

Humanitarian crisis within humanitarian places: A case study of the Somali refugees in Kenya

Le Nguyen Nhat Minh*



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ABSTRACT

The international regime of refugee protection has been argued to function in order to provide those who lost their citizen status with legal protection under the idea of humanitarianism. In such regime, the policy of containment has been familiar. It metes out a practice of states hosting refugees within their territories by containing them in humanitarian camps. This article focuses on the conceptualization of B. S. Chimni about the link of ideology of humanitarianism to the erosion of refugee protection, and particularly the policy of containment in practices of hosting states. In order to concretize Chimni's critique to see how the erosion of refugee protection manifest within the containment policy, I then complement his conception with Nanda Oudejans' clarification about the conception of the refugee as persons who have lost a legal place to live. Under this complemented theoretical framework, I argue that the ideology of humanitarianism of the refugee protection regime neglects the hidden but inevitable inequality of the refugee who stay in the territory of the hosting state. It is because while the rights of refugees are enshrined in legal instruments, their rights require a place for them to enjoy, a place which they must receive from the hosting states. In order to cultivate empirical case study, I then turn to investigate the situation of Somali refugee in Kenya. Dadaab camp in Kenya has been known as one of the oldest and largest humanitarian camps that contain the Somali refugees. Although providing the refugees with humanitarian place, the Somali refugees were deprived of a legal place for them to enjoy their enshrined rights. Bearing inhabitable conditions inside the camps, yet encountering rejections outside those camps, the refugees asymmetrically depended on the Kenyan government, while this situation is perpetuating their refugees status.

Key words: Humanitarianism, international refugee protection regime, containment policy, Somali refugees

University of Economics and Law,
VNU-HCM, Vietnam

Correspondence

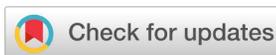
Le Nguyen Nhat Minh, University of Economics and Law, VNU-HCM, Vietnam

Email: MinhInn@uel.edu.vn

History

- Received: 07/02/2021
- Accepted: 29/7/2021
- Published: 15/8/2021

DOI : 10.32508/stdjelm.v5i4.771



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INTRODUCTION

In response to the issue of 1.25 million refugees still remaining in Europe after the World War II, the United Nations High Commissioner for Refugees (UNHCR), a United Nations' permanent body taking over from the International Refugee Office, was established to deal with issues concerning the protection of refugees. [1, p. 245] The UNHCR is mandated to work independently, in a non-political manner, and only for humanitarian purpose. The Article 2 of the UNHCR Statute holds that "[the] work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees".² In 1951, the United Nations Convention Relating to the Status of Refugees was adopted. [3, hereafter "1951 Convention"] With the first universal refugee definition, the 1951 Convention recognizes the permanence of the refugee issue in a formal way.[17, p. 245] Moreover, by regularizing the status of refugees, the Convention also enshrines their rights

as well as the states' obligations. The Convention is thus claimed to provide a regime of refugee protection.^{a 1} The International Committee of the Red Cross (ICRC) defines "protection" as practice which:

- aims to ensure that authorities and others actors respect their obligations and the rights of individuals in order to preserve the safety, physical integrity and dignity of those affected by armed conflict and other situations of violence⁴

From there, protection is a recognized responsibility of a state towards individuals within its jurisdiction, and whence that state fails to commit such responsibility could international law be triggered to provide such protection.[5; p. 548] Therefore, the protection of civilians in time of conflicts implies acts of humanitarian purpose where the word "humanitarian" is understood as "concerned with or seeking

^aBarnett adopts the definition of "regime" as "explicit rules or implicit norms guiding the actions of states and individuals, together with institutions and organizations expressing these rules or norms" [14; p. 238].

Cite this article : Minh L N N. Humanitarian crisis within humanitarian places: A case study of the Somali refugees in Kenya. *Sci. Tech. Dev. J. - Eco. Law Manag.*; 5(4):1861-1869.

to promote human welfare”.[⁶; p. 244] For this purpose, the UNHCR is mandated to provide protection for refugees in the guidance of international treaties, including the 1951 Convention, which impose fundamental principles to ensure the refugee’s rights such as right to remain, right to return, the principle of non-refoulement and the right of first asylum...[¹; p. 245] The condition of contemporary international politics, which marks from the end of Cold War until now, as Ruti Teitel once described it, is characterized with “war in a time of peace, political fragmentation, weak states, small wars, and steady conflict”.[⁷; p. 90] This condition inevitably entails mass migrations, including refugee, internal displaced persons, asylum seekers, returning refugees, on a global scale.[¹; p. 249] At the same time, contemporary international politics is also dominated by the discourse concerning humanitarian practices.[⁶; p. 244] In the field of international refugee law, besides the considerable changes in the context of refugee protections and the UNHCR’s composition, there was the apparent shift in the UNHCR’s focus from protection to “security, containment, and pre-emptive humanitarian action and assistance” [¹; p. 251].

However, scholars in the field such as B. S. Chimni keeps a critical view on this approach of the international refugee regime. In one of his research about the interaction between globalization, humanitarianism and “the erosion of refugee protection”, Chimni reminds us that humanitarianism is no longer an abstract idea but shaping the reality of the globe where interactions between peoples and states are intensified at the economic, political and cultural levels.⁶ He argues that humanitarianism adopted as an ideology contributes to the erosion of refugee protection. For Chimni, it is the inclusive characteristic, featured in the language of “humanitarianism”, and its “[lack] of rigid conceptual boundaries” that “transcends the differences between human rights law, refugee law and humanitarian law”.[⁶; p. 244] Therefore, the so-called “humanitarian practices” could include a wide range of practices, which “facilitates ambiguous and manipulative uses and allows the practices thus classified to escape critique” since they could be justified as global good.⁶

Among many aspects in which the ideology of humanitarianism could influence on the refugee protection, the article would focus on Chimni’s analysis of the “normalization of the language of security”⁶, which leads to the containment policy in the practices of hosting states. And yet, I argue that his analysis of Chimni could be complemented by Nanda Oudejans’ conceptualization of the “right to asylum”⁸. Drawing

on Hannah Arendt’s remarks on “law’s boundedness to place”, Oudejans argues that there is always a “deep and unavoidable asymmetry between [a refugee] and the receiving state”, since the refugee must be understood as persons having “nowhere in the world in legal sense”. [⁸; p. 7] The refugee is thus powerless for his or her own inclusion in front of the receiving state. In other words, as the refugees must remain in the territory of hosting state, they depends on the state’s policy rather than on rights enshrined in international treaties. Therefore, the right to asylum is not only right to claim for “protection”, but also to seek for “a place where protection can be enjoyed again”. [⁸; p. 23]

From here, I argue that the restrictive containment policy, which is explicitly linked with the language of security, sets boundaries towards the refugees without providing them a place where protection could be enjoyed. Put in other words, the practice of manipulating the flow of refugees, for the sake of security, neglects the asymmetry between the refugees and states as well as the refugees’ vulnerable reality of having no place to enjoy their legal rights. In support to this argument, I turn to the case of the Somali refugees in Kenya. Vast majority of the Somali refugees remain in the Dadaab camps, while some of others, identified as “urban refugee”, are seeking for a better condition in Nairobi. I argue that the Kenyan policy for refugee reflects the containment policy since it tries to put the refugees in camps and enforcing their repatriations. With the great transformation of Somali civil war, which linked it to the global war on terror, the Somali refugees’ situation have been exacerbated; confronted by uninhabitable condition within the camps and strict boundaries outside the camps.

MATERIALS-METHODS: REFUGEES AS PEOPLE DEPRIVED OF THEIR OWN PLACE

The international refugee regime and the ideology of humanitarianism in post-Cold War period

The period of post-Cold War has been observed with the process of globalization.^{b 9} At the same time, this ongoing process has an inextricable link to “the ideology of new humanitarianism” which seeks to “legitimize and sustain an international system that tolerates an unbelievable divide not only between the

^bThe term “globalization” here is understood as George Ritzé defines it: “a trans-planetary process or set of processes involving increasing liquidity and the growing multi-directional flows of people, objects, places and information as well as the structures they encounter and create that are barriers to, or expedite, those flows...” [11; p. 2]

North and the South but also inside them” [6; p. 245]. The term “ideology”, as B. S. Chimni adopts the definition from John B. Thompson, as the “meaning in the service of power”^{6,10}. Through the modern language of rights, it constructs “the most global and incontrovertible unity: the unity of humanity” where humanitarianism could actualize itself.⁶

In the field of international refugee law, Chimni argues that “the ideology of humanitarianism, among other things, [facilitates] the erosion of the fundamental principles of refugee protection”⁶. It is because the ideology of humanitarianism adopts the language of human rights to legitimize the language of security. Moreover, the inclusiveness featured in humanitarianism blur the legal categories among human rights, humanitarian law and international refugee protection and thus the roles of institutions. It also promotes a neoliberal approach to the post-conflict society, and turning repatriation into the only solution. [6; p. 251] For the scope of its research, the paper now focuses on the adoption of the language of human rights to legitimize the language of security, as one of aspect that humanitarianism could influence on the erosion of refugee protection.

This approach emphasises on how international law is instrumentalised as a “quintessential venue” in order to deal with political power contestations, yet in a legitimate form.¹¹ This strain of conceptualisation could be seen in the language of a UNSC Resolution and its implication on the meaning of the refugee situation. In the Resolution 688 in 1991, the UN Security Council “gravely concerned by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions”¹². For the Security Council, the issue of refugees could “threaten international peace and security in the region”¹². This established link between the flows of refugees with threats to international peace and security has reflected the ideology of humanitarianism. Since problems of refugee are too severe that go beyond specialized organizations such as UNHCR, other organizations such as the Security Council could also address them.⁶ However, as the flows of refugee is identified as one of major considerations to decide of the Security Council, problems of refugee protection is confined within the language of security. Consequently, the refugees are both victims who must be protected in safe places, and a threat to the security of host countries or a burden for their resources. [6; p. 252] In the one hand, the containment policy promotes “the humanitarian space”, such

as humanitarian camps, or safe heavens established by the UN Security Council, where, as it is claimed, the refugee could be protected. [13; p. 1012] In the other hand, such restrictive protection could amount to the protection limited within the scope of security, not only for the refugees but also the international security as a whole.

In the next section, I demonstrate that the erosion of refugee protection norms is necessary as there always exists an asymmetry between the refugees and the hosting states while such inclusiveness of the humanitarian language continue to hide and neglect it.

The neglected asymmetry between the refugees and the hosting states

In her research about the concept of “right to asylum”, Nanda Oudejans points out that there is always an asymmetry between refugees and democracies which attributes the unequal relationship between the refugees and hosting states. As international regimes vow to protect the refugees and their fundamental rights, the asymmetry could only be demonstrated by a distinction between being stateless by law and being stateless in fact, and that the refugees could not be protected, even with international law, have they lost their own legal place. Consequently, as the refugees remain in the territory of the hosting states, they depend on such states’ policy, rather than having direct protection from international treaties.

In *The Origin of Totalitarianism*, the German philosopher Hannah Arendt challenges the conception of the “Rights of Man” which was defined as “inalienable”. [14; p. 269] Through the case of the refugees, who bear the loss of political status, she argues that such a conception has become “the evidence of hopeless idealism or fumbling feeble-minded hypocrisy” [14; 15]. It is because the refugees are ones who “had been deprived of their human rights”, or more specifically, bearing the “fundamental deprivation of a place in the world which makes opinion significant and actions effective” [14; 15], since they must flee from their country. The traditional read of the rights of man is thus inadequate to protect in case of the refugees.

Since the 1951 Convention, how have the refugees been protected? In other words, with their rights enshrined in a legal instrument, to what extent are the refugees’ lives ensured? Nanda Oudelans problematizes this issue through the distinction between “de facto statelessness” and “de jure statelessness”. [14; 15, p. 20] For Oudejans, beside the stateless persons and minorities who are recognized and could be identified as being stateless by the law, the statelessness of

the refugees is a matter of fact. [14;10, p. 21] It is because the refugee, in general, is regarded as belonging to the country of origin. [14;10, p. 22]

And yet, to fully embrace this statement, Oudejans turns to Hannah Arendt's emphasis on the law's boundedness to place. Hannah Arendt once stated that: "All legislation first create a space in which they are valid and this space is the world in which we can move about in freedom." [15, p. 189-190; 15, p. 19] Han Lindahl elaborates this statement when arguing that this boundedness of the law to space is necessary, since all political community could only be conceived if their boundaries close off an inside against an outside. [16, p. 882] Therefore, a national, who belong to his own space of political community could enjoy his rights, freedom in movement, and equality. That is why Oudejans, drawing from this premise, claims that although the refugee could move in freedom, it provides them "no right to residence", because rights, freedom and equality require a limitation in space, and such "limitation gives the human a place he can call his own". [8, p. 20] Have the refugees crossed the borders of their community, they are deprived a place in the world, which leads them to have no place to enjoy their legal rights. Furthermore, as a person who fled from his country identified as a "refugee" in the law of the international community, they are, in practice, not foreigners coming from other countries, but barbarians coming from foreign places. [8, p. 19]

That is what could attribute the asymmetry between the refugees and the hosting states. Furthermore, as international law is claimed to protect the refugees by enshrining their rights and imposing obligation to different actors (such as UNHCR, aid agency, or hosting states, ...), a major part of refugee protection depends on the practice of hosting states because the refugees remain in their territory. This asymmetry is deepened in the language of humanitarianism, because humanitarian assistance is based on the unity of humanity which is inclusive and neglects the refugees' inequality. Through humanitarian practices such as policy of containment, the refugees should be protected within humanitarian places. And yet, the policy of hosting states hardly provides the refugees further assistance than that. Therefore, while the refugees must depend on the hosting states, their rights is restricted within the scope of humanitarian assistance. As Chimni also states:

- [t]he universal and protective label 'refugee' has, as a result, fragmented and translated into the curtailment of rights. Those who seek refuge find that they represent security threats to states

and regions and that all roads lead quickly home. On the other hand, reintegration is no easy task as a strange intimacy characterizes the causes and solutions of refugee flows. [6, p. 245]

I now turn to the case study of Somali refugees in Kenya, a situation that is deemed as one of the most heinous humanitarian crisis.

RESULT - DISCUSSION: THE PROTRACTED SITUATION OF SOMALI REFUGEES IN KENYA

Historical background of Somali refugees crisis

The Somali population has long been subjected to a displacement crisis due to governance failure and conflict in the south-central Somalia, since the early 1990s.¹⁷ Internationally, about over a million Somalia have fled from their country, and internally, approximately a further million population were displaced. [5, p. 545] And yet, for more than two decades, political violence has never been brought to an end. Described in words of Ken Menkhaust, "Somalia has been the site of one of the longestrunning humanitarian crises in the world". [18, p. 320] Far from being a constant situation, the conflicts have been fluctuated with dramatic transformation, and the crisis of displacement have occurred in different places, with new movement of crisis overlaid the old one over time.¹⁷ Besides, environment issues also pressure and exacerbating the refugees and internal displaced population's situation.¹⁷

In order to understand the origins of the crisis, Anna Lindley, divides the crisis into three phases. The first period was from the early 1990s where the civil war broke out, when the collapse of the state followed by intense conflicts. After Siad Barre's authoritarian regime in Somalia collapsed in 1991, self-claimed "warlords" mobilised the clans people to fight for control of key resources in the region.¹⁷ In spite of international peacekeeping interventions between 1992 and 1995, wide-scale humanitarian crisis and displacement, both internally and internationally, was still occurred due to conflicts and drought.¹⁷ The second phase of localisation and stabilisation of conflicts in between 1996 and 2006, which dovetails much less new movement. The emergence of the Islamic Courts Union (ICU) as a major political force, winning over warlords that were backed by the United States in middle of 2006, has provided relative peace and security. It was until 2006 that the Somali civil war transformed, in the light of the global war on terror. The

transformation resulted in new pattern of the flight of the population, fleeing not only from persecutions or political violence caused by the clash of many military actors, but also from environmental hardship and hunger.¹⁷

The complexity of the Somalia's situation was shown in 2007, when the region was the site of Ethiopian troops' unilateral intervention and multilateral interventions from African Union (AU), as well as the insurgency and counter-insurgency campaign, and most of all, the intensification of Al-Qua'ida's activities and the counter-terrorism campaign from the US. [18, p. 320] The Ethiopian won over the ICU and supported the Transitional Federal Government (TFG), which received international sponsors, in Mogadishu, Somalia. At the same time, the ICU's military wing Al-Shabaab, which declared its loyalty to Al-Qua'ida in 2008, vowed an armed opposition against the TFG, Ethiopian, and the AU forces.¹⁷ All these political violence was followed by the worst drought in more than 50 years, in 2011. However, the clash between the Al-Shabaab, and the Western donors has prevented the international aid to territories hold by Al-Shabaab's troops, which exacerbated the humanitarian crisis.¹⁷ Among places in the neighbouring countries of the Somalia in African region, Kenya has been the main destination for Somali refugees. In 1992, as the crisis peaking, there were approximately 285,000 Somali refugees registered in Kenya.¹⁷ During the year, there was an average of 900 refugees arriving in Kenya every day, with the Somalis being the majority. [19, p. 82] In more recent time, Kenya has become the primary destination for those who fled from south-central Somali. The information of the UNHCR as of May 2015 shows that more there were 423,244 Somalis registered in Kenya, which amounted to more than half of total registered Somali refugees and asylum-seekers in the East and Horn of Africa.²⁰ In Kenya, most of the Somali refugees stay in the Dadaab camps in the North Eastern Province of Kenya.⁵ Since established in 1991-1992 – in the beginning of the civil war in Somalia, the Dadaab camps now has been known as “the world's largest and oldest refugee settlement.”²¹

Containment policy in Kenya as setting boundaries towards the refugees and refugees protection norms

Kenya's policy to the Somali refugees

The Kenyan regime for refugee protection was originated as a response to the excessive flux of refugees arriving, since the early 1990s. [22, p. 566] Kenya has been a state party to the 1951 UN Convention Relating to the Status of Refugees since 1966, and to its

1967 Protocol since 1981.^{23,24} Kenya is also a signatory to regional instrument such as 1969 Organization of African Unity (OAU) Convention Governing Specific Aspects of Refugees Problems in Africa^{c 25}. However, it was not until 2006 that the Kenyan government passed the bill incorporating these international and regional instrument at national level. [17, p. 20] Since the crisis broke in early 1990s, Kenya provided registration to *prima facie* refugees and offering them protection in camps. [17, see also²⁶, p. 567] Most of the refugees in Kenyan territory are located in Dadaab camps in the north-eastern side of the country which is close to Somalia, and Kakuma in the north-western side. [17, p. 20]

The government soon found itself overwhelmed with increased number of application for asylum, because of which the government requested the UNHCR for assisting in managing encampment in large scale.¹⁷ The Kenyan Refugees Act was finally passed in 2006²⁷, which implies a greater involvement of the government in the refugees' problems.¹⁷ Based on this Refugee Act, the Kenyan government also passed a Refugee Regulation in 2009, adjusting reception, registration and adjudication with respect to the refugees in Kenya.²⁸ With this bill at domestic level and the Department of Refugee Affairs (DRA), established as a department of Kenyan Ministry of State for Immigration and Registration of Persons, the government took over the reception and registration of refugees from March 2011.¹⁷

As the Kenyan Refugee Act implements the 1951 Convention's definition of “refugee” where the status of refugee could be determined by described as either “statutory refugees” or “prima facie refugees”²⁷. Since Kenya is a signatory to both international and regional legal instruments, criteria for refugees determination in Kenya reflect both the incorporations of paragraph 2 of article I of the 1951 Convention [29, article I(2)] and of “the expanded refugee definition” in the 1969 OAU Convention.^d This expansion is shown in paragraph 2 of section 3, the Kenyan Refugee Act, whose criteria determine a person as “prima facie refugee” if

- [...] such person owing to external aggression, occupation, foreign domination or events seriously disturbing public order in any part or

^cHereafter 1969 OAU Convention

^dTamara Wood argues that the refugee definition in the 1969 OAU Convention is an expanded definition with respect to the 1951 Convention in three main features: “a purely objective set of criteria”; “the generalized nature of the refugee-generating events”; and the removal of “internal flight alternative” requirement from the 1951 Convention's definition. However, although expansion is adopted in Kenyan legal instruments, it is not implanted in the practice of refugee determination. [see 23, p. 559]

whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.²⁷

It is argued that the Refugee Act makes “explicit link” to this prima facie refugee status.²² Persons who do not meet requirements of the first status (“statutory refugee”) could be considered for the expanded one (prima facie refugee).²² Moreover, section 3(3) of the Refugee Act empowers the relevant Minister to declare prima facie refugee status on group basis, which means a specific group could gain refugee status collectively.²⁷ And a person who is excluded from such refugee status of group basis could also apply for it individually.²⁷

Containing as excluding

Translated into practice however, the humanitarian assistance for the refugees in Kenya, especially the Somali refugees, are hardly ensured. Although the Kenyan government has been noted for its allowance for refugees to stay in its territory, the treatment refugees receive there is hardly bearable.

While some others seek for a better condition in the urban area, they are confronted with the discrimination from the anti-migrant narratives. As Saul Tobias proves it, the African Sub-Sahara countries, including Kenya, which are adopting the neo-liberal economic policies, have affected the discrimination of the citizens towards the refugees and migrants.⁷ The refugees and migrants became the convenient targets to blame for the citizens about economic security, disappearance of jobs, and the decrease of welfare provisions. [23, p. 5] Consequently, the refugees and migrants are casted as the burden for the country’s resources and economy.

At the same time, situation of the Somali refugees have never been the same since the global war on terror. In words of Rosi Jaji, it is “the localization of global conflicts and the globalization of local conflicts” that leads to the discrimination upon the Somali refugees, even among other refugee populations. [30, p. 2] In the one hand, with the rise of Al Schabaab, which claimed it allegiance to Al Quai’da, the local conflicts are directly linked with the international security and peace. In the other hand, in the context of the global war on terror, the Somalis become the “immediate face and quintessence of global terrorism”³⁰. The barriers against them were deepened after the incident on 21 September 2013, when “the Al Schabaab militants laid siege to the Westgate mall in downtown Nairobi” [31, p. 29]. This event is called a turning

point of the humanitarian situation is Kenya that exacerbated the tensions between the hosting state and the refugees.³² This military group that has focused its terrorist operations in East Africa, Somalia, and Kenya becomes the key factor that burst the narratives casting the Somali refugees not only a burden to the state’s resources, but also a threat to the state’s security. As the Chairman of the Administration and National Security Committee, Asman Kamama stated:

- We have information that quite a number of crooks planned a terror attack from a refugee camp in Northern Kenya. We need to consider relocating all the refugees. The United Nations should take them to other countries...^e

All leads to the claims that rejects the refugees’ free movement within the country, and further, that they all should be restricted within camps for the sake of security. On March 2014, a “forced encampment directive” towards all refugees remaining in urban area of Kenya was issued, which attempted to relocate the refugees.³¹ As Joseph Ole Lenku, the Interior Minister stated:

- All refugees residing outside the designated refugee camps of Kakuma and Dadaab are hereby directed to return to their respective camps with immediate effect. Any refugee found flouting this directive will be dealt with in accordance with the law. Consequently, all refugee centres in urban areas – Nairobi, Mombasa, Malindi, Isiolo and Nakuru – are hereby closed. [quoted in³¹, p. 29]

This policy of the Kenyan government proves that the refugees, particularly the Somalis, in Kenya are rejected for a place that they could legally own. In a contrary, the territory that appears as humanitarian camps has failed to provide them a life. And yet, as the Kenyan government, in the attempts to enforce their return, has forced the Dadaab closed³³, the refugees are even excluded from this type of fundamental territory.

From here, it could be seen that what B. S. Chimni calls the erosion of protection norms is not the erosion meaning of norms in the legal text. Rather, it is the erosion of protection when international norms are implemented in particular situations. The neglected asymmetry between the Somali and the Kenyan government in the framework of containment policy has

^eD Walada & D Mwere. Westgate attack was planned in refugee camp. BBC 2013 <www.bbc.com/news/world-africa-24339508> [quoted in 22, pp. 29, 32].

caused the dependency of the refugee on the hosting states. At the same time, the effects of humanitarian language in international norms have been contributing to perpetuating this unequal dependency.

Kenyan government has been a member of international instruments relating refugees protection, and has also enshrined international norms within its national laws. However, without a legal space to enjoy such human rights protection, the Somali refugees is derived from the access to it. Put it other words, the containment policy contribute to the perpetuation of the refugees status of the Somali that keeps their marginal to the enjoyment of human rights. Moreover, being left to cope with the vast arrival of Somali refugees on its own, and abandoned by the international community, the argument usually put forward is that Kenyan government's reaction to the refugee situation shall be considered "not to blame".³² However, this strain of arguments often exclude the above mentioned asymmetry which leads to exclude the actual situation of many lives of the refugees from the discourse.

CONCLUSIONS

Illustrating about the complete enslavement of the refugees and internal displaced person (IDPs) to the logic of governance, Luis Eslava once used the image of the hunters and the hunted:

- In order to capture monkeys, hunters used to drive the animals to their cave. Once there, the hunters would simply wait for the monkeys at the entrance to the cave, until, thanks to lack of food or drink, the monkeys would eventually try to escape. Drained of energy, the monkeys, like the IDPs, re-entered the world only to hand themselves over to their hunters.³⁴

Within the force of globalization and the escalation of private conflicts, the world observes the banality of humanitarian crisis everywhere, in which lives of refugees are subjected to protracted inhabitable condition and rejections from the hosting countries, such as the Somali refugees in Kenya. International law on refugee protection has been established with the mandate to enhance the protection of refugees, by enshrining the legal norms that provide refugee rights. However, the case study of Somali refugees in Kenya has illustrated how the erosion of international norms could hamper the real lives of refugees in local situation, and how refugees dependency on the hosting governance may deprive them from the access to fundamental protection.

Law and international law in particular legitimizes itself was neutral and equal principles. Albeit, this characteristic of law could also hide the social inequality inflicted on those who cannot have their legal space. Through the lens of B. S. Chimni and Nanda Oudejans, it is proved that the hidden inequality of the refugees which the ideology of humanitarianism has neglected is inevitably perpetuating such humanitarian crisis within the so-called "humanitarian space". The conclusion of this article thus urges a re-examination of the international regime but with an insight of the existing hidden inequality.

LIST OF ABBREVIATIONS

UNHCR: United Nations High Commissioner for Refugees

ICRC: The International Committee of the Red Cross

ICU: Islamic Courts Union

AU: African Union

TFG: Transitional Federal Government

DRA: Department of Refugee Affairs

IDPs: Internal displaced persons

COMPETING INTERESTS

The author declares that he have no conflicts of interest.

AUTHOR CONTRIBUTIONS

The entire content of the article is done by the author only.

REFERENCES

1. Barnett L. Global Governance and the Evolution of the International Refugee Regime' [2002] 149 Int'l J. R. L. 238, 245; Available from: https://doi.org/10.1093/ijrl/14.2_and_3.238.
2. The Office of the United Nations High Commissioner. Statute of the Office of the United Nations High Commissioner for Refugees, A/RES/428(V). 1950. Art 2.
3. The United Nations. Convention Relating to the Status of Refugees (adopted 28 July 1951, entry into force 22 April 1954) 189 UNTS 137.
4. International Committee of the Red Cross. ICRC Protection Policy. Institution Policy 2008; 90(871):751-755; Available from: <https://doi.org/10.1017/S1560775508000151>.
5. Horst C, Nur AI. Governing Mobility through Humanitarianism in Somalia: Compromising Protection for the Sake of Return [2016] 47(3) Development and Change 2016 47(3):542-562; Available from: <https://doi.org/10.1111/dech.12233>.
6. Chimni BS. Globalization, Humanitarianism and the Erosion of Refugee Protection Journal of Refugee Studies 2000. 13(3):243-263; Available from: <https://doi.org/10.1093/jrs/13.3.243>.
7. Teitel RG. Transitional Justice Genealogy. Harvard Human Rights Journal 2003. 16(69):90.
8. Oudejans N. The Right to Have Rights as the Right to Asylum. Netherlands Journal of Legal Philosophy 2014. 43(1): NJLP 7-26; Available from: <https://doi.org/10.5553/NJLP/221307132014043001002>.
9. Ritzer G. Globalization: The Essentials. Wiley-Blackwell; 2011. p.22 ; Available from: <https://doi.org/10.1002/9780470670590.wbeog260>.

10. Thompson JB. Ideology and Modern Culture. Cambridge: Polity Press; 1999;
11. Gammeltoft-Hansen T. International refugee law and refugee policy: the case of deterrence policies. *J Refug Stud.* 2014;27(4):574-95; Available from: <https://doi.org/10.1093/jrs/feu030>.
12. United Nations Security Council, Security Council resolution 688 (1991) [Iraq]. 5 April 1991; Available from: www.refworld.org/docid/3b00f1598.html.
13. Christiane A. The Normative Erosion of International Refugee Protection through UN Security Council Practice *Leiden Journal of International Law* 2011 1009-1027; Available from: <https://doi.org/10.1017/S0922156511000471>.
14. Hannah A. The Origins of Totalitarianism. Harcourt Brace & Company; 1968;
15. Hannah A. The Promise of Politics. 189, 190 in *ibid*, 19;
16. Lindahl H. Arendt and the nomos of political community. *Philosophy and Social Criticism* 2006; 32:881-901; Available from: <https://doi.org/10.1177/0191453706066979>.
17. Lindley A. Between a Protracted and a Crisis Situation: Policy Responses to Somali Refugees. *Refugees Survey Quarterly* 2011; 30(4):14-49; Available from: <https://doi.org/10.1093/rsq/hdr013>.
18. Menkhaus K. Stabilisation and humanitarian access in a collapsed state: The Somali case. *Disasters* 2010; 34(3):320-341; Available from: <https://doi.org/10.1111/j.1467-7717.2010.01204.x>.
19. Chkam H. Aid and the Perpetuation of Refugee Camps: The Case of Dadaab in Kenya 1991-2011. *Refugee Survey Quarterly* 2016; 35(2):79-97; Available from: <https://doi.org/10.1093/rsq/hdw005>.
20. UNHCR, SOMALIA: Areas of origin (regions) of registered Somali Refugees and asylum-seekers in the East and Horn of Africa. 1 May 2015 (2 January 2017); Available from: <https://data.unhcr.org/horn-of-africa/download.php?id=1594>.
21. UNHCR. Dadaab - World's biggest refugee camp 20 years old. 2012; Available from: [/www.unhcr.org/news/makingdifference/2012/2/4f439dbb9/dadaab-worlds-biggest-refugee-camp-20-years-old.html](http://www.unhcr.org/news/makingdifference/2012/2/4f439dbb9/dadaab-worlds-biggest-refugee-camp-20-years-old.html).
22. Wood T. Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention's Expanded Refugee Definition. *International Journal of Refugee Law* 2014; 26(4):555-580; Available from: <https://doi.org/10.1093/ijrl/eeu048>.
23. United Nations Treaties Series. Protocol Relating to the Status of Refugees. 31 January 1967;
24. UNHCR, 'States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol' accessed by 2 January 2017; Available from: <http://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>.
25. Organization of African Unity. Convention Governing the Specific Aspects of Refugee Problems in Africa. 10 September 1969;
26. Tobias S. Neoliberal Globalization and the Politics of Migration in Sub-Saharan Africa. *Journal of International & Global Studies* 2012; 4(1):1-16;
27. The Kenya Gazette Supplement, The Refugee Act 2006; Available from: <http://www.refworld.org/docid/467654c52.html>.
28. The Refugee (Reception, Registration and Adjudication) Regulations, 2009. accessed by 3 January 2017; Available from: <http://www.refworld.org/docid/4a1c0d782.html>.
29. United Nations Treaties Series. Convention Relating to the Status of Refugees. 28 July 1951;
30. Jaji R. Religious and ethnic politics in refugee hosting: Somalis in Nairobi, Kenya. *Ethnicities* 2014; 14(5): 634-649; Available from: <https://doi.org/10.1177/1468796813518313>.
31. Akin-Aina S. The State of Exception and Legal Ambiguity: The Kenyan Forced Encampment Directive for Urban Refugees. *Oxford Monitor of Forced Migration* 2014. 4(1):28-33;
32. D'Orsi C. "We Cannot Manage This Plight Alone Anymore": Analysing the Kenyan Threats to Forcibly Repatriate All Somali Refugees from Dadaab Camp. In: *Refugees and Forced Migration in the Horn and Eastern Africa*. Springer; 2019. p. 243-65; Available from: https://doi.org/10.1007/978-3-030-03721-5_13.
33. BBC. Kenya announces Dadaab refugee camp will close by November. 31 May 2016. accessed by 6 January 2016; Available from: <http://www.bbc.com/news/world-africa-36418604>.
34. Eslava L. *Dense Struggle: On Ghosts, Law, and the Global Order*. Routledge Handb Law Theory Forthcom. 2018; Available from: <https://doi.org/10.2139/ssrn.3124030>.

Khủng hoảng nhân đạo trong những khu vực nhân đạo: Một nghiên cứu tình huống về người tị nạn Somali ở Kenya

Lê Nguyễn Nhật Minh*



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TÓM TẮT

Cơ chế quốc tế bảo vệ người tị nạn vẫn được cho là vận hành nhằm cung cấp cho những người đánh mất tình trạng công dân một sự bảo vệ pháp lý, dưới ý tưởng của chủ nghĩa nhân đạo. Trong cơ chế này, chính sách giam giữ là một trong những chính sách quen thuộc. Nó thiết lập một thực hành của các quốc gia tiếp nhận người tị nạn trong lãnh thổ của mình bằng cách "chứa" họ trong những trại nhân đạo. Bài viết này tập trung vào quan niệm của B. S. Chimni về mối liên hệ giữa hệ tư tưởng của chủ nghĩa nhân đạo với sự mục ruỗng của chế độ bảo vệ người tị nạn, và cụ thể là trong chính sách giam giữ (containment policy) trong thực hành của những quốc gia tiếp nhận. Để cụ thể hoá phê phán của Chimni và thấy được sự bảo vệ cho người tị nạn bị mục ruỗng như thế nào bởi chính sách giam giữ, tôi làm rõ thêm quan điểm của ông bằng sự khái niệm hoá của Nanda Oudejans đối với người tị nạn như là những cá nhân bị mất đi một nơi chốn pháp lý để sống. Trong khuôn khổ lý thuyết này, tôi lập luận rằng hệ tư tưởng của chủ nghĩa nhân đạo về chế độ bảo vệ người tị nạn đã bỏ mặc một sự bất bình đẳng bị ẩn giấu nhưng bất khả từ của những người tị nạn sống trong lãnh thổ của quốc gia tiếp nhận. Đó là bởi vì mặc dù các quyền của người tị nạn được minh định trong những văn bản pháp lý, các quyền của họ còn yếu sách một nơi chốn để quyền này được thụ hưởng, một nơi chốn mà người tị nạn buộc phải nhận từ quốc gia tiếp nhận. Để thu thập dữ liệu nghiên cứu tình huống thực nghiệm, tôi chuyển sang phân tích thực trạng của người tị nạn Somali ở Kenya. Trại tị nạn Dadaab ở Kenya được biết đến như là một trong những trại lâu đời nhất và lớn nhất, để tập trung những người tị nạn Somali. Mặc dù cung cấp cho những người tị nạn này một nơi nhân đạo, người tị nạn Somali vẫn đang bị tước đi một nơi chốn pháp lý để họ có thể hưởng những quyền được công nhận của mình. Gánh chịu những điều kiện khắc nghiệt bên trong những trại nhân đạo, nhưng lại đối mặt với sự loại bỏ từ bên ngoài các trại nhân đạo đó, người tị nạn lệ thuộc một cách bất cân bằng đối với chính quyền Kenya, trong khi tình trạng này vẫn đang kéo dài địa vị người tị nạn của họ.

Từ khoá: Chủ nghĩa nhân đạo, chế độ bảo vệ người tị nạn, chính sách giam giữ, người tị nạn Somali

Trường Đại học Kinh tế - Luật,
ĐHQG-HCM, Việt Nam

Liên hệ

Lê Nguyễn Nhật Minh, Trường Đại học Kinh tế - Luật, ĐHQG-HCM, Việt Nam
Email: MinhLnn@uel.edu.vn

Lịch sử

- Ngày nhận: 07/02/2021
- Ngày chấp nhận: 29/7/2021
- Ngày đăng: 15/8/2021

DOI: 10.32508/stdjelm.v5i4.771



Bản quyền

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Trích dẫn bài báo này: Minh L N N. Khủng hoảng nhân đạo trong những khu vực nhân đạo: Một nghiên cứu tình huống về người tị nạn Somali ở Kenya. *Sci. Tech. Dev. J. - Eco. Law Manag.*; 5(4):1861-1869.