCR policy to canton the refugees according to their ethnicity. The ethnicisation of the camp is a double-edge sword. It promotes ethnic equality as in the case of minority Somalis Bantus (*Jareerweyne, Jareer, Gosha, and mushunguli*), descendants of the Bantu ethnic group, who were historically marginalised by mainstream Somalis of Cushite descent.[1] At the same time, it also encourages ethnic separatism, which is the very foundation of the camp. I had to find out where I belonged. Luckily, I was registered by the UNHCR within a month and provided food ratio card. Nothing else. I built a mud house and Kakuma camp became my home for over seven years. During this entire period, the UNHCR did not provide me with any official document which could identify me as a refugee. Idleness

[1] MA Eno, *The Bantu Jareer Somalis: unearthing apartheid in the horn of Africa*, Adonis and Abbey Publishers Ltd, London, 2008.

dominated my life in the camp. This idleness was directly related to my pre-exilic experience, the experience of war, and abandonment, which affects every refugee.

One of my unforgettable experiences is the refugee census which is conducted periodically. When it was time to be counted, we were given very short notice, less than 12 hours. Whoever was not present in the camp without prior consent from the UNHCR, misses out and by default forfeits their refugee entitlements. As numbers are essential for donor support, the UNHCR often took extreme measures during this exercise. The headcount was often carried out from midnight and by dawn it was over. The process involved herding refugees into an enclosed shelter, fenced with barbed wires and cordoned off by armed police and sometimes the army; an exercise predicated on colonial camps. Through this exercise, I was counted as a means of revalidating my physical presence. The UNHCR is more interested in numbers than humans; since physical presence enables funding. Through the headcount, I was dehistoricised, removed from the past and rendered voiceless. Silence took hold of me and trauma kicked in. This process was carefully designed so I constantly remained a victim and locate myself within this state of legal limbo, of non-existence. Despite its longevity now extending over three decades, Dadaab and Kakuma camps remain in a state of temporary permanency. Eventually, I migrated to Australia in 2003. This is the story that informs my scholarly work and my drive in seeking a solution to prolonged encampment. While the literature on refugees is extensive, it is dominated by present-day concerns such as border security and humanitarian aid, but not the daily struggle of the refugees. Cognisant of this deficit, my thesis is informed by my lived experience in the camp. This approach offers not only a critical dialogue with refugee literature, but uniquely presents an Afrocentric perspective of the refugee phenomenon in Africa.

Afrocentric, Afrocentrism or Afrocology as a philosophy, was coined in the 1980s by the African American scholar and activist Molefi Asante.[2] It was later institutionalised by its intellectual and ideological antecedents such as Garveyism, the Negritude movement, Fanonism, Kawaida, and Cheikh Anta Diop's historiography.[3] Over the years, it gained legitimacy as an intellectual movement to construct a space for the

[2] MK Asante, *Afrocentricity: The theory of social change*, Peoples Publishing Group, Chicago 2001, p. 3.
[3] Encyclopedia, 'Afrocentricity,' accessed on 7 Jan 2021, <https://www.encyclopedia.com/history/dictionaries-thesauruses-pictures-and-press-releases/afrocentricity>.

literary criticism of Africans. As an ideology which is centred on Africa, it eventually became an emblem of Pan African movement. Afrocentrism also refers to viewing African problems from an African perspective. This methodological foundation presents a new historical perspective and challenges the traditional Eurocentric perspective of Africa. It is a rediscovery that not only corrects the denial of Africa's contributions to the world and its entry into academia as another facet of looking at the world, but also corrects the distorted view of Africa.

When I first presented my dissertation proposal to my supervisors, I was intending to write about the success of the UNHCR in Kakuma camp. I was still held hostage in my patriarchal view of the UNHCR in the belief that its camp model of care and control is the most appropriate. Notwithstanding the fact that the refugee agency has never acknowledged the camp in its publications, but by default, camp-based model is its official policy. In the process of writing this thesis, I had to backtrack and reflect on my unforgettable experience. I also undertook an exhaustive review of refugee literature to examine the persistence of the camp to this present day. It was in this process that I came across Caroline Elkin's research on Britain's colonial camp in Kenya. It did not take me long to question my earlier view of Kakuma camp. I also questioned my cursory reading of the UNHCR's publications which glorify the camp as a *de facto* durable solution for the millions of refugees. This laid the foundation for my critique that the UNHCR is implicated in keeping refugees in prolonged encampment. While I give the UNHCR some credit for what it does for the refugees, especially during emergencies, I question its institutionalisation of the camp. Upon a closer scrutiny of my life experience in the camp, it became very clear to me that the camp is not just a place of shelter and food aid; it is a political space which has become a permanent space for the concentration of refugees or 'the undesirable others'. For example, had I remained in the refugee camp to this day, I would not have been in this privileged position to write this thesis. During my entire time in the camp, I was just a number without identity. Through an integrated reading of the literature and informed by my personal experience, my view of the camp changed from when I started writing this thesis. I now argue that Africa seeks the possibility of affording refugees the freedom of movement which could potentially lead to gradually phasing out the camp.

For over three decades, Kakuma and Dadaab camps have stood as a symbol of modern refugee humanitarianism in Africa. My thesis challenges this orthodoxy. Three key themes drove this inquiry. First, I wanted to share my refugee story as a way of shining light on the daily struggle of the refugee in the camp space. I then move beyond telling my story by exploring the link between colonial camps and refugee camps through an extensive analysis of the literature. It is not enough to just explain the origin and structure of the camp, but I also want to explore how the camp fits into the global neo-colonial project. Second, I take a deconstructionist approach to foreground that the camp's mystical humanitarianism is aimed at camouflaging the neo-colonial expansion and the symbolic violence being produced by prolonged encampment. This colonial continuity is demonstrated through exclusionary refugee laws and policies. Third, I want to explore why Kenya's asylum policy has transitioned within a space of two decades through three phases: hospitality, deterrence, and now encampment. I have a lived experience in the last two phases. Noting that the daily life of the refugee is difficult to ascertain solely from written materials, I need to go behind the scenes by chronicling my life story which by default, captures the unheard voices of the millions of encamped refugees. This methodological approach counters the silence inherent in refugee literature.

1.2 Significance

This thesis makes a significant contribution to knowledge by enriching scholarly understanding of the persistence of prolonged encampment in Africa. The last time the UNHCR conducted a major research on Protracted Refugee Situations (PRS) in Africa was in 1985.[4] The primacy of the study was restricted to the humanitarian needs of the refugees in UNHCR-assisted rural settlement and self-settlement programs. The study shows that the UNHCR camp policy failed to provide durable solutions to the refugees. Even then, the study focused only on emergency phase of displacement. As the camp transitioned into permanency, this prompted the UNHCR to shift its policy to refugee repatriation. By the mid-1990s, the doctrine of voluntary repatriation had already acquired an absolute character in the United Nations General Assembly (UNGA) Resolutions, largely promoted by the UNHCR as 'the decade of repatriation'.[5] Throughout the last 30 years, Africa witnessed a change from relatively small-scale repatriations to large-scale return of refugees, although some were returned to the epicentres of war. This shift in policy was largely strengthened by the development in international refugee law that led to amplified use of the cessation clauses of the 1951 Convention. However, in the majority of repatriation exercises, the UNHCR promoted the rights of repatriation over the rights to be protected from possible return where persecutory risks persisted. These rights were selectively acknowledged, hence forcing the refugees to return or remain when it suited the UNHCR's strategic goals.[6] For instance, the UNHCR's repatriations of Ethiopians from Djibouti, Rwandese from Uganda, and Somalis from Kenya, were 'shrouded with an aura of secrecy and uncertainty',[7] resulting in a cycle of flights as soon as refugees were forcibly returned home. Previous scholarship did not adequately highlight the plight of refugees in prolonged encampment. Subsequently, this has frustrated efforts to formulate effective policy response. Inevitably, Kenya adopted its current encampment policy which has placed the camp in a constant state of emergency.

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[4] B Stein & B Clark, 'Refugee integration and older refugee settlement in Africa', a paper presented at the 1990 meeting of the American Anthro-political Association, New Orleans, 28 November 1990.
[5] M Zieck, 'UNHCR and voluntary repatriation of refugees: a legal analysis', *Ohio Journal on Dispute Resolution*, vol. 20, no. 1, 2005, pp. 217-248.
[6] H Adelman & E Barkan, *No return no refuge: rites and the rights in minority repatriation*, Columbia University Press, New York, 2011, p. 23.
[7] A Farah, *UNHCR and the repatriation of Somali refugees from Kenya*, Oxford University Press, Oxford, 1994, p. 32.

Furthermore, this 'jurisdiction specific' study is significant as its outcomes could be replicated elsewhere. Kenya is one of the largest refugee host nations in the world and it began hosting refugees from the 1960s. This country has also ratified both the 1951 Convention and the 1969 Convention. Despite its extensive experience with refugees which spans over six decades, inadequacies in its refugee legal framework, porous borders, and lack of accountability for violations of refugee rights means that the system is not working. While refugee advocates demand that the character of the 1951 Convention be broadened to make it more effective to meet the needs of the refugees in prolonged encampment, critics have held its Eurocentric context that the assistance it provides to refugees is too generous.[8] The manipulation of the legal system not only isolates African refugees further, it also validates the colonial system embedded with the refugee legal framework. The outcomes of this research will contribute to academic knowledge and enhance efforts in affording the refugees the freedom of movement in Kenya and more broadly in Africa.

By examining the phenomenon of 'prolonged' refugee encampment in Africa, particularly in Kenya, this thesis argues that encampment which is a temporary *de facto* fourth durable solution to the refugee phenomenon, has become a permanent institution for concentrating millions of refugees. 33 of the 54 African nations have established some of the largest refugee camps in the world. The current approaches to the problem, such as the institutionalisation of the camp and the securitisation practice, require critical review with a view to conceptualising new ways forward. A critical review of the Kenyan situation will provide a case study of this phenomenon and important information for addressing the problem of prolonged encampment in Africa. This thesis undertakes this task by placing the problem of refugee encampment, which is fundamentally about the possibilities for free movement, against the context of colonial relations in Africa. It argues for Africa to adopt a borderless policy in line with the African Union (AU) Agenda 2063. The AU Agenda 2063 is a significant innovation in the institutional development of the African continent which is the concrete manifestation of how the continent intends to achieve this vision within a 50 year period from 2013 to 2063.[9] Its key institutional agenda

[8] A Millbank, 'The problem with the 1951 Refuge Convention', viewed 18 November 2017, <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP05#major>.

[9] African Union, 'Agenda 2063: the Africa we want,' accessed on 15 Jan 2019, <https://au.int/en/agenda2063/overview>

aims at addressing ‘Africa specific’ issues, including freedom of movement across this continent.

1.3 Aims

This thesis is a theoretico-methodological intervention aimed at decolonising the Eurocentric frameworks and theories of the camp. In examining the colonial/imperial continuity of the camp, I deploy numerous theoretical approaches within the decolonial frameworks, including Third World Approaches to International Law (TWAIL) scholarship while mapping the distinct issues as they relate to prolonged refugee encampment in Kenya. Decolonisation theory reveals how the law operates to allow for the persistence of the camp. This approach consolidates and builds on the works of postcolonial theorists such as Edward Said, Frantz Fanon, Ngugi wa Thiong’o, and Achille Mbembe among others. As postcolonial theory does not capture the permanence of imperialism in its entirety, I deploy Biko Agozino’s decolonial theory[10] as a methodological intervention to emphasise that Africa is still very much bootstrapped to neo-colonial/imperial desire. To allow for a comprehensive analysis, this thesis traverses a wide range of interrelated areas of inquiry: coloniality, citizenship, *Ujamaa*, human rights, securitisation, sovereignty and borders, to reveal the shortcomings in the current approaches to the problem of encampment. In this decolonial approach, I critique prevailing narratives that continue to glorify prolonged encampment.

A decolonial approach is a ‘revolutionary shift’ which seeks to correct the misconception and misrepresentation of Africa perpetuated by Western academics. This approach guards against generalising refugee experience while being mindful of the colonial history that has structured refugee encampment in Africa. As international refugee law portrays the image of the refugee through Western representations of Africa, I build my critique of international law using TWAIL scholarship that the legacy of colonialism lives on in the international system, ‘mutating into new forms each day’.[11] This approach not only breaks away from a Eurocentric representation of Africa, it also offers a ‘counter-colonial’[12] critique of existing theory in mainstream refugee literature. As the term ‘refugee’ is founded on

[10] B Agozino, *Counter-colonial criminology: a critique of imperialist reason*, Pluto Press, London, 2003, p. 54.
[11] L Eslava, ‘Critical legal thinking’, viewed 22 October 2019, <http://criticallegalthinking.com/2019/04/02/twail-coordinates/>.
[12] Agozino, Counter-colonial criminology, p. 62.

the experience of Eurocentric political thought and sanctioned by law, this experience which has sustained the colonial/imperial continuity of the camp, must be examined. The origin of colonialism has often been obscured by Eurocentric traditional analytical frameworks that govern the scholarship on this subject. In essence, the universalising mission of international refugee law and its project of governing others has contributed to the colonial/imperial continuity of the camp. By deploying decolonisation theory, I seek to identify and sketch the structures that limited the ability to understand the link between colonialism and international refugee law. A decolonial approach, according to Agozino is a scholarly activism as it offers a counter colonial critique of international refugee law.[13] This approach is important in refugee research that remains a predominantly Eurocentric discipline. I argue for a break away from universalising an essentially European approach when addressing 'Africa specific' refugee issues.

Similarly, this thesis critiques international refugee law as a Western export to Africa which attempted to nullify the precolonial history of the rule of law on this continent. Notwithstanding the fact that the struggle against colonialism was necessitated by a lack of recognition of human rights in the colonies. As colonial violence is predicated on and has acquired the status of law, both law and violence are paradoxically present within the refugee space. Law itself is violent in all its characters as it makes its presence known through violence. As Walter Benjamin explains, 'law is a mythical violence'.[14] In the context of encampment, law and violence continually amalgamate to legitimate the hostility in the camp space. While law aims to address lawlessness, injustices, and violence, what exists in the refugee space is the 'legitimacy of legal violence'.[15] The law's legitimacy justifies the violence and makes it positive law.[16] In this respect, prolonged encampment is a demonstration of the operation of legal violence. This violence cannot be critiqued because it resides with the sovereign. This means that the sovereign relates to the refugees through the law which legitimises the refugees' indefinite encampment. The law's violence remains, mythical and concealed, even though it causes suffering on those upon whom it is

[13] Agozino, Counter-colonial criminology, p. 55.
[14] W Benjamin, 'Frantz Kafka: On the tenth anniversary of his death', *Illuminations*, H Zohn (trans), Schoken Books, New York, 1968, pp. 111-140.
[15] C Menke, 'Law and violence', *Law and Literature*, vol. 21, no. 1, 2010, p. 10.
[16] Ibid.

imposed. The *leitmotif* of international refugee law as a colonial inheritance, is more concerned with the institution of the governance rather than, justice, rights, and freedom of the refugees. The making of international refugee law is nothing more than the positivisation of arbitrariness as it owes very little responsibility towards the refugees (to invoke Arendt's phrase: 'rightless' people) in Africa. While the UNHCR is preoccupied with expanding its protection mandate to people who are not refugees, the refugee agency constantly innovates to interpret its mandate to accommodate its neo-colonial project. Building on Arendt's insight of rightlessness, I argue for 'withering away'[17] colonially induced international refugee law once the condition that necessitated encampment has been removed. The 'withering away' in legal theory originated from Marxist tradition. As a Marxist concept, 'the withering away doctrine refers to the idea that the social institution of the state will be obsolete as the society will be able to manage itself.[18] While the law continues to be an important instrument in ordering the society, it is still the case that the law continues to justify states' restrictive encampment policy. It is in this context that the state deploys the law as an instrument to dominate, control, alienate, isolate and discard the refugees who are considered the 'undesirable other'.

This thesis examines the theoretical and conceptual frameworks of the camp by tracing its historical and socio-political usage from the time of European colonial conquest and slavery in the 18th century. It incorporates both the historical and theoretical analysis which reveals that the camp is predicated on colonial practices. The theoretical analysis consolidates and builds on the insight of Fanon's 'The wretched of the earth', Agamben's 'the state of exception', Mbembe's 'postcolony theory', and Said's 'orientalism'. Taking this approach exposes the coloniality of the camp which has historically been concealed. Over the years, refugee coloniality has continued to manifest itself through the concentration of millions of refugees. Theorising the camp as a political space demonstrates the camp as a form of social exclusion and segregation. This thesis builds on Zygmunt Bauman's observation that 'refugee camps are built using the techniques of enclosure and isolation developed by the managers and supervisors of Auschwitz and Gulag'.[19] The

[17] B Agozino, 'The withering away of the law: an indigenous perspective on the decolonisation of the criminal justice system and criminology', *Journal of Global Indigeneity*, vol. 3, no. 1, 2018.
[18] C Sypnowich, 'The withering away of law, studies in Soviet thoughts', *Springer*, vol. 33, no. 4, 1978, pp. 305-332.
[19] Z Bauman, *Modernity and the Holocaust*, Polity Press, Cambridge, 1989, p. 17.

horrifying Holocaust story is provocative because it brings to light racial persecution and genocidal killing that almost decimated minority groups in the age of civilisation. Being mindful of Bauman's inference to colonialism and the Holocaust as historical events, colonialism still exists today, but in a new form. As such, this thesis moves beyond Bauman's assertion by conducting intensive investigation of postcolonial literature in order to understand the before, during and after of the formal colonial encounter in Africa. Bauman's insight is particularly useful because it allows me to address a number of theoretical and empirical issues that relate to how the camp has become a culture of rejection of refugees, people who Bauman theorised as 'waste products of modernity'.[20] The camp has always been premised upon colonial features: lack of free movement (confinement), identity (borders), and ethics and social justice (exclusion), which were symbols of anti-colonial struggle. The encampment project that emerged at the height of colonial empires is not just an ideology, it developed into a permanent institution. This thesis presents a decolonial discourse that the camp – a 'Western phenomenology'[21] – has become a permanent institution for managing population in prolonged encampment. Phenomenology is derived from Greek *phainómenon*, meaning consciousness or experience.[22] These experiences include imagination, thoughts, assumptions or perceptions of Africa based on European cultural particularity. In European imagination, the camp is the best form of refugee protection in Africa, a position that this thesis critiques. As the life of the refugee is determined by law 'borne of imperial project',[23] I have taken a decolonisation approach which is a detour from the abstract universalism of international refugee law. Analysing the law through this prism exposes the law as a critical factor in the production of systemic violence that occurs within the refugee space which, by default, denies refugees the fundamental rights to freedom of movement. The argument arising from the analysis of the literature is that current approaches have failed because they produce the problem instead of addressing it.

[20] Bauman, Modernity and the Holocaust, p. 17.
[21] P Henry, 'Africana phenomenology: its philosophical implications', viewed 24 July 2020, <https://globalstudies.trinity.duke.edu/sites/globalstudies.trinity.duke.edu/files/file-attachments/v1d3_PHenry.pdf>.
[22] Stanford Encyclopaedia of philosophy, 'What is phenomenology', viewed 1 August 2020, <https://plato.stanford.edu/entries/phenomenology/>.
[23] M Agier, *On the margins of the world: the refugee experience today*, Polity Press, UK, pp. 1-38.

This thesis proceeds to examine the effectiveness of the 1951 Convention Relating to the Status of Refugees (the 1951 Convention)[24] the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (the 1969 Convention)[25] and Kenya's domestic legislation relevant to refugees. A critical review of these legislation reveals that the language they use is more recommendatory than mandatory. This has resulted in their selective application and thereby weakening the level of protection afforded to refugees. As Nanda Oudejans observed, the status of refugees becomes 'neither welcomed nor *refouléd'.*[26] This legal limbo is created by international refugee law which, by distancing itself from the contemporary challenges facing refugees, has lost its relevance and utility. By default, international refugee law as it existed in the 1960s was and remains fundamentally the protection of powerful states.

Critical to this thesis is the critique of the UNHCR. The refugee agency intervened in Africa through the back door at a time when this continent was littered with European colonial empires. My theoretical analysis builds on Edwin Odhiambo-Abuya's assertion that the UNHCR is viewed as a new 'kind of Western colonialism'[27] as it continues to promote the international refugee law which is predicated on the vision of the West. This thesis reveals how the refugee agency is not only structurally biased, but also how it has historically been limited in its capacity to provide meaningful protection to the sheer number of refugees languishing in a network of mega camps across Africa. In my analysis, I take several steps back to unveil the UNHCR's historical linkage with colonialism as it intervened in Africa during the decolonisation wars under the façade of international law. Understanding the colonial legacy of the UNHCR is important as universalising an essentially European approach to address the refugee phenomenon specific to Africa has proven inadequate.

[24] UNHCR, 'The 1951 Refugee Convention', viewed 22 July 2020, <https://www.unhcr.org/1951-refugee-convention.html>.
[25] African Union, 'OAU Convention Governing the Specific Aspects of Refugee Problems in Africa', viewed 12 July 2020, <https://au.int/en/treaties/oau-convention-governing-specific-aspects-refugee-problems-africa>.
[26] N Oudejans, 'Asylum: a philosophical inquiry into the international protection of refugees', PhD thesis, Tilburg University, Germany, 2011, pp. 1-245.
[27] E Odhiambo-Obuya, 'A critical analysis of liberalism and postcolonial theory in the context of refugee protection', *King's College of Law Journal*, vol. 16, 2005, pp. 263-291.

This thesis explores Frantz Fanon's postcolonial theory in order to problematise refugee encampment in Africa. Fanon's postcolonial theory is situated within the global narrative of emancipation and freedom of the oppressed. Although Fanon is not African, his insight accurately foretells the realities of postcolonial Africa. His concept of equality, justice, and freedom provides an ideological frame of reference for seeking alternatives to the current institutionalisation of the camp. Throughout this thesis, I weave together the various interrogations of the camp by disclosing the link between 18th century colonial camps and the contemporary refugee camp. The two are traditionally regarded as incompatible in refugee literature. However, it is undeniable that they are linked in their intent: concentration and segregation.

Due to their lack of legal personality, refugees are not able to advance any legal objection to their indefinite encampment. Placing the camp under a decolonial spotlight exposes the role of the state as the exclusive creator of law.[28] Decoloniality refers to a form of liberatory critical thinking which provides a detour primarily from a Eurocentric production of knowledge with a distorted view of Africa. This distortion in mainstream literature gives too much emphasis to Eurocentric approaches to refugee issues. Decoloniality reveals and disrupts this distortion and colonial continuity. Although originated from Latin American scholars such as Aníbal Quijano, Walter Mignolo and María Lugones,[29] the African decolonial tradition was developed by Edward Said, Homi Bhabha, Achille Mbembe, Gayatri Spivak Ngugi wa Thiongo and Agozino. As coloniality directly accounts for what is happening within the refugee camp space, a critical examination of the UNHCR's concept of protection allows for a broader decolonial engagement with the refugee regime.

I critique that colonial camps were imposed and regulated by imperial law/edict. Similarly, refugee camps are imposed and regulated by law and aided by international institutions. While international refugee law frames encampment as humanitarian, it has become an inroad for imperialism. Enacting laws that legitimise and decree refugee indefinite encampment demonstrates that African states continue to engage in colonial order. Legally, encampment policy removes the refugees' legitimacy and makes them illegitimate bodies. As the law provides the

[28] M Giannacopoulos, 'Tampa: violence at the border', *Social Semiotics*, vol. 15, no. 1, 2005, p. 33.
[29] S, Ndlovu-Gatsheni, 'Decolonisation, decoloniality and the future of African studies', viewed 1 July 2020, <https://oxfamblogs.org/fp2p/decolonization-decoloniality-and-the-future-of-african-studies/>.

legal cover by which the state restricts the free movement of this vulnerable population,[30] this means it is within encampment paradigm that refugee coloniality is manifested. This thesis extends the Fanonian decolonial concept further by arguing for the possibility of refugees' rights to freedom of movement in a borderless Africa.

A key facet of this thesis is the examination of securitisation as a practice at African borders in order to determine the extent to which it has contributed to prolonged encampment. In this age of *borderphobia*,[31] crossing an international border means challenging the traditional sovereign right of the state to decide who to admit into its territory. I use the term *borderphobia* to critique the exclusion of refugees as a demonstration of the ongoing colonial violence at the borders. *Borderphobia* (or the fear of borders) by refugees embodies the structural imperial violence embedded within the encampment paradigm because refugees are seen as foreign bodies and a threat to the state. This fear invokes insecurity which justifies the doctrine of defence. *Borderphobia* also raises the question of power and belonging as the refugees are seen as aliens, foreigners or unlawful non-citizens. This *borderphobia* is a steep reminder of colonial relations which still exist in recent memory. In the colonial era, *phobia* was used as an identity marker to designate a status between the natives and the colonialists as free/slave, inferior/superior and black/white. As the refugee fits well into the statist assumption of not belonging to a territory, it creates fear factor that moulds comfortably to the citizen/non-citizen dichotomy. The construction of borders real or imagined, is intended to create *phobia* and to inflict violence by way of deportation, detention, quarantine or control of those considered aliens and foreigners. For the purpose of this thesis, the term 'violence' is used to describe the different episodes encountered between the state and refugees at the borders. This violence takes on many shapes and forms, including the concentration of refugees for decades in camps, or what Sarat and Kearns call 'sites of civility'.[32] Although international refugee law defines refugees as the unprotected 'others', it locates them outside the nation-state, and denies them their fundamental rights, for example, the rights to free movement. When law, violence, and civility are bonded together, this blurs the distinction between them, they become legitimate,

[30] Giannacopoulos, Tampa: violence at the border, p. 39.
[31] A Burke, 'Borderphobia: the politics of insecurity post 9/11', viewed 13 May 2018, <http://www.borderlands.net.au/issues/vol1no1.html>.
[32] A Sarat, & TR Kearns, *Law's violence*, University of Michigan Press, USA, 1995.

acceptable, and their necessities never end. Their acceptability and legitimacy erase the law's violence from view, making the law function as a fact.

1.4 Methodology

Methodologically, this thesis is interdisciplinary, undertaking critical legal analysis of the 1951 Convention, the 1969 Convention and Kenyan domestic laws relevant to refugees. The analysis aims to reveal how the law functions to validate the colonial/imperial continuity of the camp. Interdisciplinarity has become a methodological agenda for refugee studies in recent decades and has contributed to increased scholarly recognition in this field.[33] Interdisciplinarity represents a qualitative shift in the way refugee research is being conducted in recognition of the complexity of the global displacement of refugees. This methodology allows for dialogue to creatively interact with the theories of each discipline while revealing the complexity of their subject matter. This approach also allows for a deeper analysis to emerge through a collection of empirical materials woven together throughout this thesis. The interdisciplinary approach of this thesis is significant as it allows for a nuanced, yet distinct engagement with refugee literature from an Afrocentric perspective.

Originating from Anglo-American academic tradition, interdisciplinary ensures consistent analytical and conceptual frameworks used across disciplines. This methodology consolidates the relationship between each of the different disciplines used in this thesis in a seamless web. My analysis is assisted by Harrell-Bond's insight that 'the main theoretical contribution of interdisciplinary research among populations in crisis is to inform, correct, expand, and develop the theories of each discipline'.[34] Through this approach, I address the distinct, but inter-related concepts and theories informing the inquiry in this thesis. This includes key theories on securitisation, coloniality, *refoulement*, citizenship, *Ujamaa*, borders and encampment. I deploy TWAIL scholarship on decoloniality as a platform to critique these conceptual frameworks. In this context, this methodology makes it possible to collectively examine both the historical and socio-legal theory of the camp to demonstrate the colonial continuity within it and the law's violence in maintaining this colonial continuity.[35] This approach creates a dual imperative: it exposes how the

[33] E Voutira & G Dona, 'Refugee research methodology: consolidation and transformation of a field', *Journal of Refugee Studies*, vol. no. 2, 2007, pp. 163-171.
[34] D Indra, *Engendering forced migration*, Berghan Books, Oxford, 1998, p. 40.
[35] Giannacopoulos, Tampa: violence at the border, p. 35.

camp emerged as a colonial institution, and it advances an Afrocentric approach to understanding the colonial context of the camp.

Michael Ignatief warns that the refugee story becomes politically and historically sterile 'if is it not told in a way that attributes to causation and consequences of the disaster that occurred'.[36] It is in this context that I deploy narrative research as a methodology interwoven with the text in order to problematise the camp. Discourse analysis or storytelling becomes the object of this research and it informs how the text is interpreted and understood. Narrative methodology emerged within the framework of sociocultural theory embedded largely within a postmodern paradigm. This is a relatively new branch within interpretive research tradition.[37] Some scholars have used it as a method of inquiry, especially in the field of teacher education because naturally teachers are story tellers.[38] Narrative inquiry is an umbrella term that covers the human dimensions of experience told by people in a cultural nature of narrative discourse. This approach has the potential to address ambiguities such as complexity, the dynamism of the individual, and organisational phenomena.[39] Throughout the ages, human experience has always been narrated in novels or plays with nuances that could not be expressed in any other way. As refugees are passive recipients, the narrative methodology allows me to recount my personal experience in a collaborative and dialogic relationship with this thesis instead of me being just an informant. I adopted this methodology as I never had the chance to tell my story because while in the camp, I only existed as a number, voiceless, an anonymous victim, dehistoricised, devoid of the past and hidden from the future; a life of limbo. As most refugee scholarship is written by those with no firsthand refugee experience, this thesis is reflective of my personal experience. It advances an Afrocentric approach to understanding prolonged encampment in Africa. This

[36] M Ignatief, 'The stories we tell. Television and humanitarian aid', in J Moores, *Hard choices, moral dilemma in humanitarian interventions*, Rowan & Littlefield Publishers, Oxford, 1998, p. 296.
[37] T Moen, 'Reflection on the narrative research approach', *International Journal of Qualitative Research Methods*, vol. 5, no. 4, 2006, pp. 56-69.
[38] MF Connelly, & JD Clandinnin, 'Stories of experience and narrative inquiry', *Educational Researchers*, vol. 19, no. 5, 1990, p. 4.
[39] M Fleming, 'UNHCR position on the directive by the Kenyan government on the relocation of refugees from urban centre to refugee camps', viewed 13 November 2019, <https://www.webpages.uidaho.edu/css506/506%20readings/review%20of%20narritive%20methodology%20australian%20gov.pdf>.

approach informs, educates, provides insight, and most importantly, serves the process of knowledge transfer into the field of refugee studies.

While I locate this research primarily within refugee law, I also deploy case study as a methodology to allow for a deeper analysis of encampment. This methodology is becoming highly suitable for refugee studies as it allows for jurisdiction specific research to be investigated and compared. This methodology is critical to this thesis because, while the attention of the international community is on current refugee emergencies such as from Syria, Iraq and other countries, the circumstances of refugees in prolonged encampment in Kenya have been subjected to very limited doctrinal scrutiny and legal scholarship. A review of the Kenyan situation provides an insight into the extent of prolonged encampment and important information for addressing the problem of prolonged encampment across Africa. Although the issues may be distinct, I am interested in issues such as lack of freedom of movement that may apply across the board.

I also integrate the theory/theorisation of the camp as part of my methodology to locate instances of colonial/imperial continuity with the broader issue of encampment. The theoretical analysis is assisted by Agamben's theory of 'The state of exception' and the '*Homo sacer* sovereign power and bare life', Fanon's 'The wretched of the earth', Mbembe's 'On the postcoloniality', Agozino's 'The withering away of the law: an indigenous perspective on the decolonisation of the criminal justice system and criminology', and Wæver's 'Securitisation and desecuritisation theory'. I apply the theoretical frameworks of these scholars to analyse how the law continues to disguise itself by disallowing the interrogation of itself. I map the distinct issues relating to the law's violence (discussed in detail in chapter six) and connect this to the conceptual understanding of encampment. This approach allows for a broad assortment of empirical materials to be drawn and woven throughout this thesis.

For the purposes of this thesis, I deploy several legal texts, both primary and secondary, in close integration with each other in order to provide objective analysis of the refugee legal framework. I went through a critical process of identifying the different sources of the legal instruments for inclusion based on their credibility and relevance to refugee protection. These include: the 1951 Convention and its 1967

Additional Protocol; the UNHCR Statute; the United Nations General Assembly (UNGA) Resolutions; the UN ExCom Conclusions; the UNHCR Handbook and Guideline for Protection; Global Compact on Refugees (the Compact); and the International Covenant on Civil and Political Rights. Alongside these are the regional instruments: the 1969 Convention; the African Commission on Human and Peoples' Rights; the Economic Community of West African States (ECOWAS), and the African Union (AU) Protocol on Free Movements, respectively. I also explore Kenya's domestic legislation relevant to refugees: The Aliens Restriction Act 1967; the Kenya Refuge Act 2006 (KRA); the Kenya Citizenship and Immigration Act 2011; the Kenya Citizenship and Immigration Regulations 2012; and the Kenya Security Amendment Act 2014. The interrogation of these legal texts is important as it allows for an objective analysis of prolonged encampment in Kenya.

1.5 Limitations

Although general reference is made to the 1951 Convention which is the cornerstone for refugee protection globally, this thesis focuses more on the application of the 1969 Convention and Kenya's domestic legislation relevant to refugees. Comparisons are made between the 1951 Convention and the 1969 Convention to demonstrate the gaps in this legislation. Ethical issues are not incorporated in this research as this study does not involve interviews, questionnaires, human behaviour, observation or animal use.

1.6 Chapter breakdown

This thesis has eight chapters each examining a specific area of inquiry that forms part and parcel of this thesis. In chapter one, I introduce the background leading to this thesis' aims, significance and methodology, and the layout of this thesis. It provides general background, and the significant contributions this thesis brings to the broader field of refugee studies. In chapter two, I explore the theoretical and socio-political explanation of the camp. I map out the historicity of the camp augmenting it with an analysis of the various types of the camp dating back to the colonial period. Inspired by a critical reflection and my personal experience as a former refugee, I explore how the camp has become a permanent institution for the concentration of millions of refugees. In chapter three, I proceed to explore the British colonial camp in Kenya to determine whether encampment in this country is

predicated on the experience of colonialism. My emphasis is on the historical development of Kenya's domestic law regarding refugees' rights to entry, residence and citizenship. These are reflected in the analysis of Kenya's legal frameworks: the Kenya Refugee Act 2006; the Kenya Citizenship and Immigration Act 2011; the Kenya Citizenship and Immigration Regulations 2012; and the Kenya Security Amendment Act 2014. I use these pieces of legislation to analyse and demonstrate the ways in which the law has concealed refugee colonial continuity in Kenya. In chapter four, I conduct a critical deconstruction of the expanding mandate of the UNHCR and its doctrine of protection in order to reveal the colonial context in which the refugee agency intervened in Africa. I argue that although the UNHCR is peripheral and detached from colonialism, it intervened in Africa at a time when its founders owned vast colonial empires in Africa. Understanding this colonial origin is significant in examining the way in which the refugee agency intervened and has remained in Africa ever since.

In chapter five, I examine the securitisation of African borders in order to determine the extent to which securitisation as a practice has contributed to prolonged refugee encampment. In order to do this, I analyse the securitisation theory formulated by the Copenhagen School, and the Traditional Securitisation conceptual frameworks in relation to the securitisation of African borders. While securitisation as a practice is considered a recent development in Western philosophical thought, it was already encoded within colonial practice in Africa in the 19th century. It is within this colonial context that this thesis offers decolonial critique of securitisation as a practice and how it contributed to prolonged encampment. In chapter six, I explore Fanon's postcolonial theory in order to provide a succinct entry point into the broader analysis of refugee coloniality in Africa. Fanon's postcolonial theory serves as an impetus to this thesis' investigation of the link between colonialism and the refugee camp. In particular, I examine whether his theory of violence could be adopted in addressing ongoing refugee coloniality in Africa.

In chapter seven, I make the case for a borderless Africa as this can redress the problem of prolonged refugee encampment. The central argument in this chapter is that Africa seeks for the possibility of adopting an indigenous solution to its refugee crisis by affording the refugees the rights to entry, residence, and work in all the 54

countries in Africa. In my analysis, I deploy the concept of *Ujamaa,* a Swahili word for ‘familyhood’, which is a social policy agenda aimed at changing xenophobic attitude towards refugees and non-citizens in general. *Ujamaa* with its emancipatory framework could facilitate the refugees’ transition into life in the broader community once a borderless policy is introduced in Africa. Similarly, I analyse the Global Compact on Refugees (the Compact) which is the most recent development in the refugee space. Whereas the Compact promises hope, it did not offer new commitment to ease the burden on refugee host nations. As such, Africa’s commitment to the Compact should be framed within the AU Agenda 2063. In chapter eight, the conclusion of this thesis, I sum up the seven chapters by outlining the major findings of this thesis. The central argument advanced in this thesis is that refugees be afforded the freedom of movement in a borderless Africa.

Chapter 2: Theories of the camp

2.1 Introduction

This chapter explores the different theoretical frameworks and political explanations of the camp. It does this by tracing the historical development of the camp from the colonial period and how it later manifested itself during the Holocaust era. In order to unpack this colonial history, this thesis draws on Giorgio Agamben's theory of the 'state of exception' and his invocation of the Holocaust as an illuminative framework within which to analyse the ethical and ontological implications of the camp. What we are dealing with in this day and age is the permanent temporality of the camp, which has transformed the refugee landscape into a modern security architecture. Although largely regarded as a Third World phenomenon,[40] the camp is manifested in the West in the form of mandatory detention centres, offshore camps or transit camps - what Perera refers to as 'neo-colonial outposts'.[41] In this context, a new juridico-political space, 'the camp' space, is created inside, yet outside of the nation-state. In light of recent developments, the grant of protection to refugees and asylum seekers be it in the form of passage or temporary or permanent residence or the preferred confinement in camps, falls within the dictate and interest of the state. This chapter is important to this thesis because exploring the theoretical and historical camps enriches scholarly understanding of how the camp has become a permanent and globally legalised institution for the concentration of millions of refugees. The chapter demonstrates why the camp should not be understood as a distant historico-geographical event, but as an ever-existing condition within the present globalised political system. The camp is a useful tool that could be deployed in the emergency phases of forced displacement. However, where there are no durable solutions in sight, keeping the refugees for a protracted period of time without affording them the freedom of movement is undesirable. The fundamental question this chapter addresses is, what is it about the camp itself that permits such events to occur in the first place?

[40] Perera, S, 'What is the camp?,' viewed 22 May 2019, <http://www.borderlands.net.au/vol1no1_2002/perera_camp.html#:~:text=The%20camp%20is%20the%20space,'%20(1997%3A108).>.
[41] Perera, What is the camp?, p. 2.

2.2 The colonial camp

The idea of the camp or 'camp thinking' emerged during the 18th century Spanish colonial war against the Cubans. Arsenio Martinez Campos, then Commander of the Spanish garrison in Cuba, first spoke of the 'concentration camp' in 1895.[42] His ultimate aim was to relocate or 'reconcentrate'[43] the natives into colonial camps through imperial force. Colonial camps were camouflaged as privileged sites of protection where the natives could be civilised, protected and assimilated into whiteness. In so doing, the Cubans who were considered racially different, had to be put under colonial administration. This raciality was to preserve white sovereignty and racial hygiene which was the hallmark of colonialism. In reference to the British conquest of Australia, Aileen Moreton-Robinson argued that 'whiteness was predicated on racial superiority and colonialism…, it is constitutive of the epistemology of the West that has become universalised'.[44] The desire to concentrate the Cubans was necessitated by the difficulties in assimilating them into sovereign whiteness.[45] This sovereign whiteness was a strategic term used to silence and dismiss anything non-Western.[46] It is a Western way of describing oneself as being knowledgeable and at the same time challenging the intelligence of anyone non-Western. According to Aileen, this whiteness which wedded in colonial violence, was invisible, unmarked, and unnamed,[47] but was ever present. Similarly, the natives were never presented as objects, but colonial subjects. It was this subject position that made the colonial camp the signifier of whiteness which assumed the position of a superhuman. The whiteness epistemologically exercised in the colonies operated as an invincible regime to distinguish whiteness from the natives as human/inhuman, superior/inferior, privilege/un-privilege. Indeed, white privilege and white race was instrumental to colonialism. It was through this power relation that whiteness defined itself as the norm in not long-ago life in the colonies. Whiteness is used here not as a description of race, but as an analytical category. It is a technique, a racial construct used to deconstruct and reconfigure, a mode of analysis

[42] V Lal, 'The concentration camp and development: the past and future genocide', *Patterns of Prejudice*, vol. 39, no. 2, 2005, pp. 220-228.
[43] Ibid.
[44] A Moreton-Robinson, 'Whiteness matters', *Journal of Australia Feminist studies*, vol. 21, no. 50, 2006,
[45] A Moreton-Robinson, 'Whiteness, epistemology, and Indigenous representation', in A Moreton-Robinson (ed), *Whitening race: essays in social and cultural criticism*, Aboriginal Studies Press, Canberra, 2004, pp. 75-88.
[46] Ibid.
[47] Ibid.

that represents anything that does not conform to whiteness in all the colonies. As a historical construct, white supremacy cannot be distinguished from racial dominance during colonialism where non-whites were forcefully reconcentrated in the camp.

With their superior military might, the colonialists deployed their whiteness through the scorched earth policy. This policy was aimed at destroying anything that the natives could use against them. This lethal counter-insurgency eventually resulted in the death of about 200,000 people.[48] Two years after the Cuban camp was closed, the concentration camp model was adopted with similar intent by colonial Britain when fighting the Boers in South Africa.[49] Within the space of four years, the Germans followed suit with a similar policy of containment. By 1905, they had killed over 14,000 Herero and Nama tribesmen in Namibia.[50] A similar scorched earth policy was adopted by the British against the Mau-Mau rebellion in Kenya from 1905 to 1960.[51] Within the space of about ten years, four European superpowers established colonial camps in four different colonies. It was during the decolonisation wars that state sponsored encampment policy became part of a global Western territorial ordering produced by whiteness doctrine. Ever since, the camp has grown in its scale and implementation strategy such as the civilian detention systems at the Mexican-US border, where the US has resorted to putting children in cages and separating them from their families.[52] As Waitman Wade Beorn observed, 'things can be concentration camp without being Dachau or Auschwitz…if it is intended to separate one group from another.'[53] Whether Auschwitz or a refugee camp, what remains constant is the intent of locking up people to deny them their human dignity and fundamental freedom of movement.

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[48] Ibid.
[49] EV Heyningen, 'A tool for modernisation? The Boer concentration camp of South African war 1900-1902', *South African Journal of Science*, vol. 106, 5/6, 201, pp. 1-10.
[50] P Grbac, 'Civitas, polis, and urbs: reimaging the refugee camp as the city', working paper series no. 96, Refugee Studies Centre, University of Oxford, UK, 2013, p. 9.
[51] J Zimmerer, 'The births of the Osland out of the spirit of post-colonialism perspective on the Nazi policy of conquest and extermination', *Patterns of Prejudice*, vol. 39, no. 2, 2005, pp. 197-219.
[52] The Guardian, 'Family separations at US border plagued by problems, Watchdog finds', viewed 18 June 2020, <https://www.theguardian.com/us-news/2020/mar/06/trump-border-separations-children-mexico-watchdog>.
[53] WW Boem, 'An expert on concentration camps says that's exactly what the US is running at the border', viewed 22 October 2019, 2019, <https://www.esquire.com/news-politics/a27813648/concentration-camps-southern-border-migrant-detention-facilities-trump/>.

As in the case of the British war against the Mau-Mau rebellion in Kenya and the French war in Algeria, the line between punishment and extermination was blurred as the death rate was extra-ordinary.[54] Branche Raphaelle commented:

> torture was obviously an effective means not only to torture one human being, but also to reach his or her entire community… torture was used not only to force peoples to talk, but to make them understand and remember who wielded power…[55]

As settler colonialism required violence in order to achieve its goal, this resulted in forcefully concentrating the natives in camps, a practice that evolved into a systemic policy of torture. The camp fulfilled several punitive measures such as forced labour, the devastation of farmlands, starvation and genocidal killing. Torture was one factor that drove the natives to surrender and give up their sovereignty. As Raphaelle pointed out, the camp became the space for segregation predicated on raciality that obliterated native sovereignty. This aligns with Arendt's observation that the camp was originally predicted by 'race-thinking',[56] an ideology which has no formal substantive content other than a conviction about inherited nature and human indifference. Race and violence became the defining face of colonialism. As in the case of Kenya, colonial Britain in the 1950s, established a network of detention camps or what the British called a 'civilising mission' to rehabilitate Mau-Mau sympathisers on their civic duties. This civilising mission was characterised by an extended state of emergency which lasted for over 40 years. In other words, the camp thinking began from the moment British law arrived through imperial force.[57] Through this racialised disfranchisement, the camp played a critical role in the dispossession and forceful dislocation of the natives which was the basic requirement of colonialism. The central tenet of this thesis is that colonial camps radically shaped the whole world by producing practices that have continued to this day. This colonial relationship began through European conquest, modified over the years and produced knowledge that allows its reproduction.

Similarly, Du Bois, an African American civil rights leader of the 20th century, warned that we are lying about democracy when we mean imperial control of 750 million

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[54] S Scheipers, 'The use of camps in colonial warfare', *Journal of Imperial and Commonwealth History*, vol. 4, no. 43, 2015, pp. 678-698.
[55] B Raphaelle, 'The French military in its last colonial wars: Algeria 1954-62 – the reign of torture', in S Tobia & C Andrew, *interrogation in war and conflict: a comparative and interdisciplinary analysis*, Routledge, London, 2014, p. 33.
[56] H Arendt, *The origin of totalitarianism*, 3rd edn, Harcourt, New York, 1967, pp. 1-657.
[57] Giannacopoulos, Tampa: violence at the border, p. 15.

human beings in colony.[58] As Du Bois prophesied many decades ago, the 'othering' of 20th century colonialism finds itself in the 21st century which is the colonial/imperial continuity of the camp or the globalisation of encampment. This colonial continuity/imperialism remains omnipresent, invisible, dominant and embedded within the social structure of the camp. Indeed, the camp persistence demonstrates a new phase of the 'othering' of human sorting that accompanies modernity. As a product of both colonialism and modernity, the concept of whiteness remains invisible, opaque, and unrecognised within the camp space. This invisibility is made possible through humanitarianism in internationally funded refugee camps.

Benjamin Meiches provides a different perspective on the origin of the camp. He draws on Manuel DeLanda's assemblage theory[59] to conceptualise the material elements of the camp space and argues that technological advancement was a factor in the establishment of the camp as a space of confinement, security and political governance.[60] As a sociologist, DeLanda problematises the assumptions of political, social and economic thought in relation to the global capitalist economy characterised by a tendency towards control, the financialisaton of economy and the securitisation of governance.[61] His neo-assemblage theory is based on dialectics and social constructionism emphasising the idea of continuity between the social and the non-social by claiming that the expressive dimension of assemblages is to a great extent 'material' and not discursive.[62] Meiches critiques the socially adopted anthropocentric bias of the camp and argues that as an institution, the camp arose at the convergence of three historical techno-social singularities: the invention of barbed wire, the expansion of colonial wars and the rise of transit networks.[63] He links his theory to Reviel Netz, whose analysis played a crucial role in explaining the development of the camp. Netz argues that barbed wire emerged from the Great Plains of America in the 1870s as a fencing technology to regulate seasonal livestock.[64] According to Netz, barbed wire later gained an advantage over other

[58] WEB Du Bois, 'Address to the nations of the world', viewed 15 May 2020, <https://face2faceafrica.com/article/read-w-e-b-du-bois-famous-to-the-nations-of-the-world-speech-at-the-1st-first-pan-african-conference-in-1900>.
[59] M Delanda, *A new philosophy of society: assemblage theory and social complexity*, New York, Continuum, 2006.
[60] B Meiches, 'A political ecology of the camp', *Security Dialogue*, vol. 46, issue 5, 2015, p. 82.
[61] M Delanda, A new philosophy of society: assemblage theory and social complexity,' Continuum International Publishing Group, London, 2006, p. 14.
[62] H Axelrad B Bezerra, 'M DeLanda, a new philosophy of society: assemblage theory and social complexity,' Planning Theory, vol, 9, issue 1, 2010, p. 91.
[63] Ibid.
[64] R Netz, 'Barbed wired: an ecology of modernity', *Journal of American Studies*, vol. 4, no. 1, 2006.

methods of confinement due to its low cost, light weight, and the ability to partition spaces.[65] This resulted in the consolidation of cattle ranches, eventually fuelling its mass industrial production and use in military warfare across Europe and America. Meiches concludes that the camp's features, such as barbed wire, tents and barracks, while resembling training compartments, merely indicates their military origin, and are items that existed prior to the idea of the camp.[66]

Indeed, barbed wire was first used by the Spanish colonialists against the Cuban war at the end of the 18th century.[67] The Spanish colonial army fenced off large islands in anger in order to contain the insurgency when the Cuban fighters resorted to guerrilla tactics.[68] This eventually prompted the war's expansion to rural communities, resulting in mass displacement. Similar tactics were deployed by the British during the South African war when they bisected the veldt with long fences supported with armoured trains.[69] Inevitably, camps had to be set up to cater for the displaced who were crammed into designated concentration camps, making it one of the largest humanitarian disasters of the 18th century. By and large, it was during the decolonisation wars that concentrating the civilian population as punishment became morally and legally acceptable. Over the years, the camp has evolved to describe numerous episodes of state violence and illegality. As the above brief analysis demonstrates, the camp emerged as a colonial institution to violently concentrate a large number of people in displacement. While scorched earth policy and the camp's actants such as tents and barbed wire indicate their military origin, the concentration of the civilian population was a real colonial innovation. It was from then that colonial violence and the brutalising experience of domination and control to a great extent shaped the camp thinking to this present day. Despite its dark history, camp technology has gained currency as a permanent security apparatus for concentrating refugees. It was during the Holocaust era that the camp was embraced by modernity as a tool of subordination, oppression and control. Unlike colonialism, the Holocaust camp occurred only within European borders, but its ideology and technology of encampment spread the world over.

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[65] Ibid.
[66] Meiches, A political ecology of the camp, p. 82.
[67] J Hyslop, 'The invention of the concentration camp: Cuba, South Africa and Philippines, 1897-1907', *South African Historical Journal*, vol. 63, issue 2, 2011, pp. 251-276.
[68] Ibid.
[69] Ibid.

2.3 The Holocaust camp

The Holocaust camp is an exemplar of the kind of 'race-thinking' that emerged in 20th century Europe during which about six million Jews were killed in Nazi Germany. During this period, the Nazis built detention camps across Europe that lasted for about 12 years.[70] The word 'holocaust' also refers to the Nazi ideology aimed at exterminating other minority groups such as Gypsies, Poles, Serbs, homosexuals and psychologically and physically disabled persons.[71] The Holocaust story touches on some of the violent and 'dark past' of Western civilisation. For the purpose of this thesis, coming to terms with the events that shaped Holocaust camps is key to understanding the contemporary refugee camp. Although the Holocaust was a one-off event in the history of humankind that discredited Western civilisation, Bauman gave it many names: 'continuation of antisemitism', 'social phenomena', 'genocide' and 'persecution'.[72] The Holocaust story can be traced to one key aspect: persecution. The Holocaust era was depicted as utopian, tyrannical, brutal and evil. As an authoritarian regime, the Holocaust provided the most devastating illustration of the culture and the institutionalisation of violence that shaped modernity.

Bauman invokes the Holocaust discourse by stating that 'refugee camps are built using the techniques of enclosure and isolation developed by the managers and supervisors of Auschwitz and Gulag.[73] The reference to 'managers and supervisors' reflects Bauman's concern that for the Holocaust to have happened the way it did, required the participation of a modern civilised society. While not equating the Holocaust camps with refugee camps in any shape or form, the architecture, design, and strategy of refugee camps are designed by very civilised, decent and normal people. The concern here is not about the historical camp, but that nearly all Western nations have either instituted or legislated the camp. The camp as a globalised project, is preoccupied with the notion of insecurity, exclusion, segregation and subordination.

Bauman outlined three key factors that facilitated and provided the moral context for the Holocaust: power, authority and morality. This means the 20th century camp

[70] The Wiener Holocaust Library, 'The camps', viewed 9 October 2018, <http://www.theholocaustexplained.org/ks3/the-camps/what-are-camps/#.WNBIIvmGO9I>.
[71] IR Friedman, 'The other victims of the Nazis', viewed 9 October 2018, <http://www.socialstudies.org/sites/default/files/publications/se/5906/590606.html>.
[72] Ibid.
[73] Bauman, Modernity and the Holocaust, p. 11.

represented the failure of modernity. The Holocaust manifested the conviction that certain groups of people needed to be extinct. For the Holocaust execution to have happened the way it did, required the facilitation of bureaucrats who laid down its architecture, design and strategy. The silence and the attitude of the unconcerned citizens also played a key role in facilitating the Holocaust logic. It is on this basis that Bauman warned that morality should be observed to ensure the crime of the Holocaust camp is never repeated. In almost a similar context, the gatekeepers of refugee camps are very civilised, decent and normal people. Yet due to their vulnerability in this space, refugees are routinised, segregated and isolated from mainstream society. They are enclosed in a carefully calculated design to disguise the violence being inflicted. Bauman concludes that 'this crime… is easy to commit with every inch of social distancing'[74] especially for Western donors who do not have a closer visibility of these internationally funded camps.

Bauman's view correlates with Arendt, whose 20th century concept of 'totalitarianism' was rooted in racial ordering, intolerance, exclusion and control.[75] However, each theorist needs to be analysed in the context of what was happening in Europe at the time. The 20th century European totalitarian experiment drew on colonial ideologies of encampment, shaped by terror, racial violence, domination and control. The totalitarian ideology focused on its Germanness, its *volkness*, and its cultural purity. It marked the birth of a radically new, purified and revolutionary muscular age. Along the way, its ideology mutated into many forms which invoked its elasticity and totality. Totalitarianism is closely associated with what Gilroy refers to as 'governmental race hygiene'.[76] Racial hygiene invokes and reveals the continuing practices of white coloniality of power. Motivated by racial hierarchy, racial ideology or racial eugenics, the Holocaust was an attempt to erase those minority races such as the Jews. Although the concept of space and race developed in different states across Europe, they were central to the Holocaust. The fundamental question is: why did 20th century Holocaust camps facilitate negative racial homogeneity in Europe? Drawing on examples from the Nazi experience, Gilroy cautions against the construction of racial identity that erases individual responsibility.

[74] Arendt, The origin of totalitarianism, p. 22.
[75] Ibid.
[76] P Gilroy, *Between camps: race, identity, rationality, and the colour line*, 1st edn, Penguin Press, London, 2000, p. 213.

Writing about the Holocaust, Bauman utilises the metaphor of 'liquid modernity'[77] to explain how the Holocaust was rooted in modernity. He says that fluidity and liquidity have the ability to 'flow', 'spill', 'run out', 'splash', 'pour out', 'leak', 'flood', 'spray', 'drip', 'seep' and 'ooze'.[78] This extra mobility of the fluid explains the 'modernity discourse'. This fluidity led modernity to be complacent with the crimes of genocide as it was difficult to spot. What is important is that the Holocaust was not just about the 'Germanness of the crime', but also about the institutionalisation of the camp, a hidden secret of how minority groups are treated. On Bauman's account, the perpetrators of the Holocaust were 'civilised, decent, not monsters, but normal people.[79] As Bauman alludes to, this led liquid modernity to transform into solid modernity – the preoccupation with security, control and the camp, characterised the failure of humanity in this age of democracy and civilisation.

Bauman also argues that the camp has become the 'great modern project of ultimate human order.'[80] Modernity connotes a capitalist approach to production, consumption and wealth accumulation, but only for the few in society. It leaves the weak and the poor, including refugees, on the periphery. Modernity also emphasises individualism and consumerism at the expense of citizenry; the exclusion and inclusion paradigm. What this means is that modernity not only produces waste products, but wastes that need to be segregated from mainstream society. This is why liquid modernity theory discredits globalisation, portraying it as an oppressive and regressive social agenda embedded within neoliberal democracy. Using the camp as a political space for the exclusion of one of the most vulnerable people in society should be understood as one of the cruellest ways through which modernity expresses itself. This thesis contends that the camp is not only a socially terrifying colonial invention, but also that the camp narrative provides 'totalitarian continuities' between 20th century events and 21st century camp.

Paul Gilroy explains how the 'camp thinking' and the coloniality of power was embedded within the colonial project of the camp:

> understanding the situation entails more than just seeing camps as epiphanies of catastrophic modernity and focusing on the extensive colonial precedents for

[77] Z Bauman, *Liquid modernity*, Polity Press, UK, 1989, p. 19.
[78] Ibid.
[79] Ibid.
[80] Z Bauman, *Contemporary ethics*, Polity Press, UK, 1993, p. 27.

> genocidal killing in Europe. It necessitates our own contemporary uncertainties and anxieties that the condition of permanent emergency associated with the [nationalist] camp both feeds on and creates it.[81]

Gilroy provides an elaborate theory of the camp as an epiphany of modernity. He links the idea of nationalism, raciology, colonialism and modernity, to the virtual reality of 'race politics' in European civilisation.[82] This, according to Gilroy, led to the principle of difference and classification.[83] Gilroy links his theoretical framework to the question of land and space as whiteness has mutated and continued to sustain global dominance on imperial subjects – the proliferation of the camp. He contends that we should not only be concerned with the historical camp, but the camp of our present time as the most visible signature of modernity. It is this 'age of camps' or 'modernity's pernicious signature' which is a time when cruelty has been modernised and become a new normal. Gilroy's theoretical-philosophical framework emanated from Enlightenment's aspiration and obsession with whiteness and imperialism. The whiteness as an identity marker, is a social status which others were denied access to, also shaped Western political culture that led to the camp thinking. By and large, the camp, both real and figurative, was produced through annihilation and racial inferiority complex.

Indeed, the proliferation of the refugee camp has become an integral product/manifestation of globalisation as is the dense archipelago of the stop-over 'Nowheresvilles'. To put this in context, Nowheresvilles is a nickname given to a shantytown that sprung up during the Great Depression in the United States. The Webber dictionary describes Nowheresvilles as a place denoting 'failure or obscurity'.[84] The common denominator for both Nowheresvilles and the camp is that both sites are planned to accommodate by-products of globalisation or the fluidity of modernity. Besides being hosts to a gated community of the poor, the extraterritoriality of these two sites are underpinned by their permanence. Although Bauman's theory is largely quasi-philosophical and historically situated within Nazi Germany, it highlights the danger of modern-day institutionalisation for those on the

[81] Gilroy, Between camps, p. 245.
[82] Ibid.
[83] Ibid.
[84] Merriam-Webster Dictionary, 'Nowheresville', viewed 19 November 2018, <http://www.merriam-webster.com/dictionary/nowheresville>.

margin of society, the preoccupation with security, globalisation and encampment, or what he terms 'wasted lives'. Bauman had in mind refugees, people whom he branded 'wasted lives'. It is this negative impact of globalisation which lends itself to the Enlightenment concept of human inequality and finds expression in Bauman's theory of liquidity.

Similarly, Claudio Minca asked the critical question: 'How are we after Auschwitz, still able to metabolise the camps and fundamentally remain indifferent to their presence…?'[85] Minca is asserting that Auschwitz is not a distant reality. His reference to Auschwitz is a steep reminder that the proliferation of the camp around the world, be it detention camps, transit camps or refugee camps, are no different from 18th century concentration camps. They are all driven by the desire to control by violence whether implicitly or explicitly. In this context, the refugee camp, a juridical limbo, has become an extra-territorial space. The refugee camp space closely aligns with the colonial camp in terms of the policing, architectural structures and the bureaucratic and physical force that shaped the camp space.

Over the years, a number of democratic Western nations, including the US, New Zealand and Australia have either legislated or instituted the camp. These are in the form of detention camp, transit camp, offshore camp or refugee camp. This paradigm shift makes the camp become a technology to exact collective punishment on those seeking to enter/remain on the territory of another state. The proliferation of the camp in this age of securitisation is questionable because refugees are being detained even when they have not committed any prosecutable offense. They are being detained because of their different political identity. In contemporary politics, refugees have no permanent legal identity and their presence within the nation-state is considered a security threat. They are unwanted bodies that need to be controlled, disciplined, securitised and immobilised by violence. These bodies resemble those in an 'occupied enclave'[86] due to the longevity of their confinement. An enclave is part of a state or territory geographically separated and entirely enclosed within a state. While keeping refugees enclaved is considered humanitarian, this systematised and routinised enclavity justifies prolonged encampment. Such a technological

[85] C Minca, 'Geographies of the camp', *Political Geography*, vol. 49, 2015, pp. 74-83.
[86] H Brankam, 'Occupied enclave: policing and the underbelly of humanitarian governance in Kakuma refugee camp in Kenya', *Political Geography*, vol. 71, no. 2019, pp. 67-77.

bureaucracy under the façade of international refugee law dictates the relationship between the state and the refugees. Although no government has acknowledged the camp as a deliberate collective punishment, the fact remains that governments have introduced legal frameworks that nullify the refugee presence on their territory. The enclavisation of the camp has not only become acceptable to the general public, it is a permanent feature of the nation-state. The concept of the camp as an occupied enclave correlates with Jiirgen Zimmerer's assertion that the use of camp technologies later became a tool of violence in Nazi Germany. He argued that the Nazi concentration camp was not only a repetition of certain technological instrumentality, but a policy decision that had already been contextualised within the German national psyche.[87] On this basis, the German population could be said to be willing participants, as they chose not to voice their concerns about the violence taking place. For the Holocaust to have happened the way it did required mental preparation of some kind. Most importantly, the concern is not about what happened about a hundred years ago, but about the contemporary refugee camp.

2.4 The camp as the state of exception

This section draws principally on Agamben's theory of 'the state of exception'. Agamben developed a thought-provoking political theory of the camp in a series of publications, including his 1995 Remnants of Auschwitz and the 1998 *Homo Sacer.*[88] The *homo sacer* – 'the sacred man' – is a term originated in ancient Roman law.[89] It describes someone who was banned from participating in society and not even worthy to be sacrificed in a religious ritual.[90] The *homo sacer* is one of the most distinctive elements in Agamben's project in redefining the sovereign as the basis of state politics.[91] The analysis of his tripartite concepts of the '*homo sacer,* bare life, and sovereign power' allows for critique of the camp as the state of exception. I am also interested in his reflection of 'bare life', in order to redefine the paradigm shift in contemporary sociocultural nature of the camp, and whether the camp operates as a juridical limbo or as a space for refugee protection. Agamben's theory, a paradigmatic ontology, is useful in understanding the context from which the camp

[87] Zimmerer, The births of the Osland, p. 198
[88] G Agamben, *Homo sacer: sovereign power, and bare life*, D Heller-Roazen, (trans), Stanford University Press, USA, 1998, p. 108.
[89] G Agamben, *The state of exception, K Atterl* (trans), *Chicago University Press, USA, 2005.*
[90] Agamben, Homo sacer, p. 108.
[91] Ibid.

emerged. As Agamben's political thoughts emanated from European history, some scholars are wary that his insight might lend itself to theoretical imperialism.[92] As Agamben's theory is saturated with colonialism, I integrate it with an Afrocentric approach while using decoloniality theory to allow for the critique of the colonial/imperial continuity embedded with the camp space.

Agamben defines the state of exception as 'the political space of modernity,' which, by forming a permanent 'space of bare life', creates a 'materialisation of the state of exception'[93] as the new normal. The concern here is about the juridico-political structure of the camp. The Italian philosopher wrote, 'the state of exception is not a special kind of law (like the war law) rather, insofar as it is a suspension of the juridical order itself, it defines the law's threshold or limit concept.'[94] In other words, the state of exception creates a space of pure violence. Agamben also conceptualised his theory invariably in relation to the concentration camp, Nazism, and totalitarianism.[95] This could be interpreted as the central metaphor for negative sovereignty. In this context, the camp could be viewed as a space in which 'the rule of law is suspended under the cover of the law'.[96] In other words, the state can remain lawful while infringing on the rights of the individual. As Hickman notes, this becomes a 'double-layered constitutional system'.[97] The question is, to what extent has the camp become a permanently instituted state of exception? Agamben identifies and draws a controversial parallel between the refugee camp and the first Spanish concentration camps in Cuba,[98] as the origin of the contemporary camp. As discussed earlier, it was this history of colonial dispossession that shaped the 'camp thinking'. Over the years, the refugee camp has become the 'hidden matrix' of the modern political space which the state uses to exclude, enclose and/or even eliminate the '*homo sacer'*. This view is supported by the current exceptionality and abdication of the rule of law in the camp space. In view of this, the sovereign uses

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[92] S Lee, N Jan & J Wainwright, 'Agamben, postcoloniality,, and sovereignty in South Korea', *Antipode*, vol. 46, issue 3, 2014, pp. 650-668.
[93] G Agamben, *Means without end: notes on politics*, V Bineti & C Casarino (trans), Minnesota University Press, USA, 2000, p. 41.
[94] Agamben, The state of exception, p. 822.
[95] G Agamben, *Remnants of Auschwitz: the witness and the archive*, Xzone Books, New York, 1999, pp. 1-176.
[96] Ibid.
[97] T Hickman, 'Between human rights and the rule of law: indefinite detention and the derogation model of constitutionalism', *Modern Law Review*, vol. 68, no. 4, pp. 655-668.
[98] G Agamben, *The camp as nomos of the modern*, D Heller-Roazen (trans), in *violence, identity, and self-determination*, De Vreies & S Weber, (eds), Stanford University Press, USA, 1997, pp. 106 -118.

the camp as a political space in order to exclude and outlaw the refugee who is the *homo sacer*. The camp as the state of exception is also intertwined with insecurity, exclusion, depression, oppression and repression, but this distinction is blurred. This means, the *homo sacer* resides outside the law and yet it is defined by it. S/he is not protected by the law, but only relates to it through their exclusion from the law itself. There is clearly a danger when the *homo sacer* is exposed to the state of exception because s/he has no legal status.

The notion of the camp as an exclusive zone is further explored by Diken et al who view the camp as an exclusive location for non-citizens. They contend that the contemporary camp serves to materialise the avoidance of the 'unprepared encounter' with others.[99] When political bodies are spotted along the borders, it immediately provokes anxiety around national security. As such, these bodies must be excluded and confined in the camp. Keeping the refugees in prolonged confinement demonstrates that the camp has become a governmental machinery which influences the way the sovereign responds to the refugee phenomenon. States' encounter with the refugees who are regarded as foreign bodies, aliens, strangers, sojourners or outsiders, demonstrates that the latter have no legal status. Viewed through this lens, it is likely that the camp may, for a long time, remain an effective technology for the exclusion of the *homo sacer*. Western governments provide humanitarian aid to these biopolitical bodies, but from a distance. This social distancing positions them outside the juridical order which creates the state of exception. To use Schmittian theory, states stand in 'absolute purity'.[100] This means that Western governments are not responsible for what happens within the camp space. Agamben sums up this scenario:

> we must expect not only camps, but also always new and more lunatic regulative definitions of the inscription of life in the city. The camp, which is now securely lodged within the city's interior, is the new biopolitical nomos of the planet earth.[101]

Agamben is alluding to the fact that the camp has become the new biopolitical nomos regulated through the ordering force of the law and violence,[102] enjoined by

[99] B Dicken & CB Lausten, *The culture of exception: sociology facing the camp*, Routledge, London, 2005, p. 214.
[100] C Schmitt, *Political theology: four chapters on the concept of sovereignty*, in G Schwab (trans), Chicago University Press, USA, 2005, p. 33.
[101] Agamben, The state of exception, p. 1003.
[102] Giannacopoulos, Tampa: violence at the border, p. 33.

the power of the sovereign. Agamben draws from Foucault's theory of biopolitics: a reference to a philosophical concept that introduces a new element of control within the judicial power of the sovereign. In the context of the space politics, biopolitics refers to the control of 'others' through techniques of biological threats posed by 'other races' or the 'sub-races' as was the predominant feature of the Holocaust. The establishment of a racially defined camp under the shadow of the Holocaust was the means through which a particular race was erased almost entirely from planet earth. What Agamben is concerned about is that the camp thinking is not confined to the past, but exists in the present and will continue to exist into the future.

Agamben's ethical concern is about those who will continue to live on the margins of society, including refugees. In this context, the camp space exists as the state of exception, outside of the normal politics where the human rights of the refugees are never guaranteed. The primary concern is that refugee camps, although shaped in humanitarian language, demonstrate a paradigm shift as they have become a political modernity in which the sovereign is elevated above the law.[103] As refugees have become the image of humanitarianism, they are deprived of their humanity. In other words, the camp is a zone of indistinction between inside and outside, inclusion and exclusion,[104] determined by the sovereign. The primary role of the sovereign in this space is the production of bare life, human and humane; the violent exclusion of the refugees. The sovereign sits inside and outside this juridical space and s/he is the only one who decides the exception.

Similarly, Diken argues that what makes inclusion/exclusion an indistinct concept in this context is that every camp consists of flows selected and transformed '*intermezzo',* into an inside and outside.[105] This means, by introducing a state of exception, the sovereign tries to constitute that which is external in the internal aspect of the juridical order. In other words, the refugee is included while being excluded, and excluded while being included. What this means is that the modern state of exception while not absolute, has attained a political character where war is

[103] Ibid.
[104] Ibid.
[105] B Diken, 'From refugee camps to gated communities: biopolitics and the end of the city', *Citizenship Studies*, vol. 8, no. 1, 2004, p. 39.

metaphorically maintained to justify excessive government powers in order to exclude the undesirable others.

Agamben's theory is not exempt from criticism, especially his invocation of the Holocaust and the comparison of Guantanamo Bay detainees with refugees as being the contemporary sovereign paradigm of the West in which the state is best visible. Elspeth Guild argues that refugees are neither victims nor *homo sacri*; they are struggling for their rights.[106] Similarly, Debenti contends that 'Agamben not only orientalises or exoticises the refugees, he also overly dramatises the camp and, by doing so, his theory is of little relevance in understanding the varieties of camps'.[107] Paul Passavant, while acknowledging the significance of Agamben's political theory, argues that 'Agamben neither provides a coherent assessment of the modern state, nor does he provide a coherent set of theoretical prescriptions to solve its injustices'.[108] His use of rhetorical device describes the blurred distinction between sovereignty, law, and violence which he drew from one of his many lectures in New York and elsewhere post-September 11. Doctrinally, the state of exception has become the primal form of modern government and the camp as a declaration of the state of exception outside of the normal legal order. Agamben's theory is relevant to this thesis' project due to my ethicist zeal for human rights. Reading Agamben's theory through a decoloniality lens provides insights into the colonial continuity of the camp – the state of exception. In order to appreciate his experimental concepts, one needs to read his provocative writings as a rhetorical hyperbole.

Agamben conceptualised the camp as the paradigm of the political modernity where the sovereign has gained the right to operate outside the strict legality of the law. His idea is based on three core conceptual frameworks: the camp as the state of exception; the sovereign power as the production of 'bare life'; and the camp as 'the biological paradigm of the West'.[109] This reduction of the subject to bare life has the effect of producing the *muselmann*, a term which originated in Auschwitz, taken over by Agamben as referring to someone who is simply trying to exist as an animal.[110] During colonialism, the *homo sacer* was excluded because s/he was considered

[106] E Guild, *Security and migration in the 21st century*, Polity Press, UK, 2010, p. 66.
[107] S Betts, & J Milner, *The externalisation of EU asylum policy: the position of the African states*, Centre for Migration Policy, working paper no. 36, Oxford University, UK, 2006, p. 4.
[108] PA Passavant, 'The contradictory state of Giorgio Agamben', *Political Theory*, vol. 35, no. 2, 2007, pp. 147-174
[109] Agamben, The state of exception, p. 1004.
[110] Ibid.

non-human, uncivilised and racially different. As Agamben's concept of the sovereignty of 'life', or 'zoe', has a European origin, some scholars question his reluctance to engage colonial and postcolonial histories in the way he contextualised the exception.[111] However, his critique is not limited by space and time as the state of exception exists everywhere in the modern world. More significantly, the state of exception conceptually defines the relationship between the metropole and the colony. Agamben contends that the sovereign is the threshold who transforms law into violence. In this state of exception, the sovereign creates a void within the law, a situation of chaos to guarantee his/her own authority. It is in this context that a decolonial engagement with Agamben's theory allows for locating the colonial continuity of the camp where sovereign power operates with ease.

2.5 The camp as the state of emergency

Following from the analysis of the camp as the state of exception in the section above, this section links it with the conceptual framework of the state of emergency in relation to the new security paradigm embedded within refugee encampment. The state of emergency and its philosophical significance dates as far back as Aristotle.[112] In legal theory, the concept has a juridical provision where law is suspended due to an impending emergency or serious crisis that poses a threat to the sovereign state. Conceptually, the state of emergency or state of exception is predicated on the fiduciary theory.[113] This theory suggests that the state may employ emergency powers when its security is at stake, especially during war time or large-scale terrorist attacks. It is such a situation that grants the executive arm of government, the power to effectively suspend the constitution. The state of emergency is the state of limbo; between law and no law. In implementing such a measure, the executive would have had a much greater power than would be otherwise granted by the constitution.

The modern state of emergency emanated from the 1789 French Revolution.[114] By the 20th century, the state of emergency had gained precedence in the international

[111] S Nair, 'Sovereignty, security, and the exception: towards situating postcolonial homo sacer', in G Delanty & SP Tunner (eds), *Routledge handbook of contemporary social political theory*, Routledge, London, 2011, pp. 386-394.
[112] Graduateway, 'Aristotle's politics: oligarchy and democracy essay', viewed 22 June 2020, <https://graduateway.com/aristotles-politics-oligarchy-and-democracy/>.
[113] Schmitt, Political theology, p. 10.
[114] SP Sheeran, 'Reconceptualising states of emergency under international human rights law: theory, legal, and politics', *Michigan Journal of International Law*, vol. 34, no. 3, 2013, p. 496.

legal system. Over the years, several neoliberal democratic and non-democratic governments have scribed constitutional provisions, making the state of emergency a political issue not based on any legal principle. Some states established a state of emergency that has been ongoing for decades. For example, Egypt has declared a continuous state of emergency since 1981 when President Anwar Sadat was assassinated.[115] Nations that have invoked Article 4(3) of the International Covenant on Civil and Political Rights, citing national emergencies include: Algeria, Sudan, USA, Uganda, South Sudan, Kenya, Ethiopia, Tunisia, Turkey, Venezuela, Crimea, Mali, France, Syria (since 1963) and Israel, although technically not under a state of emergency. Both national and international law have provisions for a derogation clause,[116] which allows for the concentration of powers in the executive arm of government in emergencies and the abdication of the legal review of such powers. This norm has gained universal application which tends to undermine the rights of minority groups, including refugees and asylum seekers.

The state of emergency is triggered when a security threat to a state arises, which could not be predicted factually to conform to a performed law. As the exception is not codified in existing legal order, the situation demands that the sovereign intervenes by suspending the law. For example, when Hitler proclaimed the Decree for the protection of the people and the state, it suspended Article 48 of the Weimer Constitution concerning personal liberties.[117] Agamben notes that from a judicial standpoint, the entire Third *Reich* was considered a state of emergency that lasted 12 years.[118] It was from this background that the state of emergency became an essential characteristic of every modern sovereign state.[119] Nonetheless, the state has fiducial duty to guarantee the freedom of its citizens. However, such powers are subject to very strict limitations flowing from the Kantian concept of legal order that persons should not be subject to arbitrary powers.

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[115] International Federation for Human Rights, the emergency law in Egypt, viewed 9 September 2019, <https://www.fidh.org/en/region/north-africa-middle-east/egypt/THE-EMERGENCY-LAW-IN-EGYPT>.
[116] United Nations Human Rights, 'The International Covenant for Civil and Political Rights', The covenant's texts allow state parties to adjust their obligation temporarily under the covenant in time of public emergencies. The key elements of this derogation are (a) a threshold of severity cause; (b) the notification to the treaty depositary; (c) consistency with other international obligations; (d) adherence to the principle of proportionality; and (e) the protection of non-derogable rights, viewed 13 November 2018, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.
[117] DM Seymour, 'The autonomy of the political and the dissolution of the Jews', *International Journal of Law in the context*, vol. 3, issue 4, 2007, pp. 373-387.
[118] Agamben, State of exception, 41.
[119] Ibid.

Carl Schmitt, a conservative Catholic, developed a philosophical concept of the state of emergency in the aftermath of World War I. It was a time during which civil liberties were curtailed when the Weimar Constitution was in effect. Schmitt stated, 'Sovereign is s/he who decides the exception'.[120] For him, the sovereign sits outside the bound of the law and can establish the Greek tradition of *iustium* or suspension of the law.[121] However, drawing from Agamben's parallel conclusion of the 'genealogical investigation of the *iustium'*,[122] the state of emergency is a space devoid of law. The distinct theoretical and conceptual frameworks of these two philosophers will inform the analysis below. Schmitt's definition of the sovereign as 's/he who decides the exception'[123] is the secularisation of the theological concept which portrays the sovereign as he who is the only one who decides the emergency. In other words, the sovereign cannot be constrained by constitutional norms when making decisions during emergencies. Schmittian's theory became a façade of the American policy post-September 11 due to the invocation of presidential powers and the suspension of the constitution. For example, just within nine days of his presidency, the US president Donald Trump, issued a presidential decree, a 90-day immigration ban for people from seven Muslim countries.[124] The order also halted the processing of refugees from war torn countries indefinitely.[125] It is such a situation that grants the sovereign the right to live above the law. This set a precedent that transformed the entire political-constitutional life of the neoliberal democratic state. Writing during the interwar period in Germany, Schmitt, a proponent of this approach, noted:

> the precise nature of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency and of how it is to be eliminated. The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited. From the liberal constitutional point of view, there would be no jurisdictional competence at all.

[120] Arendt, Origins of totalitarianism, p. 5.
[121] Ibid.
[122] Agamben, op. cit., 41.
[123] Arendt, Origins of totalitarianism, p. 5.
[124] ABC News, 'Donald Trump, suspends US refugee program indefinitely bars Syrians', viewed 22 Oct 2017, <http://www.abc.net.au/news/2017-01-28/donald-trump-signs-orders-limiting-refugee-intake/8219644>.
[125] Ibid.

> The most guidance the constitution can provide is to indicate who can act in such a case.[126]

Schmitt could be considered a legal positivist. He defended the constitutionally entrenched limits on the sovereign power within Germany during the Weimar period. His view suggests that the sovereign cannot defend itself during 'extreme emergency' and that the only way by which it can restore order is to free itself from the bounds of the law. His theory has huge implications for human rights because as with municipal law, it is impossible to anticipate the circumstances under which the sovereign might invoke emergency powers. As human rights are a sub-law category, the state can both grant and deny them at its discretion. Schmitt seems to suggest that the exception is the sovereign and the sovereign is the exception. In this context, the sovereign is the only one who can interpret and decide the exception. In other words, the exception becomes a space where the juridico-political order can have validity, only when law itself is suspended. Thus, sovereignty becomes the borderline concept of order where the sovereign decides the exception and determines when the law is applicable.

The roles and functions of law in relation to the state of emergency in modern European culture emerged during the crisis of the 1789 French Revolution and the Declaration of the Rights of Man and Citizen.[127] This gave birth to the entire Westphalian system. The use of the state of emergency reached a climax in 20th century preceding World War I, upsetting the established European order with an increase in the number of the displaced, stateless persons and refugees. To this present day, the camp as a juridico-political space, has become a geopolitical object – the nomos of the earth – and a permanent state of emergency. Essentially, the camp space embodies sovereign power and humanitarianism, all enveloped within the proliferation and the logic of sovereignty. It is significant to point out that the camp and its modern conceptual and political account, has naturalised sovereignty from its universality to what Schmitt terms as 'friend-enemy' relationship.[128] While the state of emergency has a juridical provision where the law needs to be suspended due to an impending emergency, caution must be taken to protect the rights of the

[126] Arendt, Origins of totalitarianism, p. 7.
[127] SD Kasner, 'Compromising Westphalia', *International Security*, vol. 20, no. 3, 1984, pp. 115-151.
[128] Schmitt, Political theology, p. 7.

individual, including the rights of the refugees who, by default, have already lost the protection of their country of origin.

The Westphalian system with its state-centred principle of autonomy and territory,[129] views the state as having an exclusive right to declare the state of emergency over its subjects. However, this is no longer universally applicable. For example, territorial control over the Antarctica and Free Economic Zones for the Oceans are decided by both territorial and extra-territorial actors.[130] In one form or the other, every single major treaty since 1964 has violated the Westphalia model: Westphalia Utrecht, Vienna, Versailles and Helsinki. The Westphalian concept does not present an accurate description as sovereignty is not absolute in contemporary politics. Governments have been forced to accept certain principles such as human rights, minority rights and democracy. It is in this context that I critique the legality of encampment as the new state of exception. The Eurocentric concept of sovereignty based on Westphalian model which grants the state absolute power to decide the state of emergency, presents a danger especially to vulnerable groups such as refugees.

David Held defines the doctrine of sovereignty as having two distinct dimensions - 'internal' sovereignty and 'external' sovereignty.[131] The former assumes the status of a supreme body over a given society, whereas the latter does not claim to be an absolute authority. The latter could also be assumed to have a strict political power in an institutional sense to decide the state of emergency as witnessed in the US from time to time. As the sovereign is the only body that resides over the exception, it logically defines its very structure. Taking the US invasion of Iraq as an example, former President Bush challenged the United Nations prior to attacking Iraq saying, 'We do not need permission from anyone to invade Iraq'.[132] This supports Schmittian's theory that to be outside and yet inside of the law is the very nature of sovereignty. The danger with Schmitt's theory is that during a state of emergency, the sovereign should have unlimited authority and the power to suspend the law at will. In so doing, the sovereign frees itself from all normalities of the law and

[129] SD Krasner, 'Compromising Westphalia,' *International Security*, vol. 20 no. 3, 1995, p. 115-151.
[130] The Australian Government, 'Australia and the Antarctic treaty?', viewed 23 June 2020, <https://www.antarctica.gov.au/law-and-treaty/australia-and-antarctic-treaty-system/>.
[131] H David, Democracy and the global order: from the modern state to cosmopolitan governance, Stanford University Press, USA, 1995, pp. 1-336.
[132] Washington Post, 'US invasion of Iraq', White House statement on the invasion, 2002, p. 3.

becomes absolute. Furthermore, as long as the state of emergency remains a temporary condition, to think that the law continues to exist during the state of emergency as per Schmitt's assertion, is a lunacy. This is because any action taken by the sovereign outside the law still has a juridical character. Schmittian's account of sovereignty is problematic because the distinction between law and the exception is very clear. The former is a normal practice in which the constitution applies and the latter does not. As such, declaring the state of emergency renders the sovereign absolute and makes the exception the rule. This is also exemplary of the many fictitious political situations in which the state of emergency has been generalised. Arguably, Schmitt's view that the law survives the state of emergency is contradictory, as sovereignty is both inside and outside the law. In such a circumstance, the fictitious role of the state of emergency vanishes.

There are two schools of thought regarding the state of emergency. The first one views the state of emergency as positive law. This approach is codified in international law through the notion of derogation.[133] Derogation is an exceptional measure that grants the state the right to lawfully infringe on the human rights of the individual in an emergency situation.[134] This paradox arises from what Kant terms a fiduciary relation between the state and the individual. In this context, the state of emergency becomes very critical from a human rights perspective. The second school of thought views the state of emergency as 'extra-juridical'[135] and unwarranted. International and regional human rights conventions such as the ICCPR,[136] the European Convention on Human Rights, the American Convention on Human Rights, the African Charter on Human Rights and the Arab Charter on Human Rights, have derogation clauses that permit the state to suspend the protection of certain basic human rights in times of public emergency. Recognising the dangers that accompany the state of emergency, international law retrospectively limits the circumstances under which the state may legally derogate its international

[133] International Covenant on Civil and Political Rights (ICCPR) International Covenant on Civil and Political Rights (ICCPR), art, 4, entered into force 1976; European Convention on Human Rights (ECHR) entered into force 1950, viewed 23 May 2017, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.
[134] J Fitzpatrick, *Human rights in crisis: the international system for protecting rights during state emergency*, University Pennsylvania Press, USA, 1994, p. 106.
[135] W Benjamin, *Reflections: essays, aphorism, autographic writings'*, in P Demetz (ed), Houghton Mifflin Harcourt, 1986, p. 297.
[136] International Covenant on Civil and Political Rights (ICCPR); art 4, European Convention on Human Rights (ECHR); and art 15 of Inter-American Convention on human rights, art. 27, viewed 11 November 2016, <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>.

obligation. This obligation requires the state to strictly observe its fiduciary responsibility within its jurisprudence, in order to safeguard the human rights and civil liberties of others.

Benjamin Constant, a constitutionalist, influenced by the Scottish Enlightenment, who, in the aftermath of the Napoleon rule in France, cautioned against the 'proliferation of laws'[137] that go far beyond the protection of life, liberty and property which undermines the legitimacy of and obedience to all law, including those meant to secure freedom. On the other hand, proponents argue that a legal space must be created in times of emergency given that the circumstances that pose security threats to the state are endless,[138] and, as such, using juridical mechanism is inadequate. This thesis takes a decolonial approach and argues for the limitation of the legality of state response in times of emergencies. Although a constitutional endorsement of the state of emergency is within the law,[139] the concern this thesis raises is the over extrajudicial extension of such powers, and the shift from the rights of the individual to the security of the state. The current global state of emergency has become a new paradigm of governmentality. This practice has created a legal black hole in the conscience of humanity where law is entirely removed from judicial oversight.

Further on this subject, this thesis draws on Agamben's recent scholarship in which he argues that the assumption that the law is unable to regulate the state's executive powers is 'a *fictio iuris* par excellence.'[140] In the context of the asylum paradigm, the invocation of the state of emergency presents a situation where the refugee who has no legal status becomes the scapegoat. This is because both the sovereign and the refugee are outside the law. A conclusion could be drawn that we can all virtually be stripped of our legal rights and become *homines sacri* unless the rule of law prevails during emergencies. In order to address Schmitt's sovereign discretion in times of emergencies, a legal provision that supports the core features of human rights is necessary to address its scope and application.

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[137] B Constant, *Principles of politics applicable to all governments*, in E Hofmann (ed), D O'keeffe (trans), Liberty Fund, USA, 1987, p. 64.
[138] J Madison, A Hamilton & J Jay, 'The federalist papers', in GW Carey & J McClellan, Liberty Fund, USA, 1987, p. 185.
[139] C Keith & K Poe, 'Are constitutional state of emergency clauses effective? An empirical exploration', *Human Rights Quarterly*, vol. 26, no. 4, 2004, p. 1080.
[140] Agamben, Means without end, p. 87.

2.6 Conclusion

This chapter explored/outlined the historical evolution of the camp, tracing its genesis from 18th century colonial camps and the Holocaust camps. It revealed how encampment technology emerged from colonial experience and has been transformed into a permanent solution for the containment of millions of refugees. The refugees who occupy this space are confined in this legal wilderness for an unforeseeable future, and their status is beyond any legal framework – national or international. Although the camp historically emanated from European colonial conquest which culminated into the Holocaust, camp-based model of managing a large population in displacement has become a hidden geopolitical humanitarianism.[141] This fits neatly with Hansen's observation that colonial violence 'not only refers to the wars of conquest on which colonial rule was established, but also the use of strong measures to keep the colonised in a subject state.[142] It is on this basis that the camp should not be understood as a distant historico-geographical event, but as an ever-existing condition within our present juridico-political system. This calls for the need for a new political thinking that recognises the inalienable rights of the refugees. As the majority of 21st century refugees have neither been repatriated nor naturalised, but encamped for generations, the next chapter continues to examine the colonial origins of the camp in Kenya as a single jurisdiction.

[141] Ibid.
[142] E Hansen, 'Freedom and revolution in the thoughts of Frantz Fanon', *Ufahamu, Journal of African Studies*, vol. 7, no. 1, 1976.

Chapter 3: The colonial origins of prolonged encampment in Kenya

3.1 Introduction

This chapter examines the colonial origins of encampment in Kenya. Three distinct periods are examined: the colonial period from 1895 to 1962; the post-independence period from 1963 to 1990, considered a 'golden age' for refugees as many of Africa's refugees were products of decolonisation wars; and the encampment period from 1991 to the present which witnessed the collapse of the institution of asylum in Kenya. Central to my analysis are the two bodies of research by Caroline Elkins' titled 'Imperial reckoning: the untold story of Britain's Gulag in Kenya',[143] and David Anderson's 'Histories of the hanged: the dirty war in Kenya and the end of empire'.[144] The colonial illusion or 'British Gulag in Kenya' remained almost entirely hidden from public view as colonial Britain destroyed almost all official records of their violent attempts to suppress the Mau-Mau rebellion. Elkins calls it 'British Gulag in Kenya' due to similarities with the Nazi camp. The two researchers provided compelling accounts of the atrocities committed by colonial Britain in a network of concentration camps in Kenya. This chapter is significant to this thesis as it lays down key features of Kenya's colonial past (which Elkins equates to the Holocaust event), in order to create a context for the critical examination of refugee colonial/imperial continuity in Kenya.

3.2 British colonial camp

Kenya, formerly known as the East African Protectorate, was a British colony from 1895 to 1962. As Kenya became a state as a direct result of colonisation, this was based on the doctrine of *terra nullius* which gave the British the inalienable right to inherit everything they found within the borders of Kenya. This means that Kenya's borders were the material places where belongings, identities and citizenship were constructed and deconstructed. As a British colony, thousands of Kenyan soldiers fought alongside the British Allied Forces in WWII and defeated Adolf Hitler. After their return home, Kenyan veterans joined the civilian population in demanding the same freedom they assisted the British in fighting for, but ended up being incarcerated in detention camps. This led to one of Britain's bloodiest and most

[143] C Elkins, *Imperial reckoning: the untold story of Britain's Gulag in Kenya*, Henry Holt, New York, 2005, pp. 1-475.
[144] D Anderson, *Histories of the hanged: the dirty war in Kenya and the end of empire*, Norton WW & Co. Ltd, New York, 2005.

protracted colonial wars in Africa. Elkins estimated the number of the natives incarcerated in British barbed wired detention camps to be about 1.4 million people.[145] In this dirty war, colonial Britain declared the state of emergency which lasted over 40 years.[146] Although colonial Britain claimed that the state of emergency as a colonial warfare fell within the rule of law, Thomas Mockaitis argued that the British 'have generally been conspicuous for the lack of such excess'.[147] In contrast, Niall Ferguson, who lived in Kenya in the years leading to independence, endorsed the Britain's civilising mission, arguing that 'it was the right thing to do as it exported liberal values, representative government, and economic progress.'[148] About 60 years after Kenya gained political independence, Elkins documented the scale of violence committed by colonial Britain in Kenya with voluminous evidence. Relying mostly on oral evidence from the Mau-Mau survivors, she conducted interviews with over 600 survivors of the Mau-Mau rebellion; a Swahili word for the anti-colonial uprising against white settlers. She also interviewed white settler informants and combed colonial archives in London and Nairobi to reveal what the British called a 'civilising mission' in Kenya.[149] One Kikuyu women narrated her experience:

> We then saw Kamiraru pulled up by two men. They took the first man and hooked him up to the engine of the Land Rover while it was still running and his body just shook all over. But they weren't finished with him… [they] took him over to the generator that was at the back of the police station's garage. They then hooked him up to this generator and electrocuted him… they then turned to the other man, tied him to the Land Rover and made him run behind them as they drove off. He was running and of course he falls. They drove him until he died in pieces… A lot of atrocities like this one were done.[150]

Torture and killing were the means through which the British implemented its imperial policy in order to not only gain intelligence from the natives, but it was considered the best way in dealing with the insurgency. Imperialism drove this quest as the British were not only killing the natives, but also taking over land from those they had killed. More evidence emerged after independence that the British

[145] Elkins, Imperial reckoning, p. 80.
[146] Ibid.
[147] T Mockaitis, 'The origins of British counter insurgency', *Small Wars and Inter-insurgencies*, vol. 1, issue 3, 1990, p. 214.
[148] N Ferguson, *Empire: how Britain made the modern world*, Penguin Press, UK, 2004, p. 18.
[149] Elkins, Imperial reckoning, p. 88.
[150] Ibid.

summarily executed about 1090 men, often in public with portable gallows in order to prompt Mau-Mau supporters to recant.[151] This was twice the number of men executed by the French in Algeria.[152] Most importantly, the excessive use of force not only crossed the line, but it violated the European Convention on Human Rights and the Geneva Convention which Britain extended to Kenya in 1953 about a year into the emergency.

Seen as the protector of the liberty of man, colonial Britain denied prisoner of war status to the Mau-Mau supporters who were brutally tortured with the pure mantle of imperial muscular zeal. Whereas Huw Bennett defended the British colonial regime, arguing that they used 'minimal force',[153] Eric Downton, then the Daily Telegraph correspondent in Kenya, argued that the inmates 'received what were drumhead trials' and were hanged immediately after trials 'that made a mockery of the British justice'.[154] Although Bennett conceded that torture was effective and necessary in the colonies, he argued that 'it did not arise due to disciplinary breakdown'.[155] Similarly in his later writings, Mockaitis acknowledged that the British used excessive force in Kenya more than in other colonial empires, but that they adhered to the doctrine of minimal force.[156] These views has to be analysed in the context of the entire period of the British colonial rule in Kenya. Torture, extortion, and violence were the very character of Britain's engagement in all its colonies. However, in comparison to the anti-colonial wars in Vietnam or India where the British withdrew, the Mau-Mau insurgency was characterised by excessive torture which culminated into summary execution. In other words, everything that flowed from the British counter insurgency measures – torture, forced labour and summary killing – defined its imperial policing in Kenya. This means violence played a key role in forcing the natives to give up their freedom and land. The then British Attorney General Eric Griffith-Jones described the British barbed wired colonial camp as 'reminiscent of conditions in Nazi Germany'.[157] Although the British defended 'their barbaric violence

[151] Anderson, Histories of the hanged, p. 394.
[152] Ibid.
[153] W Bennett, 'The other side of the COIN: minimum and extraordinary force in British army counter insurgency in Kenya', *Small Wars and Inter-insurgency*, vol. 18, no. 4, 2007, p. 638.
[154] E Downton, *Wars without end,* Stoddart, Toronto, 1987, p. 236.
[155] Ibid.
[156] T Mockaitis, 'The origins of British counter insurgency', Small Wars and Inter-insurgencies, vol. 1, issue 3, 1990, p. 214.
[157] D Anderson, 'British abuse and torture in Kenya's counter-insurgency, 1952-1960', *Small Wars and Counter-insurgencies,* vol. 23, no. 4-5, 2012, pp. 700-719.

as falling within the rule of law in order to extract confessions',[158] this eventually led to the institutionalisation of the camp in Kenya. It was from this colonial beginning that Britain's imperial culture of violence and the use of the camp as the state of emergency, gave birth to refugee encampment. To date, the refugee camp in Kenya has retained the structure of colonialism which this thesis argues, has to be decolonised. Kenya was part of British East Africa Protectorate since 1919. While the focus of this thesis is on Kenya, German camps were first established in Tanganyika (Tanzania) prior to the Mau-Mau rebellion. For example, the term 'camp commandant' is still in use in refugee setting to date, a term which emanated from British colonial ideology. As Patricia Daley put it, 'the causes and consequences of the African refugee problem can be understood only in the historical context of the integration of African communities into the capitalist system and their resultant underdevelopment'.[159]

Initially, Elkins was set to write her dissertation about the success of the British civilising mission in Kenya. However, she later discovered that almost 99 per cent of the documentary evidence of the British detention camps was destroyed on the eve of Kenya's independence.[160] After exhuming the remnants of colonial archives that were hidden from public view, her thesis came to a halt when she discovered that many of the documents relating to the camp were still classified as confidential for over half a century.[161] Subsequently, she had to frame her dissertation as a personal journey of discovery which earned her a Pulitzer prize.[162] The Mau-Mau rebellion was not about the war for independence alone, but also the land issue and the abolition of the colonial camps where thousands of Kenyans were held captive during the last years of British colonial rule. The British colonial camps were still operational a few years after Britain had signed the Nuremburg Principles which classified colonialism as a war crime and a crime against humanity. Although considered the birthplace of international criminal law, the Nuremburg trials were conducted between 1945 to 1949, but only relating to crimes committed by

[158] Ibid.
[159] P Daley, 'Refugee and underdevelopment in Africa: the case for Burundi refugees in Tanzania' PhD thesis, Oxford University, 1989.
[160] M Parry, 'Uncovering the brutal truth about the British empire', The Guardian News Paper, 18 August 2016.
[161] Ibid.
[162] Ibid.

individuals and not the state.[163] As such, the British avoided legal responsibility although it violated Article three of the 1949 Geneva Convention regarding the protection of the civilian population during armed conflicts. Besides, despite widespread evidence of systemic abuse such as murder, torture, extermination, enslavement, and arbitrary detention committed against the civilian population which fall within the definition of war crimes and crimes against humanity, the British forces avoided individual criminal responsibility for these crimes despite evidence of state sponsored policy of extermination. This was the case in all British anti-colonial struggles across Africa given the power imbalance between the colonised and the colonisers.

Centred on the courtroom environment, Anderson's inquiry was considered an indictment of the British colonial legal system. By using new evidence, he unearthed the British legal records to reveal the extra-legal imprisonment of the natives, many of whom were on death sentence at the time. As Anderson put it, 'the Kenyan brutal counter insurgency remained a secret at the time, but so thoroughly documented'.[164] The evidence provided by the two researchers indicates that torture in detention camps was a systemic pattern of state policy. In his re-evaluation of the British colonial history, Anderson used new evidence from previously unseen archives, testimonies of those who fought on both sides, and over 800 legal cases of those awaiting the death penalty. He revealed that death sentences in British camps were more common in Kenya than in places like Palestine and Malaysia at the time.[165] Although colonial Britain negotiated a peaceful exit from its colonial rule, at the height of the state of emergency, it introduced draconian anti-terror laws, suspended the human rights of suspects, imposed collective punishment, and used state execution on a large scale, more than in all its post war period.[166] In other words, the law played a key role throughout the colonial period. Anderson also dispelled the myth that the Mau-Mau rebellion was directed at white settlers. He argued that only 32 settlers were killed compared to over 300,000 Kikuyus.[167] So the Mau-Mau rebellion was never a race war as some critics portray it to be. To put it in context,

[163] E Adams, 'War crimes: were the Nuremburg trials only victors' justice', viewed 10 July 2020, <https://www.globalresearch.ca/were-the-nuremberg-tribunals-only-victors-justice/5405078>.
[164] Anderson, Histories of the hanged, p. 309.
[165] Ibid.
[166] Ibid.
[167] Ibid.

colonial Britain declared the Mau-Mau emergency at the time when they have already surrendered India and Pakistan. It was in the same period that Palestine was sacrificed in favour of the Jewish state.[168] Between January and December 1960 was referred to as an electric period of independence as 17 African nations gained 'formal' political independence.[169] Kwame Nkrumah was already made the first Prime Minister of Ghana. Uganda, Tanzania, Rwanda, Burundi, Somalia, Sierra Leone and Nigeria also gained independence from British colonial rule during this period.

After independence, the new Kenyan society plummeted into a crisis as the result of racial hierarchy that placed remnants of white settlers at the helm of the Kenyan society. At the time, the Kenyan Constitution still served the interest of the minority white settlers. Native Kenyans failed to get equal representation in all spheres of life. Political representation was through hand-picked local chiefs whose authority was consolidated through association with colonial projects and the use of missionaries as the conduit for African voices.[170] For example, Waruhiu wa Kungu, being 'mission educated', was appointed local chief and a church elder since 1920.[171] He was also a prosperous farmer representative and one of the gate keepers of the colonial state.[172] This means that there was no real democracy and there was no space for dissent. In addition, the movements of the ethnic communities were geographically confined within colonial territories, whereas the settlers could travel unimpeded throughout Kenya. The white settlers also kept the *kipande*, a system in which all natives were forced to hang metal tags on their neck containing personal identity and passbook without which no Kenyan would get a job.[173] This colonially defined borderline between the settlers and the Kenyan citizens defined in a racialised logic, emanated from British colonial rule. It was this policy of segregation and alienation that made Kenyan society weary of foreigners on their soil. Even in the post-independence period, the Kenyan government reintroduced the institutionalised order to segregate citizens from non-citizens. For example, in 2018, the Kenyan government set up a hotline where citizens could report 'suspected refugees' to the

[168] France24, '1960: the year of independence', viewed 28 June 2020, <https://www.france24.com/en/20100214-1960-year-independence>.
[169] Ibid.
[170] Anderson, Histories of hanged, p. 412.
[171] Ibid.
[172] Ibid.
[173] Ibid.

authority. This state-led securitisation of asylum followed a long history of colonial order. As the number of refugees in Kenya grew in the 1990s, the default response was to concentrate them in the camp, assisted by the institutional infrastructures of the UNHCR as a tool of control. In other words, postcolonial Kenya inherited a policy of population control adopted from colonial Britain. It is this psychic life of colonial subjectivity that informed how Kenyan society responded to the heightened number of refugees on their territory following on from this colonial relation. Theoretically, this is what Partha Chatterjee refers to as 'colonial rule of difference'.[174] This racialised and ethnicised categorising of population aimed at tightening migration and population control. Ever since, encampment has become a permanent technology for refugee management in Kenya, premised on the experiences of colonialism.

The camp is inherently colonial, it facilitated the mystical belief that those in the periphery of society have to be segregated and confined in infinite encampment. Ronald Hall examined the cultural and institutional form of racial segregation among minority Afro-American victim groups to test the fibre of the American social terrain. Although coming from a historically different angle, he demonstrated that 'victims of colonial era act out various forms of discrimination against other equally subjugate or victimised populations'.[175] Similarly, as Kenyan society emerged from colonial bondage, it was this victimisation that dictated their response to non-citizens. What followed was that the survivors of colonial Kenya and their descendants became wary of refugees, especially on the issue of land.

One of the most critical factors that forced Kenyans to take up arms against colonial Britain was the land issue as the latter occupied almost all fertile agricultural land in Kenya. Britain enacted a series of Crown land ordinances that legalised the dispossession and control of fertile native lands. Subsequently, traditional land ownership and customary law regarding the acquisition of land was superseded by British law. This resulted in the appropriation of vast amounts of land, including native reserves, to white settlers. In 1946, the British governor claimed that their control of Kenya was a right passed on to them by their forefathers. He said, 'This land we have made is our land by right, the right of achievement.'[176] This meant that

[174] P Chatterje, *The nation and its fragments*, Princeton University Press, New York, 2004, p. 282.
[175] RE Hall, *An historical analysis of skin colour discrimination in America: victimism among victim group populations*, Springer, New York, 2012, p. 212.
[176] Elkins, Imperial reckoning, p. 360.

colonialism was a right, a passage of rights that white settlers inherited from one generation to another. They could not be dispossessed of this inheritance. When Jomo Kenyatta was made Kenya's first President, he retained the colonial policy by preaching forgiveness to Mau-Mau survivors and former detainees with this slogan: 'let us agree that we shall never refer to the past'.[177] This was a double-edged sword statement. While Kenyatta aimed to heal the colonial divide by keeping some white settlers in Kenya, in so doing, he endorsed the very colonial continuity that remained in Kenya to date. Iain Macleod, who headed the colonial office after the *Hola* massacre, referred to colonialism as a 'veil over the past'[178] as some white settlers who were culpable of atrocities retained their racial privilege status. In particular, Terence Gavaghan, who was the former head of detention camp in Mwea, remained in Kenya after independence, overseeing the transition to the new administration.[179] The white settlers who continued to live privileged lifestyles comprised 1.4 per cent of the population in Rift Valley Province, retained about 80 per cent of the land in post-independence Kenya while the natives were reduced to squatters.[180] This historical dispossession ensured colonial continuity to the present. Grounded in this historical context, when the number of refugees on Kenyan soil increased in the 1990s, the Kenyan government adopted an encampment policy to isolate the refugees to avoid the land question arising again. For example, the two refugee camps in Kenya are located in the drought ravaged, semi-desert areas of Turkana and Garissa districts. Hence, the refugees have to rely solely on humanitarian aid. Although Kenya's refugee policy has evolved significantly over the decades, keeping the refugees in a constant state of emergency is reminiscent of colonial enclavity. Elkins' oral history and Anderson's legal records arrived at the same conclusion: that the British colonial camps in Kenya were characterised by cruelty and blatant torture. What the two authors demonstrate is that the colonial camp was the point of colonial implosion in Kenya. As refugee camps in Kenya were built through a colonial lens, ever since, they retained the conditions of isolation and exclusion that originated within the colonial era. It is this continued, legalised violence which indicates that

[177] Ibid.
[178] Ibid.
[179] Ibid.
[180] A Odhiambo, 'Review of Frank Furedi, the Mau-Mau war in perspective', *Journal of African History*, vol. 32, no. 2, 1991, p. 363.

colonialism is not confined to the past, but its legacy has shaped Kenya's contemporary refugee camp.

3.3 The rights to entry

Britain colonised Kenya in 1895. In 1902, it established direct rule through the East African Protectorate. Colonial Britain promulgated its Immigration Ordinance (IO) in 1906.[181] The IO placed several restrictions on non-citizens who wished to enter and settle in Kenya. This policy laid the foundation stone for Kenya's current immigration and refugee policy. When Kenya gained political independent from the British in 1963, it replaced the IO with Immigration Act (IA) 1967 by an Act of Parliament. The IA was a replica of the pre-independence IO which shaped Kenya's immigration policy to date. In 1967 and for the first time, the IA introduced visa 'M class' as a special visa category that refugees could obtain.[182] By this time, the number of refugees in Kenya had almost doubled following an upsurge of civil wars in the Sudan, Ethiopia, Chad, and the Great Lakes Region. The IA mirrored the definition of a refugee in Article 1A of the 1951 Convention as their provisions were used to access asylum claims. Schedule five of the IA defined a refugee as:

> a person who is a refugee, that is to say, is owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion… is unwilling to return to such country; and any wife or child over the age of thirteen years of such a refugee.[183]

Although the above definition mirrors the definition of a refugee in the 1951 Convention, section 4(1) of the IA states that 'no person who is not a citizen of Kenya shall enter Kenya unless s/he is in possession of a valid entry permit or a valid pass'.[184] Ironically, 'M class' visas are not issued at the border or after entry into Kenya for fear of legalising refugee presence in Kenya. It is the responsibility of the asylum seekers to take the risk of crossing the border and report to the UNHCR to make asylum claim. The UNHCR took over the role of the state and was responsible for refugee registration at the border. The reality is that any non-citizen who enters Kenya without a valid entry permit is considered unlawful and is at risk of

[181] OD Odhiambo, 'African immigration policies: the case of Kenya, 1906-2000', a master's thesis, Nairobi University, Kenya, 2003, pp.1-204.
[182] Kenya Immigration Act 1967, 'Section 5(3) of Immigration Act Cap. 173', viewed 14 September 2017, <http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/RepealedStatutes/ImmigrationActCap172.pdf>.
[183] Ibid.
[184] Ibid.

refoulement. One of the significant loopholes in the IA was its omission of the principle of *non-refoulement* which by default, is the cornerstone of the 1951 Convention. Technically, *refoulement* is the only exit door available should a refugee lose their refugee status. This conditional form of asylum positions refugees under constant fear of the ever-present possibility of *refoulement*, regardless of their lawful residence. Essentially, *refoulement* could be taken as an extension of border control, which is strategically used to withdraw not only residency rights, but refugee status as well. Section 20(1) of the IA also grants immigration officers discretionary powers on whether to recognise an applicant's request for asylum. The IA did not require the decision maker to give any reason for a negative decision. The lack of protection from *refoulement* reflects the punitive intent of the IA. *Refoulement*, which is an extension of the sovereign right to exclude, is the norm rather than the exception under Kenyan immigration law. Put in another context, although the law requires refugees to live in the camp as subordinates of the state, they continue to be passive recipients of that right. Evidently, the right in question is endangered. This is because that right has a condition attached: it is discretionary and could be revoked anytime. As such, the IA does not offer adequate protection to refugees.

On 18 May 1973, Kenya enacted the Aliens Restriction Act 1973 (ARA). The ARA defines an 'alien' as any person who is a non-citizen in Kenya.[185] This, by default, includes refugees and asylum seekers. Although the ARA did not recognise refugees as a special category of non-citizens, it incorporated a refugee definition and acknowledged refugee applicants in the aliens' application form A1 paragraph 10. However, the recognition afforded to refugees is far from meeting the refugee protection standard as there is a great disparity between a refugee and an alien. This is because the latter still enjoys the protection of their country of origin and a refugee does not. Besides, the ARA did not spell out what rights, if any, refugees to which were entitled upon entry into Kenya.

The incorporation of a refugee definition in the ARA presents some additional challenges. First, under the 1951 Convention, refugee status is granted only when an applicant demonstrates an evidence of persecution on convention grounds, notwithstanding that exceptional cases exist. Although Kenya began hosting

[185] Kenya Alien Restriction Act 1973, 'Chapter 173, (2), viewed 29 June 2017, <http://kenyalaw.org/kl/fileadmin/pdfdownloads/RepealedStatutes/AliensRestrictionActCap173.pdf>.

refugees prior to enacting the ARA, there was no legislation that recognised civil war as a cause for seeking asylum. Second, there were no provisions in the ARA that could guarantee the rights of refugees upon entry into Kenya. Third, and most importantly, the ARA had no legal provision on the principle of *non-refoulement*. Although this country could be said to have met its international obligation by allowing refugees entry into its territory, it could equally be argued that there were no legal safeguards such as a *non-refoulement* obligation. As demonstrated in the preamble, this legislation was intended to consolidate Kenya's immigration law,[186] without regard for refugee protection. The policy intent of the ARA is clearly demonstrated in Article 3(1) which states:

> the Minister may, at any time when a state of war exists… by order impose from time to time restrictions on aliens and provision may be made by order for prohibiting aliens from landing in or otherwise entering Kenya generally or at certain places and for imposing restrictions or conditions on aliens landing or arriving at any port in Kenya.[187]

The requirements of section 3(1) of the ARA present additional challenges. It conferred excessive powers to the Minister to make entry restrictions at any time when an eminent danger exists or when such conditions did not exist. This makes the ARA read like wartime legislation, considering that Kenya gained independence in 1962, about three years prior to enacting this legislation. Ever since, no Minister has formally declared such a situation of danger or great emergency, which brings into question the legal validity of its policy intent. This indicates that the legislation retained its colonial context. Similarly, section 3(1)(c) of the ARA also permitted the Minister to require aliens to reside in designated areas during great emergencies. The ARA remained ambiguous as to the meaning of 'a situation of imminent danger or great emergency'.[188] This provision was subject to the discretionary powers of the police and immigration officers, especially in matters relating to refugees and asylum seekers who are taken to pose a security threat to the nation. Such a restrictive policy was instituted following mass exodus of refugees in the 1990s. This later became the basis for permanent encampment policy in Kenya. Put together, the

[186] The Aliens Restriction Act 1967', viewed 28 January 2018, <http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/RepealedStatutes/AliensRestrictionActCap173.pdf>.
[187] Ibid.
[188] Ibid.

Immigration Act 1967 and the Aliens Restriction Act 1973, both of which are still in the statutes book, are taken to have provided the legal basis for refugee management in Kenya. They incorporated the provisions of the international refugee law through incremental amendments. This legislation was used exclusively for restricting immigration without regard to the protection needs of those seeking asylum. While they included legal provisions for refugee protection, a policy on how to implement such provisions was lacking.

In 2006, Kenya enacted its Kenya Refugee Act 2006 (KRA). The KRA requires refugees to register at designated locations within 30 days of entry into Kenya. However, there have been cases where refugees were turned away by immigration officials,[189] subjecting them to unnecessary abuse. Although the KRA and other domestic legislation mirrors the international refugee legal frameworks, including using *prima facie* as a criterion for refugee protection, it has some serious loopholes. This is because of the burden posed by the significant number of refugees who could not return home. The KRA Article 16(4) also states that refugees have the right to find gainful employment provided that no other Kenyan could do the same work. Theoretically, this means they have the right to seek and gain employment or start a business. However, the Refugee Consortium of Kenya reported that Kenya does not provide work permits to the refugees.[190] There are numerous reasons why this is so. First, whereas this provision grants the refugees the right to work, the KRA restricts their movement outside of the camp designated zones as per Article 16 2(b). Second, work permits are only granted in Nairobi, the capital city, not in the camp. Third, most if not all refugees could not afford to pay for work permit which costs about $200 and is renewable every two years. Those who choose to travel outside the camp without authorisation often did so under constant police harassment. Fourth, although some refugees reside in urban centres for a variety of reasons, including education and medical treatment, urban refugees live clandestine lifestyles to conceal their identity, which puts them in a position of vulnerability.

[189] Kenya Refugee Act 2006, section 11(1), viewed 16 May 2017, <https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/refugee_act2006.pdf>.
[190] Refugee Consortium of Kenya, *Asylum under threat: assessing the protection of Somali refugees in Dadaab refugee camp along the migration corridor,* Pann Printers Ltd, Nairobi, 2012, p. 72.

3.4 The rights to residence

The Kenyan Parliament enacted the KRA 2006 which established the domestic encampment policy.[191] This policy requires all refugees to reside in two designated camps along the Kenyan borders: Kakuma camp in Turkana District in the north-west and Dadaab in the Garissa District in the north-east of the country. The KRA Articles XVI(2)(b) and XVII (a, c, d, e and f) make it explicit that camps are the rightful residence for the refugees. Furthermore, it is a crime under section 25(f) of the Act for a refugee to reside outside the designated camp zones. This encampment policy was initially intended as a temporary stopgap to allow for the government to devise a long term means of dealing with mass influxes of refugees. Nonetheless, it ended up becoming a permanent feature of refugee management in Kenya to this day. Despite having a well-known history of hospitality and generosity towards refugees, the Kenyan Government in its KRA Article XVI (iv), reverted to requiring that 'No refugee shall have the right to work'.[192] This policy is in line with Kenya's non-integration policy and it corresponds with Louise Holborn's view:

> … governments have been with a strong preference for keeping refugees separated from the rest of the population ... to prevent rather than further integration, freedom of movement has been curtailed in all settlements.[193]

Although Holborn was referring to the 1970s, nothing has changed over the years. This modern culture of describing refugees as 'those who do not belong', focuses increasingly on keeping them in camps instead of welcoming them as potential new citizens. It is this policy of encampment that Agier described as the semi-permanent apartheid of the world which 'engendered a new form of being-in-the-world, characterised by wandering and lasting destitution'.[194] The involuntary concentration of refugees in the camp is neither apolitical nor passive. In many ways, Kakuma camp which has a separate administration since its establishment in 1991, resembles the state of the 'other world'. It is within the camp space that humanitarian work functions as a long-standing colonial trap. It is this humanitarianism that curtails the refugee rights to free movement.

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[191] Kenya Gazette Supplement, 'The Kenya Refugee Act, no. 13', viewed 24 September 2018, <http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2007/THE_FINANCE_ACT__2007.pdf>.
[192] The Kenya Refugee Act 2006, article 1XVI (iv).
[193] LW Holborn, Refugees: a problem of our time, the work of the UNHCR 1951-1972, vol. 2, Scarecrow Press, Methuchen NJ, 1975, p. 1346.
[194] M Agier, 'Between war and city, p. 138.

As it is not explicitly prescribed in the 1951 Convention, refugee encampment policy in Kenya is in compliance with Kenya's non-integration policy. Jamal puts it this way:

> with refugees sequestered, concentrated, visible and presumably out of harm's way, camps represent a convergence of interests among host governments, international agencies and the refugees themselves. They are not ideal for anyone, but they help focus attention and provide a safety net… refugees understand that camps make them visible, and keep their plight, and the politics that underpin it, in the world's consciousness[195]

The refugee camp provides protection safeguards in the emergency phase of displacement in order to preserve the institution of asylum. However, the longer the period of encampment, the more likely it is that the refugee will enter an intractable life of limbo. As the refugee camp is internationally funded, it is being managed like a *de facto* international administration of territory due to the convergence of political interests. As Jamal put it, both the country of asylum and the refugee home country are implicated in this enforced reliance on external assistance; a convergence of interests. This donor driven politics of encampment has led to 'host fatigue'[196] as Kenya has on many occasions in the past threatened to close all refugee camps on its territory. Using Nettleton's anthropological insight, donor funded aid is equated to commodity exchange which places the recipient in a position of obligation whereby 'the assistance not yet repaid debases the man who accepted it, particularly if he did so without thought of return.'[197] This means that the aid provided has conditions attached to it which the refugee has the obligation to abide by in return. Essentially, states have ratified refugee treaties and passed on camp management to the UNHCR to run the camp. Where hybridity arrangement exists in which both the UNHCR and the state co-manage the camp, the former's role is often regarded as peripheral. Paradoxically, they have created an exclusive community who have to be disciplined, isolated, and restrained, and their movements restricted. The creation of refugees as a diasporic community has engendered a new identity of 'the otherness'. It is through the creation of the otherness that refugees do not fit within the nation-state. They have to be managed by domestic law aided by international humanitarian

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[195] A Jamal, 'Camps and freedom: long-term refugee situations in Africa', viewed 22 April 2018, <https://www.fmreview.org/african-displacement/jamal>.
[196] Ibid.
[197] S Nettleton, 'Running away with health: the urban marathon and the construction of 'charitable bodies', *Sage Journal*s, vol. 10, no. 4, 2006, pp. 441-460.

agencies whose administration of the camp resembles colonial administration where the refugees are regular head-counted to justify ongoing funding. This supports Bauman's view that refugees as 'waste products of modernity'[198] are being managed through the capitalism which creates and discards them.

In 'Orientalism', Said observed that Britain often tried to justify their ill intentions by producing the 'other'.[199] Conceptually, orientalism allows the colonisers the mentality of constructing the colonised as an inferior race. They needed to be controlled, contained, dispossessed, detained. Orientalism not only became part of Western culture, it fits the imperialism agenda of control and superiority predicated on the difference of culture. Said was distressed by the conditions brought about in the Third World by colonialism, its hegemonic culture, and the institutions that continued to support it. For example, the West founded both the UNHCR and the 1951 Convention in the heydays of colonialism, but they are not willing to acknowledge that this institution has outlived its usefulness. This institution is an extension of the West's continued influence beyond the colonial period of acquisition and conquest. Said tells us to look at the historical past and develop a new way of thinking and of looking at the West and its institutions differently. As such, colonialism should not be regarded as a thing of the past as it has rolled over into the present, but in a different form.

Apart from Harrell-Bond, Guglielmo Verdirame and Merrill Smith with their "Anti-warehousing campaign",[200] human rights advocates rarely oppose encampment policy as a matter of principle. For example, Karen Jacobsen views camps as 'both a security and an effective material assistance to refugees', thereby not only assuring the most basic of rights – the right to life – but also facilitating the monitoring of protection issues.[201] Jamal made a similar argument that 'camps strengthen asylum by encouraging hosts to accept the presence of refugees'.[202] Critics of encampment policy such as Amnesty International, expressed a concern that Kenya's encampment policy does not only involve direct breaches of basic human rights and

[198] Bauman, Modernity and the Holocaust, p. 45.
[199] E Said, *Orientalism*, Penguin books, London, 2003, p. 205.
[200] M Smith, 'Warehousing refugees: a denial of rights, a waste humanity, *World Refugee Survey'*, viewed 11 May 2017, <https://refugees.org/wp-content/uploads/2015/12/Warehousing-Refugees-Campaign-Materials.pdf>.
[201] K Jacobsen, 'Refugees' environmental impact: the effect of patterns of settlement', *Journal of Refugee Studies*, vol. 10, no. 1, 1997, p. 22.
[202] Jamal, 'Camps and freedoms, p. 4.

refugee rights, but also creates situations in which other rights are more likely to be endangered.[203] Where there are no durable solutions for a protracted refugee population, allowing the refugees the freedom of movement is desirable and will fulfil a host of other rights as shrined in Article 12 of the International Covenant on Civil and Political Rights.[204] The biggest problem facing the refugees in Africa is not lack of law, but the law's failure to adequately protect them. More importantly, for refugees who have been in a protracted situation for over twenty years, such as in Kakuma camp, prolonged encampment policy is indefensible. The virtually intractable containment of refugees is not transitory as it has dramatically changed every aspect of refugee policy in Kenya. By March 2020, the UNHCR figures indicate that of the 492,802 refugees in Kenya, 84 per cent legally reside in the camp.[205] Children account for 53 per cent of this population.[206] This state of limbo has now extended to over 30 years, with fourth generation refugees being born in this camp. As the domestic law ushered in the current encampment policy, this change completely altered the refugee landscape in Kenya as its legal framework is replete with exclusion and cessation clauses. Due to the refugees' legal subjectivity and their rights to residence, including the standards applicable in a refugee camp, their protection standard should be much wider and higher than the provision of basic needs. This legal subjectivity is shrouded with symbolic violence. Although the standard of protection of refugees in Kakuma camp is considered to have been met as enshrined in the 1951 Convention, certain rights, such as the rights to movement and employment, are very limited within the confines of the camp. The ongoing containment of refugees in Kenya is structured by law, but devoid of law. As argued above, Kenya's refugee laws, immigration laws, terrorism laws and citizenship laws are all connected and predicated on colonial/imperial relations in Kenya.

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[203] Amnesty International, 'Refugees - human rights have no borders', viewed 11 June 218, 1997, <https://www.amnesty.org/en/documents/ACT34/003/1997/en/>.
[204] International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 19 December 1966, viewed 28 May 2019, <https://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch_IV_04.pdf>.
[205] UNHCR Kenya, 'Figures at a glance', viewed 26 March 2020, < https://www.unhcr.org/ke/figures-at-a-glance>.
[206] A Akingbade, 'These five African countries have the highest number of children refugees in the world', viewed 14 August 2018, <http://venturesafrica.com/these-5-african-countries-have-the-highest-number-of-child-refugees-in-the-world/undefined>.

3.5 The rights to citizenship

This section argues for a transnational concept of citizenship and contends that citizenship should not be regarded simply as a collection of laws, but a collection of values to which refugees could contribute significantly in light of the AU Agenda 2063. I deploy Nando Sigona's concept of *campzenship* in order to problematise the legal exclusion in Kenya's citizenship law which designates the refugees as camp-citizens or *campzens* and the camp as their rightful residence.[207] The same legislation also makes it very clear that this nation does not naturalise refugees.

The current Kenyan citizenship legislation has its origins in pre-independence British colonial citizenship law. Over the years, the legislation was modified several times, but still retained its Britishness. Across the continent of Africa, the British colonies were part of the 'crown dominion'.[208] Citizenship under colonial rule was governed by British Common Law. Most Commonwealth countries, including Kenya at independence, had their constitutions drafted according to the standard 'Lancaster House'.[209] The newly formed states adopted three common rules to citizenship: citizenship by birth, by registration or by naturalisation. In adopting a similar provision, the Kenya Constitution 2010 section 14(1) states that 'a person is a citizen by birth if on the person's birth, whether or not the person was born in Kenya, if either the mother of father is a citizen'.[210] This provision seems to provide a pathway for *campzens'* children born to Kenyan parents, the right to acquire Kenyan citizenship. However, under section V of the Kenyan Constitution 2010, the Principal Registrar may demand additional proof of 'other particulars'[211] as may be prescribed. The additional requirements are discretionary and have been the basis for refusal to grant citizenship to *campzens*. Even though *campzens* are born in Kenya and have met the residency requirement under the Kenyan Constitution, to date, no single refugee has been granted Kenyan citizenship because they are legally excluded.

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[207] Kenya Citizenship and Immigration Act 2011, viewed 29 February 2018, <https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/citizenship_immigration2011.pdf>.
[208] B Manby, *Citizenship laws in Africa, a comparative study*, *Muse project justice initiative*, African Books Collective, Nairobi 2012, p. 14.
[209] Ibid.
[210] Constitution of Kenya 2010, section 14(1), viewed 18 January 2017, <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010>.
[211] Constitution of Kenya 1963, section 93, viewed 16 July 2017, <kenyalaw.org/kl/fileadmin/pdfdownloads/1963_Constitution.pdf>.

Campzenship as a theoretical concept was first coined by Sigona drawing on his experience of the Roma's nomadic camps in Italy.[212] Given its relevance, I use the term *campzenship* to show the physical boundary between refugees and Kenyan citizens to signify the refugees' prolonged territorial presence, with a fourth generation born in Kenya. The term also delineates an internal status and defines the legal dimension of statelessness or alienage. More significantly, as the exclusion of *campzens* from Kenyan citizenship is legally permanent, millions of refugees across Africa could be identified as *campzens*. The flipside is that although the principle of *non-refoulement* is incorporated into the Kenya Refugee Act 2006, this does not prevent *campzens* from being *refouled*. This indicates that the only means of exiting this new status is through *refoulement*. *Refoulement*, which is an extension of the sovereign right to exclude, has become the norm rather than the exception in Kenya. The concept of exclusion in the Kenyan refugee law emerged in the context of the current securitisation practice where the dominant argument for *refoulement* is based on national security concerns. Due to their prolonged territorial presence, *campzens* should be entitled to immunity from *refoulement*, especially where the receiving nation is unwilling to accept their forceful return. Due to their prolonged territorial presence, an argument could be made that *campzens* should acquire permanent residency status with all its derivative rights, including the rights to work and free movement as stipulated in the AU Agenda 2063. Despite this dark reality, there has not been any critical scholarship in this area. Although the argument for border closure is legitimate in light of modern state system, the presumptive right of movement, especially for refugees fleeing persecution, should be equally protected.

Citizenship has historically been negatively conceptualised as a normative project of exclusion of 'others': aliens, refugees, strangers, immigrants, etc.[213] While the concept of citizenship was established during the Westphalian era, its specific provisions and acquisition are governed by domestic legislation, which set the parameters for inclusion and exclusion. For example, the Kenya Immigration and Citizenship Act (KCIA) 2011 provides four pathways for Kenyan citizenship, namely: descent, birth, registration or naturalisation.[214] The latter three categories are

[212] N Sigona, '*Campzenship*: reimaging the camp as a social and political space', *Citizenship Studies,* vol. 9, no. 1, 2014, p. 2.
[213] Ibid.
[214] Ibid.

designated to persons born outside Kenya. This definition excludes *campzens* who are instead described by their removability. The KCIA Article 33(1) (s) defines *campzens* as 'illegal' upon entry into Kenya. It also establishes measures for enforcing this cosmetic illegality. Even though *campzens* have met residency requirements due to the longevity of their residency in Kenya which extends over 20 years, there is no legal provision for them to be conferred Kenyan citizenship.

It is in this context that Bridget Anderson in her analogy, 'juxtaposes migrancy with vagrancy'.[215] Her analogy focuses mainly on the UK context where it is citizenship that cements the concept of 'Britishness'. Paradoxically, the UK government introduced a language test as a condition for acquiring British citizenship.[216] Britishness is a quality that disqualifies other people from becoming British. This is despite being a multicultural nation shaped over centuries by waves of immigrants. The concept of Britishness provokes a range of attitudes of difference towards other new immigrants. This disadvantages people from non-English backgrounds who must satisfy the naturalisation requirements. Anderson also designates migration as a *'*crime of status',[217] which extends to the control of *campzens* who are considered a security threat to the nation state. Her analogy aligns with the Kenyan situation where *campzens* are criminalised under the KCIA.

The KCIA effectively implements chapter three of the Kenya Constitution 2010 which was promulgated on 30 August 2011. It repealed the Kenya Citizenship Act CAP 170, Immigration Act CAP 172, and Alien Restriction Act CAP 173. These amendments are in line with Article 34 of the 1951 Convention which requires *'*state parties take measures to facilitate the naturalisation of refugees'.[218] Further, the regional treaty, the 1969 Convention, is silent on the issue of naturalisation, but its requirement in Article 11(1) that 'countries of asylum use their best endeavour to secure the settlement of refugees who are unable to return to their country of origin',[219] could be interpreted to have the same effect. Nonetheless, the process through which *campzens* acquire Kenyan citizenship is riddled with complexities.

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[215] B Anderson, 'Us and them?: The dangerous politics of immigration', viewed 11 January 2019, <https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199691593.001.0001/acprof-9780199691593>.
[216] Ibid.
[217] Ibid.
[218] UNHCR, '1951 Convention article 34', viewed 22 November 2018, <https://www.unhcr.org/5d9ed32b4>.
[219] UNHCR, '1969 Convention, article 11(1)', viewed 29 June 2018, <https://www.refworld.org/pdfid/50fd3edb2.pdf>.

Kenya does not grant citizenship to refugees. The KCIA recognises three pathways through which an alien could acquire Kenyan citizenship:

> Section 3(7) citizenship by birth - a person becomes a Kenyan citizen by birth if on the date of that person's birth, regardless of the place of birth, the mother or the father is a Kenyan.
> Section 3(11) citizenship by marriage - a person who has been married to a citizen of Kenya for at least a period of seven years, shall be entitled on application to be registered as a citizen of Kenya.
> Section 3(13) (1) citizenship by registration - a person who has been lawfully resident in Kenya for a continuous period of at least seven years, and who satisfies the conditions prescribed by an Act of Parliament, may apply to be registered as a citizen.[220]

The KCIA sections 3(7), 3(11) and 3(13)(1) are presumed to provide refugees pathways to Kenyan citizenship through marriage and registration. However, the Kenya Constitution 2010 takes precedence over other laws and provides citizenship based on the doctrine of *jus sanguinis*. This doctrine stipulates that a person's citizenship is based on the citizenship of their parents. Of all the refugee children born in Kenya since Kakuma camp was established about 30 years ago, none have ever been naturalised. This means that refugee children born in Kenya adopt the citizenship of their refugee parents. Furthermore, there is no historical evidence that a refugee who was married to a Kenyan citizen acquired citizenship through marriage. For this reason, *campzens* should benefit from the universalistic citizenship which by default, is taken to extend civil rights and entitlements to long term resident non-citizens. The refusal to grant citizenship to campzens is based on the theory that migration has led to pluralisation of allegiances and commitment to both country of origin and country of refuge.[221] However, this theory is problematic because most refugees flee their country of origin as the result of losing their citizenship rights. *Campzens'* long term residence in the camp is testament to this fact. The longer the length of refuge, the lesser the possibility of allegiance to the

[220] Kenya Immigration and Citizenship Act 2011, section 3, viewed 29 February 2018, <https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/citizenship_immigration2011.pdf>.
[221] S Benhabib, 'Twilight of sovereignty or the emergence of cosmopolitan norms? Rethinking citizenship in volatile times', *Citizenship Studies*, vol. 11, no.1, 2007, pp. 19-36.

refugees' country of origin. By default, refugees are people who have lost their rights to citizenship and it is desirable that they acquire the rights to residency.

3.5.1 Theories of citizenship

Citizenship is conceptualised in a number of ways, but framed within the national boundaries of the state. In the 1920s, John Rawls theorised that citizenship is *'*a relation of citizens with the basic structure of society, a structure we enter only by birth and exit only by death'.[222] About 50 years thereafter, Thomas Humphrey Marshall theorised citizenship as a set of rights that has been fought for and gained.[223] Kenyan citizenship has traditionally been conceptualised in a similar fashion. Those present in Kenya before or on the date of independence in 1963 and their descendants automatically acquired Kenyan citizenship. Such a customary pathway to citizenship which is bound to the nation-state is problematic and has made Kenya wary of granting citizenship to refugees. In contrast, Christopher Wellman's cosmopolitan theory argues for a complete prohibition to border entry to non-citizens, including refugees. He argues that refugees could be better helped at home through aid rather than extending citizenship to them in another territory.[224] As states have the prerogative rights to grant or deny entry to its territory, Wellman's argument is flawed, firstly because refugees do not leave their country of origin looking for aid, rather for safety having lost the protection of their own government. Second, his argument for closed borders loses legitimacy if its benefit excludes refugees who are one of the most vulnerable population groups in society. In this regard, his theory of citizenship which applies only to people within a jurisdiction, defines the symbolic state violence on refugees. Rainer Baubock critiqued a state-based theory of citizenship, arguing that 'the new challenge for political theory is to go beyond a narrow state-centred approach'[225] by embracing a system of rights that cuts across international borders. The denationalisation of citizenship very much aligns with the ethos of my thesis: a view for a single citizenship for all Africans.

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[222] J Rawls, 'Political liberalism', viewed 2 January 2020, <https://cup.columbia.edu/book/rawlss-political-liberalism/9780231149716>.
[223] TH Marshal, *Citizenship and social class, citizenship and social development*, Doubleday and Co, New York, 1964, pp. 197-230.
[224] CH Wellman, 'Immigration and freedom of association', *Ethics*, vol. 19, no. 1, 2008, pp. 109-141.
[225] R Baubock, 'Temporary migrants, partial citizenship and hyper-migration', viewed 17 January 2020, <https://cadmus.eui.eu/bitstream/handle/1814/19315/CRISPP-tempmig-preprint.pdf?sequence=2>.

Citizenship pathways for refugees is still problematic across Africa. For example, Uganda's refugee law is regarded as liberally progressive. This country amended its 1960 Aliens Act by enacting a new Refugee Act in 2006.[226] Although the new legislation has a provision for the naturalisation of refugees, it still maintains an exclusion period of residence for the purposes of naturalisation for up to 20 years.[227] In Kenya, where refugee encampment policy has been institutionalised, refugees have no pathways to citizenship regardless of their period of residency. Considered sojourns, *campzens* live a segregated lifestyle, invisible to most Kenyans unless they make their way to urban centres, which is legally out of bounds. Although Kenya has been hosting *campzens* for over three decades, this country is not an immigration nation. As such, the naturalisation of *campzens* who are linguistically, culturally and ethnically different, is politically untenable. As the Kenyan legislation demonstrates, ***campzens'*** rightful place of residence is the camp.

3.5.2 *Campzenship's* legal liminality

Given that ***campzens'*** cultural and historical identities are different, legally they have no rights to Kenyan citizenship. Conceptually, granting citizenship to *campzens* may be seen as providing them the rights to freedom of movement and access to Kenya's scarce resources. This allocative function is one of the stumbling blocks for granting citizenship to *campzens*. Borrowing from Jacques Rousseau's theory of social contract,[228] citizenship as an institution becomes a formal expression of economic and socio-political rights of an individual. This also aligns with David Miller's 'quasi contract'[229] theory of citizenship, wherein refugees are admitted on certain grounds. However, Miller's contractual principle applies to voluntary migrants whose visas are subject to periodic reviews. In contrast, refugee status is not renewable. This formal closure also relates to the concept of citizenship as a tool for inclusion and exclusion where the contestation for belonging is based on cultural and historical identity. This contradictory illegal ambiguity highlights the fact that the refugees will remain neither legal nor illegal. This inherent 'legal illegality' renders the refugees outside, yet inside the law. It also affirms ***campzens'*** legal liminality as a new identity. The daily realities

[226] Uganda Control Aliens Act 1960, article 18, viewed 11 July 2018, <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=544e48d84>.
[227] Ibid.
[228] J Rousseau, *The basic political writing*, 2nd edn, Hackett Publication Co., Indianapolis, 1962, pp. 1-312.
[229] D Miller, *The case for limits*, in AJ Cohen, & CH Wellman (eds), *contemporary debates in applied ethics*, Blackwell Publishing, UK, 2005, pp. 1-343.

of this illegality embody anxiety, fear, physical and emotional trauma, and the constant threats of *refoulement*. The textual analysis draws on the contradiction that constitutes this illegality with its coherent violence which functions to deny the refugees their rightful entitlements.

Encampment and refugee illegality are clearly correlated, and this ensures that camp residents are excluded from mainstream society. This exclusion is premised on the theory that refugees are subjects of another state and do not have the rights to citizenship in their host country. This norm is also embedded in international refugee law where refugees are expected to hold on to the citizenship of their country of origin and even pass it on to their descendants. However, Joseph Carens argued against this theory from the perspective of global justice. This is because it negates the libertarian theory of citizenship,[230] which promotes a set of universally recognised rights, such as the rights of political participation that long-term resident non-citizens are entitled to. If *campzens'* chances of repatriation are not realistic, then there is a case for them to get full citizenship upon meeting certain qualification thresholds. In theory, long term residency ensures that social membership is bonded, and the conferring of citizenship becomes the formalisation of that membership. It could also be legitimately argued that the requirements for citizenship become illegitimate after the initial residency period (seven years as per the Kenya legislation) has lapsed, if this requirement is not dropped altogether.

Kenyan citizens are also defined restrictively as a community of descendants. As such, *campzens* are only allowed temporary residence in Kenya which is conditional on them returning to their country of origin when it is safe to do so. This conditional form of asylum is summed up by Jamal Arafat:

> The refugees in Kakuma enjoy freedom from *refoulement* and a certain level of assistance, which is an assurance that Kenya respects its international obligation towards the refugees. However, the conditions of their stay are restrictive that once what enable refugees in flight to enjoy protection now constrain them, and curtails their ability to live in dignity and realise their full human capacity…[231]

[230] C Joseph, *Migration and morality: a liberal egalitarian perspective*, in B Barry, & R Goodwin (eds), *free movement: ethical issues on the transnational migration of people and money*, University of Pennsylvania Press, USA 1992, pp. 25-47.
[231] A Jamal, 'Minimum standards and essential needs in protracted refugee situations', a review of the UNHCR programs in Kenya, evaluation and policy analysis unit, UNHCR, Geneva, 2000, p. 7.

This indicates that encampment is enforced within the framework of securitisation practice as an effect of the ongoing colonial status of the law. Although *campzens* are spared the risk of *refoulement*, their civil liberty is curtailed and constrained. This exclusion policy is enforced by the power of the law. Despite being outside the law, this exclusion becomes a legal technique of isolation, yet the 1951 Convention which is revered as the cornerstone for refugee protection, presents itself as impartial, neutral and non-violent. C*ampzenship*, like citizenship, is a juridical status within the Kenya refugee legislation. Corporate identities should outweigh ethnic identity which is the basis for Kenyan citizenship. Put differently, *campzens* have two statuses: legal or illegal when in and out of the camp. This pre-emptive legal illegality premised on violence, indicates that Kenya's encampment policy is predicated on colonial order. As this legal illegality defines the function of law, it is linked to Kenya's colonial past and present.

In postcolonial Kenya, there were still no functional institutions with constitutional powers to facilitate the acquisition of citizenship. This created discretionary powers where junior staff could decide the critical right of a person to citizenship. However, in 2010 and for the first time, both the Kenyan Constitution 2010 and the Kenya Citizenship and Immigration Act 2011 were amended with legal provisions and policies for refugees to be naturalised as Kenyan citizens, based on birth, marriage or lawful residence. Technically, this legislation allows *campzens* to apply for Kenyan citizenship after meeting certain thresholds, including a demonstrable knowledge of Kiswahili language. Nonetheless, *campzens* who have applied to become citizens in previous years are yet to hear the outcome of their applications.[232] To date, none of the applications has been successful because Kenya does not grant citizenship to refugees. Kenya is a nation whose citizenship foundation was conceived through birth and ethnic belonging. It is unthinkable that the refugees will be naturalised.

3.5.3 Ethnicity and citizenship

As in most African countries, Kenyan citizenship law is heavily linked to the history of its 'Indigenous community' present in Kenya on or prior to the date of independence. This became the threshold or the cut off period for inclusion or exclusion from citizenship. In order to understand the historical complexity of ethnicity as an

[232] UNHCR, 'Comprehensive refugee programming for solutions', viewed 11 November 2016, <https://www.unhcr.org/ke/wp-content/uploads/sites/2/2016/05/Kenya-Comprehensive-Refugee-Programme-document-KCRP-20161.pdf>.

impediment to Kenyan citizenship, an analysis of this issue could shed more light. Ethnicity plays a significant role in the socio-political life of Kenya. Felix Ngunzo Kiolo conceptualised ethnicity in relation to a culture where humans identify themselves as culturally and linguistically different from others.[233] The Kenyan anthropologist Karuiki Nyukuri, further observed that ethnicity as an inclusive concept, defines groups of people based on 'colour, race, language, appearance, and religion'.[234] However, what is missing from these two theorists' arguments are the key characteristics of ethnicity. Ethnicity is acquired hereditarily through membership in an ethnic group or by virtue of being born into a community. For example, if one's ancestors are French, they inherit the French ancestral bloodline.

What is known as the nation of Kenya today is a political construct and a community made up of tribal groups, which predates the British colonial rule. In the pre-colonial period, Kenya was a borderless territory and people of various cultural backgrounds interacted freely through pastoralism, trade and intermarriages. Like most African nations, Kenya has over 45 distinct ethnic communities, including people of Indian descent many of whom have only recently been recognised as citizens.[235] This include ethnic communities such as the Badala in Mombasa, who migrated from India over 800 years ago, the Baluchis who migrated from South Asia in the 16th century,[236] the Swahilis who have lived in Kenya for over a century and whose language has become the national language of modern Kenya,[237] and the Nubian tribe,[238] believed to have migrated to Kenya just before independence. These ethnic communities have only recently been granted Kenyan citizenship. In essence, post-independence Kenya was formed based on ethno-geographical identities and ethnicity or *jus sanguinis* doctrine.

Bettina Ongweno and Aloo Obura questioned the application of *jus sanguinis* doctrine as a means of acquiring Kenyan citizenship. They argued that it ignores the

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233 FN Kiolo, 'Ethnicity: the legacy of Kenyan politics from colonial to post-colonial era', *Maseno University Journal*, vol. 1, Maseno University Press, Kisumu, 2012, pp. 1-222.
234 BK Nyukuri, 'The impact of past and potential ethnic conflicts on Kenyans stability and development', a paper prepared for USAID conference on conflict resolution in Greater Horn of Africa, 1997, p. 5.
235 H Charles, *Kenya: a history since independence*, Tauris & Co. Ltd, Croydon, 2012, pp. 1-197.
236 Y Ghai, & JPW McAuslan, *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present*, Oxford University Press, Nairobi, 1970, pp. 1-536.
237 K Karuiki, 'The land question in Kenya: struggles, accumulation and changing politics', viewed 2 January 2016, <http://erepository.uonbi.ac.ke/handle/11295/46104>.
238 L Bigham, 'Kenyan's Nubian minority pushes forward for equal treatment', *Open Society Foundations*, Bambazuka News, 15 May 2015.

rights of people in Kenya whose ancestors predate this rule, but could not transfer citizenship to their descendants.[239] Mwai Kibaki, then leader of the opposition party who became the third President of Kenya, also questioned the application of *jus sanguinis* doctrine:

> …Balala is a Kenyan citizen whose grandfather was also a Kenyan before independence, and those of us who were around at independence know that if you were born in Kenya, you became a Kenya citizen on 12th December 1963…That was the first constitution of this nation and that is how all of us became citizens of Kenya. It is a fact.[240]

Kibaki's sentiment is being echoed by thousands of people who have been excluded from the Kenyan citizenship. This means many people whose parents were born in Kenya on or before independence were excluded from acquiring citizenship. For context, Balala's ancestors migrated from Yemen to Kenya before independence. After independence, several ethnicities that immigrated to this country prior to independence were considered non-Kenyans and subsequently excluded from Kenyan citizenship. As Kibaki alluded to, this system of citizenship based on a colonial regime of power and control, defined who was a Kenyan and who was not. Since Kibaki made this comment over a decade ago, Kenya still has a significantly large number of stateless persons, signifying that refugees would be unassimilable. As Kenyan citizenship is constructed based on indigeneity and ethnic cantonment, *campzens* are unlikely to acquire Kenyan citizenship. Just as German citizenship was originally *volk*-centred, Kenya's citizenship has historically been ethno-centric. It is for this reason that the space for ***campzens'*** participation in Kenyan society has remained restricted and inaccessible.

There is no international institution that governs citizenship law, as this is the exclusive prerogative of the state. In Western democracies like the US, Canada and Australia, where citizenship and nationhood are defined by a universal formula, the control of immigration and naturalisation policy is selective and conditional, reflecting their history and contemporary society. Looking at Australia post-1901, its exclusionary/inclusionary policy for determining who became a citizen, was a

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[239] B Ongweno & A, Obura, 'Irony of citizenship: national belonging, and the constitutions in postcolonial African state', *Law and society Review*, vol. 15, issue 1, 2019, p. 1.
[240] M Kibaki, 'Speech by Mwai Kibaki, leader of opposition party in Kenya', Kenya National Assembly: Parliamentary debates, 8 December 1994.

demonstration of the alienation of the 'other' based on the link to British ancestry. This exclusionary policy remains the hallmark of Australia's current citizenship law. As Henry Reynolds pointed out:

> Australia was able to assert its independence not by hauling down the Union Jack, but by closely controlling who and what could enter the country through tariffs, immigration controls, customs and quarantine regulations…[241]

Notably, Australian immigration law is predicated on the experience of colonialism. By 'hauling down the union jack', Reynold was referring to the day Australia was colonised through racial violence. 26 January 1788 was the date when the first fleet of British ships docked at Port Jackson in New South Wales.[242] It was this illegal invasion and dispossession that continue to embody the denial of Indigenous sovereignty and land. From the time the Union Jack was hauled down-under, white settlers claimed to be the original people of this nation. Since Australia's claimed independence, this claim positions the first people as non-existing or already assimilated at the time. The sovereign claim was sealed with military style parade and ceremonies as a sign of the dispossession.[243] This sovereign act was inscribed in law (Mabo 2),[244] indicating that Australia was occupied through violence. This marked the beginning of the nation of Australia and its laws. Although Indigenous Australians are now part of Australia's political community, Motha asserts that this nation is still in an 'age frozen in racial discrimination'[245] whereas Perera dubs this raciality a 'lunatic fringe'.[246] Australia prides itself as being non-discriminatory yet it is more receptive to migrants from Europe than those from Asia and other parts of the world. [247] Although the racial aspect of Australia's immigration policy officially ended in the 1970s, this nation continues to define its borders against refugees or 'external others.'[248] This policy of exclusion dates back to the founding of Australia, predicated on British law. Although Australia prides itself as a nation of immigrants, its domestic law relating to refugees is still being applied inconsistently, demonstrating colonial

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[241] H Reynolds, *Part of a continent for something less than a nation?, the limits of Australian sovereignty, our patch: enacting Australian sovereignty post-2001*, Network Books, Perth, 2007, p. 66.
[242] Ibid.
[243] Ibid.
[244] S Motha, 'The sovereign event in a nation's law', in *Law and Critique*, vol. 12, 2002, pp. 331-338.
[245] Ibid.
[246] S Perera, 'Race, terror, Sydney December 2005', *Borderlands*, vol. 5, issue, 1, 2005.
[247] A Manzo, *Creating boundaries: the politics of race and nation*, Boulder, Lynne Rienner, 1996, p. 23.
[248] Ibid.

continuity. By and large, both Australia and Kenya, former colonies, are shaped by colonial laws that inform their treatment of refugees to date.

3.6 Kenya security laws

Since 1998, Kenya witnessed a series of terrorist attacks. Kenya's decision to send troops to Somalia as part of the African Union Mission to fight *Al Shabaab* the Somali-based terrorist group, triggered this response. When *Al Shabaab* warned Kenya of revenge attacks, this warning was ignored, resulting in numerous terrorist attacks on Kenyan soil. The incidences that sparked the security laws amendment in Kenya were two terrorist attacks in the township of Mandera along the Kenya-Somalia border on 22 November 2014 and 2 December 2014, in which 64 people were killed.[249] Subsequently, this prompted President Uhuru Kenyatta to constitute a body consisting of the Executive and Legislative Assembly to oversee the amendment of the country's security laws.[250] Prior to passing the bill into law, the Kenyan government had ordered for the forceful relocation of all *campzens* from urban centres to the camp. The directive was followed by *Operation Usalama Watch* which targeted refugees and asylum seekers for potential deportation.[251] It is such a directive that moves issues from normal politics into the state of exception. This new measure broadened the powers of the state security agencies, placed it beyond judicial oversight, and imposed restrictions on *campzens'* right to the freedom of movement. Such an exceptional measure reflects Schmittian's formulation of the theory of sovereignty, which requires the suspension of normal politics.[252] This state-centred approach to security elevates the interests of the state above that of the individual. It then grants the sovereign a superior position to deal with the matter in an exceptional manner.

After signing the security bill into law, President Kenyatta issued a statement defending his government's position stating that 'the law will improve Kenya's capacity to deter and disrupt any threats to national security'.[253] Subsequently, Kenya

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[249] C Stewart, 'Kenya bus attack: Al-Shabaab gunmen behead and shoot 36 non-Muslim labourers at Mandera quarry', *Independent Newspaper*, 2 December 2014, p. 5.
[250] Ibid.
[251] Human Rights Watch, 'Kenya: halt crackdown on Somalis', viewed 16 September 2019, <https://www.hrw.org/news/2014/04/11/kenya-halt-crackdown-somalis>.
[252] C Schmitt, *The nomos of the earth: in the International law of the Jus Publicum European*, Telos, New York, 2003, pp. 1-372.
[253] U Kenyatta, 'An address to the nation after signing into law the Security Amendment Act 2014', viewed 11 November 2017, <http://www.president.go.ke/briefing-room/>.

intensified its counterterrorism fight in Somalia. In retaliation, *Al Shabaab* attacked Garissa University 2 April 2015 killing 148 students. In the aftermath of this attack, President Kenyatta issued another statement in which he linked this attack to Dadaab refugee camp which he said was a breeding ground for *Al Shabaab* terrorists:

> For more than two decades, more than 400,000 Somalis have been hosted at the Dadaab refugee complex. During this time, the Dadaab camp has been operating on a fraction of the resources required … Dadaab has become a protracted situation characterised by … insecurity, radicalisation, criminality, and allows terrorists to exploit it for their operational efforts. It is for these reasons that the Kenya government decided in May last year to close down Dadaab refugee complex.[254]

Kenyatta's comment places the sovereignty debate under critical spotlight. His reference to 'closing the refugee camp' not only indicates the sovereign the rights to exclude, but also that both sovereignty and law are constitutively exclusive. Kenyatta's speech played a critical role in shutting down critiques as he framed refugee issues using terms such as 'insecurity, radicalisation, criminality…' Security threats do not exist independently from the political discourse that construct them. Defining the refugees in security terms removes the civilian character of the camp. This characterisation also portrays the relationship between the refugees and the state as enemy-combatant. Kenyatta's invocation of security and the use of threats to close the camp is a demonstration of the power of the sovereign which he represents. His decision to close the camp was sanctioned by the very law that established the camp. Particularly, closing the camp could have resulted in *refoulement* which by default, is within the sovereign rights to expel non-citizens. In other words, both sovereignty and law operate as one singular entity. When sovereignty and law are presented as one entity, they not only invoke inviolable violence, but also seal themselves from critique.[255] As Kenyatta's speech-act demonstrates, the sovereign not only sits outside of the law, it operates above the law. Although the terrorist attack in Kenya was unjustifiable, the main effect of the

[254] U Kenyatta, 'Speech by President Uhuru Kenyatta', viewed 16 September 2019, <http://www.president.go.ke/2017/03/25/speech-by-his-excellency-hon-uhuru-kenyatta-c-g-h-president-of-the-republic-of-kenya-and-commander-in-chief-of-the-defence-forces-extra-ordinary-summit-of-the-igad-assembly-of-heads-of-state-and/>.
[255] Giannacopoulos, 'The non-justiciability of justice, p. 7.

speech-act of uttering security, particularly coming from the president, has the potential to fend off public scrutiny of the government.

Wæver theorised securitisation as 'something is a security problem when the political elites declare it so'[256] in order to gain control over it and justify the use of measures that would, in the absence of a threat to national security, be unacceptable.[257] Essentially, a problem becomes securitised, escalated above political process, and transformed into a panic politics.[258] As Kenyatta alluded to, a security utterance seeks to re-order society and preserve power relations. It also instils fear within a population and in this case by describing the refugees as the 'unwanted other' within Kenya's political space. As a former colony, Kenya's sovereignty and law are derived from its colonial past. This sovereignty is predicated on what it excludes as the law sees fit. For the past few decades, Kenya's invocation of postcolonial law as a neutral object plays a critical part in neutralising the law's violence.[259] The ongoing security situation prompted the Kenyan government to threaten to trigger the cessation of refugee status and closing all the refugee camps.

3.7 Cessation of refugee status

The 'cessation clauses' in Article 1 C (1)-(6) of the 1951 Convention, and Article 4 (e) of the 1969 Convention spell out the conditions under which refugee status ceases to apply. Kenya incorporated the cessation clause in its Kenya Citizenship and Immigration Act 2012. The invocation of the cessation clause is premised on the consideration that international protection to refugees should not be granted where it is no longer necessary or justified.[260] In other words, the primary consideration for invoking the cessation clause is when a 'change in circumstance' takes place in the refugee's country of origin that ends the fear of persecution. Despite the fact that the cessation clause has been revoked in Africa on a regular basis since 1973, there hasn't been any sustained academic study to establish the legality of its application in the context of durable solutions to refugee issues.

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[256] O Wæver, *Securitisation and desecuritisation on security,* RD Lipschutz (ed), Columbia University Press, 1995, p. 5.
[257] Ibid.
[258] Ibid.
[259] Giannacopoulos, The non-justiciability of justice, p. 35.
[260] Y Siddiqui, *Reviewing the application of the cessation clause of the 1951 Convention relating to the status of refugees in Africa,* working paper no. 76, Refugee Studies Centre, Oxford Department of International Development, University of Oxford, 2011, p. 9.

In 2014 over a period of one month, the Kenya Executive and Legislative Assembly amended 21 pieces of legislation with a view to invoke the cessation clause. Of relevance to *campzens* are the amendments to some key provisions of Refugee Act 2006, Kenya Security Act 2012 and Kenya Citizenship and Immigration Act 2012 as reflected in clauses 45-48 of the Security Law Act 2014 (SLA). The amendments made it easy to invoke the 'cessation clause' to prematurely terminate refugee status. One of the most controversial amendments of the Kenyan SLA 2014, was the capping of the number of refugees and asylum seekers permitted to live in Kenya to one hundred and fifty thousand persons. Section 48 of the SLA states:

(1) The number of refugees and asylum seekers permitted to live in Kenya shall not exceed one hundred and fifty thousand (150 000) persons.
(2) The National Assembly shall vary the number of refugees or asylum seekers permitted to stay in Kenya.
(3) Where the National Assembly varies the number of refugees or asylum seekers in Kenya, such variation shall be applicable for a period not exceeding six months only.
(4) The National Assembly shall review the period of variation for a further six months.[261]

These provisions raise several legal issues with regards to the protection of refugees in Kenya which warrants some critical examination. There are about half a million refugees and asylum seekers in Kenya. If their numbers were to be capped to 150,000 persons as stipulated in the SLA, it will be through the invocation of the cessation clause which terminates refugee status. To date, the use of the cessation clause has become 'a paucity of contemporary state practice …' [262] If Kenya is to be successful in capping the number of refugees on its territory, it must be through *refoulement*. In light of the increasingly globalised polarisation and politicisation of asylum, mass *refoulement* would set a bad precedent to other refugee host nations in the continent of Africa and globally.

The cessation clause has been invoked only four times in the entire continent of Africa for refugees from: Sierra Leone in 2008, Angola and Liberia in 2012, and Rwanda in 2013.[263] That speaks volumes about how complex it is to implement the cessation clause in the African continent. In addition, countries that have invoked the

[261] Security Amendment Act 2014, 'The security laws (amendment) Acts, 2014, Article 48', viewed 11 May 2019, <http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2014/SecurityLaws_Amendment_Act_2014.pd>.
[262] J Fitzpatrick, & S Botman, 'Current issues in cessation of protection under Article 1C of the 1951 Convention and Article 1.4 of the 1969 Convention', University of Washington, 2001, p. 24.
[263] B Manby, 'Citizenship law in Africa, a comparative study', viewed 27 May 2015, <https://muse.jhu.edu/chapter/1760686>.

cessation clause were not successful in implementing its provision as those refugees for whom return to country of origin was not safe and chose not to be repatriated, ended up becoming stateless. It is significant to note that Kenya's renewed interest in the cessation clause and its attempt to put a cap on the number of *campzens* will spark a huge controversy over the asylum debate in Africa and globally. This is because the invocation of the cessation clause is often shrouded with political dilemma, especially for the refugees who are either unwilling or unable to return home and become stateless. Being one of the largest refugee host nations in Africa, it is yet to be seen how Kenya will implement section 48 of the SLA 2014. Besides, putting a cap on the number of refugees and asylum seekers allowed in a country has never been applied anywhere on the continent of Africa.[264] That aside, the SLA 2014 is silent on the criteria to be adopted to identity the 150,000 refugees. Put differently, this is a country that hosts about half a million refugees, and if their number is to be capped to 150,000, it must be through *refoulement*.

An important element in determining whether a general declaration of cessation clause can be triggered is the voluntariness of return. However, the KCIA did not acknowledge voluntary return as an option. Noting that the majority of *campzens* were granted *prima facie* refugee status, the invocation of a general cessation in this context depends entirely on the *'*ceased circumstance' in the country of origin. Even then, it requires a targeted, phase-out approach of a certain refugee sub-group from a specific country of origin rather than an entire refugee caseload as outlined in the KCIA. Furthermore, such an application would still require an expert analysis of the ceased circumstance, including evidence of a durable solution, which the SLA 2014 is silent about.

The SLA 2014 states 'the National Assembly shall review the period of variation for a further six months'. The provision for periodic review of refugee status presents a significant shift in Kenya's refugee regime as previous refugee legislation did not have such a requirement. Such a review would only be legitimate and compelling if there is change in circumstances in the refugees' country of origin for which the refugees were originally granted asylum. Unfortunately, this is not the case. A similar situation was witnessed in Uganda when a general cessation for the Rwandan

[264] Siddiqui, op. cit., p. 9.

refugees was declared in 2012. However, this was not for the purposes of reviewing the status of refugees, but rather for limiting the number of new refugee caseloads from Rwanda. What was also different in the Rwandan case was that the strategies contained four components: 'voluntary repatriation, local integration, retention of refugee status, and the revocation of refugee status'.[265] That aside, the time-constraint provision in the SLA 2014 requiring the refugee to repeatedly prove their eligibility for protection is problematic as it validates prolonged encampment. Although clause 1(4) of the 1969 Convention anticipates the termination of *prima facie* refugee status, this does not automatically result in repatriation as the refugee could potentially obtain another lawful status in another country by way of resettlement or in the asylum country by way of naturalisation. Given that *refoulement* is an extension of the sovereign power to exclude, in the Kenyan case, the cessation clause should not be treated as an automatic trigger for return.

Refugee status is never intended to last forever. However, given the ongoing armed conflicts in major refugee source countries such as South Sudan, Somalia and other countries within the region, the UNHCR anticipates the number of refugees in Kenya to increase, not decrease.[266] Given Kenya's past records of *refoulement*, the cessation clause is negative in nature and it has a huge repercussion on the refugees if return is not voluntary. Notwithstanding the consequences for those refugees unwilling or unable to return home, the invocation of cessation clause will result in a cycle of refuge as refugees are often returned to politically unstable situations. It is desirable that the voluntariness of return be exercised, but only within the framework of the AU Agenda 2063 and through a phased-out approach.

3.8 Conclusion

This chapter examined the colonial origins of the camp in Kenya as a single jurisdiction. Kenya was a British colony from 1895 to 1962. During this period, colonial Britain established mega detention camps as a counter insurgency against the Mau-Mau rebellion. After gaining political independence, Kenya retained the usage of the camp, initially to detain opposition political leaders, then gradually for the concentration of refugees. This colonial continuity has reinforced the political

[265] UNHCR, 'Ending of refugee status for Rwandans approaching', viewed 19 September 2017, <https://www.unhcr.org/en-au/news/briefing/2013/6/51cd7df06/ending-refugee-status-rwandans-approaching.html>.
[266] UNHCR, 'Reports on UNHCR activities in Kenya', viewed 3 January 2020, <http://reporting.unhcr.org/node/2537>.

othering of refugees and legitimises Kenyan's encampment policy. It is in this context that the permanent temporality of the camp plays into the totalising impulse of sovereignty. Although this country has demonstrated a commitment to the refugees by domesticating the international refugee law, the imperial manoeuvre of international refugee law within Kenya's domestic law makes the latter colonially constitutive. While some provisions within Kenyan domestic law have relevance to the refugees, they are heavily influenced by national security concerns rather than refugee protection concerns. This colonial/sovereign power relations conflates to legitimise Kenya's encampment policy. This confirms that the security apparatus in Kenya is still structured within a sovereignty discourse embedded within refugee 'colonial confinement thinking'. As the refugee camp in Kenya is managed by the UNHCR, the next chapter examines the role of the refugee agency in retaining the colonial legacy of the camp.

Chapter 4: Critique of the UNHCR

4.1 Introduction

This chapter critiques the colonial function and legacy of the UNHCR and its failure to end prolonged refugee encampment. Although formal colonialism has ended, the UNHCR is posited as a new 'kind of Western imperialism'.[267] The refugee agency intervened in Africa through the back door when the entire continent was littered with European colonial empires. It is not surprising that the term colonialism was never referenced in the 46 Articles of the 1951 Convention. However, in its 68 years of existence, the refugee agency's protection mandate has ballooned and the category of people it oversees has increased markedly, including Internally Displaced Persons (IDPs), returnees, stateless persons and other persons of concern to this office. This has jeopardised its traditional protection role to refugees, hence weakening its response to refugees in prolonged encampment. Although the UNHCR claims that its work is to take primarily preventative measures, it is revealed in this chapter that the refugee agency continues to manage the camp like an extension of a colonial state. Consistently applying the colonial concept of protection to refugee management is problematic for a very fundamental reason: it is a basic form of criminality. This chapter shades light on how the colonial legacy of the camp has left a 'mental state' that informs how both the state in Africa and the UNHCR continue to engage with the refugees as 'colonial others'.

4.2 The definition of a refugee

The term refugee is legally determined in the 1951 Convention and the 1969 Convention. The former reflects pre-1951 events in Europe while the latter emerged at the peak of decolonisation wars in Africa. However, the two Conventions differ in their definition and the concept of a refugee. The 1951 Convention Article 1A defines a refugee as a person who:

> has a well-founded fear of persecution because of: race, religion, nationality, membership in a particular social group, or political opinion; is outside his/her country of origin; and is unable or unwilling to avail him/herself of the protection of that country, or to return there, for fear of persecution.[268]

[267] Odhiambo-Obuya, op. cit., p. 264.
[268] UNHCR, 'The 1951 Convention', viewed 12 July 2020, <https://www.unhcr.org/1951-refugee-convention.html>.

Article 1A of the 1951 Convention outlines the conditions under which a refugee is granted, denied or discontinued international protection. A significant factor in this determination is a 'well-founded fear of persecution' upon return to country of origin. Although narrowly defined within the Convention, the term 'persecution' connotes oppressive or violent actions such as threats to life or freedom which endanger the institution of asylum. The Convention's enumerated persecutory factors such as race, religion, nationality, membership in a particular social group, or political opinion, are identical to the principle application under human rights standards and international law. However, attempts to broaden the meaning of a refugee to cover refugee problems specific to Africa failed. This resulted into the adoption of the 1969 Convention. The 1969 Convention is independent of, though integrally related to the 1951 Convention. It broadened the refugee definition, but deviated from the proposition that persecution is an essential criterion of refugeehood. Article II of the 1969 Convention extends the refugee definition to include 'everyone who, owing to external aggression, occupation, foreign domination or events disturbing public order in either part or the whole of his country of origin.'[269] It is such an open door policy that continues to save millions of refugees in Africa.

The 1951 Convention defines a refugee as a persecuted individual. Although the refugee phenomenon has existed for centuries, their protection became a global concern from the 20th century. The first international attempt to codify international refugee law was during the League of Nations.[270] However, the concept of persecution which later defined the refugee in the 1951 Convention predates the League of Nations[271] as it was first articulated in British law in 1905.[272] Citing the British Aliens Act of 1905, Jane McAdams states that "the express inclusion of 'persecution' in post-war instruments reflected pre-existing, underlying understandings about the 'preconditions' for refugee-hood, rather than creating a fundamentally new conception of the refugee".[273] The refugee definition was then adopted in successive agreements by the League of Nations. It was also reflected in

[269] The 1969 Convention, article 1(II).
[270] J McAdams, 'Rethinking the origin of persecution', *International Journal of Refugee Law*, vol. 25, no. 4, 2014, pp. 667–692.
[271] GS Goodwin-Gill, *International Law and the Movement of Persons between States*, Clarendon Press, California, 1978, pp. 138–39.
[272] Aliens Act 1905 (5 Edw VII c 13), s 1(3)(d).
[273] J McAdam, op. cit., p. 670.

the 1946 International Refugee Organisation (IRO) constitution as one of three 'valid objections' to refugee repatriation.[274] As such, the definition of a refugee as a persecuted person in the 1951 Convention reflected the Western liberal thinking of the 1950s. James Hathaway periodised this development into three phases:

> the juridical (1920-35) when refugees were defined by their lack of formal diplomatic protection; the social (1935-39), when refugees were seen as 'helpless casualties of broad-based social or political occurrences; and the personalised criteria (1938-50), when refugees were seen as those escaping injustices and political upheaval from country of origin.[275]

Although there is lack of clarity within the *travaux préparatories* records or in the 1951 Convention, it is beyond any dispute that the concept of 'persecution' or what Hathaway terms 'the exclusive benchmark'[276] of refugee status, played a major role in the development of the refugee instrument pre-1951. Subsequently, the 1951 Convention became an established feature of the post-war international instruments on human rights, refugees and criminal responsibility.[277] Lack of a more inclusive definition of the refugee was noted from the inception of the 1951 Convention. As a 20th century construct, the concept of a refugee was not compatible with the humanitarian principles embedded within the 1969 Convention. In particular, the 1951 Convention lacks specific protection provision for people fleeing armed conflicts or becoming refugees as a result of internal conflicts during decolonisation struggles, democratisation, and the creation of new and independent African states.[278] This prompted the African leaders to develop their own regional convention. The first draft of the 1969 Convention, referred to as the Kampala Draft, was published in 1964. At the time, the African continent was fighting decolonisation wars which led to massive displacement of people. While African leaders were working on a parallel regional refugee convention, the UNHCR convened at the

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[274] JC Hathaway, 'A reconsideration of the underlying premise of refugee law', *Harvard International Law Journal*, vol. 129, Issue 31, 1990, p. 175.
[275] Hathaway, op. cit., p. 349.
[276] Ibid.
[277] Besides the 1946 IRO Constitution, the 1945 Nuremberg Charter included among the crimes against humanity 'persecutions on political, racial or religious grounds', and art 14 of the Universal Declaration of Human Rights (adopted 10 Dec 1948) UNGA res 217A (III) included a right to seek asylum from persecution.
[278] J Hyndman, BV Nylund, 'UNHCR and the status of prima facie refugees in Kenya', vol. 10, no. 1&2 *International Journal of Refugee Law*, 1998, pp. 34-35.

Bellagio Colloquium,[279] which later led to the adoption of the 1967 Protocol. There were significant concerns about the first draft of the 1969 Convention. The most notable was perhaps Article 31 of the draft which provided that the 1969 Convention would supersede all preceding bilateral and multilateral agreements relating to refugees.[280] In Holborn's view, the UNHCR's interest in rapidly adopting the 1967 Protocol was partly stimulated by the 'efforts of the African member states…to draft their own regional convention on refugees'.[281] Holborn explains that 'the emergence of an instrument which in any sense superseded or competed with the 1951 Convention would seriously impair the universal character of the 1951 Convention which the UNHCR had spent years fostering'.[282] It was in this context that the 1969 Convention had to be a replica of the 1951 Convention. Ever since, any attempt to review the 1951 Convention is interpreted as a threat to the Convention itself as signatory states will unlikely commit to new obligations under the Convention.

In view of this, the 1969 Convention covers broader circumstances of the refugee, including granting refugee status on *prima facie* basis. This regional treaty does not signify a dramatic shift from the 1951 Convention, but rather is indicative of the natural progression of the nature and circumstances of the refugee situation in Africa. As such, it was incumbent on Africa that the definition of a refugee is augmented to include those circumstances. Beyond the African continent, India in particular, is dismissive of and has formally denied the UNHCR a binding legal role in refugee status determination, even though it permitted the organisation to operate within its territory.[283] In so doing, India could be considered to hold an *opinio juris* in favour of an expanded definition of refugee.[284] The 1969 Convention also became influential in the adoption of the 1984 Cartagena Declaration in Latin America which also broadened the definition of a refugee, including the rights that they are entitled to. Under no obligation, Mexico adopted this definition which demonstrates a growing

[279] UNHCR, 'The state of the world's refugees 2000: fifty years of humanitarian action', viewed 18 April 2020, <https://www.unhcr.org/publications/sowr/4a4c754a9/state-worlds-refugees-2000-fifty-years-humanitarian-action.html>.
[280] UNHCR, 'UNHCR memo, 29 April 1965,' UNHCR archives, fonds 1/5/11/1, 1965.
[281] Ibid
[282] LW Holborn, Refugees: A Problem of our Time-The Work of the United Nations High Commissioner for Refugees, 1951-1972, vol. I & II, Scarecrow Press, New Jersey, 1975, pp. 183–188.
[283] WT Worster, 'Evolving definition of refugee in contemporary international refugee law', *Berkeley Journal of International Law*, vol. 30, issue 1, 2012, p. 133.
[284] Ibid.

acceptance outside Africa.[285] It is this wide acceptance that demonstrates a general practice and *opinio juris* in recognition of the 1969 Convention refugee definition.

The 1969 Convention was a landmark event in the turbulent history of Africa as its core humanitarian tenet is not to stop or even control the movement of refugees at the border, but to regulate their status in the asylum country. It is on the basis of this broad interpretation that Odhiambo-Abuya argued that in order to reformulate an African asylum policy, the first point of reference should be the 1969 Convention because 'it is a home-grown treaty'.[286] However, as the 1951 Convention selectively applies to the African refugee situation, the African refugees do not need another treaty or any new legal instrument. The entire population of Africa needs freedom of movement within this continent without restrictions. This is regardless of whether their movements are conditioned by a refugee-like situation or are voluntary. Although human rights are inherent in the UNHCR's administration of refugees, the protection afforded to them is largely the responsibility of the state. Where a hybrid arrangement is in place, this is spelled out in an agreement between the state and the UNHCR. The latter's role is often referred to as providing assistance to the host country. Even then, Verdirame believes that refugee camps are inherently incompatible with international human rights law and are therefore, *ultra vires* as they infringe on the rights of refugees.[287] Taking Kakuma refugee camp as an example, the fact that refugees are forced to live in a controlled camp environment for decades without the rights to movement, one wonders how human rights could be applied in such a situation. Obviously the UNHCR's component of human rights obligation will continue to attract criticism because such a commitment sits outside the traditional role of this agency. It is on this basis that Fanon urged an indigenous solution befitting the African situation instead of relying on a Eurocentric law. Fanon stated:

> Europe where they were never done talking of Man, and where they never stopped proclaiming that they were only anxious for the welfare of Man, today we know with what suffering humanity has paid for every one of their triumphs of mind…let us decide not to imitate Europe…let us create the whole Man, whom Europe has been incapable of bringing to triumphant birth.[288]

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[285] Ibid
[286] Odhiambo-Obuya, op. cit., p. 217.
[287] G, Verdirame, *The UN and human rights: who guards the guardians?,* Cambridge University Press, New York, 2011.
[288] F Fanon, *The wretched of the earth*, Grove Press Inc., New York, 1969, p. 310.

In the context of Fanon's emancipatory philosophy, Europe claims to be the defender of the rights of man, the welfare of man, the freedom of man, but at the time, they owned vast colonies in Africa and around the world. It was this inhumanity that Europe demonstrated its desire to dominate, to control and to humiliate with violence in all corners of the world. Fanon believed that rather than address the dominant colonial culture, Europe denied the colonised the rights to innovation, new thinking, and new ways of doing things differently. By importing the 1951 Convention to Africa, Europe was justifying its centuries of slavery in which a quarter of humanity were held in captivity. It is this inhumanity that Fanon cautioned Africa against imitating in order to accomplish what Europe could not. Of course, Africa was not involved in the establishment of the 1951 Refugee Convention as this was largely a European affair, in the heydays of colonialism. A decade later, African global influence emerged with the expansion of African membership in the UNGA in the 1960s. This was through the admission of 16 newly independent states, surpassing that of Asia and Latin America for the first time.[289] Following this came the adoption of the UNGA in December 1960 of the historic 'declaration on granting the independence to colonial countries and peoples',[290] sponsored by 43 Afro-Asian states. Africa then developed its own refugee law – the 1969 Convention, but it remains a replica of the 1951 Convention. Nevertheless, the 1951 Convention was adopted in circumstances which are very different from the situation today. A typical refugee in Europe in 1951 was likely working class, with a healthy bank account, who could easily return home within a few years, or integrate into the country of asylum. In contrast, African refugees, many of whom were subsistence farmers, with large extended families, migrated to poor countries, and might live in the camp for many years, without the hope of safe return home. This situation was never envisioned in Africa even in 1969. Indeed, Africa needs true innovations and inventions, to look for something different and not imitate Europe to address its refugee problem.

As African society is broadly defined to include sojourners and refugees, asylum claim under the 1951 Convention is assessed on an individual basis. Those who do

[289] L Edmonson, *Africa and the developing regions. General history of Africa: Africa since 1935*, C Wodji, & A Mazrui (eds), UNESCO, California, 1993, pp. 1-126.
[290] United Nations Human Rights, UNGA Resolutions 1514 (XV) of 14 December 1960, adopted by a vote of 89 in favour, none against and 9 abstentions, (Australia, Belgium, France, Dominican Republic, Portugal, Spain, South Africa, United Kingdom, United States), viewed 22 July 2018, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/Independence.aspx>.

not meet the individualised criteria are isolated and discarded. It is in this context that refugees are being kept in prolonged encampment to prevent them from international migration so that they do not become other states' responsibility. As Hathaway observed, 'the law would not focus on the "how" or "why" of the need for protection, rather the extent of the denial of physical security leading to departure'.[291] The 1951 Convention assesses claims for refugee status based on persecutory grounds as opposed to the 1969 Convention which considers the reason for flights. To date, the doctrine of international refugee law resembles a return to colonial captivity which permitted recourse to force in dealing with the colonies. This is because those who did not qualify as refugees under the 1951 Convention are discarded. Within this jurisprudence, the relationship between the state and the refugees further entrenches this colonial continuity. As such, international refugee law in its primordial form, raises the continued centrality of keeping refugees in the camp. This is clearly a violation of the very tenet of international human rights law as this approach is likely to make encampment almost permanently legal. Although colonialism was present during the drafting of the 1951 Convention, Glen Peterson mimic that, 'the colonial origin of the UNHCR might have escaped the attention of refugee scholars'.[292] When the 1951 Convention came into force, the instrument of ratification was not extended to postcolonial territories due to the presence of powerful states such as France, Britain and Germany still claiming more territories in Africa. Writing about the refugee phenomenon in the 1950s and 1960s, Hathaway, Loescher and Harrell-Bond casually referred to colonialism as a trigger to drafting of the 1951 Convention.[293] Viewing international refugee law from an Afrocentric perspective reveals the imperial reach of its legal framework. Put differently, it is unlikely that any African government would sign up to the 1951 Convention if it is to be availed for renegotiation with the view for additional mandates.

One of the controversies of the 1969 Convention centres on its focus on group displacement or *prima facie* criteria. This means that the majority of Africa's refugees may not satisfy the individuated criteria under the 1951 Convention. Viewed from this lens, African refugees could form an entirely different category of persons in need of

[291] Hathaway, op. cit., p. 351.
[292] G Peterson, 'The uneven development of international refugee law regime in post-war Asia: evidence from China, Hong Kong and Indonesia', *Journal of Refugee Studies*, vol. 25, issue, 3, 2012, p. 327.
[293] G McFadyen, 'Colonial legacies and the asylum system: language, silence and the portrayal of the refugee "Other"', PhD thesis, Aberystwyth University, Wales, 2014, p. 207, p. 32.

international protection. The tension between the two principles are at the heart of international refugee law. Neither persecution alone nor human rights paradigm can adequately explain the meaning of a refugee in a way that is globally acceptable. One is designed to limit the number of refugees, while the other broadens it. It is often the case that when an African refugee encountered the authority within this continent, it is more likely that their issues are related to political or international relations, not legal. For example, the 1951 Convention enumerates the following grounds for claiming refugee status: 'race, religion, nationality, political opinion, and membership in a particular social group'. This was clearly demonstrated during the Nazi regime where race and religion played a pivotal role in the genocide of the Jewish race. Similarly, the protection of various social groups, such as homosexuals and disabled persons, presented the same concerns at the time. The moral/legal question is whether persons belonging to these categories are more deserving of protection than women and children fleeing from active armed conflict that targets the entire population. It therefore appears that the refugee regime has become irrelevant as the needs of 21st century refugees have exceeded the convention's mandate, resulting in unnecessary and prolonged encampment. As I have argued throughout this thesis, granting refugees the freedom of movement is desirable and could address several issues affecting refugees in prolonged encampment.

4.3 The concept of 'protection'

The concept of 'protection' enshrined in the 1951 Convention originated from the colonial era. In its overseas 'civilising mission' in the age of democracy, but beyond its borders, colonial British established the British East Africa Protectorate encompassing Uganda, Kenya and Tanzania that lasted from 1895 to 1960. In colonial terms, protection meant acquiring partial or full control over natives or their territory through invasion and laying claims over them through settler colonies or what the colonialists refer to as civilising mission. This was authorised by the Berlin Conference of 1885 which legitimatised European colonial administrations across Africa.[294] Protectorate is a system of indirect rule through which the British used pre-existing local chiefs to rule on their behalf.[295] Under the framework of 'protection',

[294] P Gathara, 'Berlin 1884: remembering the conference that divided Africa', Al Jazeera News 16 November 2019.
[295] J Galbraith, *Mackinnon and East Africa 1878-1895, a study in the new imperialism*, Cambridge University Press, UK, 1972, pp. 1-264.

almost all colonial territories were placed under protectorate status. When the UNHCR intervened in Africa in the 1950s, almost the entire continent of Africa was still under protectorate arrangements. The UNHCR later reformulated the term 'protection' to mean humanitarian assistance to refugees.[296] This reappraisal meant the refugee agency portrays a humanitarian image of protection to cleanse itself from Africa's colonial past. In other words, the refugee agency is engaged in silent diplomacy by detaching itself and avoiding the responsibility for the damage caused by colonialism. Ever since, the UNHCR has continued to glorify its doctrine of protection, but without disturbing its colonial relations to Africa. By claiming to be a protector of the refugees, the UNHCR continues to generate a colonial order whose mandate should not be questioned. Nonetheless, Angela Woollacott raised the provocative question in reference to the protection of Indigenous people in colonial Australia. She asked, 'who is protecting whom and for what purpose?'[297] Aileen's critique does not only provide the framework within which to interrogate race relations in Australia's colonial history, but also reflects how Europe maintained its colonial relations in Africa. Here, the term 'protection' was colonially structured, aimed at segregation, subordination, and control, informed by racial hierarchy and privileged embedded within white policy.[298] This colonial perspective is significant in examining European colonial engagement in Africa. When Britain colonised Kenya, it used the same theme of protection as a template to control the natives as its colonial subjects. For instance, the Nandi tribe were the first colonial subjects to be put in 'protection reserve'[299] as punishment for protesting the construction of the Kenya-Uganda railway through their farmland. During this period, the natives were not regarded as citizens, but as colonial subjects. In his book 'Orientalism', Edward Said critiqued the civilising language in which the expansion of empires is couched. He said that this created the very 'Orient'[300] that defined the colonial hegemony of the West. The issue here is that the term 'protection' was the pinnacle of colonial administration. Unless the evolution of the term 'protection' is analysed through a colonial lens, and its colonial legacy clearly understood in the historically specific

[296] Hyndman, op. cit, p. 82.
[297] A Woollacott, 'The meanings of protection: women in colonial and colonising Australia', *Journal of Women's History,* vol. 14, no. 4, 2003, p. 216.
[298] Moreton-Robinson, 'Whiteness matters', p. 76.
[299] Wikipedia, '*Uganda railways'*, viewed 28 July 2018, <https://en.wikipedia.org/wiki/Uganda_Railway>.
[300] Said, Orientalism, p. 49.

circumstances that warranted it, the contemporary discourse on refugee protection will remain a utopian project of the future. By demonstrating how protection is a long-standing colonial trope that is deployed by the UNHCR, this thesis argues that an indigenous solution is necessary to solve the problem of prolonged encampment in Africa.

When the UHNCR was established in 1950, it initially adopted the term 'protection' to mean granting asylum, and providing legal assistance and refugee status determination procedures aimed at promoting the principle of *non-refoulement*.[301] This also relates to the judicial refugee status, including non-expulsion and freedom of movement. In short, the protection of refugees has in the past focused on their fundamental rights to asylum. While the concept of protection is not clearly spelled out in international refugee law, the UNHCR over the years, has reconceptualised it to include a myriad of assistance ranging from the delivery of tents and food items, to education and healthcare services – collectively referred to as 'protection strategy'.[302] This reconceptualisation, which is centred on material assistance, defined the work of the UNHCR during the CWE when 'persons of concern' who had no firm legal status became the beneficiary of protection. In the late 1990s, the UNHCR established an 'assistance division' parallel to protection division. The division was established to implement a new concept of protection which was largely influenced by the different actors in the refugee space, including states and humanitarian agencies. Hathaway and Neve note that the UNHCR's shift away from its legal principle is a serious misrepresentation of international refugee law.[303] Notwithstanding Hathaway's assertion, the UNHCR's current approach to protection should predominantly be understood within neo-colonial discourse as opposed to being strictly legal as originally intended. Where refugee status is granted specially to encamped refugees, in some cases, this is basically to ascertain entitlement to material assistance. Such institutional adaptation suggests that international refugee law and the UNHCR's protection mandate have become a matter of political discretion to suit states' interests.

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[301] UNHCR, 'The state of the world's refugee', viewed 17 October 2016, <http://www.unhcr.org/3eeee0464.html>.
[302] UNHCR, 'QA: protection: the heart and soul of the UN refugee agency', viewed 11 November 2017, <https://www.unhcr.org/en-au/news/latest/2007/2/45cc85604/qa-protection-heart-soul-un-refugee-agency.html>.
[303] JC Hathaway, & RA Neve, 'Making international refugee law relevant again: a proposal to collectivised and solution-oriented protection', *International Human Rights Journal*, vol. 10, 1997, p. 116.

4.4 The UNHCR protection mandate

The Statute of the UNHCR stipulates, inter alia, that this agency 'shall provide international protection under the auspices of the United Nations (UN), to refugees who fall under its present Statute…'[304] This is the legal foundation on which the refugee agency has historically been operating. Right from its inception, the UNHCR had a broader competence *ratione personae* and its mandate has been progressively expanding through subsequent UNGA resolutions. Although the refugee agency was never meant to be a permanent institution, in 2003 the UNGA voted to lift its temporal limitation and granted it a permanent mandate.[305] Ever since, protection and supervisory functions remain the primary mandate of this agency.

States are still major players in the UN systems because they are members of the UNGA which directs the operation of the UNHCR. As such, the protection and supervisory role of the UNHCR must be in conformity and integrated with states' restrictive requirements. While asylum is still being granted throughout the world, at least on a temporary basis, most states do not welcome refugees. As such, they interpret the 1951 Convention restrictively on the basis that it encourages asylum. In addition, states have developed a tendency of imposing domestic measures that contradict the legal framework of the 1951 Convention with its exilic orientation. This has forced the UNHCR to rely on human rights law to supplement the treaty-based legal framework and use its doctrine as a 'fill in the gaps' measure. It is on this basis that the interface between human rights law and refugee law provides a paradigm shift that could overhaul the international legal regime as refugees have become the inherent bearers of human rights. Since its intervention in the 1950s, the refugee agency continues to manage a network of mega refugee camps across Africa which were built based on the colonial concept of protection.

Although the UNHCR claims that its work is primarily a preventative measure, Odhiambo-Abuya observed that the work of the refugee agency 'manifests itself in the Western vision of international refugee law, which is predicated on ideas and structures that work in the interests of Western nations…'[306] Taking Kakuma camp as

[304] UNHCR, 'Statute of the UNHCR, General Resolution 428 (v) of 14 December 1950', viewed 22 October 2017, <https://www.unhcr.org/3b66c39e1.pdf>.
[305] UNHCR, 'UNGA Resolution 58/153 implementing actions proposed by the UNHCR to strengthen the capacity of this office and to carryout its mandate', 22 December 2003.
[306] Odhiambo-Obuya, op. cit., p. 277.

an example, the legal subjectivity of the refugees is tied to commodity exchange as the refugee population rely entirely of foreign aid. In the observation of Medicine San Frontier, the decline in refugee protection could be explained by the rise in humanitarianism as the latter is being used as a cloak for this failure.[307] The key factor driving this trend is that donors want to maintain social distancing by keeping refugees in the region of their origin through prolonged encampment. This policy of containment is meant to keep refugees immobile, and in the camp, shaped by the legal definition of a refugee who is to be taken care of. It then becomes apparent that states that donate funds to encamped refugees in Kenya and elsewhere, do not hold themselves to the same standards of liberal democratic values. This also explains why humanitarianism is well funded.

Laura Barnett believes that both 'the UNHCR and the 1951 Convention are products of Cold War Era'.*[308]* Samuel Moyn rejects this narrative, stating that this is a 'depoliticised view'[309] of the international systems following the wars of decolonisation. Writing about the refugee crisis in Asia in the 1950s, Glen Peterson argued that the UNHCR is a colonial institution.[310] He argued that the UNHCR resettlement program was about the 'mass deployment of Chinese labour on a global scale to satisfy the needs of distant economies'.[311] Similarly, Gillian McFadyen highlighted the colonial silence in the history of the UNCHR when she raised the perennial question: 'human rights for whom when so many states were the possessions of colonial powers? Who was the recipient of human rights when Africa was very firmly attached to European empires?'[312] Nonetheless, the geopolitical valence of refugees has not changed since the end of Cold War Era. This has promoted a shift in policy where Western nations prefer to assist refugees through social distancing by keeping them in their 'region of origin'. This occurred first in the early 1990s through the policy of 'preventive protection'[313] and then in the 2000s

[307] SE Mierop, Protection of civilians in conflict, in world in crisis: the politics of survival at the end of the twentieth century, Doctors without Borders (eds), Routledge, New York, 1997.
[308] L Barnett, *Global governance and the evolution of the international refugee regime*, Oxford University Press, UK, 2002, p. 246.
[309] S Moyn, *The last utopian: human rights in history*, Harvard University Press, London, 2010, pp. 1-352.
[310] G Peterson, 'The uneven development of the international refugee regime in post war Asia: evidence from China, Hong Kong and Indonesia', *Journal of Refugee Studies*, vol. 25, no. 3, 2011, pp. 327-343.
[311] Ibid.
[312] G McFadyen, 'Colonial legacies and the asylum system: language, silence and the portrayal of the refugee "Other"', PhD thesis, Aberystwyth University, Wales, 2014, p. 207.
[313] AE Shacknove, 'Who is a refugee?', *Chicago Journals*, vol. 95, no. 2, 1985, p. 276.

through the externalisation of asylum. Asylum policy has always been at least one-part state interest and one-part compassion.[314] This has paved the way for the development of laws and policies to prevent refugees from seeking asylum in the West. As Antony Anghie observed, 'we still live in a common era of Continued Empire (CE), albeit under a new form'.[315] This partly explains why Kakuma camp has acquired PRS with the refugees trapped in limbo for decades. Although the UNHCR adopted the Agenda for Protection (AFP)[316] in 2002, which is a recommitment to the principles of the 1951 Refugee Convention, aimed at finding a comprehensive solution to PRS, the main approach it took in Kenya has always been on care and control of the camp.

The surrogate protection role of the UNHCR is globally acknowledged. However, once a refugee has been accepted and the risk of *refoulement* eliminated, the legal mandate of the UNHCR is relegated to care and control of refugee camps. As Jeremy Harding put it, refugees and asylum seekers are 'shuttled along a continuum of abuse'.[317] Even the UNHCR claims that while the camp provides physical protection to refugees,[318] however, as the years progress, it wastes the very lives it once protected. Suffice to note that refugee camps are often borne out of emergencies and evolve into ghettoes, hallmarked by dependency and bureaucracy. Borne as a space that freezes its inhabitants' status and conditions to 'bare life', the camp has turned its temporariness into a 'transient permanency', and, over time, evolved from its ghetto beginning, expanded and turned into a permanent state of exception. It has also become a space where 'every image of the past that could not be recognised by the present as one of its concerns, disappears permanently'.[319] In this space, time is not a concept of measure, but a philosophy of being that assumes no past and no future; it is a continuous presence. The past is saturated with the 'presence of now'. It incorporates the past, present and future as one. The refugees have become the *homo sacer*, the victims of the law as they are stripped of the rights

[314] A Anghie, 'Imperialism, sovereignty and the making of international law', *SJ Quinney College of Law*, Cambridge University Press, UK, 2004, pp. 1-381.
[315] Ibid.
[316] UNHCR, 'Agenda for protection', viewed 18 September 2015, <https://www.unhcr.org/protection/globalconsult/3e637b194/agenda-protection-third-edition.html>.
[317] J Harding, *The uninvited migrant journey to the rich world*, London review of books, profile books, London, 2000, p. 3.
[318] UNHCR, 2004. 'Protracted Refugee Situations,' Executive Committee of the High Commissioner's Program, Standing Committee, 30th Meeting, UN Doc.EC/54/SC/CRP.14, 10 June 2004, p2.
[319] Benjamin, op. cit., p. 297.

to free movement – a state of exception. This cycle could not be distinguished, it is the law.

James Gathii and Celestine Nyamu in their critique of the *operandi* or International non-government organisation in Africa have argued, 'Africa must not be a miniature replica of their Western counterparts'.[320] Although the UNHCR has continued to portray a humanitarian image, it remains a colonial institution without affording genuine protection to the refugees. As the UNHCR is the institution legally mandated to care for refugees and asylum seekers, it has neither acknowledged nor publicly objected to refugee encampment as its official policy. This is a presage that refugee coloniality will remain as a significant security architecture for at least another century. This is largely premised on the paradigm shift in asylum policy where it is the state and not the refugee that needs protection. This is a parallel development in international politics aimed at secreting the refugee legal frameworks. It is on this basis that, for over three decades, encamped refugees in Kenya have remained in a constant state of emergency due to the inherent colonial structure embedded within its encampment policy. Since its founding, the refugee agency has neither demonstrated the remit nor the capacity to comprehensively address the plight of encamped refugees. Although Western nations have maintained some level of responsibility towards the refugees, this is limited to the provision of humanitarian aid, but from a distance which resembles colonial relations. This humanitarianism is premised on the condition that the refugees must be concentrated in the camp and in particular, their region of origin.

Martti Koskenniemi presented a critical view of international law by demonstrating that it is an irrelevant moralist utopia or a manipulable façade for state interest.[321] He contends that international law is perceived as nothing more than what states already do (apologism),[322] which leads to rules that are vague. As Koskenniemi attests, there is an inherent bias in international law as it is designed to protect the interest of the state. This point was made clear in the 2002 UNHCR report regarding state powers to prevent *bona fide* asylum seekers from entering their territory:

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[320] J Gathii, & C Nyamu, *Reflections on United States-based human rights NGOs work on Africa*, Loyola University, Chicago, 1996, p. 285.
[321] M Koskennienmi, *The structure of international legal argument*, Cambridge University Press, Cambridge, 1989, pp. 1-57.
[322] Ibid.

> states have adopted, inter alia, the practice of intercepting persons travelling without the required documentation, whether in the country of departure, in transit country, within territorial waters or on the high seas, or just prior to the arrival in the country of destination. In some instances, interception has affected the ability of asylum seekers and refugees to benefit from international protection.[323]

The interception of asylum seekers on transnational routes has recently emerged as an international issue in the context of the trafficking of people across the border. Although interception has no universally accepted definition, for the purpose of this thesis, interception refers to the practice by states outside their international borders, to prevent, deter, stop and interrupt the movement of persons on the sea, land or air, who intend to travel towards a prospective country.[324] As states have the legitimate right to return persons found to have not met the criteria for refugee status under the 1951 Refugee Convention, the UNHCR's report demonstrates that states still maintain their status quo – legitimacy, power, control and the use of violence. Such measures indicate that the dominant mode of security works to keep away the refugees. Similarly, the refugee camp is automatically situated to reflect this 'bio-power of governmentality, which seeks to preserve power relations'[325] by excluding those considered undesirable. As in Kakuma camp, the construction of this camp demonstrates the physical separation of the UNHCR staff and the refugees. The camp resembles a shantytown; dotted with blue tents and crudely built mud houses. In contrast, the UNHCR staff compound is fitted with all the amenities found in big cities: clean running water, electricity, internet, swimming pool, air-conditioned modern buildings and well-built fences circled with barbed wire. This politics of segregation or semi-apartheid is geographically and politically reminiscent of colonial camps. This also reinforces the master/slave dichotomy. In this case, the invocation of power and control allows this colonial law/relation to flourish while keeping its violence invisible.

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[323] UNHCR, '*ExCom report, the interception of asylum seekers and refuges', the international framework and recommendations for a comprehensive approach, UN Doc. EC/50/SC/CRP.17*', viewed 11 March 2017, <https://www.unhcr.org/4aa660c69.pdf>.

[324] UNHCR, *'ExCom, 18th meeting of the standing committee (EC/50/SC/CPR/.17)',* viewed 13 November 2017, <https://www.hrw.org/sites/default/files/reports/italy0909webwcover_0.pdf>.

[325] J Nilsson, & S Wallenstein, *Foucault, biopolitics, and governmentality*, Soderton University Press, Stockholm, 2003, p. 14.

4.5 The UNHCR intervention in Africa

The UNHCR was established in 1950 as a European institution. Although the UNGA gave the refugee agency a universal mandate almost from the onset, its first years of operation were restricted to the refugees in Europe. At the time, the 1951 Convention was geographically and temporally limited to persons who became refugees in Europe before 1951. While this restriction was broadened with the adoption of the 1967 Protocol, some European nations maintained it, including France till 1971; Luxembourg till 1972; Portugal till 1976; Italy till 1990; Latvia till 1997; Hungary until 1998 and Malta till 2002.[326] It was in this same period that the European superpowers were maintaining firm control of colonial empires in Africa. This was also a period when powerful European nations dominated the international systems. When the UNHCR sanctioned its first humanitarian operation in Africa in late 1950s, many of the African nations were still fighting decolonisation wars. This includes the Democratic Republic of Congo where the UNHCR's flag was first raised on the continent. As the UNHCR intervened in Africa in the heydays of colonialism, it had to acquire the character of a classical colonial venture. The newly independent states or former colonial entities were wary, still welcomed the intervention while keeping 'one eye open' as the intervention might have required the use of force. This perspective is significant in examining the colonial context in which the refugee agency intervened in Africa. When the number of refugees in Africa became a concern following the wars of decolonisation, encampment technology became the standard for controlling them and it has remained as such ever since. Although the African refugee situation has evolved significantly over the decades, the UNHCR maintains its colonial/imperial mode of refugee management.

The UNHCR which Makau Mutua refers to as the 'hegemony of the West',[327] intervened in Africa very cautiously and rightly so for a number of reasons. The war of decolonisation was still raging on and it was highly political that any intervention would compromise the agency's neutrality. The refugee agency was not mandated to intervene directly in Africa at the time due to the dateline and geographic limitations the 1951 Convention had imposed. As the 1951 Convention is predicated on the

[326] JV Selm, 'European refugee policy: is there such a thing?', New issues in refugee research, paper no. 115, UNHCR, Geneva, 2005.
[327] M Mutua, 'What is TWAIL?' proceedings of the 94th Annual Meeting', *American Society of International Law*, 2000, p. 36.

principle of state sovereignty, its definition of refugee is basically persecution-centred, which reflected the situation in Europe.[328] This definition negated the mass exodus of refugees as the result of decolonisation wars that have characterised Africa's situation since the 1950s. Even after signing to the League of Nations which authorised the end of colonialism, England, France and Germany held firmly to their lucrative territories.[329] Due to fear and anxiety, some European nations with a strong colonial presence in Africa resisted the proposal for the UNHCR to intervene in Africa. Despite opposition from France and silence from other major European nations, the UNHCR intervened in Africa in response to the Algerian war of independence in late 1950s.[330] Nonetheless, its intervention was oriented towards providing material relief and encouraging 'zonal development',[331] but without modifying its Statute. So rather than rely on the legal definition of a refugee under Article 1A of the 1951 Convention, the refugee agency instead relied on its 'good offices' under UNGA Resolution 1673 (XVI) of 18 December 1961.[332] This Resolution acknowledged that the African refugee situation was never envisaged by the drafters of the 1951 Convention. In recognition of the limitation of the 1951 Convention, the African continent had to adopt its own refugee convention: the 1969 Convention. It was also perceived that the wars of independence were internal and would not last long, a view that solidified the 'internalist' conceptualisation of the refugee phenomenon in Africa. However, most of the refugees generated by decolonisation wars were never integrated into their country of asylum. They returned home as there was great solidarity with liberation movements for independence.

The UNHCR did not only intervene in Africa during the decolonisation wars, it also carried forward the vision of the colonisers by initially attaching temporal and geographical restrictions to the 1951 Convention. However, as the expression goes, 'you cannot transplant [an English oak] to an African continent and expect it to retain the tough character which it has in England.'[333] Although all oak trees belong to the beech family, the English oak is native to England, so does the African oak. The two

[328] J Crisp, 'Mind the gaps! UNHCR, humanitarian assistance and the development process,' new issues in refugee studies, working paper no. 43, UNHCR, Geneva, 2001, p. 2.
[329] Ibid.
[330] Ibid.
[331] Ibid.
[332] United Nations, 'UNGA Resolution 1673 (XVI)', viewed 18 November 2017, <https://research.un.org/en/docs/ga/quick/regular/16>.
[333] Nyali Ltd vs Attorney General, All English Report, 646, 1995, p. 653.

are incompatible because they grow in ecologically different environments. Understanding this typology is important because in all its colonies in Africa, Britain introduced English municipal law through local ordinances to operate alongside African customary law. The English law were either copied verbatim or applied by reference. Although the English law continued to operate in the early years of colonisation, it was eventually considered alien and gradually became repugnant. Not only was the English law relegated, it also failed to address the local needs of the people as it could not be applied without qualification and refinement. It was around the same time that international refugee law was introduced in Africa. However, its application did not entirely capture the needs of the African refugees, yet the African states signatory to the 1951 Convention made no attempt to scrap it. Since its inception, the principal agent in disseminating international refugee law is the UNHCR. However, significant thinking takes place outside the UNHCR[334] to reinforce the 18th century colonial concept of protection which remains its imperial touchstone. As Kenya was made to incorporate both Conventions into its domestic law, this has made the refugees 'the supreme subject of the state'.[335] Agozino in his critique of imperialism, argues that decolonisation is not an event, as it appears to be giving way to 'the project of recolonisation'.[336] In seeking justice for refugees, the six-decade-old international refugee law is in need of decolonisation due to its ongoing commitment to encampment which is a reproduction of colonisation. This colonial injustice does not only demonstrate the enduring legacy of encampment, it necessitates that the law be replaced by what Agozino calls 'the law of love and hospitality'.[337] Law is violent and its legal interpretation exerts more violence because it is imposed on refugees against their will by threatening hostility. As Giannacopoulos puts it, 'the call for love, especially as praxis within law, is urgent.'[338] Giannacopoulos raises a valid point because without love there is no justice and no hospitality, especially for refugees and asylum seekers who continue to hover

[334] JC Simon, & T Clark, UNHCR international protection policies 2000-2013: from road-cross to protection gaps and response, *Refugee Survey Quarterly*, vol. 33, no. 3, 2014, pp. 1–33.
[335] S Behrman, 'Legal subjectivity and the refugee', *International Journal of Refugee Law*, vol. 26, no. 1, 2004, pp. 1–21.
[336] Agozino, Counter-colonial criminology, p. 281.
[337] Agozino, 'Law, love and possibilities for decolonisation: a roundtable discussion', Flinders University, Australia, 13 June 2018.
[338] M Giannacopoulos, 'Without love there can be no law, but no justice', *Globalization*s, vol. 17, no. 7, 2002, p. 1086.

between law and hostility. As such, love and hospitality should be at every level of states' engagement with refugees.

Looking at migration in a wider context, the refugee in this space has become the subject of hostility. This hostility or the 'isolationist response'[339] happens at every stage of migration: departure, transit and arrival. In this space, hostility and hospitality contrast each other. Rooted in ancient Greek *xenia* or *philoxenia*,[340] hospitality encompasses welcoming, hosting and providing protection to foreigners, strangers, sojourners or even next-door neighbours. The hosting of refugees as an ancient human experience, predates international refugee law. Historically, refugees have sought refuge in neighbouring countries to seek safety. In the African context, the concept of neighbours is important as it means proximity, commonality, next of kin, or the person next door with whom you share the same neighbourhood. The guest-host relationship is culturally hospitable, but legally hostile given the inequality and power imbalance that structure this relationship. As the refugees play the role of guests, the hospitality given to them by the host is conditional if it has the potential to invoke hostility. As hospitality is juxtaposed with hostility, this duality characterises life in the camp. The key critique of this thesis is that the law's treatment of refugees and its colonial heritage camouflaged as protection, has resulted in a sovereign monopoly of hostility.

4.6 The UNHCR in-country protection

From early 1990s, the UNHCR extended its protection mandate across the borders (in-country protection) to 'persons of concern' to this office, but who are not refugees. This encompasses Internally Displaced Persons (IDPs), returnees, and stateless persons.[341] However, the protection afforded by the UNHCR to these cohorts other than refugees, is not enshrined in the 1951 Convention. Given that IDPs outnumber[342] encamped refugees and have become the largest beneficiaries of the UNHCR protection framework, this trend has weakened the UNHCR's capacity as

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[339] ML Berg & E Fiddian- Qasmiyeh, 'Hospitality and hostility towards migrants: global south perspective, an introduction', viewed 2 July 2020, <https://refugeehosts.org/2018/10/31/hospitality-and-hostility-towards-migrants-global-perspectives-an-introduction/>.
[340] D Gawler, 'You shall love the aliens as yourself: hope, hospitality, and love of the stranger in the teachings of Jesus', Religions, Oxford, USA, 2019, p. 6.
[341] UNHCR, '*UNHCR's mandate for refugees, stateless persons and IDPs',* viewed 17 June 2018, <https://emergency.unhcr.org/entry/79544/unhcrs-mandate-for-refugees-stateless-persons-and-idps>.
[342] UNHCR, 'UN ExCom no. 75 (XLV), 1994, paragraph I(a)', viewed 14 September 2018, <https://www.unhcr.org/en-au/excom/exconc/3ae68c434/internally-displaced-persons.html>.

resources are being directed away from programs that could potentially resolve prolonged encampment. The former UNHCR special envoy to former Yugoslavia, Nicholas Morris, dismissed the criticisms of the UNHCR and defended its expanded protection mandate arguing that protection policies must adopt flexibility to political realities given the difficult circumstances under which it operates.[343] The UNHCR's politicised in-country intervention offered to IDPs across the border while neglecting asylum issues in refugee host countries is unrealistic and indefensible. Besides, Morris ignores the agency's apolitical status as mandated by the UNGA. Noting that the UNHCR's engagement with refugees' country of origin, especially with repatriation exercises, has traditionally been useful, however, the agency's engagement with IDPs or in-country protection should not be the default response to general population displacement.

Globally, the movement of refugees and asylum seekers takes place in territories with exclusive *de jure* sovereignty rights.[344] However, the UNHCR has progressively gained *de facto* sovereignty rights from the UNGA to intervene across state borders. In most cases, this happens during active armed conflicts in the refugee's country of origin. Although mandated by the UNGA, whatever protection being offered in-country is beyond the 1951 Refugee Convention framework. By default, refugees are depicted as 'unprotected persons', but only after they have already crossed international borders. However, the UNHCR has acquired the mandate to crisscross the borders when delivering aid to people who are not refugees, regardless of their geographic locations. Similarly, many institutions affiliated with the UNHCR have undergone significant changes both in scope and function. For example, in order to protect their sovereignty, the West began funding international organisations, most of which were intended to further their domestic interests.[345] Further, the UNHCR developed a renewed interest in encouraging states' accession to the treaty-based 1951 Convention and affirm their moral support to this agency. Over the years, the scope of the UNHCR's humanitarianism has expanded into territories in which it is considered a violation of sovereignty. It also oversees expanded programs in the refugee country of origin, including governance, development, reconstruction,

[343] N Morris, 'Protection dilemma and the UNHCR's response: a personal view from within the UNHCR', *International Journal of Refugee Law*, vol. 9, issue 3, 1997, p. 492.
[344] *De jure* sovereignty concerns the institutional recognised rights to exercise control over a territory
[345] L Barnett, 'Global governance and the evolution of the international refugee regime', working paper no. 54, UNHCR, Geneva, 2002, p. 252.

reintegration, women's rights and peace building.[346] As the refugee agency grew in influence, it equally became powerful within both domestic and international politics. Evidently, once restricted within the periphery of international borders, the refugee agency now extends relief aid to IDPs and other persons of concern to this office, a role traditionally considered the responsibility of the state. As beneficiaries of humanitarianism, both refugees and IDPs share the same space, the former straddle the border while the latter are restricted within their borders, but routinely crisscross each other along the path. Such double displacements are evident in countries such as Uganda, DR Congo, South Sudan and Sudan where there is a sizeable number of both refugees and IDPs. It is common for the different groups to switch from one camp to the other, depending on the prevailing circumstances. In this humanitarian stage, the refugees and the IDPs receive their entitlements, but only when confined within this neo-colonial space. It is also common for the UNHCR staff to be deployed from one camp to the other as humanitarianism has become a multi-billion-dollar business. Similarly, the UNHCR patrols the borders with its trucks while pitching tents on both sides of the border, but in a way that resembles 'the scramble for Africa'. It uses its humanitarian banner in order to secure legitimacy, trust and avoid tension with the host country. This demonstrates that the camp has become a globalised humanitarianism, a governmental space of power, control, a site that accommodates discarded waste products of globalisation.

Paradoxically, there is no evidence to date that in-country protection in the domestic space of the state by the UN and gradually the UNHCR, prevented the root causes of refugee outflow. Michael Ignatieff noted:

> the inability of the UN to stop nightmarish civil war in Afghanistan; the collapse of Sierra Leone and Liberia; the Indonesian suppression of East Timorese; and the Russian's bloody attempt to crush the Chechens... These are what Boutros-Ghali calls the 'orphaned conflicts,' the ones which the West promiscuous and selective attempts ignored…[347]

Ignatieff's concerns reflect the fact that the UN policy of 'selective intervention' in the refugees' country of origin has failed. To support this proposition, the French

[346] M Barnett, 'Humanitarianism with sovereign face: UNHCR in the global undertow,' *International Migration Review*, vol. 35, no. 1, 2001, pp. 244-277.
[347] M Ignatieff, 'The fall and decline of a blue empire', *Manchester Guardian Weekly*, 29 Oct 1995.

government prevented the Rwandese refugees from crossing the borders and instead redirected them to a French protected 'safe camp' within Rwanda,[348] in order to reassert its political influence in this country. Unfortunately, the French soldiers eventually abandoned the Rwandese in the jungle. As if this were not enough, the Rwandan refugees were subsequently prohibited from seeking asylum in France on the basis that protection was being provided to them at home.[349] This was a clear infringement of the right to seek asylum given that both the UNHCR and the French government failed to provide meaningful protection to this vulnerable population. The UNHCR's humanitarianism flourishes because it is the first port of call to respond to global catastrophes such as civil war which is caused by the very system that creates these catastrophes.

During his term as the High Commissioner, Rudd Lubbers introduced several development-oriented initiatives for Africa such as Convention Plus, Development Assistance to Refugees and Development through Local Integration.[350] However, these initiatives were a total failure because the UNHCR became overburdened with having additional responsibilities meant for states. Proponents of in-country protection argue that the institutionalisation of exile undermines the fundamental rights of refugees to return home and unjustifiably relieves the country of origin of responsibility towards its citizens.[351] However, when analysed critically, and, contrary to the UNHCR's position, most refugee returns take place in countries, including South Sudan, where active armed conflicts and serious human rights abuses still exist. This means that returns are not purely voluntary, a practice that is rooted in colonialism.

The UNHCR in-country protection, or what Giannacopoulos refers to as 'offshore hospitality',[352] is premised on the idea that protection is best provided 'at home'. Shaped in humanitarian language, in-country protection represents a dramatic reformulation of international refugee law. With this paradigm shift, refugee law could collapse into human rights law. There is a danger if the UNHCR's intent is to use the

[348] C McGreal, & D Harrison, 'Continent's spoil slip from the French's finger', *Manchester Guardian Weekly,* 15 December 1996.
[349] A Gumbel, 'France blocks refugees from Rwanda program', *Manchester Guardian Weekly*, 3 July 1994, p. 3.
[350] JC Simeon, & T Clark, 'UNHCR international protection polices 22003-2013: from cross-road to gaps and response', *Refuge Survey Quarterly*, vol. 33, no. 3, 2014, pp. 1-33.
[351] TA Alienikoff, 'State centred refugee law: from resettlement to containment', *Michigan Journal of International Law*, vol. 14, no. 1, 1992, p. 120.
[352] M Giannacopoulos, 'Offshore hospitality: law, asylum, and colonisation', *Law Text Culture*, vol. 17, 2013, p. 178.

policy of in-country protection as leverage to address prolonged encampment in asylum countries. In-country policy revalidates the colonial context of protection because the UNHCR has a very limited and restricted responsibility towards IDPs and returnees. As the inequality in outcomes between encamped refugees and other persons of concern to the refugee agency is growing with priority given to the latter, there is a significant risk that refugees could be returned prematurely to country of origin, unless a norm be developed requiring that states' responsibility be invoked to hold both the sending state and the country of origin accountable.

4.7 The UNHCR's humanitarianism

Since 1969, the UNHCR has maintained its neo-colonial *status quo* in Kenya and throughout Africa providing humanitarian aid to refugees. In fact, almost all refugee camps in Africa are internationally funded. The irony is that to claim to be both humanitarian and apolitical is equivalent to self-deception. Ghana's first President, Kwame Nkrumah, observed that 'it is in the field of aid that the rivalry of the West first manifests itself'.[353] Indeed, it is through humanitarianism that the UNHCR's dominance and neo-colonial/imperial continuity is maintained. Humanitarian agencies flourish because refugees are regarded as passive victims who need to be taken care of and controlled through the strategy of containment. This donor-sponsored humanitarianism exercised through social distancing is intended to avoid legal obligation towards refugees. Harrell-Bond observed that in this space, refugees become pathological, medicalised and symbolically disempowered.[354] This category of vulnerability places the refugees as victims, whose human quality is considered diminished, incomplete or forgotten. This vulnerability requires a globalised humanitarian apparatus, a network of agents across the world to mobilise resources. Setting up the camp becomes the exclusive *raison d'etre* of the humanitarian project. The UNHCR's 'care and control' model of camp management emerged in the 1990s. During this period, the UNHCR assumed a progressively wider long termed responsibilities in managing mega refugee camps. It was on this basis that the UNHCR shifted its function from legal protection to humanitarianism as a 'fill in the gap' role. Amy Slaughter and Crisp beautifully summed it: 'The UNHCR is a surrogate state, complete with its own territory (refugee camps), citizens (refugees),

[353] K Nkrumah, *Neo-colonialism, the stage of imperialism*, T Nelson, & Sons Ltd, London, 1965, p. 6.
[354] B Harrell-Bond, 'Can humanitarian work with refugees by humane', *Human Rights Quarterly*, vol. 24, issue 1, 2002, p. 57.

public services (education, health care, water, sanitation, etc.), and even ideology (community participation, gender equality)'.[355] This humanitarianism means setting up camps in the ages of cities as a zone of exclusion, distinction, separation, invisibility. This politics of containment has become the invisible norm without apparent violence because the UNHCR regards the camp as safe haven for refugees. I take a deconstructionist approach that the UNHCR not only removes itself from the narrative of violence by portraying itself as a protector, but also insulates itself from culpability in producing this symbolic violence through exclusionary refugee law and policy, and of keeping refugees encamped for decades. Although the UNHCR plays the role of a protector in this space,[356] it is also fully aware that the very nature of prolonged encampment is precisely where violence flourishes as an imperial project. It should be acknowledged that the UNHCR's delivery of protection mandate is limited to human and financial resources. This means that many field operations may be inadequately staffed and thereby, addressing refugees' problems may be delayed or neglected. As the UNGA had noted, solutions are to be pursued, but 'under due safeguards in accordance with (the High Commissioner's) responsibility ... to provide international protection to refugees within its mandate.'[357] However, it should also be acknowledged that some of the UNHCR's controversial policies and practices, such as 'safe return', assistance in militarised zones, the protection of IDPs, and prolonged encampment, are some of the obvious weaknesses of this agency.

As refugee protection is donor funded, the UNHCR has to spend more time writing reports to donors to keep itself funded. The bureaucratisation of counting and documentation means that the UNHCR's staff spend more time writing reports to please its donors than the refugees. Gayatri Spivak argues that the reporting or 'Western production of knowledge' is neither neutral nor innocent as it aligns with Western economic interests.[358] In the reports, the refugees become nameless

[355] A Slaughter, J, Crisp, 'A surrogate State? The role of UNHCR in protracted refugee situations,' new issues in refugee research, working paper no. 168, UNHCR, Geneva, 2009.
[356] J Hyndman, *Managing displacement: refugees and the politics of humanitarianism*, Minneapolis: Minnesota University Press, 2000, p. 12.
[357] UNGA, 1957. "Report of the United Nations High Commissioner for Refugees," Resolution 1039(XI), 23 January 1957, para. 3.
[358] Spivak, G, 'Can the subaltern speak?', in P William, KL Chrismas, *colonial discourse and postcolonial theory*, A Reader Harvester, NY, 1994, p. 66.

numbers and invisible objects of western knowledge. The refugees become de-historicised, dehumanised and generalised. This generalisation is done through the removal of their humanity which feeds into the abstract legal construction of the refugee. This humanitarian project is what Agier refers to as 'the left hand of empire'.[359] For him, humanitarianism forms part of a 'global police' which exercises control during crisis in the Global South as part of imperial politics of containment.[360] This hegemonic humanitarianism could be characterised as a form of totalitarianism. The victimisation and passivity render the refugees docile as they needed to be taken care of by outsiders as the *raison d'etre* of humanitarianism.[361] Although the camp is situated at the intersection of humanitarianism, nowhere in the world has this project proved successful or durable. It is the encamped refugees who feel the full impact of this failure on which encampment is founded.

Similarly, Agier observed that humanitarianism is 'the new form of warfare through which the world's superpowers manifest their humanist compassion'.[362] Ostensibly, this humanitarianism is caught up in a web of a 'secret solidarity' with the police order.[363] I once noticed when the UNHCR in Kakuma camp projected the expansion of this camp with the expectation of a new refugee emergency from South Sudan. The expected new arrivals were pigeonholed: unaccompanied minors, single parents, people with physical disability, pregnant women, unaccompanied minors, the sick and the elderly. This policy of keeping refugees in fixed categories exemplifies life in the colony. This labelling is shaped by the politics of containment, or what Jacques Ranciere dubbed 'politics in its nihilistic age',[364] and has strategic value to the UNHCR. To put it in context, the camp, the speciality of poor countries in Africa, has become an experiment of large-scale segregation of undesirable people. From a humanitarian standpoint, the refugees become nameless objects in this space as the aid provided to them invokes their non-presence. Conceptually, a refugee is considered both 'a physical and metaphysical outsider'.[365] Yet, as numbers are essential for the UNHCR, these nameless bodies must be counted. It is

[359] M Agier, 'Humanity as an identity and its political effects: a note of camps and humanitarian governments,' *Humanity*, vol. 1, no. 1, 2000, pp. 29-45.
[360] Ibid.
[361] Ibid.
[362] Agier, Between war and city, p. 318.
[363] Ibid.
[364] J Ranciere, *Disagreement: politics and philosophy*, Minneapolis, University of Minnesota Press, USA, 1999, p. 6.
[365] R Dworkin, *Laws' empire*, Belknap Press, London, 1985, p. 338.

this exercise of counting, coding and the containment of refugees that invokes images of Foucault's 'governmentality'.[366] In modern terms, this term refers to power politics augmented with the narrative of neoliberalism and exploitation. This governmentality also refers to the institution of control through the concept of bio-power. Basically, international refugee law is premised on the concept of surrogacy which focuses entirely on the politics of containment and control as donors prefer to keep social distance from the refugees. This could explain the reasons why whenever refugees and asylum seekers decide to vote with their feet, crossing the seas to seek a better life in the West, they are considered a security threat. As such, the legitimacy of a refugee outside the camp becomes politically dangerous. They need to be depoliticised, demobilised and kept in prolonged encampment. This makes the camp space extra-legal where rights are non-existent.

Jennifer Hyndman presented a critical account of the culture, practices and operations of the UNHCR by drawing upon her experience when working in a refugee camp along the Kenya-Somalia border in the 1990s. Due to its historical and institutional approach to refugee management, Hyndman asserted that it is difficult to draw the line between the UNHCR's humanitarianism and neo-colonialism.[367] This is a complete deconstruction of the entire ethos of the UNHCR. To put it in context, it was during this period that Western governments responded to the refugee crisis in the Gulf Region. Subsequently, the UNHCR responded by containing the displaced population in 'safe zones', also known as 'UN protected areas' or 'preventative protection' within the area of active conflicts, such as in Iraq, and previously in Bosnia-Herzegovina and Somalia.[368] It was then that the UNHCR developed the concept of the 'safe zone', purportedly to emphasise the right to remain in one's country of origin even when it is too dangerous to do so.[369] This represents the strategy of exclusion to keep the potential refugees from seeking asylum in the West. When the UNHCR entered northern Iraq in 1991 to provide humanitarian protection to the Kurdish refugees, technically this was *refoulement* as it was viewed as a

[366] E Baines, 'A review of J Hyndman, Managing displacement: refugees and the politics of humanitarianism,' viewed 20 August 2017, <https://www.jstor.org/stable/10.5749/j.ctttscf9>.
[367] J Hyndman, *Managing displacement: refugees and the politics of humanitarianism*, Minneapolis: Minnesota University Press, 2000.
[368] Ibid.
[369] Ibid.

political act.[370] The so called 'Operation Provide Comfort' in Iraq was considered one of the successful US military operations in the 20th century.[371] However, it was not based on consent as such an operation was backed up by heavy military presence. This is what Agier refers to as 'striking with one hand, healing with the other'[372] to designate the role played by humanitarian agencies which cleans up the damage wrought of military invasions. The donor-sponsored cross-border humanitarianism implies that the UNHCR's work is politically oriented towards keeping the refugees in the region of active conflict. This compassion, demonstrated through rescuing war victims, could equally be classified as 'secret solidarity'[373] with the global police where the aerial distribution of medicine is followed by the dropping of bombs in places like Iraq and Afghanistan.[374]

By using feminist jurisprudence, Hyndman and Giles critiqued the gender disparity in refugee legal theory. They challenged the claim that the law has a neutral status, distinct from the refugees it controls.[375] The claimed neutrality of the law gives itself a special status. This makes the law's inequality appear natural. Using Hyndman's and Giles' feminist critique, so long as the refugees are confined in a camp-like environment where they are 'depoliticised, immobilised, and feminised through humanitarian aid',[376] they do not pose the same threats as those on the move who are considered a security threat. Although international refugee law portrays the ethics of 'care and justice', its feminisation of asylum has significantly contributed to prolonged encampment. It portrays refugees as people who must be taken care of by the UNHCR. Once confined in the camp and they accept their non-existence status, the refugees become legitimate and more acceptable than those mobile bodies trying to seek asylum overseas. This humanitarian practice is what Hyndman and Giles refer to as 'constellation of postcolonial power'.[377] I extend Hyndman's and Giles' scholarship by arguing that as a gendered system, international refugee law

[370] Goodwin-Gill, op. cit., p. 141.
[371] T Ricks, 'Operation Provide Comfort: a forgotten mission with possible lessons for Syria', viewed 22 April 2020, <http://foreignpolicy.com/2017/02/06/operation-provide-comfort-a-forgotten-mission-with-possible-lessons-for-syria/>.
[372] M Agier, 'Humanity as an identity and its political effects: a note of camps and humanitarian governments,' *Humanity,* vol. 1, no. 1, 2000, pp, 29-45
[373] Ibid.
[374] Ibid.
[375] J Hyndman, & W Giles, 'Waiting for what? The feminisation of asylum in protracted situations', *Journal of Gender, Place and Culture*, vol. 18, no. 3, 2011, pp. 361-379.
[376] Ibid.
[377] Ibid.

texts conceptually continue to fulfil the patriarchal tradition of imperialism. Needless to point out that the historical focus on civil and political rights in the 1951 Convention is a consequence of gender bias.

Hyndman argued that in armed conflict situations, 'humanitarian assistance moved more freely than persons fleeing persecution, war and violence…and legal issues are carefully navigated and in some cases avoided'.[378] Considering that the Rwandan genocide of 1994 was largely blamed on the failure of the international community, there was a valid concern that the UNHCR was more actively involved in coordinating humanitarian aid than fulfilling its protection mandate.[379] Contextually, such an intervention is often well calculated, in terms of its financial viability and popularity with its donors.[380] It is on this basis that the restriction of refugee mobility across the borders has become political. This geopolitical reorientation of humanitarianism provides the UNHCR legitimacy to intervene in sovereign states. The UNHCR's view of itself as a non-political entity as stipulated in paragraph II of its Statute, runs the risk of politicising refugee protection. This also explains why the UNHCR's concept of protection is questionable because by keeping the refugees encamped indefinitely, this humanitarian logic often silences and makes the refugees become generalised documented victims. This new trend of administration of displacement could be referred to as neo-colonialism or a new form of governmentality.

John Hargreaves, who wrote extensively on the decolonisation of Africa, suggests that neo-colonial policies, in all likelihood, killed any chance of a sovereign nation.[381] The UNHCR portrays itself as a forebearer of this modernist project of the West because all it does is promote and consolidate neo-colonialism.[382] As humanitarianism is well funded, it is also the field through which Western governments manifest themselves. This modernist approach to refugee assistance equally applies to international aid agencies as they not only operate in the humanitarian field, but also in political and ideological spheres. In fact, the ever-expanding mandate of the UNHCR is rooted in its reliance on donor relations and

[378] Hyndman, Managing displacement, p. 248.
[379] Ibid.
[380] Ibid.
[381] JD Hargreaves, *Decolonisation in Africa*, Longman, London, 1996, p. 12.
[382] A Andreasson, 'Orientalism and African development studies: the "reductive repetition" motif in theories of African underdevelopment', *Third World Quarterly*, vol. 26, no. 6, 2005, p. 973.

assistance. This relation is largely predicated on the prevention of onward migration and avoiding burden sharing responsibility. The humanitarian response is also enforced through prolonged encampment which serves the UNHCR's mandate to operate in the camp. It is through this relation that the donors use their financial leverage to reinforce the reconceptualisation of the UHNCR's protection mandate. In some cases, Western governments intervene unilaterally in conflict zones to prevent a refugee situation from becoming their responsibility. Although the UNHCR has become a globally recognised surrogate state, it has neither the political will nor the capacity to substitute the state.

4.8 Conclusion

This chapter critiques the colonial function and legacy of the UNHCR and its failure to end prolonged refugee encampment in Kenya. The UNHCR with its expanded protection mandate, and its model of encampment for managing population in displacement, is colonially structured. Understanding this colonial heritage allows for a deeper analysis of the UNHCR beyond postcolonial politics. This chapter undertook a decolonisation critique of the UNHCR's concept of protection, the ambiguity surrounding the meaning of a refugee, and the protection gaps within the 1951 Convention. It critiqued the UNHCR's ever expanding mandate, and deconstruct its concept of 'protection' which originally referred to the control and administration of colonies or the so called 'racially undesirable others'.[383] In its current usage, the term 'protection' allows states and the UNHCR to shape and define the services they provide to refugees in humanitarian language, but on condition that they legally reside in indefinite camp. It is this colonial legacy of control and domination that has left a mentality on how the UNHCR engages with refugees. In analysing this continued coloniality, this chapter shows that instead of relying on six-decade-old colonial legal framework, Africa adopts a borderless policy as an indigenous solution which is relevant to the culture, history and hospitality of the African people which predates the refugee regime. The next chapter examines the securitisation of African borders, an interrelated area of inquiry which has equally contributed to prolonged encampment.

[383] O Rathkolb, *Revisiting the national socialist legacy: coming to terms with forced labour, expropriation, compensation, and restitution*, Transaction Publishers, New Jersey, 2004, p. 212.

Chapter 5: The securitisation of African borders

5.1 Introduction

This chapter examines the securitisation of African borders in order to determine the extent to which they have contributed to prolonged refugee encampment. I advance two key securitisation theories crafted by the Traditional Securitisation Scholars, and the Copenhagen School. The distinct theoretical frameworks of the two schools provide the premise within which to examine the securitisation of African borders. Securitisation studies has recently gained prominence in international politics, a trend triggered by the events of 11 September 2001, largely shaped by the 'war on terror'.[384] While securitisation as a practice is considered a recent development in Western philosophical ideology, it has already been encoded as a tool of colonial expansion and annexation of territories in Africa. To date, colonial borders in Africa present a litmus test to the African Union's (AU) boundary rules. As the African states inherited their colonial borders almost unchanged, this chapter reveals how the securitisation of the borders have contributed to prolonged encampment. It is within this colonial context that this thesis offers a decolonial critique of the securitisation studies, by undertaking a critical and systemic analysis of the literature. It challenges the dominant assumption that securitisation is a recent phenomenon.

[384] C Aradau, *Security and liberty in the war on terror*, department of politics and international studies, *Open University*, Milton Keynes, UK, 2016, p. 16.

5.2 Colonially bordered Africa

African borders occupy a significant place in postcolonial studies[385] and in reconstructing the political boundaries of the state. During the colonial era, these borders were imposed as part of colonial expansion in order to gain control over territories and the people within them. It was during the 1885 Berlin Conference that Europe partitioned Africa into territories. The territorial division or the 'scramble for Africa', involved invasion, colonisation, occupation and annexation of territories by European powers.[386] The word territory is derived from the Italian word for terror. According to William Connolly, terror could be interpreted as 'land occupation by violence'.[387] To terrorise is to 'establish boundary in a territory by violence and warning others off'.[388] As borders and terror are synonymous, the former should not be celebrated as a sign of achievement in Western civilisation. This is because colonialism erased the sovereignty of the colonised through terror and settler takeover. In other words, terror and territory are an integral part of colonialism as they both imply taking over through violence. The relationship between territories, borders, and law is that they form a triage which became foundational to colonialism. Here, territory is conceptualised not as a space of cultural belonging, but as a political space where the sovereign exercises violence. Conceptually and analytically, borders are embedded within these numerous concepts of securitisation practice. As refugees are technically produced through the technique of territory and borders, this means that securitisation practice is associated with neo-imperial politics of difference.

At independence, the newly formed African states assumed territorial sovereignty based on the Westphalia principle which defined a state based on territorial division. This territoriality became the basis upon which borders, territories and the law continued to structure coloniality in Africa. A territory only gained recognition as a sovereign state if it met the following conditions: 'İt is colonised separately, has its

[385] CN Teke, 'Straddling borders in postcolonial discourse: delocalisation (displacement) and reconstruction of literary theory in Africa', *Mediterranean Journal of Social Science*, Vol 4, no. 3, 2013.
[386] Original people.org, 'The scramble for Africa: how Africa was divided', viewed 22 July 2020, <https://originalpeople.org/scramble-for-africa-par/>.
[387] WE Connolly, 'The complexity of sovereignty', in J Edkins, V Pin-Fats, & M Shapiro, *sovereign laws, power in world politics*, Routledge, London, 2004. 0917093354
[388] Ibid.

own colonial borders, and has official proclamation of independence'.[389] The principle of territorial integrity gave rise to the concept of the state, to segregate, discipline and control colonial subjects. Territory was used as the object of oppression without acknowledging the presence of the Indigenous people that existed in those locations for centuries. However, territorial integrity was a myth as it only succeeded in maintaining colonial subjectivity in the international legal systems. Although there has not been any boundary change since the 1960s, the AU, which is responsible for these boundaries, has recognised the arbitrariness of these borders. Fred Gateretse-Ngoga, the AU head of conflict prevention, observed that 'disputes over 19 African borders are still bubbling across the continent.'[390] In fact, borders are not free zones, they are rogue embodiments of injustice, a zone of distinction, a 'utopian space'.[391] These borders represent a global apartheid which separates and segregates, characterised by inequalities. Although territorial borders have become the mainstay of the political reality of global politics, they are institutionally bounded spaces of control and exclusion.

In postcolonial Africa, the principle of *uti possidetis*[392] emerged as a default rule of international law.[393] This principle stipulates that nations emerging from colonialism shall presumptively inherit the administrative borders that they held at the time of independence.[394] Although *uti possidetis* became a customary norm in Africa, an appraisal of its doctrine is necessary as its use raises very fundamental questions in the context of the current refugee crisis in Africa. When Nigeria, once a British colony, and Cameroon, a German colony, had a border dispute in 2002, their claims were not based on cultural claims of the historical inhabitation by their citizens, instead they relied on century-old postcolonial documents to justify their claims of

[389] Somaliland Sun, 'Somaliland: the danger of redrawing the African colonial borders', viewed 11 November 2018, <http://www.somalilandsun.com/2018/01/31/somaliland-the-danger-of-redrawing-african-colonial-borders/>.
[390] The Economist, 'Why Africa's borders are a mess', viewed 24 January 2018, <https://www.economist.com/the-economist-explains/2016/11/17/why-africas-borders-are-a-mess>.
[391] P Kajaram, & C Grundy-Warr, 'Hidden geographies and politics at territory's edge', University of Minnesota, Minneapolis, 2007, p. 201.
[392] Oxford Public International law - *uti possidetis* is a principle of international law that serves to preserve the boundaries of colonies emerging as new states. It is also premised on the principle of international law, ranging from consent and the prohibition to the use of force.
[393] Ibid
[394] SR Ratner, 'Drawing a better line: *uti possidetis*', *American Journal of International Law*, vol. 90, no. 4, 1996, pp. 590-624.

ownership.[395] Neither Nigeria nor Cameroon codified *uti possidetis* in their domestic laws and its principle did not appear in the AU resolutions. Despite the AU's support for the *uti possidetis* doctrine, to date, its invocation has never resolved border issues in Africa. *Uti possidetis* only allows for the shifting of territorial claims without any consideration of the original inhabitants of those territories. It is worth noting that international law and the notion of sovereignty have served to order postcolonial Africa into a frozen state by blocking post-independence movements towards self-determination. *Uti possidetis* doctrine and its applicability reflects the continuity of securitisation practices in Africa.

Writing about the Westphalian tradition as the 'global covenant',[396] Robert Jackson, in his recent thesis 'The global covenant', argues that borders shape rights and duties such as those relating to non-intervention.[397] His liberal view of international law as the global covenant is premised on the principle of *de jure* sovereignty by which states respect each other's territorial integrity in the international systems. Jackson's concept of global covenant is one sided, focusing on non-intervention, it praises globalisation and the international system as the global police. However, his concept of universalism seems to promote colonial/imperial continuity. Similarly, John Williams argues that borders perform important ethical functions between states and are necessary facet of human existence.[398] He contends that territorial borders are the bedrock, backdrop and the starting point of the international system and to de-reconceptualise it would mean the end of international relations.[399] I critique that universalising territorial borders is problematic as these borders have become sites where states express their exclusionary power of governing mobilities through digital technologies. It is through the borders that the state draws the virtual line between 'us and them', or 'inside and outside, but also as a 'Möbius ribbon where the perception of what is inside and outside varies depending on the position of the observer.'[400] As borders create a state of exclusion, of 'us and them', this dichotomy defines who is protected and who is not, who is a citizen and who is not.

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[395] M Fisher, 'The dividing of a continent: Africa's separatist problem', viewed 11 July 2018, <https://www.theatlantic.com/international/archive/2012/09/the-dividing-of-a-continent-africas-separatist-problem/262171/>.
[396] R Jackson, *The global covenant: human conducts in a world of states*, Oxford University Press, Oxford, 2000, p. 333.
[397] Ibid.
[398] J Williams, 'Territorial borders and the English school', *Review of International Studies*, vol. 28, no. 4, 2002, p. 739.
[399] Ibid.
[400] D Bigo, 'Frontier controls in the European Union: who is in control?', In E Guild, & D Bigo (eds), controlling frontiers - free movements into and within Europe, Ashgate Publishing, Aldershot, 2005, p. 52.

The metaphor of inside and outside reflects the power of the law in delimiting who could cross the borders. This arbitrariness of the law functions to draw the line of exclusion. The territorial division during the scramble for Africa did not only involved the takeover of the geographic space, but also the local inhabitants through violence which was the very foundation of colonialism. As border demarcation did not happen peacefully, but through structural colonial violence, a critical analysis of the various conceptual frameworks could shade more light into this phenomenon. Here I connect it with securitisation theory to address the problem of prolonged encampment.

5.3 Securitisation theory

Securitisation studies emerged Post-World War II as a sub-discipline of International Relations,[401] largely driven by American Traditional Security Scholars (TSS). Under TSS, security focuses on the state and it maintains an inherent militarised bias.[402] TSS maintains that the essence of security is war and the state is the only subject of security. In other words, the state is considered the main unit of security analysis as the threats of war and conflict occur only between states. However, as new security threats emerged in the 1980s, there became a need for new policy approaches, especially with a focus on human security.[403] From the 1980s, Europe became the centre of non-traditional or non-American security studies. The European securitisation schools (Copenhagen School, Welsh or Aberystwyth School, and Paris School) produced a large body of scholarship on securitisation theory and walked away from the American mainstream.[404] Given that these schools have varied methodological approaches to their securitisation theory, I consider this chapter against the question of colonial borders in order to understand the states' sovereign power to include and exclude refugees at the borders.

The Copenhagen School (CS) refers to a group of scholars formerly based at the Copenhagen Peace Research Institute (COPRI)[405] in Copenhagen, Denmark. The

[401] HH Hama, 'State security, societal security and human security', *Jadavpur Journal of International Relations*, vol. 21, no.1, 2017, pp. 1-19.
[402] Ibid.
[403] K Booth, *Critical security studies and world politics*, Lynne Rienner Publishers, Boulder, 2005, pp. 1-336.
[404] R Floyd, 'European non-traditionalist security theory: from theory to practice', *Geopolitics, history, and international relations*, vol. 3, no. 2, 2011, pp. 152-179.
[405] CORPI was closed on 1 January 2003, when the right-wing government merged COPRI with other Danish research institutes into the Danish Centre for International Studies and Human Rights.

CS constructed a mix of neorealist and social constructivist frameworks which generated an alternative approach to securitisation theory, based on the trilogy of the speech-act, the securitising actor and the audience. The CS provided an innovative yet controversial theory that has shaped the contemporary debate on securitisation studies to date. Their approach is located within the context of classical realism, influenced by Schmitt.[406] While often described as distinctively European, the CS constructed a comprehensive theory for analysing security based on linguistic, philosophical and sociological theory. Matt McDonald, a student of CS noted that the theories adopted by the TSS were too simplistic as a secure state does not necessarily result in the security of the individual(s) or non-state actors.[407] It was from this theory that the concept of security oriented away from its traditional statist notion to 'human security'[408] to emphasise the human element as the primary reference of securitisation practice. By default, the state has become the means rather than the end of security. However, the TSS were initially dissatisfied by the inclusion of non-state security issues such as ecological degradation, human rights, poverty, healthcare, etc., into contemporary securitisation studies.[409] Their theoretical approaches run contrary to the idea of broadening the definition of security on the basis that it could lead to intellectual incoherence.[410] Nonetheless, securitisation study remains a disputed terrain and no neutral definition is possible.

Cold War policy dominated the US foreign policy landscape for decades. Joseph Romm, an American climatologist, discussed the new threats to the US after the Cold War Era (CWE). He argued that the US needed to shift from its old military concept of security, to other non-military threats such as 'international drugs trafficking, environmental pollution, energy, and trade'.[411] Since then, the US has departed from its CWE definition of security, the relevance of which has also significantly declined over the years. Nonetheless, security is still indispensable for most states. For example, the US has fought three major wars after the end of CWE.

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[406] Schmitt, Political theology, p. 27.
[407] M McDonald, 'Security and the construction of security', *European Journal of International Relations*, vol. 14, no. 4, 2008, pp. 1-36.
[408] B Buzan, & L Hansen, *Widening and deepening security in the Evolution of International Security Studies*, Cambridge University Press, Cambridge 2009, p. 227.
[409] R Floyd, 'European non-traditionalist security theory: from theory to practice', *Geopolitics, history, and international relations*, vol. 3, no. 2, 2011, pp. 152-179.
[410] S Walt, 'The renaissance of security studies', *International Studies Quarterly*, vol. 35, no. 2, 1991, pp. 211-239.
[411] J Romm, *Defining national security: the non-military aspects*, Council of Foreign Affairs Press, New York, 1993, p. 12.

There has not been any fundamental change since WWII as the danger of nuclear weaponry and the threats to transnational terrorism has increased globally. As such, most states use securitisation theory as a key component in fighting the 'war on terror'. On this basis, the argument by TSS has merit because states, especially the developed ones, are still obsessed with their military and political powers. This is demonstrated by the vast amount of money they spend on their military. Notwithstanding their differences, both schools of securitisation studies sought to develop a theory that would effect social change. Given the contestability of the two approaches, a critical analysis of the major dimensions of securitisation theory will help unpack their different conceptual frameworks, especially as they apply to refugees.

Ole Wæver and Barry Buzan have been influential in the development of the constructivist approach that set apart securitisation studies from its Realist tradition, tracing it back to Schmitt.[412] They first presented their theory in a 1989 working paper 'security the speech-act: analysing the politics of a word'.[413] The two theorists broadened the concept of securitisation and applied it invariably to analyse state foreign policy behaviour, including transnational crime, cyber security, religious extremism, environmental degradation, healthcare, 'war on terror', and minority rights, among others.[414] These scholars described securitisation theory as the establishment of an existential threat that requires extraordinary measures to respond to it. When a speech-act presents something as a threat, the securitising actor performs a securitising move, gaining the power to create authority and move the issue beyond normal politics. This relates to the assertion that *'*security is not of interest as a sign that refers to something more real, the utterance itself is the act'.[415] In line with the Austinian theory, the speech-act theory does not have 'truth conditions' but 'felicity conditions', a term introduced by Austin in his seminal book 'How to do things with words'.[416] This concept bridges the intersection between language and reality which arises only when language and action joins into one. In

[412] O Wæver, & J Buzan, *Regions and Powers: the structure of international security*, Cambridge University Press, Cambridge, 2003, pp. 1-24.
[413] Ibid.
[414] Ibid.
[415] Ibid.
[416] JL Austin, *How to do things with words*, 2nd edn, JO Urmson & M Sbisa (eds), Harvard University Press, Massachusetts, 1962, p. 72.

pragmatic terms, this means that the focus is shifted from the conventional true/false dichotomy of securitisation theory and adopts the concept of performativity. This construction disguises the relations between sovereignty, law and violence. The concept of securitisation becomes linguistic by default. The language of security when used as a political tool for exclusion, promotes the 'undesirable others' as a security threat to the state requiring intervention. As democracy is considered the norm of politics, in contrast, securitisation practice is considered a means of moving political issues beyond the democratic process of government. It is defined by the politics of emergency and exceptionality, as Buzan sums it up:

> … securitisation is the staging of existential issues in politics to lift them beyond politics. In security discourse, an issue is dramatised and presented as an issue of supreme priority; thus, labelling it as security, an agent claims a need for and a right to treat it by extraordinary means.[417]

Buzan drew on John Austin's concept of 'performative utterances'.[418] His concept of performativity is formulated based on speech-act philosophy with its common features being the linguistic competence of the actor and the enunciation of security itself which invokes action. This theory intersects with Austinian understanding of speech-act theory, Schmitt's political theory of realism,[419] Bourdieu's theory of sociology[420] and Foucault's theory of governmentality.[421] The CS securitisation theory contends that a successful securitisation process is facilitated by 'internal or linguistic factors and by external or contextual' factors.[422] In essence, the speech-act theory is reinforced by an existential threat, the speeding up of the decision to act and the freedom to declare an emergency. In this context, securitisation theory becomes a tool for examining the different aspects of security where a typical political issue is forced to create a security threat. It is escalated from being a typical politics to a state of exception. Such a situation invokes security threats which then justifies an

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417 B Buzan, O Wæver, 'Slippery? Contradictory? Sociologically Untenable?', *Review of International Studies*, vol. 23, no. 2, 1997, p. 243.
418 Austin, op. cit., p. 75.
419 E Rossi, & M Sleat, 'Realism in normative political theory. Forthcoming in philosophy compass', *Chinese Comparative Philosophy,* vol. 9, no. 10, 2014, pp. 689-701.
420 G Scrambler, 'Sociological theorist: Pierre Bourdieu – Emeritus Professor of Sociology', viewed 11 May 2018, <http://www.grahamscambler.com/sociological-theorists-pierre-bourdieu/>.
421 MC Williams, 'Words, images, enemies: securitisation in international politics', *International Studies Quarterly*, vol. 47, no. 4, 2003, pp. 511–531.
422 McDonald, Security and the construction of security, p. 65.

emergency response and the subsequent use of force. In other words, the main effect of raising an issue above normal politics is that it has the potential to let the audience tolerate the violation of the rules that would have otherwise not been obeyed outside the law.

One of the key features of securitisation theory is that it is the discursive modality of threats requiring an emergency response. Such frameworks include border performance, governing through immigration control, 'continuum of crossing',[423] 'punitive pre-emption',[424] 'border reconstruction projects'[425] and 'existential threats'[426] requiring emergency response. Although it is within the powers of the sovereign to decide if an existential threat constitutes an emergency requiring the suspension of the rule of law, this view contradicts the CS theory which is premised on three steps, namely 'identification of existential threats, an emergency action, and effects of inter-unit relations by breaking free of rules.'[427] This is a direct correlation to Schmittian's theory of societal security which presents significant issues in contemporary security studies; making securitisation practice become a permanent state of emergency. When an existential threat, perceived or real, is identified, the matter is escalated beyond normal politics and it then becomes a state of emergency requiring an extraordinary response. In the context of asylum paradigm, securitisation practice becomes a government technique to exaggerate the risk posed by refugees and the matter is escalated to a state of exception. It is this concept of the state of exception or the state of emergency that reinforces prolonged encampment.

Two factors inform this securitisation practice in Kenya: the cultural identity of the refugees and the global war on terror. First, ethnically, refugees are regarded as outsiders, foreigners, non-citizens and culturally distinct. Accepting refugees in any host country involves cultural assimilation and integration. Ethnicity in Kenya has always been one of the effective political tools for mobilising security rhetoric against

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[423] S Pickering, *Women, violence and borders*, Sage, London, 2011.
[424] L Weber, 'Policing the virtual border: policing pre-emption in Australia offshore immigration control', *Social Justice,* vol. 34, no. 2, 2007, pp. 77-93.
[425] N Wonders, 'Globalisation, border construction projects, and transnational crime', *Social Justice*, vol. 34, no. T2V, 2007, pp. 33-47.
[426] O Wæver, 'Societal security: the concept', in B Buzan, M Kelstrup, & P Lemaitre (eds), *Identity, immigration, and the new security agenda in Europe*, Pinter Press, London, 1993.
[427] B Buzan, O Wæver, & J de Wilde, *Security: A new framework for analysis*, Lynne Rienner Publishers, London, 1998, p. 26.

the refugees. This meant that integrating refugees became one of the most difficult issues facing refugees in Kenya. Second, Kenya's porous borders, failed state narrative and Somalia's proximity to Kenya present a risk through trans-border criminality where terrorist activities across the borders go undetected. The Kenyan government claims that during refugee exodus into Kenya, it is difficult to distinguish a refugee from a terrorist.[428] For context, Somalia became a failed state after the collapse of a democratically elected government in 1992. Subsequently, this country became a breeding ground for the *Al Shabaab* terrorists for whom Kenya became a soft target. Seen as a strategic country for the operation of Western NGOs in Africa, Kenya received significant international support in its counter terrorism infrastructure.[429] This resulted in expansive counter terrorism operations with increased raids, the 'extra renditions'[430] of suspects and detention of foreigners with a focus on refugees and asylum seekers. While the counter terrorism measures were successful, it generated domestic resentment, especially among the Somali-Kenyan Muslim community who felt that they were implicated in the fight against terror purely due to their religion and ethnic links to Somalia.

In this context, the key audience of securitisation practice is the citizens whom the securitising agent attempts to convince in order to legitimise the exceptional security measures. Once this is accepted by the audience who are the citizens, this demonstrates an assurance of moral support or mandate, which then sanctions a security move. The acceptance indicates the key role played by the citizen in the securitisation process. For example, in order to incite and manage fear among its citizens, the Kenyan Government linked immigration to terrorism in its securitisation policy. When the Kenyan government enacted its securitisation policy in 2014 in the aftermath of the terrorist attack, it issued an encampment policy requiring refugees and asylum seekers to relocate to designated camps. This policy of exclusion demonstrates the power of the sovereign to make the camp operate like a form of colonial administration. Globally, this approach has shaped the conflict between citizens and refugees/asylum seekers-cum-illegals in public discourse. Such population profiling meant that the refugee is ever present, yet never acknowledged

[428] PM Kagwanja, 'Ethnicity, gender and violence in Kenya', *Forced Migration Review*, vol. 9, 2000.
[429] J Bachmann, 'Govermentality and counter terrorism: appropriating international projects in Kenya', *Journal of Intervention and State Building*, vol. 6, no. 1, 2012.
[430] Ibid.

within the law. This legal void disenfranchises and stripes the refugees from their fundamental rights to freedom of movement. Stripping refugees of their basic rights is predicated on Agamben's 'sovereign act of abandonment' which places the refugee outside the law. Agamben states:

> we must expect not only camps, but also always new and more lunatic regulative definitions of the inscription of life in the city. The camp, which is now securely lodged with the city's interior, is the new biopolitical nomos of the planet earth.[431]

It is such a state of exception that defines the refugee in security terms so that they are kept away from the national space and remain segregated to the camps which are located at the edges of cities. Refugee camps are constructed to create this territorial boundary between citizens and refugees; the life of abandonment. Agamben borrows the term 'biopolitical *nomos'* from Schmitt to define the technique of governance as the new normal in the refuge space as the life of abandonment. The *nomos* or the law in this space does not apply to life, but abandons it, reducing it to non-existence. Here, Agamben launches a critique of sovereignty, which he said confines the refugees to bare life in the camp, a normalisation of the state of exception. This 'confinement thinking' has become a new world order as millions of refugees have become trapped in this legal limbo. The refugee, having been cast outside the law and deprived of their humanity, is reduced to a bare life of survival and destitution. By default, it is this disenfranchisement practice that removes all transitory rights that accompany refugeehood.

5.3.1 The concept of exceptionalism

Securitisation processes align with the notion of exceptionalism where democracy operates outside normal politics. The concept of exceptionalism is consistent with CS's speech-act theory which necessitates a quick response to an existential threat. This exceptionalism is further explored by Jeff Huysmans in his ethical-political approach on the need to de-securitised:

> Exceptionalism puts representation under pressure by speeding up decisions. Security responses, especially after the dramatic events of 9/11, often articulate a need for swift and decisive counter measures… calls for speed and not only

[431] Ibid.

> questions the viability of deliberation and a contest of opinion; they also support strengthening executive-centred government and supress descent.[432]

This approach only serves to widen government techniques that create security dilemmas and set the society based on an 'us and them'. As Huysmans put it, 'securitisation has become a political technique of framing policy questions in the logics of survival and the politics of fear in which social relations are structured based on distrust'.[433] As political issues are presented in a xenophobic tone, it especially increases the vulnerability of minority groups such as refugees. Such an exceptional measure reflects Schmittian's formulation of the theory of sovereignty,[434] which is premised on and assumes an emergency requiring the suspension of normal politics. This state-centric approach to security elevates the interests of the state above that of the refugee. It is this situation that grants the sovereign a superior position to deal with the matter in an exceptional manner.

Sovereignty, law and security are intertwined with a theoretical problem, since the concept of securitisation can be employed by the sovereign to demonise a group of people in order to achieve public support. This is evident in the Kenyan Government's mandatory encampment policy.[435] As with all security issues, the Kenyan Government was able to get away with its encampment policy because it positioned itself above the law. Unfortunately, the notion of security has a downside as it places refugees under the banner of security, but in a negative light. By classifying an issue as a security threat, the sovereign's extra-judicial actions are legitimised, which would otherwise have been questionable under normal politics. When the local population accepts whatever step the government takes to curtail any perceived threats, this potentially facilitates inconceivable treatment via methods such as mandatory encampment. This is one of the ethical dilemmas that confronts securitisation theory because refugees are securitised and criminalised through securitisation practice. To put it differently, this is the basis upon which the state

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[432] J Huysmans, 'Minding the exceptions: politics of insecurity and liberal democracy', 2004, p. 332, viewed on 11 February 2018, <file:///C:/Users/bosco/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/Minding_Exceptions_The_Politics_of_Insec%20(1).pdf>.

[433] Ibid.

[434] Schmitt, The nomos of the earth, p. 273.

[435] The Conversation, 'Kenya's harsh new security laws put hundreds of thousands of refugees at risk,' viewed 11 February 2018, <http://theconversation.com/kenyas-harsh-new-security-laws-put-hundreds-of-thousands-of-refugees-at-risk-35789>.

uses sovereignty as its yardstick. Societal security is designed to protect the 'citizenry' identity from the 'undesirable other', in this case: the refugees. This societal narrative and the language that conceives a refugee as a foreigner is interrogated further by Jacques Derrida's theory of the foreigner:

> … the foreigner is first of all foreign to the legal language in which the duty of hospitality is formulated, the right to asylum, its limits, norms, policing, etc. He has to ask for hospitality in a language which by definition is not his own.[436]

Derrida invokes a poetic language of hospitality, saturated with platonic dialogue and its ethical implications, addressed to the foreigner, in a foreign language, a language not of the foreigner. In this space, 'hospitality emanates from the host who is also the sovereign who uses the law to sanction its authority'.[437] In his typology of the Socrates as a foreigner, Derrida's poetic narrative woven around the theme of hospitality describes a refugee as a foreigner. 'Hospitality' refers to the encounter between the state and refugee at the borders. Seen from the position of sovereign who is vested with the power to include/exclude, the refugee is regarded as a stranger, an alien, a foreigner. Derrida's territorial articulation of a refugee as a foreigner, is constructed by the sovereign in relation to its citizens. By default, the refugee as a foreigner is considered a threat to a sovereign territorial norm. Suffice to point out that the reference to foreigner is a reminder of not long-ago colonial presence in Africa. Derrida's concern is around the personage of the refugee as the first act of violence. This is because refugees are not only prohibited at the borders, they are also punished upon entry by way of indefinite encampment. In the context of African refugees, the law itself is written in a foreign language that they do not understand, and against which they cannot defend themselves, but instead have to conform and abide by. There is no alliance between the foreigner, hospitality and the law. In fact, there is no relationship as the law patricides, excludes, and secludes the foreigner for no reason other than that they are foreigners. This exclusionary politics of preying on refugees is constitutive in defining the limits of citizenship. It is in this context that the state plays an active role in promoting the culture of intolerance against refugees. The articulation of the refugee as a security threat directly feeds

[436] J Derrida, *Cultural memory in the present. Of hospitality*, in R Bowlby (trans), Stanford University Press, California, 2000, p. 91.
[437] Giannacopoulos, 'Offshore hospitality, p. 178

into the narrative for prolonged encampment. This symbolic violence affirms that encamped refugees will always be foreigners, regardless of their period of exile. This is how colonial privilege works.

Securitisation has also become a model of governmentality. Whenever refugees cross international borders, they are classified as 'illegals' which legitimises the need to confine them in the camp. It is through this 'confinement thinking' that the refugee camp has become a permanent space for exclusion, established through statist binaries of illegal/un-authorise/alien dichotomies. This means refugees have no legal status as the sovereign denies their legality at its discretion. Rather than address the problem of persecution and political exclusion, there is a paradigm shift in the securitisation as a practice where the protection of the state trumps the protection of the refugees. The contemporary securitisation approaches towards refugees are mainly driven by states' restrictive immigration policies. It is this contestation between the state and the refugees that forms the basis of sovereign distinction. The state therefore attempts to exclude the latter through sovereign abandonment. This leads to dispossession where the refugee is removed from view while the law appears non-violent and universalised by virtue of its legality. This is what Giannacopoulos refers to as an 'instance of law's violence'.[438] The sovereign abandonment of the refugee plays into the inclusion/exclusion politics legitimated by law. This violence is demonstrated by the operation of the law which is consistent with colonial practice in which the refugee will always remain a foreigner and a threat to the law itself.

5.3.2 The asylum paradigm

In this age of securitisation, the interface between refugee law and sovereignty demonstrates that those who seek refuge do critique the limits of sovereignty. The socio-legal analysis of this tension could provide a clear understanding of securitisation and its conceptual framework. Refugee law is exilic in its orientation. This means a person becomes a refugee only after crossing international borders to seek international protection. However, the tension between sovereignty and the refugee legal framework means that borders are impermeable. Securitisation

[438] M Giannacopoulos & C Loughnan, 'Closure of Manus Island and carceral expansion in the open air', *Globalizations*, vol. 17, no. 7, 2020, p. 6.

practice emphasises border protection which involves deterrence measures such as detention, *non-entre* or 'turn back the boat' policy. As Giannacopoulos put it, 'refugees are framed in the language of security and they become a threat to and through the law'.[439] The language of security has become mainstream and this gives legitimacy to xenophobia and it frames the conversation on refugees in a popularist prison of fear. Convincing the general public that refugees are illegals and pose a threat to national security aimed at enacting emergency response. In other words, refugees require a governmentality of disciplinary governance, making the treatment of refugees become dystopian. It is in this context that Kenya has recently increased surveillance along its borders. This is to ensure that refugees are either prevented from entering or are immediately directed to the camps upon entry into Kenya.

In contemporary politics, refugees are increasingly regarded as a burden rather than an ideological asset. There are several contributing factors to this paradigm shift. Throughout the CWE, refugees were considered 'agents of democracy, thereby acting as the physical manifestations of the fight against communism'.[440] However, the majority of refugees today are now from the poorer countries of the world. They are neither regarded as agents of democracy, nor seen as a potential skilled labour force. As Millbank noted, 'there is no longer a demand for unskilled labour in developed countries and therefore, no longer any ideological or strategic advantage attached to conferring asylum'.[441] In this age of securitisation, borders have become heavily securitised to deter immigration. Even though international refugee law was originally constituted to facilitate free passage for refugees across the borders, characterised primarily by humanitarian principles, liberal democratic governments, most of which are signatories to the 1951 Convention, have instead opened refugee camps or funded detention camps offshore to prevent refugees from entering their territories. This has made the contemporary camp a paradigmatic political space of modernity.[442] This point is explored further by Didier Bigo in relation to immigration:

> …the securitisation of immigration…emerges from the correlation between some successful speech-acts of political leaders, the mobilisation they create for and

[439] Giannacopoulos, Tampa: violence at the border, p. 32.
[440] Smith, Warehousing refugees, op. cit., p. 2.
[441] A Millbank, 'The problem with the 1951 refugee convention', viewed 10 May 2017, <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP05>.
[442] Bigo, Frontier controls in the European Union, p. 65.

> against some groups of people, and the specific fields of security professionals… it comes also from a range of administrative practices such as population profiling, risk assessment… with its ethos of secrecy and concern for the management of fear or unease.[443]

Bigo used speech-act theory metaphorically to justify the position of the speaker. As he alluded to, 'speech-act' termed *habitus* is framed in a way to cause unease and make citizens feel insecure. It is in this context that the securitisation of asylum has emerged as an ideological tool, structured by security professionals. The speech-act theory correlates to some successful speech-act anchored by politicians against minority groups, including refugees and asylum seekers. Securitisation derives its utility from 'speech-act' theory which portrays security-oriented imagery of the refugee as a danger to the public, instead of promoting their economic benefits. As Michael Rogin observed, 'political rhetoric works as a political demonology through which politicians construct a figure of the enemy'[444] to bring along distrust. In this myth of polity, illusion and sovereignty, the refugee is depicted as an outsider, and in a way that presumes their allegiance is to their country of origin. This allows the refugees to be theorised in territorial terms. As such, they are not entitled to the rights and privileges that accrue from the territory in which they are considered temporary immigrants. This, in effect, justifies whatever the state does to assert its sovereign power to exclude them. It is in this sovereign concept that the state portrays itself as the patriarchal protector, but only to its citizens.

5.3.3 Sovereignty and refugee law

The right of a sovereign state to grant asylum to an individual is globally acknowledged as being limited to a situation where the fear of persecution is clearly identified as stipulated in Article 1A of the 1951 Convention. Further, domestic law trumps international law and it is within the purview of the state to grant asylum. The state's pre-emptory rights to exclude aliens from their territory is illustrated in the Australian case Victorian Council for Civil Liberties v Minister for Home Affairs below:

> ...the power to exclude or expel even a friendly alien is recognised by international law as an incident of sovereignty over territory. As Lord Atkinson speaking for a

[443] Ibid.
[444] R Rogin, *The movie, and the other episodes of political demonology*, University of California Press, Berkley 1998, p. 327.

> strong Judicial Committee of the Privy Council, said in Attorney General (Canada) vs Cain and Gilhula: one of the rights possessed by the supreme power in every state is the right to refuse to permit an alien to enter that state, to annex what conditions it pleases to the permission to enter it…[445]

This comment, made by an Australian jurist, is a demonstration of the state's absolute right to exclude or even expel aliens from its territory. The power to exclude demonstrates that the refugee is not the only one constantly on the move. The state too is on the move, violently targeting any movement across the borders. This violence is legitimated by the sovereign power to exclude the refugee who is perceived to present a threat to sovereignty and the law itself. According to Atkinson, this power is the anarchical nature of the international realm. The power over border control and security is regularly invoked when refugee movements across the border are sighted. This invocation is premised on the power of the state which has been the guiding principle about refugees. To make it very clear, the power to determine who qualifies as a refugee is the prerogative of the state and not the 1951 Convention. Nietzsche describes this power in the following words: 'they come like fate, without reason, consideration, or pretext; they appear as lightning, too terrible, too sudden, too difficult, too convincing, too 'different' even to be hated'.[446] With these evocative metaphors, Nietzsche offers what he refers to as a healthier moral outlook of the law. This borderline politics aligns with the concept of the exception where law can be suspended for the purposes of preserving the state or what Benjamin refers to as 'law preserving violence'.[447] Every system of law is violent. However, this violence is inflicted on diasporic bodies who have to flee their country of origin to save their lives. As Giannacopoulos has argued, 'what is important for international law is the perception and belief in it, rather than its ability to deliver protection and justice to those most in need.'[448] The perception is that refugees present a crisis at the border and they are of immediate security concern. This means that the state has to use violence which characterises the conventional response legitimated by international law. This violence is fundamental in creating order inside and outside the state – the 'inclusive exclusion' dichotomy.

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[445] Victorian Council for Civil Liberties Inc. V Minister for immigration and Multicultural Affairs, 2002, 182 A. L. R. 617, 2001, FCA 1297 at para. 199.
[446] F Nietzsche, '*On the genealogy of morals'*, Vintage Books, New York, 1976, p. 17.
[447] Benjamin, op. cit., p. 312.
[448] Giannacopoulos, The non-justiciability of justice, p. 9.

Inclusion/exclusion is the very language of liberal political theory which gives the modern state the power to exclude refugees. This means that the concept of a refugee is constructed through a series of ontological omissions: whatever is present to a citizen is not present to a refugee. Besides, the borderline concept of sovereignty is also rooted in exclusive and monopolistic practice of violence where law could be suspended to preserve the sovereignty of the state. The confluence of crisis-oriented refugee law, sovereignty, and borders which define the struggle embedded in the political process of becoming a refugee, has become the rule rather than the exception.

Former United Nations Secretary General Boutros-Ghali once stated:

> while respect for sovereignty of the state remains central, it is undeniable that the centuries-old doctrine of absolute and exclusive sovereignty no longer stands, and was in fact: never so absolute as it was conceived to be in theory… and underlying the rights of the individual and the rights of peoples is a dimension of universal sovereignty that resides in all humanity and provides all peoples with legitimate involvement in issues affecting the world as a whole.[449]

A deeper analysis of Boutros' comment requires an understanding of the genesis of the international refugee regime. When the international refugee law was being crafted between 1920 and 1951, the immediate need of the displaced persons was about their protection and there was no concern about their legal rights. By 1933, the Convention relating to the legal status of refugees was decided and for the first, the international treaty enumerated the rights of refugees and these rights were later incorporated into the 1951 Convention.[450] Over the years, sovereignty has traditionally been the hallmark of the state. However, despite acceding to the 1951 Convention, states still retain their inherent right to prevent non-citizens from entering their territorial borders. Although sovereignty is meant to guarantee order, this order can be justifiable only if its legal principles promote humanity, especially for the most vulnerable in society. To put this in context, sovereignty is dependent on legitimacy, and legitimacy is the basis of sovereignty. In contemporary politics,

[449] B Boutros-Ghali, 'Empowering the UN foreign affairs', viewed 11 February 2018, <https://www.foreignaffairs.com/articles/1992-12-01/empowering-united-nations>.
[450] UNHCR, '1951 Convention Relating to the Status of Refugees (the 1951 Convention)', viewed 11 February 2018, <https://www.unhcr.org/en-au/1951-refugee-convention.html>.

sovereign legitimacy has collapsed into legality where the sovereign becomes the source of legitimacy. This could be interpreted as negative sovereignty. As sovereignty is intertwined with security, the refugee in this space is considered non-existent. Such an act of sovereign abandonment is located within the securitisation framework. This presents a severe dilemma which captures the refugees inside, yet outside the law.[451] Being inside and yet outside the law describes not only the territorial presence of the refugees, but also their political exclusion from the sovereign space. In other words, encampment has emerged as a trade-off between security and the civil liberty of refugees as the sovereign defends its borders in a totalitarian way. Given the unprecedented transnational migration of people globally in the 21st century, having border control based on the sovereignty right is justifiable. However, that right should not be absolute, and any anti-immigration policy meant to prevent people from seeking asylum is unjustifiable. The Westphalian concept of sovereignty, its Anglocentric supremacy, its colonial paranoia, its act of force sanctioned through the civilising process of the law, continues to promote colonial continuity in Africa.

Shifting the focus back to Kenya, historically, this country's immigration law has always contained elements of discrimination on refugees who are deemed undesirable. For example, the Kenya Immigration Ordinance 1906 orchestrated by colonial Britain, facilitated European settlement. The settlers' sovereign right was founded and protected by the legal fiction of *terra nullius*. Following Giannacopoulos' and Claire Loughnan's argument, colonial laws such as the Kenya Immigration Ordinance acted as 'an extension of *terra nullius* as it favoured imperial expansion'[452] of white settlement. This then became the precursor of and precedent for all subsequent post-independence Kenyan immigration and refugee laws. This is because the Kenyan refugee legislation created a permanent state of emergency, and a number of its provisions were designed to keep refugees indefinitely in the camp, which is an extension of imperial control.

The proposition for border control emphasises the concern over the safety of asylum seekers as they follow dangerous routes and the possibility of infiltration by terror

[451] Agamben, *Homo sacer*, p. 37.
[452] Giannacopoulos & Loughnan, 'Closure of Manus Island, p. 3.

groups. However, Seidman-Zager who studied the effect of securitisation on UK residents, revealed that 'associating asylum seekers with terrorism in public discourse could potentially lead to an increase, rather than a decrease in the human security of the resident population'.[453] This is indicative of the fact that over-securitisation does not only undermine the international refugee regime, but the intent of securitisation runs the risk of becoming self-defeating. For example, this applies to situations where the threat to security is linked to a particular section of a population where none existed before. This creates mistrust between citizens and refugees. As the latter are animated as a threat in the securitisation process, such characterisation induces public fear. As the securitisation of an issues does not make it real, such measures blur the distinction between real and perceived threats to security. While the 'fear of security' strengthens the state's position in order to exercise control, this also presents a danger to citizens because even the existence of a smaller threat could potentially invoke an illegitimate state response. As Seidman-Zager noted, securitisation practice in the UK and the European Union more broadly, has been institutionalised where refugees and asylum seekers have become the epitome of security. This constructionist approach to securitisation theory, of changing security discourse from the state to the individual, and the individual as a reference object of security, impacts negatively on citizens. The point of this theory is that security risk is not exactly real.

The securitisation as a practice has proliferated the modern refugee landscape since the end of CWE. In her essay, 'What is the camp', Suvendrini Perera unequivocally states, '… the war on terror is one where a soldier, a terrorist or a refugee can be made indistinguishable… where international law fails to protect asylum seekers from being criminalised as being illegals…'[454] In her essay, she animates securitisation practice in the context of the global war on terror post 11 September 2001. Her view supports the proposition that refugees are portrayed as transgressors of borders on whom the state exercises violence by criminalising and detaining them with impunity. This includes through the policy of externalisation and 'turn back the boats'. Such a repressive approach to border security has become the

[453] J Seidman-Zager, *Securitisation of asylum: protecting UK resident*, *Refugee Studies Centre*, working paper series, vol. 57, Oxford University, Oxford, 2010, p. 2.
[454] S Perera, 'What is a camp?, p.1.

state of exception in the 21st century. In reference to Kenya's excessive securitisation practice, its border politics has not only defeated the broader aim of refugee protection, but also poses an ethical dilemma in dealing with the refugees. This dilemma emanates from the difficulties in distinguishing a terrorist from a refugee as the latter is often made a scapegoat.

5.3.4 Criticism of securitisation theory

The CS's securitisation theory presents a significant normative dilemma. My critique of the CS's speech-act theory is that it does not provide a solid ground on which to critically evaluate claims of an existential threat or the state of emergency. This is especially when the matter relates to vulnerable cohorts such as refugees and asylum seekers. For example, as understood by the CS, 'securitisation theory is a discursive act by which the state or the elite group within it, describes something as a security issue to justify the use of force 'which in the absence of threat', be unacceptable'.[455] The matter is then moved outside the usual democratic process where de-securitisation becomes practically impossible. It is this factor that presents a new culture that results in border blockade. In recent years, states have revamped their security approaches by reverting from the broader notion of human security and are now preoccupied with a more traditionalist 'national security agenda'[456] – the protection of the state at all costs and the ever-increasing securitisation practice as the new world order. The CS proposes that speech-act theory be based on oral threat or when an event is threatening enough for it to require an emergency response. This theory lacks any strategic approach because ideally, speech-act means that there is no real emergency just that one has to be declared so. Further, refugees and asylum seekers are increasingly linked to insecurity which invokes exceptional measure in order to respond to the threats. This implies that security issues must be dealt with in an exceptional manner. Given this militarised assumption, it is difficult to imagine how the CS could implement the securitisation theory on vulnerable groups such as refugees and asylum seekers without portraying them as 'dangerous other' requiring exceptional measures.

[455] Wæver, Securitisation and desecuritisation on security, p. 15.
[456] K Booth, *Theory of world security*, Cambridge University Press, Cambridge, 2007, p. 149.

Securitisation studies largely remains within the academic domain. To some extent, it is also used by very powerful lobbyists and state elitists who hold an advantaged position over defining security threats. In other words, security threats do not exist independently from the political discourse that constructs them. As Wæver stated, 'by defining something as a security problem is when the political elites declare it so.'[457] The problem becomes securitised, escalated above political process and transformed into panic politics. Therefore, securitisation theory becomes not a subjective perception referring to something as real, but a perception. Consequently, the inherent power imbalance within securitisation theory makes it very difficult for marginalised groups to be heard, simply because they are excluded from the securitisation process.

Bellamy et al, argue that the global war on terror led and dominated by the US, resulted into a militaristic security policy.[458] Michael Williams, one of the contributors, affirmed that this approach to securitisation theory has 'pushed the promotion of human rights and environmental sustainability to the sidelines of the international security agenda'.[459] Indeed, when used as a political tool, securitisation theory has the potential to promote fear, marginalisation, and political exclusion. As such, once security is uttered, it limits the space for democratic process and shifts it to a state of exception. This demonstrates the structural power imbalance inherent within the dominant security discourse, one which has never been thoroughly scrutinised. The social construct of securitisation theory includes the securitising actor which in most cases is the political elites who declare certain matters as urgent and a posing threat, which, once accepted by the audience, legitimises the use of force. In the Kenyan case, the audience are the citizens who are the determining factors in the securitisation process. The series of terrorist attacks on Kenyan soil had ambiguous effects. Through the *Operation Usalama Watch,*[460] the Kenyan Government conducted small-scale militarised warfare aimed at de-radicalising Somali youth across the country. This targeted approach involved mass raids, arrests, detention

[457] Wæver, Securitisation and desecuritisation on security, p. 15.
[458] AJ Bellamy, 'Pre-empting terror', 1st edn, in AJ Bellamy, R Bleiker, SE Davies, & R Devetak (eds), *security and the war on terror*, Routledge, 2008, pp. 1-238.
[459] MC Williams, 'Modernity, identity and security: a comment on the "Copenhagen Controversy"', *Review of International Studie*s vol. 4, no. 3, 1998, pp. 435-40.
[460] Human Rights Watch, 'Kenya: halt crackdown on Somalis', viewed 16 September 2019, <https://www.hrw.org/news/2014/04/11/kenya-halt-crackdown-somalis>.

and ‘extraordinary rendition’ of suspected members of the Somali community.[461] It was this targeting that the Kenya Somali Muslim population were concerned about.[462] Although the Kenyan citizens may not be equally active participants in the securitisation process, they too inform the securitisation agenda in this country. The controversy was that the Somali-Kenyans viewed the Kenyan Government’s hybridisation of the war on terror as having a strategic purpose.[463] By mobilising the citizens against each other and by targeting the minority Somali population who are ethnically linked to Somalia, highlights some of the discrepancies in the Kenyan securitisation practices. It is these counter terrorism measures targeted at ‘home grown’ terrorist groups and refugees that led to Kenya’s draconian measures.

Anthony Burke argues that ‘the state plays the role of the patriarchal protector’ in the securitisation process in order to ‘provoke feelings of allegiance, safety, and submission’.[464] This political patriarchy is what Burke refers to as an *aporia*. Derrida describes an *aporia* as something like a stranger crossing a foreign land with impasse, and an ‘interminable experience’.[465] It is this *aporia* which associates security with the use of force, valorised in the name of defending the state. The understanding of patriarchy is culturally determined as a form of fixed binary distinction. The hierarchy in patriarchy sets the inequality in security discourse and signifies the imbalance in the power relationship between the state and its subjects. As such, the sustained patriarchy of security legitimises undemocratic means to devalue, subordinate and exclude the undesirable other. Similarly, encampment policy has the effect of creating public distrust and barriers between the state and the refugees. It is this hierarchical construction of security and its power relation of domination and subordination that has facilitated the separation of the state and refugees. That aside, securitisation theory also has a very narrow framework, focusing largely on speech-act and its informative power, usually by political elites who are institutionally legitimated to speak on behalf of the state. Globally, the securitisation theory is still structured within ‘border protection and camp confinement’ discourse. This feeds into the militarised view of the camp which

[461] Ibid.
[462] J Bachmann, ‘Governmentality and counter terrorism: appropriating international security projects in Kenya’, *Journal of Intervention and State Building*, vol. 6, no. 1, 2012, p. 42.
[463] Ibid.
[464] A Burke, ‘Aporias of security’, *Alternatives*, vol. 27, no. 1, 2002, pp. 1-27.
[465] Derrida, Aporias, op. cit., p. 11.

legitimises its restrictive nature. It is this shift from humanitarianism to the securitisation practice which has played a fundamental role in promoting and enforcing Kenya's encampment policy.

5.5 Conclusion

This chapter examined the securitisation of African borders and the severe restrictions it has placed on the rights to residency, freedom of movement, and citizenship for all Africans. This chapter argues that the African borders were imposed as part of colonial expansion in order to gain control over territories and the people within them. The territorial division during the scramble for Africa did not only involved the takeover of the geographic space, but also the local inhabitants through violence which was the very foundation of colonialism. As refugees are technically produced through the technique of territory and borders, these borders have become a space of exclusion. The AU's commitment to retain Africa's artificial borders and reliance on principle *uti possidetis* as a default response to border crisis have contributed to generating millions of refugees over the years.

The securitisation theory as presented by the CS is a useful framework, yet very narrow for analysing security dynamics in Africa at large. Most importantly, the theory ignores the ethical consequences of security, especially as it relates to the asylum paradigm. As demonstrated in the Kenyan situation, the Kenyan Government introduced a very strict encampment policy[466] which required, among other measures, that refugees and asylum seekers be forcefully relocated to designated camps. Securitisation theory often takes place when the political elites say so, even when there is no evidence of an eminent security threat, to warrant a restrictive response. In other words, since speech-act is based on the absence of evidence, the securitisation theory remains elusive and anecdotal. It is unsurprising that the securitisation theory which transfers refugee related matters to the realm of emergency politics, is and will remain a key component of Kenya's prolonged encampment policy. Above all, the securitisation of refugees in Kenya as reflected in domestic refugee legislation has generated local hostility and consolidated exclusive narratives, and contributed to Kenya's restrictive encampment policy. The key

[466] Amnesty International, 'Kenya: refugees appeal against forced relocation to camps', viewed 18 November 2017, <https://www.amnesty.org/en/latest/news/2014/07/kenya-refugees-appeal-against-forced-relocation-camps/>.

argument in this chapter is that the securitisation theory does not effectively capture the problem of prolonged encampment as states in Africa do not need exceptional circumstances to create security conditions. Further, securitisation practice although considered a new innovation in Western civilisation, is not a new phenomenon in Africa as it first used as a tool for colonial expansion and invasion of territories.

Chapter 6: Fanon and postcolonialism

6.1 Introduction

This chapter examines Fanon's postcolonial theory in order to problematise prolonged refugee encampment. Encampment has become the site of exclusion, symbolic violence and psychological alienation which were the enduring patterns of colonialism. As encampment and the practices that shaped it are inseparably linked to colonialism, this colonial/imperial continuity must be understood. It is in this context that Fanon's postcolonial theory is significant as it provides the foundation for generating scholarly work on how to address this phenomenon. To do this, I undertake an Afrocentric approach without the illusion of neutrality because I am committed to the emancipation of the refugees whose life resemble life in the colony. Nigel Gibson asked the provocative question: 'why invoke Fanon when the colonial era has gone?'[467] The reason is that Fanon's whole body of work is an intellectual engagement with the colonised world. It provides insights that could be used to problematise the colonial order embedded within the encampment paradigm. Similarly, this thesis provides an intellectual engagement by producing scholarly work that challenges the ongoing colonial order. As Fanon predicted, colonialism/imperialism has taken a different shape and this requires a different approach, including generating knowledge that critiques the dominance of Western philosophy of the colonised. Most importantly, this scholarly activism not only exposes the ongoing refugee coloniality, but it could potentially inform the emancipation of the refugees in Africa.

6.2 Fanon's colonial heritage

Fanon, a recognised postcolonial theorist, was born in 1925 in the French colony of the Caribbean island of Martinique. As a descendant of a former slave, he experienced both colonialism and racism in his hometown, and as a young black medical student in France.[468] Fanon later studied psychiatry in France and moved to Algeria where he became the face of the Algerian decolonisation struggle for

[467] N Gibson, Fanon: the postcolonial imagination', Polity Press, Cambridge, 2003.
[468] KP, Holst, & A Rutherford, *A double colonisation: colonial and postcolonial women's writing*, Oxford, Dangaroo Press, 1986, pp. 1-188.

independence. Although initially a devotee of French culture, Fanon later abandoned his French citizenship at the climax of the Algerian decolonisation war. It was during this period that Fanon wrote his three revolutionary books: 'A dying colonialism', 'The wretched of the earth' and 'Black skin white masks'. Evidently, Fanon's Martinique colonial heritage placed him as a colonial subject, although his intellectual upbringing placed him between the colony and the metropole.[469] By using literary and psychoanalysis in historical context, Fanon explained the feelings of alienation and dependency that the colonised people experienced. As a political socialist, he provided an ideological frame of reference for explaining the oppressive conditions of the colonised and why it was necessary for them to fight it. Although he was educated in France and fought for France during World War II,[470] Fanon's postcolonial theory lies outside of the European norms of the time. By putting his literary writing and political thoughts on the side of the oppressed, he provided an alternative reading of the literature and the philosophy of colonial identity. It is on this basis that I draw strength from Fanon's scholarship to inform my approach to postcolonial criticism in the context of refugee coloniality.

When I first approached my supervisors with my PhD thesis proposal, I was pre-occupied with one area of refugee policy in which I was held captive for too long: refugee protection. Not realising that refugee protection is the very essence of modernity/coloniality of my era. In the words of the UNHCR, protection is the legal framework from which the refugee agency derives its mandate to operate on behalf of the refugees. In order to fulfil this mandate, the UNHCR ironically works in partnership with the state, the very instrument of violence in the camp space. Even the 46 articles of the 1951 Convention are more a reflection of what states should do under the notion of sovereignty and borders than the UNHCR. The exception is Article 35 which particularly requests the UNHCR to supervise the state. However, the influence that shapes this supervision blurs the very protection being provided to the refugees who are regarded as a political community. As I understand it now, the word 'protection' phrased in European ideology and imported with European class structure, is fraught with an interpretive dilemma; protect who, and from whom?

[469] Ibid.
[470] Ibid.

Upon a comprehensive reading of Fanon, I became aware that protection and the camp are the very essence of Western modernity/coloniality.

Reading Fanon's postcolonial theory awoke my intellectual curiosity and the need to tell my story. Fanon urged that an intellectual 'must take part in action and throw body and soul into the struggle for emancipation'.[471] In using his Western intellectual upbringing, he promoted the existence of subjectivity of the colonised by creating an indigenous intellectualism to raise awareness about colonial consciousness. I was a refugee for about a decade, a life that Fanon described as an actual 'psychosis', a life that resembles subordination, alienation and imperial bondage. Prior to reading Fanon's postcolonial theory, I was still held in bondage in the belief that the refugee camp was my rightful residence and an ideal place where I was protected. Upon reading Fanon's psychological violence of colonialism, did I begin to reflect on my own experience as a refugee in Kakuma camp. I realised that I was living a life that had no past. Kakuma, a Swahili word for 'nowhere', located in a semi-desert terrain where temperatures soar up to 50 degrees, was my only home. For the UNHCR, the camp is a temporary shelter, but for the refugees, this temporality has transition into permanency. In not so distant reality, I only existed in the present, counted, but just as a number, dehistoricised, nameless, deprived of my humanity. In this space, the concept of time, which is an epitome of Western civilisation, does not exist. However, inside of me, I was well aware that my past existed, and it informed my present and my future. It was this plurality of the past and the present that determined my future. I am now aware that refugee protection attached to its Western modernity, is an illusion created by a Eurocentric narrative. It does not account for the permanency of encampment, but nullifies it. It is this state of legal limbo that triggers my scholarly journey into this dissertation with a zeal to produce academic knowledge that informs future studies on refugees. This is an ongoing scholarly activism that may contribute to resolving the problem of prolonged encampment. Undertaking a historical and theoretical approach not only decolonised the Eurocentric approach to encampment, but also challenges this colonial order.

Tracing Fanon's memoir and intellectual upbringing is significant in problematising prolonged encampment. Although Fanon is not of African nativity, his postcolonial

[471] Fanon, The wretched of the earth, p. 11.

theory foretells the realities of postcolonialism in Africa. The prefix 'post' in postcolonialism does not imply that colonialism has ended, but that it has mutated into a different form. It is still in the same form, in the same shadow, shaped by it and reflected in it. It is old and it is new, it is 'as it was in the beginning' or it is 'the afterness' of the beginning. This colonial continuity is grounded in what Homi Bhabha refers to as 'colonial hybridity',[472] which aligns with Fanon's understanding of the decolonisation struggle. As Emily Apter has discovered, in it there is a 'locomotive portmanteau quality'[473] which assumes no end. In other words, encampment and colonialism are two facets of the same coin and they continue to survive because of their status in the past and in the present.

In his critique of the state and the law, Fanon expressed the concern that colonialism was legally meant to be a violent encounter and hence, its inherent structure was violent. In his poetic words, 'colonial relationship fluctuates constantly between the desire to exploit the other and the temptation to eliminate him, to exterminate him'.[474] As a psychiatrist, he was convinced that the colonial indoctrination of Africa could be understood as a psychological disability. His emancipatory theory captured the psychology, the bourgeois influence and capitalist mentality of the colonisers. As Ivan Potekhin put it, Western interest in Africa has, for years, been dominated by the principle struggle for bourgeois ideology,[475] which is opposed to the Pan African socialist ideology of justice for all, the precursor to the decolonisation struggle across the continent of Africa. Using a criminological theory, the camp as a colonial product, is best understood as what Patterson dubs a 'surrogate ghetto'.[476] The unstated implication is that all ghetto dwellers live a life that resembles colonial captivity. This prompted Sekou Toure, the first President of Guinea to say, 'Africa needed spiritual cleansing'.[477] Indeed, such victimisation engineered on humanitarian grounds, demands fresh spiritual awakening. For example, in reference to the colonial

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[472] H Bhabha, 'Remembering Fanon: self, psyche and the colonial condition', in P Williams & L Chrismas, *colonial discourse and postcolonial theory: a reader*, Columbia University Press, New York, 1994, p. 122.
[473] E Apter, 'Continental drift: from national character to virtual subjects', Chicago University Press, Chicago, 1999, p. 55.
[474] F Fanon, *Black skin, white masks*, Grove Press Inc., New York, 1976, pp. 1-225.
[475] I Potekhin, 'Pan-Africanism and the struggle between the two ideologies', viewed 19 November 2018, <http://www.sahistory.org.za/sites/default/files/DC/Acn1964.0001.9976.000.019.Oct1964.7/Acn1964.0001.9976.000.019.Oct1964.7.pdf.>.
[476] O Paterson, *Rituals of blood: consequence of slavery in two American centuries*, Civitas/Counterpoint, Washington DC, 1998, pp. 1-145.
[477] F Akhalbey, 'The speeches by Sekou Toure that angered colonial France to pack out of Guinea', viewed 19 November 2017, <htt://www.face2faceafrica.com.>

relationship between Rwanda and France, President Paul Kagame made this statement: 'Rwanda will no longer be waiting for what others hand out to us'.[478] Given the duration of the colonial relations between these two nations, this statement signifies a total breakdown in the recently extant slave-master relationship. Evidently, in the past decade or so, many African leaders have begun to differ with their former colonial masters with regards to their donor policies which cut through the latter's interests. Although all the African nations have established diplomatic relations with their former colonisers premised on sovereign equality, this relationship still retains stains of colonialism. John Hobson made a comment about a century ago that 'colonialism enriched only the rich and powerful of the home country and the compradors at the expense of the populace at large'.[479] While the predatory colonial domination in Africa lasted for about a century, the profit motive of colonialism is concealed from the onset to date. Imperialism has now taken over under the umbrella of a different agency. It is this latter-day neo-colonialism that has produced the spatial form of exclusion and exception through the violent enforcement of the camp.

One of the emerging issues in postcolonial studies concerns refugees who continued to be managed through colonial laws and policies. Although the contemporary refugee camp did not emerge directly from colonial experience, complex terms such as 'the colonised other' or 'double colonisation'[480] have been used to describe the ongoing refugee coloniality in Africa. As the refugees on this continent are governed through the framework of international refugee law, Fanon argues that this 'legalised robbery enforced by violence, was the creation of the West'.[481] This theory suggests that the contemporary camp is reminiscent of imperial domination and marginalisation. Although international refugee law facilitates and sustains the camp, this legal framework is most guilty of disguising the violence on which it feeds. As Giannacopoulos put it, 'this graphically brings into view the omniscience of sanctioned relations of violence'.[482] It is within this space where law and violence are

[478] DW, 'France and Rwanda: re-examining France's role in the genocide', viewed 11 November 2017, <https://www.dw.com/en/france-and-rwanda-re-examining-frances-role-in-the-genocide/a-49086564>.
[479] JA Hobson, *Imperialism: a study with an introduction*, J Townshend (ed), 3rd edn, Unwin Hyman, London, pp. 1-396.
[480] B Ashcroft, G Griffith, & H Tiffin, *Postcolonial studies, the key concepts*, 2nd edn, Routledge, London, 2007, p. 66.
[481] Fanon, Black skin, white masks, p. 7.
[482] Giannacopoulos, The non-justiciability of justice, p. 16.

disguised.[483] The general structure of the camp resembles colonial continuity which necessitates Fanonian characterisation of the struggle for freedom for all humanity. Fanon is not African, but his postcolonial theory has captured the dark realities of postcolonial Africa.

6.3 Fanon's revolutionary violence

It was in France that Fanon published 'Black skin, white masks,[484] which is a critical appraisal of his ontological existence as a black student and the racism that he experienced. It was also in France that he had a self-awakening, resulting in the formulisation of his existential thirst for freedom of the oppressed. Fanon chose the normative pronoun of 'I' to denote ownership of his struggle with race relationship not to be conflated with the colonisers. The 'I' assumes the position of the oppressed. He said, 'the Frenchmen could never forget my colour as I was not simply a man, but a black man, not only a student, but a black student, not simply a doctor, but a black doctor'.[485] Fanon's subjective experience and knowledge production was very fundamental as he understood the world of the oppressed and was committed to change it. Similarly, as a third-generation refugee, this thesis reflects my struggle in the refugee camp. I understand the world of the refugee because I was once in that world. I lived it and breathed it. I was living a life of infinity which presumed no beginning and no end, a life of devastation. I lived in a world where freedom of movement was not only challenged, but was legally a punishable crime. The word emancipation is unheard of. I had to be cared for, but only within the camp. As a voiceless refugee, I was a neighbour to human rights, but not compatible with it. My silence meant the camp was my home, it was a home away from home. I was counted, but only as a number in order to maintain knowledge and scientific objectivity by the gate keepers. Numbers are important to persuade and keep the donors happy. Such knowledge continues to violently segregate, marginalise and discount refugees. This life of over-policing was not imaginative, it was real. This segregated lifestyle, which resembles life in the colony, the life of subjectivity was what the system was committed to maintain. By expressing my personal experience, I want to confront and expose the structural issues embedded within the refugee

[483] Giannacopoulos, Tampa: violence at the border, p. 33.
[484] Fanon, Black skin, white masks, p. 9.
[485] Ibid.

space. I am not seeking to vilify the protectors of the camp, especially those committed to social justice, but to decolonise the consciousness of the mind about refugee coloniality which is the longstanding colonial pattern of control, knowledge production, domination, and the classification of the world's unprivileged under the façade of Eurocentric law. It is this institutionalisation of the camp sanctioned by the law, of knowledge production, and of keeping refugees encamped indefinitely that this thesis argues must undergo a process of decolonisation. The freedom of movement for refugees will not be attained if refugee studies as a discipline inherited from a colonial and imperial past is maintained. Most importantly, prolonged encampment which entails keeping refugees in segregation for decades is an intergenerational crime.

Fanon's postcolonial theory, centred on a Manichean psychological framework which he uses to counter the effect of oppression, presents a measured clinical and theoretical insight. He describes the physical violence of colonialism as being oppressive. This reflects Pierre Bourdieu's definition of 'symbolic violence'[486] which Fanon said the French applied in their interaction with the colonised in Algeria. This violence was inherent not only in the juridical mechanism, but also as a means to eradicate the indigenous culture and socio-economic structures, in order to affirm French superiority.[487] Symbolic violence became a necessary tool for the colonisers in maintaining unequal social relations, racial hierarchy, powers structures and social domination in defence of their political interests. By far, this symbolic violence was incorporated throughout the social structures and prolonged disposition of the colonial subjects which, over time, appears naturally immutable. As Bourdieu elaborates:

> Symbolic violence is the coercion which is set up only through the consent that the dominated cannot fail to give to the dominator (and therefore to the domination) … which, being merely the incorporated form of the structure of the relation of domination, make this relation appear as natural.[488]

These strands of symbolic violence were often orchestrated by the colonialists as a critical mechanism for asserting colonial order. Symbolic violence was explicit and

[486] P Bourdieu, *Pascalian meditations*, Polity, Cambridge, 2000, pp. 1-264.
[487] Ibid.
[488] Ibid.

invisible to the colonised, but physical violence was. Similarly, this invisible violence is shaped by the sovereign through the power of the law.[489] The sovereign could not be questioned as he is the only one who could interpret the law. This violence is symbolic because it is protected and preserved by the law to keep the refugees in a state of limbo. Cesaire, the co-founder of the negritude movement, once said, 'Decolonisation was not automatic… it was a process and a struggle'.[490] In the same manner, the emancipation of the refugees is a process and a struggle which will take decades to achieve. While Fanon's 'The wretched of the earth' is saturated with physical violence as a response to colonialism,[491] the emancipation of the refugees from the symbolic violence could be achieved through the refugees' self-awareness and ongoing scholarly activism.

In his early writings, Fanon critiqued the relationship between the colonised and the colonisers as being a psychological orientation. As he put it, 'the Frenchification'[492] of the colonised produced a cultural orientation which was more difficult to deal with than systemic economic oppression. It is this alienation or the 'colonial ordering of things' and the critical role played by violence that eventually forced him to abandon his French citizenship in favour of colonial Algeria. Although Fanon was legally French, culturally he was not. It was this experience of alienation that prompted him to blow the trumpet for a collective self-determination of the oppressed. He fought for self-consciousness in order to avoid a neo-bourgeoisie class in Africa. Similarly, Kenyan novelist Ngugi Wa Thiong'o depicted Fanon in his satirical writing published in his native Gikuyu language 'Devil on the cross'.[493] He warned of the looming danger should African leaders follow the examples of the colonisers. For context, at independence, many of the African elites were educated in the West because of their ties with the colonialists. Unlike the peasants, the African elites were culturally assimilated and were more inclined to keep the colonial system from which they benefitted immensely. They were not only willing to accept reform, but worked hard to consolidate their status quo. Similarly, refugee camps are managed by numerous humanitarian actors, the majority of whom have, for far too long, maintained a pre-

[489] Giannacopoulos, Tampa: violence at the border, p. 35.
[490] A Cesaire, *Culture and colonisation, in presence African,* Presence African, Paris, 1956, pp. 127-144.
[491] Fanon, The wretched of the earth, p. 14.
[492] Ibid.
[493] N Thiong'o, *Decolonising the mind: the politics of language in African literature*, Heinemann, Nairobi, 1986, pp. 1-35.

Cold War logic of keeping millions of refugees in camps. Ever since, humanitarianism has flourished, particularly in Africa where access to dangerous places such as war zones has become a new normal. This means that aid agencies are competing with each other in keeping refugees encamped for decades as camp images justify the multi-billion-dollar humanitarian business. As Malkki put it, 'the language of relief aid, policy science, development', comes from humanitarian agencies and not the refugees.[494] Prem Rajaram adds that because of this narrative, the refugee crisis 'becomes the prerogatives of Western experts'.[495] The narrative of 'textbook expertise' provides a modern form of authority that erases personal responsibility into the 'abstract authority' with impeachable academic credentials. The problem of refugees can never be resolved purely by aid workers-cum-experts or what Agier refers to as 'humanitarian government'[496] characterised by the permanence of the camp. This permanence presumes no past and no present where the camp is in a constant state of emergency. Bauman's metaphor of fluidity and liquidity is today represented by this permanence.

In contrast to Mahatma Ghandi's theology of non-violence, Fanon adopted a radical Marxist discourse by choosing violence as a strategic tool to affect revolutionary change towards the French bourgeoisie in Algeria. He was very much consumed with anger for justice when he made the call that 'violence is a cleansing force and makes the colonised free'.[497] As colonialism was established through violence and remained so, Fanon argued that, 'violence alone, violence committed by the people, violence organised and educated by its leaders, makes it possible for the masses to understand social truth…'[498] What is interesting about Fanon's concept of violence is the fact that it brought about the desired results: the emergence of the current African nation-states. In seeking for the freedom of movement for refugees, I argue that power belongs to the people and when the refugees organise themselves into a social unit to resist an unjust system, there could be positive outcomes. Whereas Fanon used violence as a hallmark of his philosophy towards colonialism, Ghandi's

[494] L Malkki, 'Speechless emissaries: refugees, humanitarianism, and de-historisation', *Cultural Anthropology*, vol. 11, no. 3, 1996, p. 386.
[495] PK Rajaram, 'Humanitarianism and the representation of the refugees', *Journal of refugee studies*, vol. 15, no. 3, 2002, p. 262.
[496] S Bachelet, 'The 1951 Convention – 60 years on', in M Agier, *Managing the undesirables: refugee camps and humanitarian government, esharp*, Polity Press, Cambridge, 2011, p. 150.
[497] Fanon, The wretched of the earth, p. 56.
[498] Ibid.

non-violence is more appropriate to use in the refugee space. Nonetheless, both philosophies are similar as they aim at the emancipation of the colonised.

As a political realist, the violence Fanon witnessed during the decolonisation struggle was the shortest distance between two poles: freedom and oppression. His political theory which reflects his personal experience fused with theory, became influential in framing a humanist philosophy that informed his anti-colonial critique, including his view of the negritude[499] movement. As Wallerstein put it:

> Fanonism has continued and has highlighted the revolution in the third world. Fanonism also revealed that the colonised people are suffering unfair treatment and oppression in respect of humanity by the colonialist and it has resorted to military force at the turning point in world history.[500]

It was Wallerstein who first coined the term Fanonism as a concept for understanding the cultural anthropology of the developing world. As Wallerstein put it, Fanonism emanates from the struggle against colonialism. Fanonism also situates nativism in a postcolonial context in addition to investigating the class divide created by colonialism. In contrast to his Western intellectual upbringing, Fanon advocated for violence as a means of ending France's colonial rule in Algeria. He argued that 'Europe should not be the measure and model of what is 'human' or 'civilised'.[501] He viewed decolonisation as a total departure from colonial past and demanded that the struggle for human liberation be communalistic in orientation, as opposed to the individualism in the West. By and large, Fanon's philosophy of freedom and humanism became instrumental in the decolonisation struggle not only in Algeria, but across the world. Fanonism later spread from being an anti-colonial discourse to a globalised concept for cultural studies and literary criticism. Although colonialism has mutated into a different form, Fanonism is still relevant today due to the continued structural and symbolic violence embedded with international refugee law. This is mainly because international refugee law's colonial construct remains removed from view, yet it designates the refugees as foreign bodies, aliens and victims who need

[499] Negritude is a postcolonial movement founded by a group of writers from francophone speaking colonies such as Shengor, Diop from Africa and Cesaire from the Caribbean. It is a 20th century diasporic movement formed in response to colonialism motivated by cultural renaissance when racism was at its peak.
[500] I Wallerstein, *The capitalist world economy*, Cambridge University Press, Cambridge, 1980, p. 251.
[501] Fanon, The wretched of the earth, p. 96.

to be excluded from mainstream society. Colonialism remains adventurous as it concerns itself with continuities and discontinuities, the past and the present, the old and the new, it is endlessly deferred. Colonialism invokes its historical past, but most importantly, the current otherness of refugees. Fanonism continues to be present and relevant today because the connection between imperialism and the erosion of the African culture of hospitality towards sojourners and especially refugees, is still very direct and has been constant ever since.

Humanity has a double-sided identity, but unfortunately only one side is presented in the humanitarian space. In this space, the refugees are presented as victims, numbers, nameless, depersonalised, demobilised, dislocated and decoded. This one-sided picture of humanity ideally identifies refugees according to their category of vulnerability: malnourished children, unaccompanied minors, pregnant women, single parents, people with physical or psychological disability, widows and elderly persons. Their pictures are commonly displayed at public exhibitions, galleries and academic conferences by those humanitarians who seek aid on their behalf. The display is not about their emancipation, but the continued supply of aid so they are sustained in the camp without any exit strategy. Critics like Ilan Kapoor argue that celebrity humanitarianism is inherently destructive for the Global South. He contends that celebrity humanitarianism such as the band aid 'save Darfur' purportedly aimed at helping 'distant others' promoted by celebrities such as Bono, Angelina Jolie, George Soros, and Madonna, legitimates and indeed promotes neoliberal capitalism and global inequality.[502] Similarly, Lisa Richey argues that while this aid-celebrity engagement provokes response, at the same time it marks a disengagement between the public and politics across North and South.[503] This politics of humanitarianism juxtaposed with containment permanently relegates the refugee in the camp space. It is only in the assembly of citizens where equality and freedom exist. It is this lack of alternatives characterised by micro powers of exception that refugee humanitarianism is well funded. To put it in economic terms, the refugees are the target of humanitarianism. It is within the humanitarian corridor that the *problématique* of identity, a traumatised identity, is produced.[504] The camp dictates

[502] I Kapoor, *Celebrity Humanitarianism: the ideology of global charity*. Routledge, New York, 2013.
[503] LA Richey, '*Celebrity humanitarianism and the South-North relations: politics, place and* power, Routeledge, London, 2015.
[504] Agier, Between war and city, p. 322.

their identity, their daily life, what they eat or drink, and their movements are controlled in totality until they either return home or the camps are closed. The chance of them returning home or the camp closing remains elusive as their status has transitioned into permanency. As Michael Pallock observed in the experience of the Nazi camp, 'identity becomes the preoccupation and the refugee as an object of analysis'.[505] As previously discussed, this adds to the violence of the law and sovereignty which occurs on every trajectory of refugee life.[506] This neo-colonialism/imperialism is fought, but without any apparent violence which gives the camp its meaning.

As a psychiatrist, Fanon believed that the effect of colonisation was due to reactive psychoses triggered by oppression by the colonisers who used violence to crush resistance, sometimes by massacre. He argued that decolonisation required greater violence as a logical response, though he doubted what outcome this would bring.[507] Fanon's emancipatory theory was very influential, not only for the peasants and refugees in Africa, but also for the global audience, including the colonisers. As he recounted in all his writings, his critique of colonial psychiatry remained influential in fighting for the emancipation of the colonised world. Because he considered violence to be a necessary part of anticolonial struggle, critics regard his writings as 'controversial'[508] or 'an act of terrorism'.[509] However, Fanon did not advocate for arbitrary violence, but rather that violence be commensurate with the dangers of colonialism. For him, the psychopathology of colonisation does not necessarily belong only to the past, but also the present.

On 28 September 2017, Bruce Gilley published a controversial essay 'The case for colonisation' in Third World Quarterly Journal. He argued that Western colonisation was both 'objective and legitimate'[510] and was beneficial to the colonised. He argued that colonialism should be reinstituted because of its benefits as 'many people were willing to tolerate it'.[511] In his essay, Gilley neither mentioned the German genocide

[505] M Pallock, *Concentration experience: issues in maintaining social identity*, Matiele, Paris, 2000, p. 10.
[506] Giannacopoulos, Tampa: violence at the border, p. 36.
[507] F Fanon, *A dying colonialism*, Grove Press Inc., New York, 1965, pp. 1-181.
[508] HH Fairchild, 'Frantz Fanon's the wretched of the earth in contemporary perspectives', *Journal of Black Studies,* vol. 25, no. 2, 1994, p. 197.
[509] RC Smith, 'Fanon and the concept of colonial violence', *Black World/Negro Digest,* vol. 22, no. 7, 1973, p. 25.
[510] B Gilley, 'The case for colonialism', *Third World Quarterly,* 8 September 2017.
[511] Ibid.

against the Nama tribe in Namibia nor the horrors carried out by the colonial French in Algeria. Instead, he cited the British suppression of the Mau-Mau rebellion in Kenya, which he said, 'was better than the alternative,' [512] but without mentioning the 'British Gulag' in Kenya. In response to Gilley's essay, Nathan Robinson, the editor of Current Affairs Magazine, argued that the essay was a moral equivalent of 'Holocaust denial'.[513] Although Gilley's essay has since been withdrawn, it drew global condemnation leading to the entire editorial team of the Third World Quarterly Magazine to resign. The British, French and other European nations, unprovoked, travelled across Africa to commit the crime of conquest. They placed claims on territories and people they have nothing in common with, yet there was no domestic protest to these external colonies.

Fanon's postcolonial theory raised the consciousness of the mind that influenced social and political change in Africa which was crucial in the decolonisation struggle. The central theme of his theory is participatory democracy – bridging the gap between the bourgeois caste and political independence. Although the decolonisation struggle in Algeria was started by the urban elites, it could not have been successful without the participation of the marginalised rural peasants. For this freedom to be realised, he said, 'required the participation of the entire population'.[514] It is on this basis that the backbone of Fanon's political philosophy is centred on the participation of the masses. Similarly, Fanon's psychoanalysis of alienation is befitting the camp situation where the emphasis on control and prolonged confinement resembles an internal colony. It is from this standpoint that the first President of Guinea, Ahmed Sekou Toure once said, 'we prefer poverty in freedom to opulence in slavery…'[515] It is this kind of alienation that Fanon prophesised and urged that should be decolonised through resistance. Given that Fanon's writing was apocalyptic and more appropriate in a colonial setting, this thesis does not advocate for uprising within the camp space. Instead, it argues that refugees need to have similar consciousness in order to liberate themselves from indefinite encampment.

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[512] Ibid.
[513] N Robinson, 'A quick reminder of why colonialism was bad, Current Affairs', viewed 11 November 2018, <https://www.currentaffairs.org/2017/09/a-quick-reminder-of-why-colonialism-was-bad>.
[514] Fanon, A dying colonialism, p. 3.
[515] R Hallett, *Africa since 1875*, University of Michigan Press, Michigan, 1974, p. 807.

Aided by law as its agent, colonialism implies permanent violence. This led Bauman to critique the mental state of the colonisers as 'schizophrenic'.[516] To use Bauman's own words, 'the civilisation process is not only about the uprooting, but it was more about the distribution of violence'[517] aimed at erasing other races. As Andre Madouze recounted about the Algerian insurrection, 'once the conflict broke out, the two sides dealt like for like, and the horrors were shared'.[518] It was in this context that Fanon called for the political freedom of the state and for an alternative society which accepts differences. He also expressed concern about the freedom of the individual as being of utmost importance –freedom without limit of space or boundaries. In this day and age, barbarism is still the guiding ethos of modernity as it seeks control and domination over others as the means to an end. It is precisely this practice that requires a critical dialogue and a return to pre-colonial Africa as a single country. Africa's hospitality towards refugees is remarkable due the open-door asylum policy across the continent. For example, Uganda, Kenya and Ethiopia collectively host over 2.5 million refugees. This is a clear demonstration of state responsibility and burden sharing framework. In contrast, the West has introduced domestic laws that legitimate the expulsion of refugees. Given the ideological and political concept of who qualifies as a refugee in Global North, there is a general perception that the African refugees arriving in Europe 'did not quite fit the traditional European concept of a refugee'.[519] This differentiated treatment afforded to refugees from Global South not only regard refugee pandemic as a global phenomenon, but it is unfair to states that host millions of refugees. The 1951 Convention's inability to respond to modern-day refugee crises is a concern. To insist that Africa continues to adhere to a traditional international refugee law framework, where the rest of the world is withdrawing from it, is double standard. Existing scholarship on refugee camps in Africa emphasises the importance of what Weizman refers to as 'humanitarian present'.[520] This institutionalised intervention through containment and aid has significantly contributed to prolonged encampment because the camp is viewed as befitting Africa. This exclusion that legitimatises colonial continuity as violence is encrypted in the camp's governance. Rather than relying on six decades of

[516] Bauman, *Life in fragments: essays in postmodern morality*, Oxford University, Oxford, 1995.
[517] Ibid.
[518] A Madouze, 'Overseas stories: from one resistance to the other', vol. 1, *Viviane Hamy*, Paris, 1998, p. 351.
[519] Hathaway, op. cit., p. 42.
[520] E Weizman, *The least of all possible evils: humanitarian violence from Arendt to Gaza*, Verso, London, 2011, p. 11.

Eurocentric refugee law, Africa should provide freedom of movement to its refugees. When the UN Charter was founded in 1945, it established the principle of equality and self-determination of nations. Nonetheless, at least about 2 million people still live under colonial rule in the 17 remaining non-self-governing territories.[521] This is forthright imperialism. Similarly, while the struggle for the decolonisation of Africa has been achieved, freedom of movement of the individual within the continent has not. To use Emmanuel Hansen's concept, there are two dimensions of freedom: 'one is alienated consciousness and the other is alienated material conditions,'[522] both of which characterise life in the refugee camp. Colonialism produced alienation both physically and psychologically. The idea that a section of the population must be encamped for decades and taken care of through humanitarian aid reflects colonial captivity. This continued colonial violence, or what Ghassan Hage terms 'colonial paranoia',[523] was what Fanon warned would develop into a neo-colonial relationship. As neo-colonialism has taken root in Africa, it has become an economic enterprise. Essentially, Fanon's writing was intended to arouse anger and anxiety against such a pathological mindset.

As a psychoanalyst, Fanon's philosophy was instrumental in the decolonisation process, not only in the African continent, but across the world. In his theoretical approach, he demonstrated how colonisation was constructed and maintained:

> The colonial world is divided into two. The dividing line, the frontiers are shown by barracks and police stations. In the colonies it is the policeman and the soldier who are the official, instituted go-betweens, the spokesmen of the settler and his rule of oppression… by means of rifle-butts and napalm not to budge.[524]

Although Manichaean in outlook, Fanon's world was divided into two: one belonging to the colonised and the other to the colonisers.[525] It is this dualism that made Fanon to understand both worlds. Contextually, colonial violence represents what is happening within the contemporary camp environment. As this colonial violence could not be deployed legitimately, structural violence and symbolic violence has

[521] United Nations, 'Decolonisation,' accessed 7 Feb 2021,<https://www.un.org/en/sections/issues-depth/decolonization/>.
[522] E Hansen, 'Freedom and revolution in the thought of Frantz Fanon', *Journal of African Studies*, vol. 7, no. 1, p. 120.
[523] G Hage, 'Against paranoid nationalism: searching for hope in a changing society,' Pluto Press, Australia, 2003, p. 47.
[524] Fanon, The wretched of the earth, p. 37.
[525] Fanon, A dying colonialism, p. 102.

become the norm and its being expressed in the form of restrictive asylum policies and legislation. As Woolford put it, 'it is at this broad level that the dominant vision of colonialism is negotiated'.[526] Fanonism continues to be relevant today because its theory of total freedom for humanity very much appeals to the refugees who continue to be the subject of neo-colonialism.

Fanon's philosophy of emancipation and freedom was not only instrumental during the decolonisation wars in Africa, but it remained relevant in examining the phenomenon of encampment. His narrative of liberation and freedom reflects the experience of refugees whose life in the camp resembles colonial captivity. While the contemporary refugee camp did not emerge from colonialism, the former has retained the latter's legacy. In this context, it is not enough to celebrate the achievement of decolonisation when millions of Africans languish in a network of camps for decades. Africa's refugees are the people whom Fanon wrote about in his seminal thesis 'The wretched of the earth'. In fact, the despotic regimes across Africa have retained a colonial mindset inherited during the colonial period. While Fanon advocated for violence as the means to achieve this freedom, his philosophical principle of humanism emphasises the need for a society that cares for its most vulnerable people, such as refugees.

Fanon's inference to colonial violence points to the foundational violence, which was not only embedded within colonial law, but it was structured by it.[527] His preference for radical decolonisation philosophy is relevant today because it means getting rid of all colonial institutions, such as the refugee camp, which has persisted to this present day. The fact that all the African countries have gained political independence does not translate into the unity of the continent unless all Africans have the freedom of movement across the continent. Fanon's liberation theory serves as a reminder that state machineries, such the refugee camp instituted through the framework of the law with its structural violence, still exist in Africa, but are deployed differently from the colonial era. What is happening within the camp is what Sir Alfred Lyall calls 'doing our imperialism quietly'.[528] Africa's reliance on

[526] A Woolford, 'The next generation: criminology, genocide studies and settler colonialism', *Special Issue: redefining the criminal matter: state crime, mass atrocities and human rights,* University of Barcelona, Revista Critica, Penaly Poder, no.5, 2003, p. 172.
[527] Giannacopoulos, The non-justiciability of justice, p. 7.
[528] H Bhabha, *The location of culture*, Routledge, London, 1994, p. 26.

postcolonial institutions and humanitarian aid as a social policy agenda which is associated with imperialism should be brought to a complete halt.

Agozino has been instrumental in developing a critique of Western 'colonial criminology' to understand the crimes committed by the colonisers in Africa. He applied a 'decolonised theory of criminology'[529] in the context of the law of colonial administration and social justice during the colonial era. He states that the raciological origin of criminology in the Enlightenment period has remained unscrutinised because it largely focuses on pretty crimes while ignoring the crimes of slavery, colonialism and neo-colonialism.[530] In this context, prolonged refugee encampment, which the UNHCR has facilitated, is a crime of colonialism. The front loading of critical consciousness is necessary to remove the coloniality of the historically structured colonial administration of the camp. Agozino critiqued Western criminology which focuses on pretty crimes of the individual.[531] He argued that theorising the state, international institutions and punishing state crimes is the way to go. His approach represents a point of departure from the mainstream discipline of criminology. He critiqued that law and liberal democracy still resemble organised violence or what he terms 'executive lawlessness'[532] which characterises life in the refugee camp. Agozino's scholarship also questioned the Eurocentric emphasis on 'scientific objectivity'[533] from which criminology derived its knowledge. As he observed, objectivity can be 'irresponsible for the apolitical social science to try to understand the world of oppression without a commitment to change it'.[534] This is exemplified by the objectivity of prolonged encampment which is rooted in colonial law that has sustained it. One of the reasons why encampment has continued to be a significant component of neo-colonialism is because the Eurocentric refugee law operates largely as a repressive technology.[535] Agozino argued for a decolonisation of criminology in order to solve the imperialist problem of the marginalised and the segregated from the society. Agozino concluded that the 'establishment' criminology has distorted facts, proven deficient, conservative and imperialistically inclined.

[529] Agozino, Counter-colonial criminology, p. 281.
[530] Ibid.
[531] Ibid.
[532] Ibid.
[533] Ibid.
[534] Ibid.
[535] Ibid.

Similarly, this thesis has adopted a decolonial approach in order to address the ongoing problem of prolonged encampment. This is a justified approach because postcolonial institutions such as the camp, the law imbued within it, and the symbolic violence it perpetuates, are the very essence of neo-colonialism. In this respect, Africa should show what the Jamaicans call 'One Love', to inspire solidarity towards refugees. This is because the universal construction of the term 'refugee' as a special category of people is where exclusion/inclusion and the power of the law resides. It is against this background that applying decolonial theory to the emancipation of refugees will be realised.

Encampment is rooted in colonialism and this makes Fanon's theory critical in addressing the symbolic violence in the refugee camp. As Fanon understood it, imperialism, though camouflaged, continues to generate colonial order. This colonial continuity requires an emancipatory approach to challenge the Eurocentric theory that sustains it. The term 'emancipation' is derived from Latin *emancipatus.* Its original meaning is: 'put out of paternal authority, declare someone free, or give someone's authority over'.[536] In Karl Marx's philosophical thoughts:

> Every emancipation is a restoration of the human world and of human relationships to man himself. Human emancipation will only be complete when the real individual man has absorbed into himself the abstract citizen; when as an individual man, in his everyday life, in his work, and in his relationships, he has become a species-being…[537]

Marx's emancipative theory relates to the notion of equality of the individual as a singular. His critique concerns those outside of the established structures of power and are excluded from mainstream society due to their specific circumstances. Marx's concept of emancipation remains conservative, referring only to the freedom of the individual. The concept of emancipation then shifted during decolonisation wars to mean 'free from oppression, bondage, restraint, or to liberate', emphasising the need for equality for all. Fanon used this latter concept to refer to the collective national liberation movement of the masses. As emancipation is a direct corollary of violence, it provides a pathway to refugees' freedom of movement. It is within this

[536] J N Pieterse, 'Emancipations, modern, and postmodern', *Development and Change*, vol. 23, no. 3, 1992, pp. 5-41.
[537] W Schmied-Kowarzik, **'**Marx as a philosopher of human emancipation*,'* accessed 7 Jan 2021, <http://annetteschlemm.de/emanc.htm>.

context that Fanon's concept of emancipation is relevant for the problem of encampment addressed in this thesis.

Fanon's philosophy of emancipation refers not only to the freedom of the colonised, but also to the marginalised at the periphery of society. This is why Fanon's postcolonial theory is relevant to my thesis as it seeks for the emancipation of the refugees whose indefinite encampment resembles colonised identity. Just as Fanon's writing achieved one thing – formal political independence for Africa, my thesis seeks to achieve one thing: the refugees' freedom of movement. As Ysern-Borras Eduardo observed, 'to survive in a colony means to assume the ways and mores that fit colonial ideology – dependency, and docility…'[538] Similarly, encampment has been part and parcel of postcolonial regimes under the banner of humanitarianism. It is this docility or submissiveness that has made the refugees become a global project of humanitarianism. Fanon's colonial theory of freedom and emancipation is significant in problematising the refugee colonial docility. The docility and alienation of the refugees and the existing conditions within the camp space under which this colonial order flourish are structured by law. It is a space where law operates as if it is independent of human action. Despite its humanitarianism, refugee law still retains its colonial legacy because the alienation that characterised colonial society still manifests itself within the camp space. This colonial relation is one axis upon which the necessity of affording refugees the freedom of movement should be evoked. It is this colonial relation that Fanon addressed in his writings.

Fanon's postcolonial theory provides a succinct entry point into the broader analysis of refugee coloniality in Africa. The textual exposition of his work contributes to understanding how the refugee camp has retained a significant feature of colonialism. Even when Fanon's ideas were conceived, first written and published in French, it was in the Anglo-Saxon world that his writings aroused the most interest.[539] It was then that the discourse on colonialism entered mainstream Western theory and criticism. In his last book, 'The wretched of the earth', he prophesised what was going to happen in the postcolonial period: colonial continuity. It is this futurity of Africa that resonates with the overall aim of my thesis. Having

[538] Y Eduardo, 'The colonised personality: Frantz Fanon's concept of the psychology of people living under socio-political conditions of colonialism', PhD thesis, Wrights Institute Graduate School of Psychology, Berkley, 1985, p. 54.
[539] A Mbembe, 'On the postcolony: a brief response to critics', *Qui Parle,* vol. 15, no. 2, 2005, p. 1.

lived in both worlds – the colony and the metropole – meant that Fanon and myself have a shared experience of alienation which informed our passion for social justice. Fanon postcolonial theory was applied to the various emancipatory movements in the last century, including the civil rights movement in the US, the apartheid regime in South Africa, the feminist struggle for equality, minority rights, and self-determination in a number of countries in the developing world. Africa cannot pretend that using a Eurocentric approach to refugee management is the only option. As he concluded, 'each generation must out of relative obscurity discover its mission, fulfil it, or betray it'.[540] His theory of revolutionary violence should not be regarded as a critique, but a prophecy for understanding Africa's colonial past and present. Fanon's philosophy of humanism and emancipation provide valuable insights on how to achieve social justice for the refugees in prolonged encampment.

6.4 Conclusion

This chapter examined Fanon's postcolonial theory in order to understand how refugee camp has retained significant features of colonialism. Fanon's postcolonial theory is significant because it provides the foundation for generating scholarly work on how to address the problem of encampment anew. As encampment practice is directly linked to colonialism, this colonial/imperial continuity must be understood. Following in Fanon's footsteps, this thesis produces new knowledge on prolonged encampment that challenges the ongoing colonial order. Fanon's colonial heritage and scholarly work were the two factors that motivated me to write this thesis. Having lived in both worlds of the metropole means that Fanon and I share experiences of alienation which informed my ethical and scholarly commitment to social justice. Fanon's work has proved prophetic for understanding Africa's colonial past and present. As he concluded, 'each generation must out of relative obscurity discover its mission, fulfil it, or betray it'.[541] Given that refugee camps in Africa are premised on colonial continuity, I argue that the refugees' freedom of movement be the hallmark of this new approach.

[540] F Fanon, 'Quotable quotes, accessed 7 Jan 2021, <each generation must out of relative obscurity discover its mission, fulfil it, or betray it>.
[541] Ibid.

Chapter 7: Borderless Africa

7.1 Introduction

This chapter makes the case for a borderless Africa as this can redress the problem of prolonged refugee encampment by affording refugees freedom of movement. Having traced the history of the camp dating back to the colonial period, the colonial heritage of the UNHCR, the Eurocentric framework of refugee law, and Kenya's domestic law relating to refugees, the analysis indicates that the camp as a colonial institution has proven inadequate in providing a durable solution to the refugee in Africa. In discussing the possibility for a borderless Africa, this chapter deploys two case studies. The first case study explores the Economic Community of West Africa (ECOWAS) and its Protocol on free movement.[542] As a regional treaty, ECOWAS has a reciprocity visa exemption policy similar to the Schengen Area in Europe which could provide a template for visa-less travel across Africa. The second case study is *Ujamaa*, a social policy agenda that emerged in Tanzania in the aftermath of colonialism. A Swahili word for 'familyhood',[543] *Ujamaa* was instrumental in the decolonisation struggle in Africa. The *Ujamaa* concept is not a legal framework, but a social policy agenda aimed at changing the communities' xenophobic attitude towards refugees which could be implemented simultaneously alongside the policy for a borderless Africa. Although aspirational, ECOWAS and *Ujamaa's* philosophy could play a key role in harmonising the continent of Africa once refugees are afforded the freedom of movement. Similarly, this chapter examines the Global Compact on Refugees (the Compact), which is the most recent global initiative for cooperation on burden sharing and responsibility sharing aimed at supporting countries that receive and host refugees. While the majority of African nations have endorsed the Compact, the solution to prolonged refugee encampment should be framed within the AU Agenda 2063, which states that all Africans have rights to entry, residence and work in all 54 countries in Africa.

[542] ECOWAS comprises of 15 West African states, Mauritania withdrew its membership in 2002.
[543] JK Nyerere, 'Ujamaa – the basis of African socialism', Ujamaa: essay on socialism', viewed 22 August 2017, <https://www.jpanafrican.org/edocs/e-DocUjamma3.5.pdf>.

7.2 Closed border theory

In this era of *borderphobia*,[544] states have tightened their grip on the doctrine of sovereignty by denying refugees entry into their territory. This aligns with closed border theory championed by political theorists such as Joseph Carens, Ronald Dworkin, Robert Nozick and Michael Walzer.[545] Their theory is premised on the idea that the state should have absolute authority to grant the right of entry into its territory. As Carens observed:

> The power to admit or exclude aliens is inherent in sovereignty and it is essential for every political community… even if that means denying entry to peaceful, needy foreigners. States have no obligation to be generous in admitting immigrants.[546]

Carens' theory aligns with Rawls' political theory in which he argues that aliens, including refugees, be regarded as 'metaphysical outsiders'. [547] This means the admission of non-citizens is considered a voluntary waiver of the right to exclude. This theory is premised on the idea that immigrants from poorer nations seek asylum in the West purely for economic gains and that they are better-off receiving aid in their own country. Conceptually, borders take many shapes and forms. A border can be a fence, a map, a water catchment, a mountain, or an open space, acquiring both temporal and permanent status. All it does is demonstrates the territorial logic of the state, in what Michel de Certeau terms 'illusory inertia'.[548] de Certeau observed that the map is lifeless, stationary, but colonises the space in a certain inertia technicality to demonstrate the boundaries of culture and people. de Certeau is alluding to the fact that the border as a Western artefact, is illusory yet it obscures a logic of ambiguity. Borders can also be alive and they can move backward or forward and can be translated into a policy of deterrence, to capture refugees through interdiction, exclusion, or 'turn back the boat' policy as witnessed in Australia through Operation Sovereign Borders. This border concept aligns with what Nevzat Sogut refers to as 'bordernisation'[549] as a site, a location, a position and a condition that

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[544] A Burke, 'Borderphobia: the politics of insecurity post 9/11', viewed 24 November 2018, <http://www.borderlands.net.au/vol1no1_2002/burke_phobias.html>.
[545] Dworkin, Laws, empires, op. cit.
[546] J Carens, 'Aliens and citizens: the case for open borders', *Review of Politics*, vol. 49, no. 2, 1987, p. 251.
[547] J Rawls, 'Justice, fairness: political not metaphysical', *Philosophy and Public Affairs*, vol. 14, no. 3, 1985, p. 223.
[548] M de Certeau, 'The practice of everyday life', University of California, Berkeleys and Los Angeles, 1998, p. 24.
[549] N Sogut, '*Borders captures: insurrectional politics, border crossing politics and the new politics'*, University of Minnesota Press, Minneapolis, 2007, p. 286.

emerges between the state and refugees. This exclusionary border theory is based on a few key decisions of courts in the US, Australia and the UK, must be re-examined. As is often the case, Western nations apply closed border policy in a much broader context than originally intended. Sogut terms this 'new political order' cultivated by the West as 'resurrectional movement'.[550] Unlike in the US, Canada, Australia and New Zealand, sovereignty was never ceded so there was nothing to resurrect. As in the case of Australia, where although the *Mabo* judgement has erased *terra nullius* claims,[551] the issue of Aboriginals' native title and land ownership remains unresolved. Under the doctrine of *terra nullius*, the Indigenous people were assumed to have no land tenure, and this justifies the colony/settler takeover.[552] Over the years, Australia continues to pride itself as a nation of immigrants, welcoming refugees from around the world. However, as refugee issues continue to dodge this country, the Melville Islanders had this to say when responding to the *Tampa* boat after the Federal Court denied entry into Australia to 438 refugees who were stranded in the sea, '…we know what it is to be non-Australian. If that boat comes back, we will welcome them and give them food and water.'[553] The welcoming and hosting of refugees should be the new approach for all humanity.

From the 1980s, migration in Africa largely remains intra-continental with very insignificant numbers of people seeking asylum outside of Africa. The current exodus of Africans across the Mediterranean Sea to Europe originated with the introduction of the visa regime in Europe rather than the journalistic impression of poverty and conflicts in Africa.[554] When conducting research on African refugees, most researchers use micro data from very few African countries with refugee-like situations such as Somalia, Eritrea and Chad to justify their findings. What is not often reported is that most Africans emigrating from this continent are holders of valid passports and visas.[555] It is often the case that African emigration is viewed with a Eurocentric lens focusing on the destination while ignoring the benefits that the migrant brings. That narrative feeds into the reasons for prolonged encampment.

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[550] Sogut, Borders captures: insurrectional politics, p. 286.
[551] M Hodson, 'Government lies again – Tiwi islanders: "we are all non-Australians,'" Greenleft Weekly, 19 Nov 2003.
[552] Ibid.
[553] Ibid.
[554] P Gathara, 'The problem is not negative Western media coverage of Africa', viewed 7 July 2020, <https://www.aljazeera.com/indepth/opinion/problem-negative-western-media-coverage-africa-190708100429209.html>.
[555] United Nations Office on Drugs and Crime, 'Organised crime and irregular migration from Africa to Europe, viewed on 11 February 2020, <https://www.unodc.org/pdf/research/Migration_Africa.pdf>.

As the United Nations put it, 'the irregular migration to Europe has become nothing more than a booming business for people smugglers not the refugees'.[556] It is significant to note that only a handful of Africans take this journey whereas the majority are so much attached to their land, community, culture and habitat that they would not be willing to migrate anywhere purely for economic reasons. Besides, if rich Western nations are hypercritically concerned about bridging the economic disparity, this could be achieved by transferring wealth, but not aid to poorer nations and not through restricting immigration.

Exclusive border policies originated from the Anglo-American tradition. From a moral point of view, border closure is not only hazardous for Africa, but it is a drastic departure from the liberal democratic tradition because the most vulnerable people for whom this policy should not be applied are refugees. Prior to the 19th century, there was no territory on the continent of Africa where aliens were not admitted. While ethnic boundaries existed from time immemorial, it favoured transboundary movement. The African colonial borders are highly restrictive, making cross border movements for refugees legally impossible. With a population of 1.2 billion people, free movement will allow Africa to transform national borders into gateways for free trade and free travel across Africa.

In his book titled 'Africa: unity, sovereignty and sorrow,' Pierre Englebert retold the tragic story of Africa, as since independence, its leaders failed to provide some of the basic needs to their citizens:

> Most of them … have not brought about or facilitated much economic or human development for their populations since independence. Often, they have caused their people much havoc, misery, uncertainty, and fear. With some exceptions, African states have been, mildly or acutely, the enemies of Africans. Parasitic or predatory, they suck resources out of their societies. At the same time, weak and dysfunctional, many of them are unable or unwilling to sustainably provide the rule of law, safety,

[556] B Schoumaker, et al, *Changing patterns of African migration: a comparative analysis*, in C Beauchemin, ed, migration between Africa and Europe: trends, factors, and effects, Springer-Verlag & Populations Studies Series, New York, 2005, pp. 23-162.

> and basic property rights that have, since Hobbes, justified the very existence of states in the modern world.[557]

When the AU was founded in 1969, this heralded the transformation of the continent with the vision of establishing a United States of Africa. However, to date, the greatest challenge in achieving this vision is that the respective African countries have held tightly onto their sovereignty. This led Englebert to argue for a 'blanket removal'[558] of all postcolonial states. Englebert's reference to 'blanket removal' is likened to a private sector management model requiring that African leaders be dismissed *en masse* so they reapply for their jobs. The reapplication process would require them to demonstrate to their electorates as to why they should be re-elected.[559] Given that a dozen African leaders are doing well, the majority have either led their countries to total collapse, or their influence ends within the vicinity of the capital cities as they are unable to provide the very basic services to their citizens. Englebert challenges this unconditional sovereignty. He argues that these weak states have resorted to 'legal command' which is the 'capacity to control, dominate, extract, or dictate through the law'[560] facilitated by the unconditional recognition of statehood. He concluded that these weak states need to exhibit the features of statehood before their sovereignty is recognised internationally. As Jackson and Roseburg argue, African states were formed on the basis of judicial statehood, not their effectiveness. This is what Jean-François refers to as a form of government 'extroverted states'[561] while Coopers Frederick refers to it as 'gatekeeper state'.[562] Frederick went on to say that African leaders inherited the mantle of gatekeeper from their colonial rulers.[563] It is this role that provides the African elites with legal cover under international law which is reminiscent of colonial politics. As African states' sovereignty emerged from their colonial past, Englebert could be misinterpreted as validating Western hegemonism. Although Englebert's argument for blanket removal of sovereignty, or what he terms 'secessionist deficits', may sound controversial and paternalistic, a state's sovereignty is recognised on the

[557] P Englebert, 'Africa: unity, sovereignty and sorrow', *Journal of Contemporary African Studies*, vol. 29, no. 2, 2011, pp. 238-241.
[558] Ibid.
[559] Ibid.
[560] Ibid.
[561] J Bayart, *The state of Africa: the politics of belly*, Polity Press, Oxford, 2009, pp. 1-420.
[562] C Frederick, *Africa since 1940: the past of the present*, Cambridge University Press, Cambridge, 2002, p. 23.
[563] Ibid.

basis of its legality, not its effectiveness. The sovereign legitimacy he presented, comes from the citizens and not from the West. The new breed of African leaders like Rwanda's President Paul Kagame, Tanzania's President John Magufuli, Danny Faure of Seychelles, and a number of leaders have shown just that.

7.3 Case study: ECOWAS

Established in 1975, ECOWAS recognises the rights to free movement of persons, employment and residence within member states. Most importantly, under Article II of the ECOWAS protocol, refugees from member states are granted the same rights and privileges as their citizens. After gaining political independence from colonial rule, 15 West African states assembled in Lagos in 1979 and established the ECOWAS, way before the Schengen which was established in early 1990s. Article II of this treaty stipulates that:

> It shall be the aim of the Community to promote cooperation and development in all the fields of economic activity… for the purpose of … fostering closer relations among its members and contributing to the progress and development of the African continent.[564]

This Article stipulates that inter alia, the abolition of current border restrictions will set the foundation for a borderless Africa. This was a significant milestone which made ECOWAS become a community of people, not countries. This was the first time a sub-continental treaty was promulgated, aimed at promoting economic growth among member states. It is incumbent upon the AU to build on ECOWAS' current framework and create an integrated and borderless Africa. In 1991, ECOWAS member states adopted the Protocol relating to Free Movement of Persons, Residence, and Establishment (the Protocol).[565] Reviewed in 1993, Article 59 of the Supplementary Protocol established the rights to visa-free entry, residence and work for citizens of member states. The protocol fulfils obligations to the African Charter on Human and Peoples Rights which guarantees the rights of an individual to free movement and settlement as reflected in the AU Agenda 2063. By and large, ECOWAS' removal of restrictions on movement of persons across Africa has set the

[564] ECOWAS, 'Article II', viewed 11 January 2019, <https://www.ecowas.int/wp-content/uploads/2015/01/Revised-treaty.pdf>.
[565] UNHCR, 'Protocol relating to Free Movement, Residence and Establishment of Persons', viewed 28 August 2018, <https://www.unhcr.org/49e479c811.pdf>.

foundation for the possibility of free movement for all Africans, including refugees and asylum seekers. Most importantly, while the Protocol has reservations for admitting non-citizens, Article V and VII enumerate protection safeguards for illegal entry. The Protocol's supplementary Article XIII also limits mass expulsion of non-citizens, except on security, public order or health grounds. Equally important is Article III of the Protocol as it grants citizens from a member state the rights to entry, residence and work.

In another development, on 29 June 2019, leaders of ECOWAS formerly adopted the 'ECO' at a meeting of West African Ministers in Nigeria. To make Africa more integrated, ECOWAS has been searching for a single currency for its member states. 31 years after the goal was first set, this regional bloc has now set a dateline of 2020 to introduce 'ECO' as a single currency.[566] Once endorsed by all the members, the ECO will replace the CFA franc which was introduced by France in 1945. The CFA franc is still being used by eight Francophone ECOWAS member countries: Benin, Burkina Faso, Guinea-Bissau, Ivory Coast, Mali, Niger, Senegal and Togo, which together have over 300 million inhabitants. Like other colonial empires, it was France that introduced the CFA franc as a colonial currency in the francophone region of Africa. By default, France still holds a *de facto* veto on the boards of the two central banks within the CFA franc zone. Interestingly, although the CFA franc was redesigned post-independence, the monetary and exchange rate policies of the franc zone countries are still being dictated by the European Central Bank. Having a single currency will boost trade and commerce in this region as most ECOWAS member states are not strong enough to cope up with the increasingly growing global economy.

The introduction of ECO is never without opposition. Nigeria, whose GDP is quadruple the rest of the members combined, except for Ghana, is sceptical about the ECO. In contrast, Ghana's President Nana Akufo-Addo is convinced that the ECO reflects the aspiration of all ECOWAS English speaking countries. He said, 'We remain determined to have a single currency, which would help remove trade and monetary barriers, and raise the living standard of our people.'[567] Despite its

[566] DW, 'ECO currency. Will Ghana lead Anglophone West Africa to a single currency?', viewed 18 March 2019, <ttps://www.dw.com/en/will-ghana-lead-anglophone-west-africa-to-a-single-currency/a-42679886>.
[567] Ibid.

longevity, other critics think that the CFA franc is associated with colonialism. Speaking at the anniversary of Chad, President Idris Debby stated, 'we must have the courage to say there is a cord preventing development in Africa that must be severed.' [568] The 'cord' he was referring to is the over-75-year-old CFA franc. The CFA franc is viewed as a symbol of French paternalism, dating back to 1994 when France devalued the currency. Other critics also think that apart from the franc zone being synonymous with poverty and under-development, the CFA franc was never intended to boost trade and economic growth in Africa. For example, in 2016, a group of radical economists published a book titled 'Take Africa out of the monetary easement: Who benefits from the CFA franc?'[569] They argued that states that are not willing to upset France think that the weakness of the CFA franc does not lie in its colonial heritage, but the monetary policies of the individual states.[570] Those who are interested in affordable credit margins and a competitive edge with other international lending institutions, think that the CFA franc which operates at an inflation rate lower than the African average, is good only for those who benefit from it.[571] I argue that while the CFA franc survived post-independence monetary harmonisation, it is time that ECOWAS facilitates the prolonged monetary union in line with the AU Agenda 2063 because this will lead to the integration of Africa. As exemplified by the European Economic Union which adopted the Euro in the EU economic zone in 1999, having a single currency could potentially lead to the integration of Africa. As a continental institution, the AU will provide fiscal coverage and monetary surveillance for the whole of Africa. Despite the dramatic differences in the monetary policies across Africa, the introduction of a single currency for Africa has a lot of benefits, including reduction in transaction costs, improved price stability, employment generation, and reduction in exchange rate. As Rwanda, Mauritius and Seychelles have demonstrated, a borderless policy will redress poverty in Africa. The Protocol was a landmark event in the turbulent history of Africa as it abolished the restriction on the movement for citizens of member states. By removing visa

[568] The CFA franc: the French monetary imperialism in Franc, viewed 29 February 2017, <https://blogs.lse.ac.uk/africaatlse/2017/07/12/the-cfa-franc-french-monetary-imperialism-in-africa/>.
[569] Ibid.
[570] Ibid.
[571] Ibid.

requirements, it has created a single space for movement to citizens within member states.

The idea of a United State of Africa has been a topical debate among African leaders for decades. This idea has been articulated in a series of continental agreements and treaties such as the Abuja Treaty, the Lagos Plan of Action, the New Partnership for Africa's Development, all of which are linked to the AU Agenda 2063. It is envisaged that these commitments collectively have become the flagship for a collective self-reliance for Africa. Over the years, progress has been made, including the launched of a Pan African passport in July 2016 by the AU. The rollout of the AU visa free Africa commenced in January 2018 within the East African Community (EAC).[572] The rest of the African states have commenced issuing the AU passport. This continental solidarity set the benchmark for unity that has changed the landscape of Africa. The AU passport has already been disseminated to all African citizens from 2020.[573] Noting that only 13 of the 54 African nations issue biometric passports, it is expected that more countries will open up their borders as they see the benefits of this visa-free innovation.

One of the most ambitious regional integration and economic cooperation in Africa is demonstrated by the Tripartite Free Trade Agreement between three regional blocs. These are Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC), and Southern African Development Community (SADC). The COMESA-EAC-SADC regional bloc was ratified in 2008. It comprises of 26 countries. This regional agreement accounts for about 58 per cent of Africa's Gross Domestic Product (GDP).[574] This initiative provides complementary pathways to achieving Agenda 2063.

[572] M Babatunde, 'East African nations to issue common passport in 2018', accessed on 30 June 2018, <https://face2faceafrica.com/article/east-african-passport.>.
[573] K Monks, 'United States of Africa? African Union launches all-African passport,' accessed 30 June 2018, <https://edition.cnn.com/2016/07/05/africa/african-union-passport/index.html.>
[574] African Regional Development Bank Group, Regional integration. Policy and strategy 2014-2023, accessed 22 June 2018, < https://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Regional_Integration_Stategy_RIPoS_-2014-2023_-Approved_-__Rev_1__-_11_2014.pdf>.

7.4 Case study: *Ujamaa*

As the bedrock of the vision for a borderless Africa, this thesis deploys the concept of *Ujamaa*[575] to facilitate the integration of Africa. *Ujamaa*, a Swahili word for 'family-hood', emerged as a social and economic policy agenda in the aftermath of the British colonial rule in Tanzania. Slave trade and colonialism are the historical events that necessitated the phenomena of *Ujamaa*. The concept was coined by the first President of Tanzania, Mwalimu Julious Kambarage Nyerere. As a nationalist project, *Ujamaa* became one of Africa's successful indigenous projects and a significant landmark in postcolonial Africa. Just three months after becoming the first President of Tanzania in 1964, Nyerere published a pamphlet '*Ujamaa*: the basis of African socialism'.[576] Six years later, *Ujamaa,* the intellectual brainchild of Nyerere, became his official state policy and it remained so for over two decades.[577] It was later spelled out in the Arusha Declaration of 1967 which became a defining document in postcolonial Africa.[578] This document proclaimed in its preamble that 'all human beings are equal'.[579] The premise of this strategy is that the success of a nation is realised when 'we care for one another as brothers and sisters'[580] and as members of the same family where everyone participates, not as subordinates, but as equals. *Ujamaa's* concept of justice, freedom and equality is an important element in ensuring the inclusion and integration of the refugees whether that be in the country of origin or in the country of asylum once the refugees are afforded the freedom of movement in a borderless Africa. As opposed to capitalism, *Ujamaa's* socialism fosters a sense of nationhood or citizenship (*wananchi* in Swahili or literally 'the children of the country or village') with no one excluded on the basis of citizenship or the 'us and them' dichotomy. Conceptually, *wananchi* is parallel to the globalisation crusade which is viewed as a contributing factor to the inequality between Global North and Global South. The concept of *Ujamaa* is distinctively indigenous to Africa prior to colonisation. It is a belief in sharing of resources in an African traditional belief system, value, tradition and culture of hospitality. *Ujamaa* is about sharing with strangers, foreigners, visitors, neighbours, aliens and sojourners.

[575] JK Nyerere, 'Freedom and socialism, *uhuru na ujamaa*: a selection from writings and speeches 1965-1967, Oxford University Press, UK, 1968.
[576] Ibid.
[577] Ibid.
[578] Ibid.
[579] Ibid.
[580] Ibid.

It is this concept of sharing and inclusivity that makes *Ujamaa* a distinctively suitable concept for accommodating the refugees in a borderless Africa. The AU Agenda 2063 will not be successful if it is not infused with *Ujamaa's* principle of familyhood, where an African does not regard another African as a stranger or refugee, but members of the same extended family. The African socialism differs with especially the Marxist-Leninist strand of socialism. This is because the African way of life is communitarian characterised by the collectiveness of sharing and solidarity. It challenges the capitalist monopoly and rejects the class system and exploitation by promoting the principle of equality. As a colonial import, the class system never existed in Africa prior to colonisation. As Nyerere put it, 'we glorify human beings, not colour'... and that 'citizenship is not based on anything, but loyalty to this country'.[581] Class system and the politics of exclusion using borders, citizenship and race emerged from the industrial revolution in Europe as a colonial instrument. It was never an African product and not suited to the African way of life where everyone is regarded as a member of the extended family. *Ujamaa* emphasises giving power back to the ordinary citizens where egalitarianism and humanism is practiced in promoting an African hospitality which is in sharp contrast to globalisation. For example, as Africa's share of global trade stagnates at three per cent, Issa Shivji observed:

> …the transnational in cahoots with the states of the North, pressurise the states of the South in various ways to pass laws and create institutions regardless of whether such are democratically acceptable to their own people. It is obvious this type of globalisation is neither global nor global interdependence, but total negation of the sovereignty of the state and the right of peoples to self-determination and a license for new forms of global pillage.[582]

Shivji in 'Where is Uhuru?', is a poetic reflection on imperialism and neo-colonialism in Africa. He refers to globalisation as imperialism and imperialism as globalisation.[583] This means globalisation presents a danger as it disenfranchises Africa from its political independence. For example, he argued that imperialism has

[581] JK Nyerere, 'Freedom and socialism, *uhuru na ujamaa*: a selection from writings and speeches 1965-1967, Oxford University Press, UK, 1968.
[582] I Shivji, *Where is Uhuru? Reflections on the struggle for democracy in Africa*, ed., G Murunga, Pambazuka Press, Cape Town, 2009, p. 31.
[583] Ibid.

introduced programs such as the New Partnership for Africa's Development which he said is detrimental to Africa's development.[584] Similarly, Walter Rodney argued that it is in the wake of imperialism that the West continues to under-develop Africa through the ongoing reliance on Western institutions and laws as 'agent for militarisation'.[585] Imperialism creates an imbalance in North-South relationship and it is this colonial continuity that this thesis critiques. Where globalisation emphasises market-oriented capitalism, *Ujamaa* allows for indigenous initiatives such as a borderless policy for peaceful co-existence and where all Africans will have the right to freedom of movement in all the 54 nations. In view of *Ujamaa's* emancipatory socialist concept, globalisation has in fact resulted in increased inequality and poverty between and within nations.[586] Although Africa's economy has been rising steadily since the last decade with a middleclass stampede, a people-centred *Ujamaa* could lead to a United States of Africa. In describing his recent travel experiences in Africa in his book 'The moral empire: Africa, globalisation and the politics of conscience', Bob Geldof wrote:

> There have been and still are many darknesses here. The Belgians and their beheadings, whipping, amputations on children, and cannibalism…the AIDS that sneaks out of its forests; the armies of amoral children, the genocides, the warlords, and finally the lunatic self-appointed 'generals' and 'commander' militias paid for by outside interests and nation to rape, torture, brutalise, mutilate, and kill out there on the trees.[587]

In 1985, the music celebrity turned humanitarian, toured the continent of Africa and conducted live aid concerts in Europe purportedly to raise funds for Ethiopian famine. He then received honorary Knighthood which catapulted him to global prominence in Western media. He referenced Africa as 'darkness', which is 'version of the apocalypse.'[588] Whereas apocalypse means 'revelation' in biblical terms, Geldof uses it loosely to symbolically denote the end thing, destruction, damage, a disaster of global proportion. He refers to Africa as a continent of wars, famine, diseases, plagues, evils, only comparable to the Holocaust. As the Europeans, his

[584] Ibid.
[585] W Rodney, 'How Europe underdeveloped Africa', Howard University Press, Washington, 1972, pp. 1-316.
[586] S Bhalla, *Imagine there's no country: poverty, inequality and growth in the era of globalisation*, Institute for International Economics, Washington DC, 2002, p. 19.
[587] A Geldof, 'Geldof in Africa, Apocalypse still', DVD documentary, viewed 11 May 2016.
[588] Ibid.

main audience, is not comfortable reading about the Nazi Holocaust or the racialised genocide during colonialism, Geldof instead referenced genocide which only happened in Rwanda, not the whole of Africa. As apocalyptic literature is characterised by irrational representation or 'horror overload', Geldof's account is very much a postcolonial travelogue, imperialistic and attitudinal. Not that slave trade predates European excursion in Africa, the Irish songwriter was silent about the link between Africa's colonial dispossession and the emergence of European capitalism. He did not acknowledge Britain's colonial link with Africa, but he is conscious of it. Worse still, the musician did not explain how Europe contributed to Africa's apocalypse, especially King Leopold and the Belgium's racialised brutality in Congo and the use of uranium in the first atomic bombs that came from this continent. The Irishman dedicated one whole chapter to slave trade. In one narrative he said, that slave trade 'had been going on for so long before the white man showed up…everyone was at it'.[589] By this statement, Geldof is confident that slave trade was an African affair and the Europeans only played the role of a middleman. The Canadian historian Alistair Boddy-Evans, argued that between 1400-1900, about 20 million Africans were shipped out of the continent during four great slave trading operations: Trans-Saharan, Red Sea (Arab), Indian Ocean, and Trans-Atlantic.[590] Nathan Nunn suggests that based on shipping and census data, about 80 per cent of the slaves were forcefully removed from their homes.[591] This indicates that trading human beings was well organised, institutionalised, and had become a lucrative international trade. Subsequently, it depopulated and impoverished Africa. Geldof's denial justifies the racial and colonial legacy which lives to this day. Slave trade operated alongside the acquisition of land which required the slaves to work in plantations and goldmines to feed Europe. Even after the abolition of slave trade, colonial superpowers such as France, Portugal and Britain continued to operate massive labour camps either in plantations as in the case of King Leopold in the Congo, or through recruitment in the army to fight in WWI alongside their colonial masters. As such, Geldof's statement is a moral equivalent of the Holocaust denial, not forgetting that millions of Africans spent the rest of their lives in servitudes, in

[589] Ibid.
[590] A Boddy-Evans, 'A short history of the African slave trade', viewed 17 May 2020, <https://www.thoughtco.com/african-slavery-101-44535>.
[591] N Nunn, 'The long-termed effects of Africa's slave trades', *The Quarterly Journal of Economics*, vol. 123.1, 2008, pp. 139-176.

chains. Slave trade was institutionalised, involving the warfare of raiding of villages, banditry, chaining captives as profits of war, and shipping them overseas or to work in plantations within Africa. Although considered a fragmented continent, bedevilled by civil wars and conflicts over porous borders, there are colonial legacies attached to this upheaval. It is also true that Africa is undergoing a progressive transformation, including opening its borders for free trade and travel. Instead of relying on international refugee law and humanitarian aid to feed its refugees, Africa must strengthen its informal economy, virgin agricultural fields, the middleclass stampede and entrepreneurship, and adopt a borderless policy. This is what *Ujamaa* stands for so that Africa takes care of its refugees and other vulnerable population groups instead of relying on aid as preached by Geldof.

Adam Hochschild once lamented that it was in the heyday of colonialism and slave trade that 'humanitarianism in Europe rose alongside the venal projects of colonial exploitation'[592] as wealthy and powerful Western nations owned significant imperial projects in Africa. Then and now, the humanitarianism crusade had and will continue to have its own capitalist agenda. Seen in this historical context, *Ujamaa* could be a decolonising tool to assist the refugees to transition into a new life once granted the freedom of movement in a borderless Africa. This aligns with Lionel Cliffe's view that *Ujamaa* represented an indigenous strategy where Tanzania relied on its own efforts, but without compromising its independence.[593] Suffice to state that *Ujamaa* succeeded in granting the Tanzanians an authentic freedom and self-reliance – things that were discouraged during the colonial period. As an ideology, *Ujamaa* was instrumental in the fight against colonialism due to its emphasis on the freedom of the oppressed. For example, during the colonial era, the Germans used indirect rule in Tanganyika by appointing Governors who ruled through imperial edicts.[594] Below the Governors were District Officers who were in charge of a number of functions, including the collection of compulsory taxes and the power to appoint and dismiss local chiefs at will.[595] In Nyerere's own local village, the local chief was appointed by

[592] A Hochschild, *King Leopold ghost: a story of greed, terror and heroism in colonial Africa*, Houghton Miflin, New York, 1999, p. 115.
[593] L Cliffe, *From independence to self-reliance*, in IN Kimamba, & AJ Temu, eds, A history of Tanzania, Kapsel Education Publications, East Africa Publishing House, Nairobi, pp. 239-257.
[594] E Cornelli, 'A critical analysis of Nyerere's Ujamaa: an investigation of its foundations and values', PhD thesis, University of Birmingham, UK, 2012, p. 70.
[595] Ibid.

the colonial administrator rather than by the local people.[596] The Germans also introduced compulsory 'hut tax'.[597] As a monetary economy was still non-existent, the Germans introduced a number of conditions, including the demand that whoever failed to pay hut tax had to work in German-owned plantations or be arrested and face forced labour as a prisoner.[598] This oppressive regime was rejected and overturned by *Ujamaa's* concept of peasantry participation which necessitated that leaders had to be appointed by the local people and not through imperial edict. Just as the colonial administration was designed to control the entire livelihood of the local population, conceptually, the *Ujamaa* framework could be an alternative to international institutions such as the UNHCR by preparing the refugees to transition from humanitarian aid to self-reliance once granted the freedom of movement.

One of the factors that informed Nyerere's concept of *Ujamaa* was the history of the 18th century Atlantic slave trade. Tanzania was a gateway for trafficking Africans to the Middle East, Europe and America. In order to meet the demand for industrial production, the colonisers – first the Arabs then the Europeans (Britain, Germany, French and Portugal) – turned to Africans as a source of free labour. Given that the slave trade involved fighting the local population by way of banditry, kidnapping and raiding of villages, this led to the depopulation in Africa. As Judith Listowel put it:

> They walked in long pathetic lines, yoked together carrying on their head elephant tusks, bundles of cloths, beads and grains with raider escorts marching beside them with ready whips for the weary and ready to sword down those who could not march anymore.[599]

Listowel provides a definitive and graphic story of slavery in Tanzania. It is this back story of the slave trade, which she gathered orally from survivors and white informants, that demonstrates the extent of the sheer violence of slavery that necessitated *Ujamaa* as an institution so that Tanzanians could regain their dignity and liberty. Listowel assembled valuable evidence of the slave trade that almost depleted the local population. Slave trade also resulted in extreme poverty as the local population were either busy fighting to defend their territory and agricultural

[596] ibid
[597] Ibid.
[598] Ibid.
[599] J Listowel, *The making of Tanganyika*, Chatoo and Windu, London, 1965, pp. 1-43.

products or were forcefully displaced from their habitat.[600] Subsequently, the entire population was depleted. Instead of inheriting a system that enslaved his people, Nyerere opted for *Ujamaa* and focused on nationwide development of the workforce when he became President. Tanzania, then referred to as Tanganyika, was a British protectorate from 1920-1961. When Nyerere became President in 1962, he inherited a community torn apart by racism and colonialism. The colonial community were divided along racial lines. At the top were the European settlers who had more rights and entitlements, followed by Asians, Arabs and Africans at the bottom.[601] As Nyerere understood it, this racial grouping was intended to keep the Indigenous Africans in a constant state of inferiority. Subsequently, Nyerere developed the *Ujamaa* ideology in a series of his speech broadcasts, including in his 1962 *Ujamaa* pamphlets in which he expressed the idea of communitarianism:

> In our traditional African society, we were individuals within a community. We took care of the community, and the community took care of us. We neither needed nor wished to exploit our fellow men.[602]

It was this historical condition that motivated Nyerere's articulation of the concept of *Ujamaa*. Nyerere's cultural tradition and vision for communitarianism was also crucial during the liberation struggle. Both the *Ujamaa* and Nyerere are inseparable given the latter's preoccupation with the socio-political problems that were facing his new nation post-independence. In contrast to Western capitalism, *Ujamaa* is an Africanised approach to social policy that became very critical in creating an egalitarian society in the postcolonial era. Oxfam UK, a leading international NGO and *Ujamaa*-implementing partner, once commented, "If any country was to be labelled 'ideal' for Oxfam's work in terms of basic philosophy, I suppose Tanzania would come closest".[603] Oxfam's statement demonstrates a commitment to correct the wrongs committed during colonial administration in Tanzania. Although the *Ujamaa* resettlement program was largely voluntary, some critics hold the view that

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[600] EA Alpers, *The nineteenth century: prelude to colonialism*, in Zamani: a survey of East African History, BS Ogot, & JA Keirman, (eds), *a survey of East African History*, East African Publishing House and Longman, Nairobi, 1968, pp. 237-54.
[601] Ibid.
[602] Nyerere, Ujamaa, p. 6.
[603] Oxfam UK, *Forbes to BP, 28 September 1975, OXA Tan 64*, Wylie to Brown, 18 February 1975, in J Michael, '*Almost an Oxfam, Ujamaa and development in Tanzania*, *African Affairs*, 2002, vol. 101, p. 513.

the project reflected an 'authoritarian regime'[604] as the villagisation policy evolved from being voluntary to forced settlement. With rural development at the centre of its policy, *Ujamaa* helped to raise the standard of living in Tanzania where the poor felt secure and protected. For example, over 70 per cent of Tanzanians live in rural areas prior to and after *Ujamaa*. The failure of the colonial powers to establish an industrial infrastructure meant that the *Ujamaa* project did not have a strong economic or industrial base from which real economic development could take place. The *Ujamaa's* project was abandoned in 1983 when Oxfam withdrew its funding. Nonetheless, its framework and philosophical ideals is still capable of providing (and continues to provide) an alternative to colonially racialised capitalism because as Nyerere argued, wealth was shared in traditional Africa. No one could hoard wealth or accumulate it for the sake of gaining power and prestige.

During the postcolonial era, *Ujamaa* became the face of African socialism. Pan African leaders such as Kwame Nkrumah of Ghana, Sekou Toure of Guinea, Leopold Senghor of Senegal, Kaunda Banda of Zambia and Modibo Keita of Mali, adopted the *Ujamaa* concept of socialism.[605] These leaders were the first Presidents of their nations at independence. One of the most significant features of *Ujamaa* that appeals across Africa is its emphasis on communitarianism which is a sharp contrast to the Western capitalist imperialism. As Kincaid once put it, 'Do you know why people like me are shy about being capitalist? Well, it is because we, for as long as we have known, you were capitalist'.[606] It is on this basis that *Ujamaa's* principles of freedom, equality and participation set it apart from other political movements in postcolonial Africa. Besides, its legacy still plays a significant role not only in Tanzania's contemporary social and economic policies, but as a clear pathway for integrating refugees into community life.

Nyerere described *Ujamaa* as an 'extended family' which is fundamental to African society. By extension, *Ujamaa* was the lexicon of freedom in many parts of Africa. Its underlying conceptual framework is based on the African traditional culture where

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[604] R Ahearne, 'The legacy of autocratic rule in Tanzania – from Nyerere to life under Magufuli', *The Conversation*, viewed 11 December 2018, <https://theconversation.com/the-legacy-of-autocratic-rule-in-tanzania-from-nyerere-to-life-under-magufuli-73881>.
[605] K Jennings, 'Economic history, intellectual history, political history', *African History*, Oxford Research Encyclopedia. Online publication, 2017, p. 22.
[606] J Kincaid, *A small place*, Straus and Giroux, Farrar, 2000.

everybody belongs – a factor that fed into *Ujamaa*, namely participation, inclusion and ownership. So, the extended family model, which is the ethos of African society, occupies a central place in the formulation of *Ujamaa*. Similarly, it is important that Africans regain their national culture and hospitality by having an open border policy, a thing that was discouraged during the colonial era. Unlike the concept of the nuclear family in the West, the African 'extended family' comprises several households which are interlinked through a common ancestry. While the concept of *Ujamaa* predates European colonisation in Africa, the extended family philosophy was protective in dealing with threats that could endanger the community's existence at the time, such as colonialism. *Ujamaa* as an institution blends the entire African society as one big extended family where everyone is considered a brother or a sister, regardless of ancestry. Similarly, the extended family model could become a symbol of freedom for the refugees after the camps are phased out. As Nyerere put it, in this extended family where everybody is a worker, no person exploits another'[607] and 'neither capitalism nor feudalism exists'.[608] Comparatively, *Ujamaa* is a critique of the amalgamation of 120 European tribes put together at the Berlin Conference in 1884.[609] Neo-colonialism could only be eliminated through *Ujamaa's* principle of equality. This principle is consistent with the situation of refugees who, by extension, have become members of the same extended family by way of their refugee status. As Nyerere put it, 'in our African traditional society, we took care of the community and the community took care of us – it's a society that does not have two classes.'[610] The *Ujamaa* principle did not only facilitate the integration of the African society in post colonisation, but also played a critical role in cultivating a communitarian culture and overcame ethnic, religious and sectarianism which was critical in the postcolonial period. It was during this period that the spirit of hospitality was also promoted. As the AU is working towards a borderless Africa, *Ujamaa's* principles will be critical in creating a classless society where all Africans will have the same right to entry, residence and establishment in all the 54 African countries. The flow on effect of this will help redress the problem of encampment.

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[607] JK Nyerere, 'Ujamaa – the basis of African socialism', *Journal of Pan African Studies*, vol. 1, no.1, 1973, p. 6.
[608] Ibid.
[609] E Cornelli, 'A critical analysis of Nyerere's Ujamaa: an investigation of its foundations and values', PhD thesis, University of Birmingham, UK, 2012, p. 113.
[610] Nyerere, Ujamaa, p. 6.

Since the 1960s, several ambitious postcolonial initiatives were introduced in Africa, including *harambee* in Kenya and *ubuntu* in Rwanda, yet *Ujamaa* stood out as the most successful. The African refugee crisis currently has no bulletproof solution due to the deeply rooted colonial practice such as the institutionalisation of the camp. *Ujamaa's* principles of freedom and participation could redress the problem of encampment. As Martin Luther King Jr observed, 'If you cannot fly, run, if you cannot run, walk, if you cannot walk, crawl, but whatever you do, you have to keep moving forward'.[611] Instead of reinventing the wheel, the *Ujamaa* theoretical framework could provide a genuine pathway to end prolonged encampment in Africa by allowing the refugees freedom of movement in a borderless Africa.

7.5 Global Compact on Refugees

On 17 December 2018, the UNGA voted overwhelmingly to endorse the Global Compact on Refugees (the Compact),[612] a framework for cooperation on international refugee protection. The Compact does not seek to modify the current international refugee regime, but to enhance it through equitable and predictable responsibility sharing to support countries that receive and host refugees. The Compact has four objectives:

> Ease pressures on countries that host large numbers of refugees; build self-reliance of refugees; expand access to third-country or refugees through resettlement and other pathways of admission; and support conditions that enable refugees to return to their countries of origin.[613]

The objectives of the Compact demonstrate that hosting people in forced displacement which has historically been the feature of Africa's humanitarian response, has often been undervalued by the West. Spearheaded by the UNHCR, the Compact is a non-binding agreement aimed at facilitating burden sharing and responsibility sharing among member states and key stakeholders. However, I need to point out from the onset that hosting people in forced displacement which reflects burden sharing and responsibility sharing, has historically been a major factor in

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611 ML King Jr., 'Quotable quotes', viewed 18 November 2018, <https://www.goodreads.com/quotes/26963-if-you-can-t-fly-then-run-if-you-can-t-run.>.
612 UNHCR, 'The Global Compact on Refugees', adopted by the UNGA on 17 December 2018, viewed 22 October 2018, <https://globalcompactrefugees.org/article/global-compact-refugees >.
613 Ibid.

humanitarian response in Africa. Regrettably, the humanitarianism within Africa or 'home grown' support is intentionally ignored by humanitarian theorists. For context, about one third of the world's refugees are in Africa, being hosted by some of the poorest nations on earth. The hosting role, or what Nicholson refers to as 'household work',[614] performed within Africa is never regarded as burden sharing or responsibility sharing, and remains invisible. In the minds of humanitarian actors, it is considered like 'feminine'[615] private household chores, whereas the institutional support offered by the West is 'masculine' and in the public sphere. This 'elite relief'[616] model meant that scholarly research on humanitarianism focused largely on Western-style institutional support with a focus on financial contributions while neglecting the plurality of non-traditional humanitarian support. According to Davey, there is a fear that 'non-Western' humanitarianism may have a misguided understanding of what it means to be humanitarian. Put differently: it is humanitarian only when done by the West. It is such a misconception that has led to the feminisation and conceptualisation of Africa's humanitarian response where hosting refugees is regarded like household chores.

In his response to the claim about the refugee crisis in Europe, the High Commissioner for Refugees, Filippo Grandi, commented on Africa's progressive model of care towards the refugees:

> Those shouting about a refugee emergency in Europe or America should visit African communities giving care to millions of refugees with small resources. Take three East African countries: Ethiopia, Kenya, and Uganda, their average GDP per capita is about 20 times less than Europe's. And yet they collectively host about 2.8 million refugees, more than the entire number to arrive in all of Europe's 28 member states during the entire 2015-16 'refugee crisis.[617]

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[614] B Nicholson, 'Bottom-up, not top-bottom: accommodating the displaced in mid-Albania in 1918', conference paper presented at a workshop on South-South humanitarianism in the context of forced displacement, Refugee Studies Centre, University of Oxford, UK, 2012.
[615] J Pacitto, & E Fiddian-Qasmiyeh, 'Writing the 'other' into humanitarian discourse: framing theory into south-south forced displacement, new issues in refugee studies, no. 257, UNHCR, Geneva, 2013, p. 18.
[616] S Haysom, 'Contemporary humanitarian action and the role of Southern actors: key trends and debates', Opening lecture on the workshop on south-south humanitarianism in the context of forced displacement, Refugee Studies Centre, University of Oxford, UK, 2012.
[617] UNHCR, 'Filippo Grandi calls on donor nations to help stabilize Africa's conflict zones', viewed 22 November 2018, <https://www.unhcr.org/en-au/news/latest/2018/6/5b2eab644/grandi-calls-donor-nations-help-stabilize-africas-conflict-zones.html.>.

To put it in context, the UNHCR estimates the current number of people displaced globally to be about 70.8 million people, of whom 41.3 million are IDPs and 25.9 million are refugees.[618] The majority of this cohort are in Africa within the region of active armed conflicts. Africa's hospitality and humanitarianism towards people in displacement predates the claimed 'universality' of international refugee law. Unfortunately, support from institutions such as the UNHCR is regarded as constituting the masculine, public sphere while overlooking the role of the refugee host nations in Africa. Barnett and Weiss conceptualised the institutionalisation of humanitarianism as a 'Western or Christian creation'.[619] They neglected humanitarianism's global imperative, and the fact that it existed in Africa before Christianity or Western civilisation. It is very recently through the International Committee of the Red Cross that humanitarianism was structured in terms of staffing, funding and reporting. As Chimni et al put it, humanitarianism is the ideology of hegemonic states in the era of globalisation.[620] However, looking at the current global migration trend holistically, Western nations have either completely closed their borders or have introduced the policy of 'turn back the boats',[621] 'forced return'[622] 'externalisation of asylum'[623] and 'offshore detention'[624] to prevent the refugees from entering their territories, but without success. It was against this background that the Compact was hurriedly put together as a reactive framework after the asylum deterrence policies in the US and the EU have failed or are failing. In contrast, the AU Agenda 2063 is a significant innovation in the institutional development of the African continent, aimed at addressing 'Africa specific' refugee situations. It has a fifty-year plan through which its flagship bearer projects will be implemented in five stages. Agenda 2063 is based on the African traditional concept

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618 UNHCR, Global trends: forced displacement in 2017, viewed 22 December 2018, <https://www.unhcr.org/ph/figures-at-a-glance.>.

619 M Barnett & T Weiss, 'Humanitarianism contested: where angels fear to tread', Routledge, Oxford, 2011,

620 BS Chimni, *Globalisation, humanitarianism and the erosion of refugee protection*, *Refugee Studies Centre*, working paper no. 3, Oxford, UK, 2000. pp. 243-263.

621 L Hartley, JR Anderson, A Pedersen, 'Process in the community, detain offshore or 'turn back the boats'? predicting Australian asylum-seeker policy support from false beliefs, prejudice and political ideology,' Journal of Refugee Studies, vol, 32, issue 4, 2019, pp. 562-82.

622 NE Qadim, 'Postcolonial challenges to migration control: French–Moroccan cooperation practices on forced returns,' Security Dialogue, vol 45, issue, pp. 242-62.

623 S Morgades, 'The externalisation of the asylum function in the European Union,' GRITIM Working Paper Series, no, 4, Spring, 2010, p. 5.

624 L Grainger-Brown, 'The Language of Security: Reassessing Australia's Policies of Free Trade and Offshore Detention,' Australian Journal of Politics and History, vol, 65, issue 2, 2019, pp. 246-258.

of family-hood (*Ujamaa*) which is akin to responsibility sharing and it is desirable that Africa sticks to its principles.

The Compact did not demonstrate a commitment to address the root causes to current prolonged encampment and or to avert potential future causes such as armed conflicts and climate change to stop people from fleeing in the first place. Regardless of how much effort the UNHCR and its humanitarian partners put into implementing the Compact, it is impossible to envision it resolving the refugee phenomenon in Africa. The Compact was adopted at a time when the US had abandoned its global leadership for the refugee issues and instead, it is preoccupied with erecting border walls to prevent refugees from entering its shores. Additionally, the failure by Germany in negotiating an equal distribution of refugees within the EU eventually led to the development of the Compact. The EU succeeded in one thing: negotiating with warlords in Libya to return and detain asylum seekers trying to cross into Europe. Evidently, the Compact is more of benefit to anti-immigration populists in the West than to the refugees in Africa and other developing nations. This means that a borderless Africa could be considered as the default outcome. In the spirit of solidarity, Africa, whose concept of humanitarianism or burden sharing and responsibility sharing fall outside of the dominant Western framework, adopts borderless policy to allow for its refugees to have the freedom of movement across this continent.

When the Compact was launched in 2016 by former UN Secretary General, Ban Ki-Moon, in a report 'In safety and dignity', its intention was to fill the longstanding gaps in international refugee protection. In addition, its application was to reflect the principles of the legally binding 1951 Convention by strengthening its interpretation and providing new commitments such as a new protocol.[625] However, the Compact was consciously crafted without any commitment to a rights-based standard. In the context of states' restrictive interpretation of the 1951 Convention, there is no reference to the weaknesses within this existing legal framework. As Volker Turk and Madeline Garlick have argued, any meaningful commitment to burden sharing could only be addressed through the adoption of additional protocols to the 1951

[625] T Gammeltoft-Hansen, 'The normative impact of the global compact on refugees', *International Refugee Law,* vol. 30, no. 4, pp. 605-610.

Convention.[626] Amnesty International echoed similar sentiments, arguing that the Compact did not spell out the extent of the responsibility sharing and any specific targets for all the stakeholders: donors, host nations, international agencies and third country of asylum.[627] This thesis contends that the Compact should have included quantifiable targets in thematic areas of resettlement, repatriation and integration, given that the majority of the refugees are trapped in prolonged encampment.

The success of the Compact depends on several factors, including expanding access to third country resettlement opportunities. However, there is not even a single resettlement country willing to momentarily agree to this commitment. Expanding opportunities for third country resettlement such as establishing a multi-year resettlement scheme, or complementary pathways for admission such as humanitarian visas, family reunion, family or community sponsorship, seems to be a long-distant reality. For fear of the threat to their sovereignty, governments with very strong anti-immigration policies retracted from their original commitment to a 'first draft'[628] which called for a 'global mechanism for international cooperation' to regulate orderly migration. For example, the US, which has been the world's leader in resettling refugees since the Holocaust, voted against the Compact for fear that signing a hypothetical agreement may create a pathway for a new binding obligation in future. Eritrea is the only country that abstained from voting in protest against Donald Trump's administration for the detention of children seeking asylum in the US. Amnesty International also critiqued the Compact, arguing that it only 'reinforces status quo or even weaken the existing protection'.[629] Furthermore, while the New York Declaration was championed by former US President Barack Obama, Trump was the first world leader to oppose the Compact. The Trump administration in a reverse turn, reduced the US resettlement ceiling from 45,000 in 2018 to 30,000 in 2019, the lowest ceiling since the US created its resettlement program following the

[626] V Turk, & G Garlick, 'From burdens and responsibility sharing to opportunities: the comprehensive refugee response framework and a global compact on refugees', *International Journal of Refugee Law*, vol. 28, Issue 4, 2016, p. 673.
[627] Amnesty International,' Amnesty International public statement on the global compact on refugees', viewed 22 November 2018, <https://www.amnesty.org/download/Documents/IOR4082272018ENGLISH.PDF>.
[628] UNHCR, 'Draft of the Global Compact on Responsibility Sharing for Refugees', viewed 22 November 2018, <http://www.unhcr.org/events/conferences/578369114/zero-draftglobal-compact-responsibility-sharing-refugees.html>.
[629] UNHCR, 'Amnesty International public statement on the global compact on refugees', viewed 14 November 2018, <https://www.unhcr.org/en-au/events/conferences/5ad9f3cb7/amnesty-international-public-statement-global-compact-refugees.html>.

adoption of the Refugee Act in 1980.[630] Similarly, Nikki Haley, the US Ambassador to the UN, claimed that a global approach to the crisis is 'simply not compatible with US sovereignty'.[631] It is public knowledge that the Compact is juxtaposed with the principles of international cooperation and sovereignty. To argue that the former is an effective response, but the latter should buttress it, indicates that accountability for refugee protection is still lacking. In comparison to the 1951 Convention, the Compact has no binding obligation, although the implied assumption is that soft law may eventually lead to 'norm cascade'.[632] Nonetheless, this brings into question how the key objectives of the Compact will be fulfilled.

The Compact has also been criticised by civil society on the basis that global leaders are now responding positively to resolve the impact of migration and international protection after Europe was significantly affected.[633] The US President Donald Trump declared in his first speech to the UNGA in September 2019, 'we seek to support recent agreement of the G20 nations that will seek to host refugees as close to their home countries as possible'. This implies that the refugee issue in Africa is not a global crisis, but a regional one. This shift in tone should prompt African states to borrow Rene Dubos' slogan 'think globally and act locally'[634] by sticking to the AU Agenda 2063 without upsetting the globalised approach. Thinking globally implies implementing the vision of the West which threatens the Africa ethos of burden sharing and responsibility sharing which are premised on the concept of *Ujamaa*.

The Compact is littered with rights phrases, but without a unified commitment to protect the rights of those on the move, particularly the vulnerability arising from the character and reasons for their flights. Although the Compact outlined procedures for managing reception, registration and documentation of persons with special needs such as women and children, it does not guarantee their access to territories where their asylum claims could be assessed. Also, the Compact did not spell out the

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630 N Rush, 'US continues to back UN refugee compact that contradicts administration goals', viewed 22 November 2018, <https://cis.org/Rush/US-Continues-Back-UN-Refugee-Compact-Contradicts-Administration-Goals>.
631 D Lind, 'The Trump administration does not believe in the global refugee crisis', viewed 14 November 2018, <https://www.unhcr.org/neu/23105-ten-questions-and-answers-about-the-global-compact-on-refugees.html>.
632 M Finnemore, & K Sikkink, 'International norm dynamics and political change', *International Organisation*, vol. 52, no. 4, 1998, viewed 14 February 2018, p. 893.
633 K Koser, 'A global compact on refugees: the role of Australia', viewed 11 February 2018, <https://www.lowyinstitute.org/publications/global-compact-refugees-role-australia>.
634 R Dubos, 'Think globally, act locally', viewed 11 May 2020, <https://en.wikipedia.org/wiki/Think_globally,_act_locally>.

specific procedures for protecting the rights of the child to health, legal guidance and judicial proceedings. Ensuring that states refrain from criminalising them either on the land or the seas is an essential element in addressing their vulnerabilities.

The Compact did not cover persons in general displacement, including IDPs, migrants, stateless persons and people displaced by climate change and natural disasters. Further, references to climate change in the 'zero draft' that laid the foundation stone for the Compact were intentionally deleted. This demonstrates a total lack of commitment in responding to situations that trigger their movements. The proposed support to the refugee host countries was presented in the context of the Sustainable Development Goals (SDGs) without outlining any rights-based reference to the existing standard under international law. As such, the Compact reinforces the status quo where refugee host nations will continue to take the lion's share of the refugee crisis, whereas richer nations will continue to provide a tiny portion of humanitarian aid and may agree to small resettlement quarters not more than what they already do. In addition, the Compact lacks any concrete predetermined commitment to financial contribution as the responsibility sharing commitment is addressed through the existing pledging mechanism. Apart from refraining from putting additional burden on refugee host nations, the Compact did not commit any country-specific or regional framework for support in situations of mass influx or in ending protracted refugee situations. One of the political backdrops of the Compact is the lack of political appetite in offering additional resettlement spaces in a third country. This means that the system is unsustainable as states do not have to do anything if they do not wish to fulfil their promises in this uneven playing field, especially in helping people fleeing from danger. Although the Compact was formulated based on the UN Charter, UDHR, and core international human rights treaties, the Compact is silent on the question of mandatory and indefinite detention or non-penalisation of refugees and asylum seekers for irregular entry. The flexibility with soft law in 'fill the gap' role in the absence of any treaty law is acknowledged. However, its lack of actionable commitment is a step back to the development of international refugee law. Particularly, the costs of not holding states accountable to the burden sharing responsibility is enormous and disastrous.

The Compact has come at a time when state borders have been expanded beyond their physical boundaries. Some states have either completely closed their borders or have introduced deterrents, including the policy of 'turn back the boats', 'forced return' or the 'externalisation of asylum'. As border protection equates to national security, it is enforced with impunity. In sum, the international community has missed an important opportunity to improve the protection of refugees by not making actionable commitments regarding refugees in protracted situations. On face value, the Compact is a significant success, but on a closer inspection, its non-binding commitments demand very little from states by way of not committing themselves to specific funding and resettlement opportunities. It is likely that the UNHCR will lose the support of the US and the EU, its two traditional donors. For example, the US has already slashed its number of resettlement quarters. Besides, the UNHCR's silence on the detention of children at the US borders, the EU's policy of interception, forced return and slavery in Libya, and lack of authority from the former reveals fundamental tensions. There is also the possibly that these traditional donors will potentially reduce their funding, which will result in serious financial cuts to the agency's expenditures. Nonetheless, one of the key successes of the Compact is its preference for keeping the refugees in their region of origin which aligns with the AU Agenda 2063. For Africa's contribution to the Compact to be credible and effective, its entry point should be within the framework of the AU Agenda 2063. Deflecting from this responsibility for the sake of the small number of people who may seek asylum in Global North without any significant increase in resettlement opportunities in third countries will be a mistake. By and large, this analysis shows that a borderless Africa is necessary for phasing out the camp, without invoking the protection mandate of the UNHCR.

7.6 Conclusion

This chapter has made the case for a borderless Africa as the means of ending prolonged encampment. There is little justification for a closed border policy, particularly for Africa with millions of refugees in prolonged encampment. Several African countries already issue on-arrival visas which indicates that the vision for a borderless Africa is achievable. This continental solidarity has set a benchmark for unity that will change the landscape of this continent. It is anticipated that countries with existing positive reciprocity visa arrangements such as Rwanda, Seychelles and

Mauritania, will continue with their policies while other countries will either join them or open their borders unilaterally. If implemented as stated, this will reform Africa's rigid border policies and lead to the integration of this continent. Furthermore, there are already existing sub-regional economic treaties such as ECOWAS, EAC, COMESA and SADC. As these treaties imply free movement, they could provide the roadmap for implementing the AU Agenda 2063 for a borderless Africa.

The hallmark of a borderless Africa should be the freedom of movement for refugees and asylum seekers. To facilitate this transition to free movement for all, the application of *Ujamaa* philosophy would ensure refugee integration into a society of equals after being granted freedom of movement. This will ensure that refugee rights to entry, residency and establishment are recognised and legalised all over Africa in line with the AU Agenda 2063. Similarly, the Compact is a necessary step in addressing the refugee crisis in Africa, but as I have argued, it did not impose any new obligations and its effectiveness is still questionable. As the Compact was introduced at a time when Western nations have either completely closed their borders, or have introduced the policy of 'turn back the boats' means that it will not address the issue of prolonged encampment in Africa.

Chapter 8: Conclusion

This thesis examined prolonged refugee encampment in Africa, specifically Kenya. It commenced by exploring the different theoretical frameworks and political explanation of the camp by tracing its usage from the colonial period through to the Holocaust era. In the past decades, the ideology and tradition that shaped 'camp thinking' shifted and acquired many mutations and transformation along the way. The evolution of the camp began with the arrival of the European imperial conquest of territories and people through settler colonialism. In the 21st century, a new 'juridico-political'[635] space, 'the camp', was created inside 'yet outside of the nation-state'.[636] Using Arendt observations, today the residents of this political space are refugees and asylum seekers, people who have 'lost the right to have a right'.[637] This thesis critically examined this development by placing the problem of encampment, which is fundamentally about the possibilities for free movement, against the context of colonial relations in Africa. The textual analysis of this thesis provides enlightenment about the symbolic violence which has sustained the camp over the years. To date, the camp is one of the most controversial elements for refugee assistance in Africa. Although regarded by the humanitarian agencies as a significant component of refugee humanitarianism, the camp has transformed the refugee landscape into a modern security architecture. The colonial violence and the brutalising experiences of domination under colonialism have, to a great extent, shaped camp thinking to this present day. Throughout this thesis, I argue that the legacy of colonialism gave rise to the contemporary camp and made it a permanent state of exception. To redress this phenomenon, it is incumbent on Africa to develop its indigenous solution by affording refugees freedom of movement in a borderless continent in line with the AU Agenda 2063.

The historical analysis in this thesis provides important information for understanding the causation and the colonial legacy of the camp. I undertook this approach because while the literature on refugee encampment is extensive, the majority largely focus on crisis and emergency phases. With this deficiency in mind, I mapped

[635] Agamben, *The camp as the nomos of the modern*, Heller-Roazen, D (trans), *violence identity and self-determination* de Vries, H & Weber, S, (eds) Stanford, USA, 1997.
[636] Ibid.
[637] Arendt, The origin of totalitarianism, p. 212.

out the historical, political and social usage of the camp, augmenting it with an analysis of the different juridical aspects of the various types of concentration camps. Combining both the historical and theoretical analysis reveals that the problem of encampment must be addressed as a problem stemming from a colonially bordered Africa. Over the years, the camp's usage has evolved and has become a permanent place for the containment of millions of refugees. Most of the refugees have effectively become trapped in prolonged encampment. Such a state of limbo is shaped to some extent, by the low priority given to resolve PRS. This state of limbo has not only become a significant issue in the life and future of the refugees, but it's a major contributor to regional instability in Africa. However, the exclusionary nature of the refugee camp redefines the paradigm shift in this juridical limbo. The contemporary camp is not just a place of shelter and emergency food aid. It has become a global object, a juridical limbo as its physical borderline is reminiscent of an occupied enclave. This colonial mentality of concentrating a large number of people remains the hallmark of Kenya exclusive refugee policy. I must state that throughout this thesis, I maintain the argument that the refugee camps can never be equated to the colonial camp. My central recommendation throughout the thesis based a decolonial critique, is that Africa should consider developing an indigenous solution by granting refugees freedom of movement in a borderless Africa, instead of solely relying on Western institutions such as the UHNCR. By highlighting the need for the free movement of refugees, I am not arguing for a formal expansion of the rights and entitlements of refugees beyond that which is reasonably acceptable.

I foregrounded the British colonial camp in Kenya to highlight the colonial continuity of the camp and why the camp thinking persists in Kenya to the present day. I built my argument on Elkins' research in which she described the racialised violence that overshadowed the British colonial rule in Kenya from 1895 to 1962. In the last few years of its colonial rule, Britain detained almost 1.4 million people in a network of detention camps across Kenya. Colonial Britain also declared a state of emergency that lasted over 40 years. The state of emergency through which colonial Britain expressed its sovereignty highlights the ideology and tradition that shaped the camp thinking to date. Colonial Britain eventually negotiated a peaceful exit from Kenya to avoid the protracted decolonisation war against the Mau-Mau fighters. Nonetheless, encampment remains the British imperial touchstone in this country. Kenya's current

immigration and citizenship laws, although amended incrementally over time, retained their colonial heritage through segregation. This colonial continuity enables the refugee situation in Kenya to remain in a constant state of emergency. Although refugee scholars such as Jacobsen and Arafat glorify the camp to be an effective refugee protection tool, the internationally funded camps are only useful in the emergency phases of displacement. Merrell Smith observed that these camps warehouse[638] waste products that need to be separated and excluded from mainstream society. As encampment is legally sanctioned by law, this has made the camp become the unspoken dark reality of our modern age. This is violence par excellence. As this symbolic violence is hidden, it signifies the law's normalcy and neutrality,[639] hence legitimatising the camp regardless of its duration.

International refugee law provides the justification, orientation and political concept of a refugee. However, it also contributes to the very refugee problem it seeks to address. The refugee legal framework emerged at the peak of the expansion of European colonial conquest and domination in Africa and other parts of the world. Over the years, the colonial technology of control and domination continued to shape and manifest itself in many forms, including through encampment. I consolidated and built my argument on Mutua's observation that the construct and universalisation of international law should be viewed as 'an imperial project'[640] which has to be decolonised. Placing encampment discourse under decolonial spotlight allows for a critical investigation of international law which has camouflaged the colonial violence on which it continues to sustain its survival. In my critique of the law, I maintain the argument that it is not because of lack of laws that refugees end up in prolonged encampment. In fact, it is the law that legalises their legal limbo. In order to claim refugee status in law, the refugees must first become legal subjects of the state. This legal subjectivity has alienated the refugees and relegated them to indefinite encampment in return for accepting their refugee status, like a commodity exchange. It is this imperial reach of the law which continues to sustain the camp through securitisation practices to the detriment of refugees in Africa. My Afrocentric analysis reveals that international refugee law is a global empire because its colonial strategy

[638] Smith, Warehousing refugees, p. 3.
[639] Giannacopoulos, Tampa: violence at the border, p. 33.
[640] Mutua, What is TWAIL?, p. 34.

consistently legitimises refugee coloniality. I argue that international law should merely serve as a reference point or a non-binding agreement. Besides, international refugee law principles which has been the enduring pattern of the modern international system, should not be enforced by imposition.

The legal subjectivity of the refugee in the camp is predicated on the violent nature of the law.[641] This has made cross border movements for refugees almost impossible. For the refugees who managed to cross the borders, their rightful residence is the internationally funded camps which are established through domestic and international law. To put it in context, an asylum seeker who meets the refugee criteria as stipulated in either the 1951 Convention or even the more liberal 1969 Convention, must reside in the camp and could only benefit from humanitarian aid within this juridical space. As such, this 'relief model'[642] has become a virgin island where the refugee is forced to accept this commodity exchange, but they must be legally confined indefinitely within the camp. Traditionally, refugee status is regarded as temporary, based on the premise of exile and the idea that refugees would one day be repatriated to their country of origin. However, over the years, Kakuma camp has turned its temporariness into a ‘transient permanency’ over time and has acquired a particular political-juridical structure. However, this thesis argues that while the current approach of prolonged encampment and securitisation legitimated by the law, does not constitute a tangible solution for protracted refugees. This thesis does not only argue for the reform of international refugee law, but the withering away of the law itself. As Marx defined it, ‘law is a reflection of a distorted, self-interest of the capitalist man’.[643] The law should be stripped from its mystifying and ideological role, or made into positive law in a classless society where refugees have the right to free movement in a borderless Africa. In implementing the doctrine of withering away of the law in this futuristic flourishing society of equals, the law will be inconceivable, unless it provides a qualitatively positive experience. In the asylum space, both the state and law have functioned to sustain the legal and political othering of refugees who are discarded through capitalism. Conceptually, the term ‘refugee’ becomes an ideological bewilderment as it promises to offer illusory

[641] Giannacopoulos, Tampa: violence at the border, p. 38.
[642] B Harrell-Bond, ‘The Experience of refugees as recipients of aid’, in M Agier, *Refugees: perspectives on the experience of forced migration,* Pinter, London, 1999, pp. 136–168.
[643] K Marx, & F Engels, ‘Socialism: utopian and scientific’, selected works in three volumes, Progress, Moscow, vol. 3, 1970.

protection and security to refugees. To use Bauman's typology, 'the refugees as human wastes,'[644] characterise life in the modern age. As an ideology, law also claims to order the refugees, but this claim is equally illusory as the law directly contributes to the very refugee problems it claims to order. In light of Marxist understanding, 'the power of legal ideology is such that it presents a claim to truth, so that even the learned take every epoch at its word and believe that everything it says and imagines about itself'.[645] The refugees as the legal subjects, are mystified and straddled between the state and law. The refugees who are located inside, yet outside of the nation-state, become classless and rightless. Although these rights are enumerated in the 1951 Convention which is held up as an eternal authority, this regime is preoccupied with protecting the interests of the state in maintaining the production of the refugees. This aligns with the Marxist view that law is 'the will of your [the bourgeois] class made into a law' for all.[646] Similarly, the law's ideology legitimates state encampment policy by constraining the refugees' rights to free movement. In doing so, it camouflages its brutal colonial features. It is on this basis that international refugee law as a reactive regime, has proven inadequate in ending prolonged encampment. Suffice to state that 'law does not only deceive and conceal ... it also organises and sanctions real rights of the dominated'.[647] Through encampment, the law and the state continue to maintain the colonial order by holding the refugees within the bounds of the camp so they remain obedient to the law. Law was institutionalised and routinised as a legality in the name of refugee protection. When encampment is abolished, this will represent a withering away of the colonial law because the law itself will be seen to be repugnant to true freedoms, especially of movement and consigned to the museum of antiquities.

A key facet of this thesis is the examination of securitisation as a practice at African borders and how it has contributed to prolonged encampment. In today's world, border security is synonymous with refugees. States have introduced border policies such as 'externalisation of asylum', 'tow back the boats' or '*non-entre* regime' to prevent those seeking asylum from reaching their borders. I use the term *borderphobia* to critique the exclusion of refugees as a demonstration of the ongoing

[644] Bauman, wasted lives, p. 73.
[645] C Sypnowich, 'The withering away of law, p. 312.
[646] Sypnowich, op. cit., p. 308.
[647] EP Thompson, *Whigs and hunters: the origin of black acts*, Pantheon, New York, 1975, pp. 258-59.

colonial violence at the borders. *Borderphobia* embodies the structural imperial violence embedded within the encampment paradigm because refugees are seen as foreign bodies and a threat to the state. This *borderphobia* is a steep reminder of colonial relations which still exists in recent memory. Acknowledging that Western countries are still committed to the idea of burden sharing and responsibility sharing, including through resettlement schemes, their main criteria for admitting refugees is driven by economic values rather the protection concerns of the refugees. In Africa, the ability to receive and host aliens was not lacking even prior to the founding of the 1951 Convention. African states have maintained discipline to the principle of *non-refoulement* by admitting millions of refugees, even in very difficult circumstances. For example, Kenya, Uganda and Ethiopia alone host over 2.5 million refugees. However, by the same token, the fundamental human rights of *non-refoulement* provides the condition for prolonged encampment. This has created the condition for encampment where millions of refugees are held in camps for generations. In other words, *non-refoulement* obligation is the cure, but also the problem to the refugee phenomenon in Africa.

The primary objective of this thesis is to seek an alternative to prolonged encampment: the freedom of movement for the refugees. As discussed in previous chapters, encampment has become a 'global apartheid', and a primary technology for the containment and control of refugees, often for generations. States erect barriers to physically segregate and restrain refugees in this pseudo-juridical space. The internationally funded camp space is one way through which the powerful states of the West protect their privileges by preventing refugees from crossing their borders. As such, prolonged confinement is an effective application of the state's power which is sanctioned by law. In the UNHCR's view, this segregation is not regarded as punishment, but protection. However, the conditions under which prolonged encampment occurs are constitutive of punishment that is systemic and intentional. The ever-lingering question is: protecting who and from what? Any Afrocentric critique that works to eradicate this colonising system is labelled as anti-modernity. In this respect, I deploy Fanon's decolonisation theory in order to seek an indigenous way for engaging with the problem of encampment in Africa. This approach debugs the myth regarding the institutionalisation of the camp and the

universality of Eurocentric refugee law as the only means for resolving the refugee crisis in Africa.

This thesis undertook an Afrocentric approach or a 'decolonised thinking' by arguing for free movement as an indigenous solution to Africa's refugee problems. The textual analysis of encampment in this thesis informs new practice by arguing for free movement for refugees, but most importantly contributes to future academic research in seeking a new model for refugee management in Africa. Just as Fanon advocated for the use of literature to develop revolutionary consciousness in the postcolonial era, this thesis exposes Africa's refugee policy predicated on concentrating millions of refugees in the camp, often for many decades. To argue that the refugees accept the doctrine and punitive measures of the law to exclusively reside in the camp for the rest of their lives is violence par excellence. I have gone further than just argue for reform in the refugee legal regime, but for 'withering away of law' so it is replaced by *Ujamaa*. Addressing the historical injustice created by the refugee legal regime will require a collective effort. I do acknowledge that previous scholarship, for example by Jeff Crisp,[648] has made enormous contributions in seeking alternatives to the camp. However, the majority of these academic works have not argued for an overhaul of the systems that established the camp in the first place. Acknowledging that having a legal framework in place is necessary, withering away of the law refers to getting rid of the colonial laws, practices and institutions that have sustained the camp over the decades.

Compounding with this is the fact that almost all African states that host refugees have signed up for the 1951 Convention. The irony is that the nations that established the refugee regime implement them selectively in their native jurisdictions. Apart from Amnesty International with its anti-camp campaign, most refugee advocacy groups are complacent in their approach, particularly those who regard international law as a legitimate global code of governance. There is, in the literature, a tendency to glorify the camp to be an effective protection tool for refugees.[649] It is imperative that refugee scholars advocate for all law-abiding refugees to be afforded the freedom of movement across the African continent so

[648] Crisp, J, 'Mind the gaps! UNHCR, humanitarian assistance and the development process,' new issues in refugee studies, working paper no. 43, UNHCR, Geneva, 2001.
[649] Jamal, Camps and freedom, p. 14.

long as they do not pose a threat in society. Any weak form of anti-camp scholarship uncritical of the plight of the refugees, or what Mohamed Bedjaoui refers to as 'legal paganism',[650] borders the unfulfilled promises of the international refugee law.

International refugee law was universalised at the end of the 19th century or the 'age of empire' through imperial conquest. In the aftermath of WWII, colonialism mutated and took a different shape in most parts of Africa. When the UNHCR was supposedly established as a neutral institution, its role was to care for the people displaced by the decolonisation wars. However, the UNHCR, which manages a network of refugee camps, still carries out the vision of its donors with the camp as its preferred model of protection. This continued use of the camp as a neo-colonial institution is not relevant for today's Africa. While the universality of international refugee law with all its creed is desirable and inevitable, it should not trump fundamental human rights such as the freedom of movement for refugees who have remained in a subject state for decades. It is this legal subjectivity that prompts me to argue that an Afrocentric approach is required to meaningfully address African refugee situation.

I continue to argue that refugee law operates like a colonial machinery because it is being applied as a neutral object without giving attention to the circumstance of the refugees. In the context of Africa, refugee law has retained its foreign origin. When a person seeks asylum, they gain their temporary refugee status in law. This legitimises the law's colonial presence. Through its formal and abstract regulation, refugee law quarantines the refugees to indefinite life in the camp. It is this protracted legal limbo and longevity that legitimises the refugees as a threat to law itself. In practice, a refugee who fulfils the criteria in the 1951 Convention or the 1969 Convention benefits from their legal identity, but only when they are confined within the camp space. Symbolically, the law identifies the refugees by their temporality and portrays them by their removability. Noting that the prospect for an additional protocol to the 1951 Convention is slim, the focus has always been on its adoption by refugee host nations. In other words, refugee status is legislated and supported through the institutionalisation of the camp which is technically located outside the

[650] M Bedjaoui, 'Towards a new international economic order', *Boston College of International and Comparative Review*, vol. 6, no.1, 1979, p. 110.

nation-state. This exclusive colonial mentality of concentrating many refugees for an indefinite period remains the hallmark of Kenyan refugee policy. As Kenyan refugee law is capable of amendments, it is likely to take a more exclusive character. This thesis' decoloniality approach not only critiques the applicability and the enforceability of the law, but also attempts to erase its ongoing violence on the refugees. As I have argued throughout this thesis, the refugee crisis in Africa is not due to lack of laws, but the existing laws have lost their relevance and utility. It is this legal subjectivity that prompts this thesis to argue for the refugees to be afforded the rights to free movement in a borderless Africa.

Refugee status is legally determined. This determination is intended to provide effective sanctuary to those seeking asylum. The UNHCR uses both the 1951 Convention and the 1969 Convention in its adjudication of refugee assessment in Africa. Although the latter is a replica of the former, these two Conventions have a significant difference in their definitions of a refugee. The refugee definition in the 1951 Convention negates the mass exodus of refugees as the result of the armed conflicts targeting the entire population which characterises Africa's situation since the 1950s. Effectively, any African who attempts to seek asylum in the West is highly unlikely to pass the qualification threshold for claiming refugee status. In recognition of the limitation of the 1951 Convention, the African continent adopted its own refugee convention – the 1969 Convention – to reflect other contemporary issues that trigger refugee exodus in Africa. It is likely that in the unforeseeable future, climate change could be one of these issues. Although the reformulation of refugee law befitted the African situation which is characterised by mass movement, the circumstances of the refugees in Africa has worsened over the years and a new Afrocentric approach is required without invoking the protection mandate of the UNHCR.

As Agier observes, the camp has become '… the experimentation of large-scale segregation that is being established on a planetary scale.'[651] For the past three decades, encampment has been the official policy for the refugees in Kenya and other countries in Africa. This policy is particularly intended to restrict the refugees' rights to free movement; what Crisp describes as a 'dark period for refugee

[651] Agier, Between war and city, p. 320.

protection'.[652] When a person is recognised as a refugee by the state, this recognition implies their legal presence. They are no longer unlawful non-citizens, but refugees with all derivative rights. However, the same law legislates that the refugees' rightful residence is the camp. The UNHCR's camp model of care indicates that the refugee agency has recognised this contradictory nature of the law and has been providing institutional support to the refugee, but only within the camp. This is the basis upon which the camp derives its legitimacy. When the UNHCR recently acknowledged the illegality of this legitimacy, it developed its own policy 'alternative to camps'.[653] Although this implies that encampment policy has flaws, the refugee agency does not attribute these flaws to itself, but holds the view that the state is responsible for encampment policy. Furthermore, the uniqueness of Africa's camps are their longevity and the striking multigenerational dimension with fourth generation refugees being born in these camps. In addition, the demography of Africa's refugee is alarming, with over 51 per cent between the ages of 10-25.[654] For example, Kakuma camp was initially built in 1991 to cater for unaccompanied minors from South Sudan. Now, as grown-up adults, most of these refugees could neither trace their family roots nor be integrated into the host country. Living in limbo without any hope for repatriation, or resettlement, or local integration, the new breed of Africa's refugees lack identity. It is through this legal limbo that the power of the law is manifested in relation to the ongoing coloniality.

The central recommendation of this thesis is that Africa seeks the possibility of affording the refugees the rights to freedom of movement in a borderless Africa to allow for the gradual phasing out of the camp. While the modalities of how this will be implemented is not within the remit of this thesis, several inter-dependent arrangements could be considered to facilitate this process. Key among them is the provision of travel documents. In the interim, the UNHCR could continue with its fill-in-the-gaps role, especially where situations of emergency exist. A comprehensive policy for affording refugees freedom of movement needs to align with the national

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652 J Crisp, 'Long read: minor miracle or historical failure ahead for UN summit', viewed 12 May 2018, <https://deeply.thenewhumanitarian.org/refugees/community/2016/08/08/long-read-minor-miracle-or-historic-failure-ahead-for-u-n-summit>.

653 UNHCR, 'UNHCR policy in alternatives to camps', viewed 11 February 2019, <https://cms.emergency.unhcr.org/documents/11982/45535/UNHCR+-+Policy+on+alternatives+to+camps/005c0217-7d1e-47c9-865a-c0098cfdda62>.

654 UNHCR Report, 'Refugees and asylum seekers in Kenya', viewed 22 June 2016, <http://www.unhcr.org/ke/wp-content/uploads/sites/2/2018/08/Kenya-Statistics-Package-July-2018.pdf>.

priorities of the refugee host country or country of origin where repatriation is appropriate. This will allow the refugees to transition from camp life to life in the broader community. Such initiatives are already taking place. For example, the Ethiopian government has committed to close all 27 refugee camps on its territory in the next ten years through a phase-out approach.[655] Hosting over 1.3 million refugees, Uganda, with its open-door refugee policy, has granted the refugees pieces of land for self-settlement and business opportunities. Similarly, Chad has begun the process of nationalising refugee-only schools,[656] while the refugees in Djibouti are allowed to open bank accounts. I would not be doing justice to this thesis if I attempted a conclusion in the knowledge that the complexity of Africa's prolonged refugee encampment, the disguise of colonial legacy embedded within it, and the law attached to this project, are easy tasks to resolve through the publication of a single PhD thesis. The argument I present in this thesis seems simply, but its implementation would prove both contentious and political. As a priority, future refugee scholarship should focus on understanding the complexity and failures of refugee camps, and developing strategies the phase them out in order to address the ongoing and urgent problem of prolonged encampment.

[655] E Frew, 'Ethiopia plans to close 27 refugee camps', VOA, viewed 11 November 2019, <https://www.voanews.com/africa/ethiopia-plans-close-27-refugee-camps>.
[656] UNHCR, '108 schools located in refugee camps and settlement now cleared official Chadian schools. Global compact on refuges', viewed 29 November 2017, <http://www.globalcrrf.org/crrf_highlight/108-schools-located-in-refugee-camps-and-settlements-now-declared-official-chadian-schools/>.

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