

**REFUGEE CAMPS: IN SEARCH OF THE LOCUS OF THE  
ACCOUNTABILITY OF THE UNITED NATIONS HIGH COMMISSIONER FOR  
REFUGEES (UNHCR) UNDER INTERNATIONAL LAW**

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## ABSTRACT

In this dissertation, I investigate the question *how, and to what extent, can the office of the United Nations High Commissioner for Refugees (UNHCR) be held accountable, under international law, for its contribution to the harm to the environment and lives of refugees resulting from refugee encampment in refugee camps that it helps create, fund, and manage?* I use the term “accountability” in this dissertation to mean *answerability, responsibility, and liability for internationally wrongful acts or injurious consequences arising out of acts that international law does not prohibit and making good for the loss or injury suffered as a result of such acts or omissions.*

Thus, using data from primary and secondary sources and borrowing from certain theoretical paradigms and schools of thought, I theorise about the policy-context; the decision-making processes that produce refugee encampment; the locus of accountability for the injurious consequences of refugee encampment in refugee-hosting states in the global south; the international rules and principles for protecting refugees and the environment; the rules and principles constituting the regime of accountability under international law; and the strengths and limitations of the regime. In tandem with theorising these aspects, I identify practical implications or observable implications that flow from each theoretical proposition I posit and buttress these with evidence from both primary and secondary sources.

I demonstrate that the UNHCR is the architect of refugee encampment in many refugee-hosting states in the global south and show how it appropriates the *framework governance* of these states on refugee policy and practice. I argue that accountability for the consequences of refugee camps on the environment, refugees, and host communities must, therefore, follow the locus of power (in the sense of effective control) and be laid upon the author of the framework decisions that produce refugee encampment. My central thesis is that because the UNHCR, albeit a subsidiary organ of the United Nations (UN), is an independent actor on the international plane, with considerable power and influence, it should be held accountable for its authorship of the framework decisions which produce refugee encampment, which refugee encampment in turn results in harm to the environment and damage to the lives of refugees living under deplorable conditions of encampment; some for over twenty-five years.

I theorised and developed my arguments in the dissertation in two main parts. In the first part, consisting two chapters, I explain its conceptual framework. This I do by summarising the problem and identifying the main themes in the conversations in the most relevant literature. More

specifically, in Chapter 1, special attention is paid to the conceptual and theoretical issues surrounding refugee camps, harm to the environment, and accountability. In Chapter 2, the same kind of attention is paid to questions of theory and method. In part two of my dissertation, I identify and locate the sites where the framework decisions on refugee encampment are authored (Chapter 3); review the rules and principles constituting the regime of accountability under international law (Chapter 4); and explain how the rules and principles constituting the regime of accountability under international law may be applied to framing the accountability of the UNHCR for its acts of refugee encampment and the latter's consequences on the environment and the conditions of life of refugees in camps (Chapter 5).

I conclude the analyses in the dissertation in Chapter 6. The main conclusion is that, in theory at least, the UNHCR can be held accountable, under international law, using two possible legal routes: (a) internationally wrongful acts, and (b) liability for injurious consequences of activities that international law does not prohibit. In practice, however, both legal routes have gaps or limitations. In the first place, third parties face several procedural and substantive obstacles in seeking remedies against IOs for their internationally wrongful acts, in general, and the UNHCR in particular with respect to refugees. Most IOs have not developed internal procedures for settling third party disputes of a private law character. Where IOs, including the UNHCR, have internal mechanisms, such mechanisms are often inaccessible to third parties, such as refugees. And the option of private law litigation in domestic courts is also unavailable because IOs tend to enjoy near absolute (or even absolute) immunity from every form of legal process in national courts. The result: a huge gap of accountability in international law. The international law on the privileges and immunities of IOs creates the space for impunity and double standards whereby, on the one hand international law demands that those who violate its precepts should be held answerable, but on the other hand, it selectively shields certain natural and juridical persons from being held accountable, giving them an unduly privileged status and in effect mocking the idea that all persons are equal before the law.

The decision of the United States (US) Supreme Court in *Jam v. IFC*, 139 S. Ct. 759 (2019), on face value, however, seems to herald a new dawn of restrictive immunity for IO in national courts. The Court held that the scope of immunities from suit that IOs can enjoy in the US under the International Organisations Immunities Act (IOIA) of 1945, is restrictive because the IOIA entitles IOs to 'the same immunity' that foreign government dignitaries on US territory enjoy. Since the Foreign Sovereign Immunities Act of 1975 (FSIA) restricted the immunities from suit that foreign governments are entitled to while on US territory, the same standard also applies to IOs. I am cautiously optimistic, however. This landmark decision is of a national court, albeit the

highest court of the land, may have limited international impact. Moreover, the Court left it open to IOs to ‘always specify a different level of immunity,’ if a given IO ‘would be impaired by restrictive immunity.’

The second limitation concerns the second legal route, liability for injurious consequences of activities that international law does not prohibit. The rules and principles that the International Law Commission (ILC) developed are limited to addressing accountability for activities considered most dangerous or hazardous with a transboundary reach. Technically, therefore, the UNHCR’s refugee encampment activities may not fall within the ambit of these rules.

## **DEDICATION**

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# CHAPTER 1: THE RESEARCH PROBLEM AND CONCEPTUAL ISSUES

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## 1.1 Introduction

In this dissertation, I investigate the question *how, and to what extent, can the Office of the United Nations High Commissioner for Refugees (UNHCR) be held accountable, under international law, for its contribution to the harms to the environment and lives of refugees resulting from refugee encampment in refugee camps that it helps create, fund, and manage?* In other words, can the UNHCR be held accountable, under international law, for: 1) harm or damage to the environment resulting from refugee camps; and 2) harm to the lives of refugees in the camps that it helps creates, fund, and administers? In so doing, I sought to understand how under existing rules of international law and politics the international accountability of the UNHCR may be achieved. By “accountability” in this dissertation I mean *answerability, responsibility, and liability for internationally wrongful acts or injurious consequences arising out of acts that international law does not prohibit, and making good for loss or injury suffered as a result of such acts or omissions*. I return to a detailed conceptualisation of accountability in subsection 1.3.3 of this chapter.

Thus, using data from primary and secondary sources, I theorise and identify practical implications about the policy-context, the decision-making processes that produced refugee encampment, the locus of accountability for injurious consequences of refugee encampment in the global south, international rules and principles of protecting refugees and the environment, and the rules and principles constituting the regime of accountability under international law.

I demonstrate that UNHCR is the architect of refugee encampment in refugee-hosting states in the global south and it often appropriates the framework of governance on refugee policy and practice of these States. I argue that

accountability for the consequences of refugee camps on the environment, refugees, and host communities must, therefore, follow the power and processes that produce refugee camps. My central thesis is that because UNHCR is an independent international legal person and actor on the international plane,<sup>1</sup> exercising significant power and influence, and is the architect of refugee encampment in refugee-hosting states in the global south, it should be held accountable for its decisions which produce refugee encampment, which in turn results in destruction of or damage to the environment and damage to the lives of refugees living under deplorable conditions of encampment.

I have drawn insights from two sources of data: documents and fieldwork. In addition, I have gleaned theoretical insights from different schools of thought, especially Third World Approaches to International Law (TWAIL), The New Haven School or Policy-oriented Jurisprudence, Socio-Legal Studies or Approaches, and Political Economy, to explain and defend some propositions I advance on how and why the UNHCR should be held accountable for the consequences of its decisions that produce refugee encampment and harmful consequences of camps on the environment and the conditions of involuntary dependence of refugees on external aid in the camps, often for long periods.<sup>2</sup> The conclusions drawn from the data on refugee encampment are limited to similarly situated camps.

It is appropriate at this point to say something about the structure of my dissertation. I have divided the dissertation in two main parts. Part I, the *Conceptual*

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<sup>1</sup> The Office of Legal Affairs of the United Nations claims that subsidiary organs of the United Nations, such as UNHCR, do not have a separate international personality. I return to this aspect in Chapter 5.

<sup>2</sup> See, e.g., UN News, “UN-run Camps for Somalia Refugees in Kenya enter 20<sup>th</sup> year of existence” (2012), online<<https://news.un.org/en/story/2012/02/404012-un-run-camps-somalia-refugees-kenya-enter-20th-year-existence>>.



*Framework*, consists of two chapters, while Part II, *Accountability*, has four. In Chapter 1, I define the research problem and review and critique some of the key conceptual and theoretical conversations surrounding refugee camps, environmental degradation or damage, and the accountability of international organisations (henceforth, IOs), including of their subsidiary organs that perform functions on the international plane. I conceptualise the term ‘accountability’ in more detail than other terms because it is the main premise upon which my main research question and discussions and analyses in the dissertation rest. I end this chapter explaining the potential contribution of my dissertation to the existing body of knowledge in the area of my study.

I address issues of theory and method in Chapter 2. Here, I deal, briefly, with the challenges of identifying the most appropriate theoretical approach and method for answering my main research question and why I chose to rely, in the main, on a particular theory and method. I explain theory, method, and school of thought as understood in this dissertation and I argue that bodies as work that are organized under monikers such as Third World Approaches to International Law (TWAAIL), Law and Economics, Feminists Approaches to International Law, Legal Positivism, etc, are actually schools of thought about law not theories or methods of international law as is often conventionally understood. I conclude this chapter with explaining my methods of data collection and their limitations.

Chapter 3 is the first chapter of Part II on accountability. In this chapter, I sought to further develop the research problem I defined in Chapter 1 and address the question how and by whom the decisions that produce refugee encampment in some refugee-hosting states in the global south are made. Understanding this question is central to answering my main research question, namely, how the UNHCR can be held accountable under international law for the injurious consequences of the refugee camps it helps to create, fund, and administer, on the environment and the conditions of refugees living in the camps. If the UNHCR has

no role and part at all in the decision-making processes that produce refugee encampment, then my main research question is moot.

Here, I posit and develop two countervailing theoretical propositions that shed light on the decision-making processes and structures that produce refugee encampment. I then identify some observable or practical implications that flow from each theory. Given space limitation, I choose to focus on the most relevant of these implications for my research question. I return to explain some of these practical implications in Chapter 5, when discussing the accountability of UNHCR. But in the main, I demonstrate (deploying Okafor's theory on the seizure of the '*framework governance*' of global south countries), that the UNHCR has, in subtle ways, appropriated the framework governance of refugee policy and practice from refugee-hosting states and governments and is the main 'author' of the framework decisions that produce refugee encampment, especially in the global south in countries such as Kenya, where I conducted fieldwork. I argued that because the UNHCR appropriates the framework governance of refugee policy and practice in many refugee-hosting states in the global south, the case for its accountability under international law, is made stronger, for the consequences of the harms of refugee encampment on the environment and the suffering of refugees in camps that it helps create, fund, and administer. I develop the specifics of this aspect of the argument of the dissertation in Chapter 5.

Chapter 4 is the second chapter of Part II of the dissertation. In Chapter 4, I focus on the rules and principles constituting the regime of accountability under international law. I posit and develop two countervailing theoretical propositions about international law and accountability which allow me to identify and analyse the content and scope of the rules and principles governing the accountability of states and IOs. In the first place, I theorise that international law provides a legal route, or a legal regime, for engaging the accountability of actors who violate its precepts. In the second place, I hypothesise that from a TWAIL perspective, international law, at least in its living form, is hegemonic and imperialistic and

therefore is ill-equipped to provide an equitable legal route for engaging the accountability of actors who violate its precepts. I then identify, for each theory, some of its practical implications that allow me to draw specific inferences about the rules and principles governing the regime of accountability under international law. I conclude that the rules and principles governing the accountability of IOs require some reformulation and recalibration that de-emphasises the economic aspects of human and social relations and balances several disparate competing interests, including formulating general principles on a duty of care for all entities vested with power and authority.

In Chapter 5, I address the question how the UNHCR can be held accountable, under international law, for the harms or injurious consequences on the environment of its encampment of refugees and for the conditions of refugees in these camps. Building on the themes in Chapter 3, I theorise that accountability for the harms or injurious consequences on the environment of refugee encampment and the conditions of refugees in the camps, must follow the locus of the *framework governance* of refugee policy and practice in the refugee-hosting states in global south. I demonstrate two possible legal routes for holding the UNHCR accountable under existing rules and principles governing accountability under international law. In so doing, I address possible challenges with respect to questions about UNHCR's status, capacity, and obligations under international law as necessary conditions for engaging its international accountability. In addition, I also discuss the nature of the internationally wrongful acts and injurious consequences arising out of activities that international law does not prohibit and the question of attributing or imputing to the UNHCR wrongful acts and omissions that constitute a breach of its international obligations. I examine some private law options for holding UNHCR accountable and the obstacles involved.

I conclude in Chapter 5 that the UNHCR as an independent legal entity has obligations incumbent upon it, both under its Statute and the 1951 Refugee Convention (on the one hand) and under general international law (on the other).

I argue that it is, therefore, legitimate to hold the UNHCR accountable for breaching its obligations under international law. Since the UNHCR has appropriated the framework governance of refugee policy in some refugee-hosting states in the global south and authors the framework decisions that produce refugee encampment, it is the right entity to be held accountable for the consequences of refugee camps on the environment and the deplorable conditions of life for refugees under encampment. There is ample evidence to demonstrate that the UNHCR has effective control of the refugee camps systems that it helps create, fund, and administer in some refugee-hosting states in the global south and that the wrongful acts of its organs and agents are attributable to it. I then identify some of the procedural and substantive issues involved in using existing rules and principles constituting the regime of accountability under international law to hold UNHCR accountable. I further conclude that in theory, at least, it is feasible to use private law options to engage the accountability of the UNHCR this option tends to be moot, however, because IOs enjoy near absolute immunity from the jurisdiction of national courts. The US Supreme Court decisions in *Budha Ismail et al v International Finance Corporation [Jam]* delivered in February in 2019 seem to herald a new dawn of restrictive immunity for IOs. I return to this case in Chapter 5, but suffice to point out here that from an international law vantage point, the decision has no real significant impact on the immunity of IOs whose charters and specific instrument guarantee for them absolute immunity, a fact that the majority of the Court recognised.

I conclude the discussions in the dissertation in Chapter Six.

## 1.2 The Problem and the Context: the UNHCR's Approach to Refugee Protection

The UNHCR is the United Nations' (UN) refugee agency whose primary competence is to provide international protection to refugees.<sup>3</sup> In addition to this primary function, it assists States find durable solutions to the refugee problem<sup>4</sup> and, to a limited extent, provides protection to conflict or war-induced internally displaced persons (IDPs).<sup>5</sup>

The UNHCR, many refugee hosting States in Africa, and other key actors involved in refugee protection, such as international non-governmental organisations (INGOs), use refugee camps as a technology of choice for administering humanitarian aid to refugees, especially those in the global south.<sup>6</sup> While refugee camps, vary in their sizes and use from country to country and if used for very temporary periods of less than six months and to accommodate a smaller number of refugees, are not invidious per se, in the long run they cause far more harm than good to both refugees, local communities, and the environment.

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<sup>3</sup> See, *Statute of the Office of the United Nations High Commissioner for Refugees*, GA Res 428 (V), UNGAOR, 5th Sess, Supp No. 20, UN Doc. A/1775 (1950) at 46

<sup>4</sup> Ibid.

<sup>5</sup> See, e.g., *Office of the United Nations High Commissioner for Refugees*, GA Res A/53/125, UNGAOR, 53RD Sess, Supp No. 49, UN Doc A/53/49 (1999) at 233 - 234 para 16.

<sup>6</sup> A caveat is in order here. Not all aid for refugees in refuge-hosting states in the global south is provided through refugee encampment, however. Some urban refugees do receive assistance from UNHCR through its implementing partners, but this is an exception to the general rule, at least, in some of the main refugee-hosting states in the global south, such as Kenya, Tanzania, and Uganda. Indeed, UNHCR is reluctantly, however, conceding the reality, especially after the Syrian refugee crisis, that many refugees live in urban settings and in 2014 developed a policy on alternatives to refugee camps. In addition, the relentless campaign of civil society organisations to end refugee encampment in the global south appears to also influence UNHCR to, at least rhetorically, shift its position on refugee camps. I return to these aspects in Chapter 3.

Indeed, there is, however, ample evidence that refugee camps have adverse impacts on both the environment and refugees. Some studies have shown that refugee camps negatively affect the environment.<sup>7</sup> Even the UNHCR and some governments concede that refugee camps adversely affect the environment.<sup>8</sup>

More specifically, it is now well known that the presence or an influx of refugees into a neighbouring host State and their subsequent encampment in refugee camps leads to damage to the environment and natural resource depletion with possible dire social and economic consequences to both refugees and host

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<sup>7</sup> See, Andreas Braun, Stefan Lang, and Volker Hochschild, “Impact of Refugee Camps on Their Environment: A Case Study Using Multi-Temporal SAR Data” (2016) 4:2 *Journal of Geography, Environment and Earth Science International* 1, DOI: <10.9734/JGEEESI/2016/22392>; also see, e.g., Bhajan Chandra Barman, “Impact of Refugees on Host Developing Countries” in Sourav Kumar Das and Nidhi Chowdhary, *Refugee Crises and Third-World Economies* (New Delhi: Emerald Publishing (India) Pvt Ltd, 2020) at 103 – 111; Sarah Deardorff Miller, “Assessing the Impact of Hosting Refugees” (2018) World Refugee Council Research Paper No. 4; Bonaventure Rutinwa & Khoti Kamanga, “Impact of Refugees on Northwestern Tanzania” (Dar es Salaam: Centre for the Study of Forced Migration (CFSM), University of Dar es Salaam, August 2003); John Kakonge, “A Review of Refugee Environment-Oriented Projects in Africa: A Case for Environmental Impact Assessment” (2000) 18:1 *Impact Assessment & Project Appraisal* 32; Karen Jacobsen, “Refugees’ Environmental Impact: The Effect of Patterns of Settlement” (1997) 10:1 *Journal of Refugee Studies* 19; Shally B. Gachurizi, “The Impact of Refugees on the Environment: The Case of Rwandan Refugees in Kivu, Zaire” (1996) 15:2 *Refuge* 24; Asit Biswas & Quiroz Tortajada, “Environmental Impact of Refugees: A Case Study” (1995) 14 *Impact Assessment & Project Appraisal* 21; Ian Smith, “An Environmental Argument Against Mozambican Refugee Camps in Malawi” (1993) 13:6 *Refuge* 7.

<sup>8</sup> See, e.g., UNHCR, *UNHCR Environmental Guidelines* (Geneva, UNHCR, 1996); UNHCR, *UNHCR Environmental Guidelines* (Geneva: The Environment Technical Support Section, UNHCR, 2005); Government of Kenya (GoK), “The Refugee Bill”, *Kenya National Assembly Parliamentary Debates Official Report* (20 November 2003) at 3983.

communities.<sup>9</sup> One of the most serious environmental problems caused by refugee camps is deforestation and soil erosion within and around the refugee camps. For example, the influx of Rwandan refugees into the Democratic Republic of the Congo (DRC) in the 1990s caused extensive deforestation and soil erosion in Goma and the vicinity, North Kivu, and South Kivu.<sup>10</sup> It is not, however, inevitable that the mere fact of refugees entering a neighbouring country leads automatically to environmental harm. The harm to the environment results from the prolonged concentration of large numbers of refugees in a designated location, a refugee camp, usually isolated from host communities.<sup>11</sup> For example, the Dadaab Refugee Complex in Kenya that the UNHCR helped create is:

‘located in an ecologically fragile area characterized by low rainfall, prolonged droughts and seasonal flooding when it rains; the area has no surface water hence over-reliance on underground water and ...has been in existence for over a protracted period of time which, when coupled with the high population density, has resulted in significant environmental degradation.’<sup>12</sup>

UNHCR has recognised the harm that the Dadaab camp complex has done to the environment and thus mobilised other actors to draw a funding proposal and raise United States dollars six million, four hundred thirty thousand

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<sup>9</sup> See, e.g., UNHCR, “Project Proposal for Environmental Rehabilitation of Dadaab Refugee Hosting Region, Kenya” (undated, available on file with author; document obtain during fieldwork in Kenya, February – April 2018) [Project Proposal].

<sup>10</sup> See, e.g., Biswas & Tortajada, *supra* note 7 at 27 and 31; Gachurizi, *supra* note 7.

<sup>11</sup> This author’s personal experience, first, as a former Ugandan refugee in Zaire, now Democratic Republic of the Congo and second, with the presence of refugees from Kenya, Sudan, and Congo in Kigumba, in southern Uganda from the 1950 up to the 1970s demonstrate that when refugees are allowed to disperse across the country of refuge and settle amongst host communities in much small numbers, the impact on the environment and natural resources is minimal.

<sup>12</sup> Project Proposal, *supra* note 9 at 3.

(US\$6,430,000) to rehabilitate ‘the Dadaab Refugee Camp Complex and its environs for the benefit of the refugees and host communities.’<sup>13</sup>

Refugee camps are also sites where human rights are often violated and people’s dignity undermined, in large part because of the very nature or foreseeable consequences of encampment.<sup>14</sup> In fact, the European Court of Human Rights has ruled in the case of *Abdisamad Adow Sufi* and *Abdiazizi Ibrahim Elmi* (hereinafter, the *Sufi* case), decided in 2010, that conditions in Dadaab refugee camp in Kenya amount to torture within the ambit of Article 3 of the *European Convention on Human Rights*.<sup>15</sup> I return to this case in Chapter 5.

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<sup>13</sup> Ibid., at 2.

<sup>14</sup> Maja Janmyr, *Protecting Civilians in Refugee Camps: Unable and Unwilling States, UNHCR and International responsibility* (Leiden: Martinus Nijhoff Publishers, 2014), *Protecting Civilians in Camps*]; Tori Hogan, *Beyond Good Intentions: A Journey Into the Realities of International Aid* (Seal Press: 2012); Michel Agier, *Managing the Undesirables: Refugee Camps and Humanitarian Government* (Cambridge, United Kingdom; Malden, Massachusetts: Polity Press, 2011); Sarah K. Lischer, *Dangerous Sanctuaries: Refugee Camps, Civil War, and the Dilemmas of Humanitarian Aid* (Ithaca NY: Cornell University Press, 2006); Guglielmo Verdirame & Barbara E. Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism* (New York; Oxford: Berghahn Books, 2005); Zachary A. Lomo, “Refugees in East Africa: Developing an Integrated Approach”, in Bekoe, D.A (ed.), *East Africa and the Horn: Confronting Challenges to Good Governance* (Boulder: Lynne Rienner Publications, 2005); Barbara E. Harrell-Bond, “Are Refugee Camps good for Children?” (2000) UNHCR New Issues in Refugee Research Working Paper Series); T.M., Yousif, ‘Encampment at Abu Rakham in Sudan: a personal account’ (1998), 2 *FMR* 15; Natali Dukic & Alain Thierry, “Saharawi Refugees: life after the camps” (1998), 2 *Forced Migration Review* 18; Wim Van Dame, “Do Refugees Belong in Camps? Experiences from Goma and Guinea” (1995) 346 *Lancet* 360; Mohamed W. Dualeh, “Do refugees belong in camps?” (1995) 346 *Lancet* 1369; M. Dualeh, “Do refugees belong in camps?” (1995), 346 *Lancet* 1369.

<sup>15</sup> Case of *Abdisamad Adow Sufi and Abdiazizi Ibrahim Elmi v. United Kingdom*, Applications no. 8319/07 (28 November 2011).



The UNHCR and other actors involved in refugee protection have continued to use refugee camps despite the evidence that camps do harm the environment, the lives of refugees, and local communities.<sup>16</sup> That raises some fundamental questions: (a) why the UNHCR and other actors in refugee protection insist on using refugee camps when they know of its adverse effects on the environment and the negative impact such camps tend to have on the conditions of refugees in the long term; (b) whose idea it was and is to deploy refugee encampment, UNHCR or refugee-hosting states?; (c) how the decision that the refugees should be assisted only in camps was or is arrived at, or how the decision that the camp is the best technology for providing international protection to refugees was or is arrived at; (d) whether refugee encampment is an outcome of deliberations within the UNHCR as an organisation or States as corporate wholes or it was or is simply the decision of certain individuals and processes within the UNHCR or institutions of government; (e ) what role, if any, non-governmental organisations (NGOs), especially the foreign ones, play in the decision to encamp refugees; (f) the extent, if at all, that the local communities where the refugee camps are located participate in the decision-making processes that produce refugee encampment; and (g) who should, ultimately, be held accountable for the adverse or injurious consequences of refugee camps on the environment and the conditions of refugees living in these camps.

For reasons that will become clear in Chapters 3 and 5, I believe that the UNHCR should be held accountable for the consequences for refugee encampment in refugee-hosting states in the global south. And the critical question is how can it be held accountable, under international law?

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<sup>16</sup> In 2014, UNHCR issued a policy document on alternatives to refugee camps. This policy must be understood in context and I take it up in Chapter 3.

### 1.3 Conversations in the Relevant Literature and Conceptual Issues

It is pertinent to clarify the meaning and scope of the most relevant concepts that I use throughout this dissertation: ‘refugee camp,’ ‘environmental harm (damage)’ and ‘accountability,’ i.e., accountability under international law. In addition to these key concepts or phrases, however, I will also explain two other concepts used in the relevant literature, ‘organised refugee settlement’ and ‘self-settlement’ or ‘self-settled refugees’. The latter set of concepts are often used in the literature in contradistinction to refugee camps and so it is appropriate to explain them.

#### 1.3.1 Conceptualising the Refugee Camp

The conversations that attempt to define and conceptualise a refugee camp in the relevant literature are either descriptive or analytical or both. Descriptive approaches to framing the meaning of a refugee camp tend to explain its elements or features.<sup>17</sup> Analytical approaches, in contrast, go beyond the elements or features of a camp; they use conceptual maps to theorise the camp, refugee or otherwise, in its wider social, economic, and especially political dimensions.<sup>18</sup>

Analytical approaches to framing what constitutes a camp, refugee or otherwise, are useful to my dissertation for two reasons. In the first place, they provide some practical and theoretical insights into understanding the underlying assumptions of refugee encampment in ways that allow one to contextualise these assumptions and foreground the subtle drivers of power and interest dynamics. In the second place, they provide useful deductions that may help address the key

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<sup>17</sup> See, e.g., Richard Black, ‘Putting Refugees in Camps’ (1998) 2 *Forced Migration Review*, 4 – 7.

<sup>18</sup> See, e.g., Giorgio Agamben, *Means Without End: Notes on Politics*, trans. Vincenzo Binetti & Cesare Casarino (Minneapolis: Minnesota University Press, 2000); Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazan (Stanford, California: Stanford University Press, 1998).

question of the accountability of the main actors in refugee protection for the harmful consequences of encampment on the environment, refugees, and their host communities and countries.

Scholars in the humanities and social sciences disciplines (other than law) have provided most of the conceptualisations of the refugee camp. Legal scholars, and especially international refugee law scholars, have so far not been able to provide conceptualisations of the refugee camp. Malkki and Agamben, I believe, provide the most compelling conceptualisation of the camp that I find most relevant for my dissertation.<sup>19</sup> Malkki and Agamben both approach the camp from the prism of power and asymmetrical power relations and politics.

#### **1.3.1.1 The Refugee Camp as a Technology of Power and Control**

Malkki, an anthropologist, reflects on refugee camps in her seminal review article on what she termed as ‘a critical mapping of the construction-in-progress of refugees and displacement as an anthropological domain of knowledge.’<sup>20</sup> While the thrust of her article lay in the then emerging interest amongst anthropologists in studying refugees and displacement, her treatment of the refugee camp is the most relevant to my dissertation.

For Malkki, the refugee camp is not merely some innocuous or innocent isolated space or place teeming with humanitarian actors helping thousands of

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<sup>19</sup> For the most recent attempts to analyse and conceptualise the refugee camp, see, e.g., Simon Turner, “What is a Refugee Camp? Explorations of the Limits and Effects of the Camp” (2015) 28 *Journal of Refugee Studies* 1; Dan Bulley, “Inside the Tent: Community and government in the refugee camps” (2014) 45:1 *Security Dialogue* 63.

<sup>20</sup> Liisa Malkki, “Refugees and Exile: From Refugee Studies to the National Order of Things” (1995) 24 *Annual Review of Anthropology* 495 at 495.

hapless refugees as most people often assume. The refugee camp, Malkki asserts, is a ‘device of power’ or a ‘technology of power.’<sup>21</sup> She traces the origins of the refugee camp to the chaos of the Second World War (WWII) that started in 1939 and ended in 1945. Malkki argues that “the refugee” as ‘a special category and legal problem of global dimension did not exist in its full modern form’ until after, the WWII.<sup>22</sup>

Moreover, ‘certain key techniques for managing mass displacement,’<sup>23</sup> namely the refugee camp, also emerged during and after WWII. I argue, however, that ‘certain techniques for managing mass displacement’ did not emerge as recently as after the WWII, but must be located in European modernisation and colonial

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<sup>21</sup> Ibid at 498 -99.

<sup>22</sup> Ibid at 497 – 498. Malkki’s point that the refugee as a special category and legal problem of global dimension did not exist in its full modern form until after the Second World War may be challenged for being ahistorical. The refugee as a special category and legal problem of international dimension, albeit limited to European experiences, was recognised as early as 1921, when the League of Nation became seized of the matter and appointed a League High Commissioner for Russian refugees. In subsequent years, it started developing the normative basis on which international action for refugee protection may be anchored. Thus, on 12 May 1926, for example, the League of Nations adopted the ‘Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees, Supplementing and Amending the Previous Arrangements dated July 5<sup>th</sup>, 1922, and May 31<sup>st</sup>, 1924’, which was the first non-binding agreement by states on refugees that defined who was entitled to international protection. Two years later, the League adopted the 1928 ‘Arrangement Concerning the Legal Status of Russian and Armenian Refugees’ on 30 June 1928. This follows Dr Nansen’s appeal to the League’s General Assembly to address the question of the legal status of the refugees, which previous arrangements did not address. On these aspects, see, e.g., League of Nations, *Official Journal* (July 1926), 983, 985; and *Official Journal* (March 1929), 483, 485. In 1933, the first international agreement on refugee protection, a precursor to the 1951 UN Refugee Convention, was concluded. The Convention Relating to the International Status of Refugees was adopted on 28 October 1933; it conferred a legal or juridical status of an international character upon refugees. On the 1933 Refugee Convention, see, League of Nations, *Official Journal* (February 1934) 109.

<sup>23</sup> Ibid at 497.

projects at the turn of the nineteenth century.<sup>24</sup>

Malkki submits that it was at the end of WWII that ‘the refugee camp became enmeshed as a standardized, generalizable technology of power in the management of mass displacement.’<sup>25</sup> The refugee camp is a ‘device of power’ precisely because it not only enabled the ‘spatial concentration and ordering of people’<sup>26</sup> but also facilitated ‘the administrative and bureaucratic processes within its boundaries’.<sup>27</sup> Indeed, as a technology of power the refugee camp facilitated or enabled a number of operations to be carried out, such as the orderly organisation of repatriation or resettlement to third countries, the ““perpetual screening” and the accumulation of documentation on the inhabitants of the camp’, ‘the control of movement and black-marketing’ and ‘law enforcement and public discipline’.<sup>28</sup>

This framing of the refugee camp in the language of ‘devices’ and ‘technology’ of ‘power’ provides both a useful paradigm shift that invites one to question whether those who exercise power in the camps are answerable for the

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<sup>24</sup> On historical origins of camps, see, e.g., Aidan A.H. Forth, *Barbed-Wire Imperialism: Britain’s Empire of Camps, 1876- 1903* (Chapel Hill: University of California Press, 2017); Marouf Hasian Jr., *Restorative Justice, Humanitarian Rhetorics, and Public Memories of Colonial Camp Cultures* (Basingstoke, Hampshire, New York: Palgrave Macmillan, 2014); John Lawrence Tone, *War and Genocide in Cuba, 1895 – 1898* (Chapel Hill: The University of North Carolina Press, 2006); Jonathan Hyslop, “The Invention of the Concentration Camp: Cuba, Southern Africa and the Philippines, 1896 – 1907” (2011) 63:2 *South African Historical Journal* 251; and Ian R. Smith and Andreas Stucki, “The Colonial Development of Concentration Camps (1868 – 1902)” (2011) 39:3 *The Journal of Imperial and Commonwealth History* 417; Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace, 1951).

<sup>25</sup> Malkki, *supra* note 20 at 498.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

consequences of that power on the refugees, the environment, and the host communities. In other words, approaching the camp as a technology of power allows questions of accountability to be legitimately superimposed on the dominant narratives of humanitarianism, including questions about UNHCR accountability for the injurious consequences of refugee camps on the environment and the condition of refugees in encampment.

In the first place, representing the refugee camp as a ‘device of power’, for example, provides useful conceptual maps that define a set of deliberate actions to produce specific outcomes. A ‘device’ can be a *thing* made for a special purpose or a *plan* or *method* with a particular aim. From this perspective, viewing the refugee camp as a deliberate thing or plan or method created to provide protection to refugees rules out any claim that the camp is essentially an unavoidable inevitability or randomised occurrence beyond human control, for which alternatives are not feasible. If that is the case, it is legitimate to ask pertinent questions, such as, ‘how a particular camp was conceived, whose idea was it, what alternatives to the camp were considered for achieving the same aims, namely, providing international protection to refugees. These questions address issues of power and authority. If the refugee camp is a device or technology of power and therefore manifests the exercise of power and control, but not merely some neutral humanitarian space where self-sacrificing individuals put their lives at risk to save the lives of refugees, the case for the accountability of the actors who exercise power within and without the boundaries of the camp is made stronger because with power comes accountability.’<sup>29</sup>

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<sup>29</sup> See, e.g., ILA, ‘Third Report Consolidated, Revised and Enlarged Version of the Recommended Rules and Practices (“RRP-S”)’ (Committee on Accountability of International Organisations, New Delhi Conference, 2002), at 2.

### 1.3.1.2 The Refugee Camp as a ‘Hidden Matrix and Nomos of Political Space’

Agamben provides an insightful variation of Malkki’s conceptualisation of the refugee camp as a technology or device of power – the camp as ‘the hidden matrix and *nomos* of the political space in which we live.’<sup>30</sup> In other words, a camp, whether designated for refugees or otherwise, is not merely an isolated piece of land removed from the body politic of everyday life; it is a structure and device for ordering of the lives of others, albeit hidden in plain view, within the same normal everyday politics.

The camps, Agamben argues, whether the Spanish created ‘*campos de concentraciones*’ in Cuba for suppressing the uprising of the people or the British ‘*concentration camps*’ for encamping the Boers during the Boer wars, ‘were born out of a state of exception and martial law.’<sup>31</sup> From this perspective, Agamben theorises the camp as *the space that opens up when the state of exception becomes the rule*’ (emphasis in the original).<sup>32</sup> The *state of exception* is a central theoretical paradigm on which Agamben develops several conceptual maps for theorising politics and the camp<sup>33</sup>; it is a central organising idea in Agamben’s theorising of the camp.

Agamben posits three other ways of looking at the camp: as ‘biopolitical space’; as a ‘paradigm of political space’; and as ‘a marker of the political space of modernity.’<sup>34</sup> These three lenses of looking at the camp converge at the site where

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<sup>30</sup> Agamben (2000), *supra* note 18 at 37.

<sup>31</sup> *Ibid* at 37.

<sup>32</sup> *Ibid* at 38.

<sup>33</sup> On Agamben’s general theory of the state of exception, see, Giorgio Agamben, *The State of Exception* (Chicago: University of Chicago Press, 2005).

<sup>34</sup> Agamben (2000), *supra*, note 18 at 40 – 41.

power and politics intersect. Thus, the camp as biopolitical space, for example, is ‘a place in which power confronts nothing other than pure biological life without any mediation (emphasis in original).’ In other words, the camp as biopolitical space is a place where power is exercised over its inhabitants without fear of resistance or other forms of intervention.

As a biopolitical space, the camp is a product of biopolitics, and biopolitics is about how power penetrates the body and lives of the subjects of the state<sup>35</sup> or how power controls the body – how the human being is subjected to power. When the human being is subjected to power, he or she is denuded of power and is at the mercy of those wielding power over him or her. They may protest, as refugees sometimes do in the camps when abuses of their rights and freedoms reach intolerable levels, but that is just about it because they cannot alter the dynamics and asymmetries of power relations in the camp environment. Indeed, as Verdirame and Harrell-Bond demonstrate, protests in refugee camps are often met with harsh reprisals.<sup>36</sup>

Similarly, the camp as a marker of political space of modernity reminds Agamben’s readers that the camp is not simply a historical state of exception tied to Nazi concentration camps for Jews and Gypsies declared undesirable or Spanish *campos de concentraciones* for Cubans or British *concentration camps* for Boers with whom they were competing for the conquest of African peoples and their lands or the British *concentration camps* for Kenyans during the *Mau Mau* rebellion against

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<sup>35</sup> Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazan (Stanford, California: Stanford University Press, 1998) at 10.

<sup>36</sup> *Rights in Exile*, *supra*, note 14 at 193 – 194.



British rule.<sup>37</sup> The camp is, and continues to be, recreated as a space of exception today, where other human beings are made to live the bare minimum of their lives. It does not matter where this state of exception is created but it is not merely a piece of territory in some remote part of an African State hosting refugees. It could take the form of the fenced spaces at some border town or some glamorous and neutral-looking hotel adjacent an international airport in the western countries, where people whose applications for refugee status have been rejected and are being returned, against their will, to their countries of origin.<sup>38</sup>

The camp, whether conceptualised as a biopolitical space, or a paradigm of political space or a marker of the political space of modernity, remains a state of exception where the rule of law is suspended<sup>39</sup> or as a state of exception, is ‘placed outside the normal juridical order’<sup>40</sup> and becomes permanent or normal. Yet, the camp manifests the paradoxical status of exception because it at once excludes and includes the rule of law, i.e., the camp is a space in which ‘the rule of law is completely suspended’ and yet at the same time the camp is the creation of the rule of law, precisely because the sovereign is assumed to exercise powers defined by law, powers that allow him or her to declare that a state of exception exist that calls for drastic measures.

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<sup>37</sup> See, e.g., Caroline Elkins, *Imperial Reckoning: The Untold Story of Britain’s Gulag I Kenya* (New York: Henry Holt & Co/Macmillan Publishers, 2005); David Anderson, *History of the Hanged: Britain’s Dirty War in Kenya and the End of Empire* (London: Orion Publishing Group, 2005).

<sup>38</sup> Agamben (2000), *supra* note 18 at 41 – 42.

<sup>39</sup> *Ibid* at 38.

<sup>40</sup> *Ibid.*, at 39.

In this context, the camp is a ‘political-juridical structure’ within which ‘everything is truly possible in them.’<sup>41</sup> The paradoxes become more complicated when one considers the role of IOs such as the UNHCR in creating, sustaining, and perpetuating the state of exception of the refugee camp, albeit behind the scenes. I will return to this aspect in Chapter 2 when discussing, among other themes, the processes that produce refugee encampment.

The ecological or environmental dimensions of the camp, however, has received scanty attention from Agamben’s overall theoretical paradigm of the camp, whose focus is on the politics and power dynamics and their consequences for the inhabitants of the camp, the citizens, and modern politics in general. Yet, a theory of the camp that does not integrate the injurious consequences of the camp on the environment or that environmental aspects implies that the state of exception on which it is premised is also underdeveloped and underutilised.

The theoretical insights afforded by Agamben’s theory of the camp are relevant to my project in, at least, two aspects, despite this pitfall and other criticism of his theorisation of the camp.<sup>42</sup> First, the paradox of the camp as a state of exception where the rule of law is suspended and yet the state of exception is created by the exercise of power defined by law raises fundamental questions on how to hold accountable the various actors in refugee encampment for the consequences of their decisions and exercise of political power. Some of the refugee camps in the global south, and especially in Africa, aptly capture this paradox as the Kakuma refugee camp in Kenya, exemplifies.

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<sup>41</sup> Ibid.

<sup>42</sup> See, e.g., Patricia Owens, “Reclaiming ‘Bare Life’?: Against Agamben on Refugees” (2009) 23:4 *International Relations* 567; Jonathan Hyslop, “The Invention of the Concentration Camp”, *supra* note 24 at 263 – 264.

In Kakuma refugee, Verdirame shows that although in ‘theory Kenyan law applies to Kakuma camp,’ this in ‘practice ...seldom happens.’<sup>43</sup> Moreover, the refugee population in the camp, ‘although living on the territory of Kenya, is administered by humanitarian organisations, independent of the government, outside its judicial system, with no checks on power and, in effect, without legal remedies against abuses.’<sup>44</sup> Thus, Kakuma refugee camp, purportedly created on the basis of law, is devoid of the basic tenet of law. If we proceed on the premise that those who have the power to create the state of exception and sustain it bear responsibility for what happens in the camps and must be held accountable, which actor amongst those involved in Kakuma refugee camp should bear the fully responsibility for what happens in the camps and the surrounding environment? I surmise, it has to be the actor who authors the framework decisions the produce refugee encampment. I will return to this aspect in Chapters 3 and 5.

Second, seeing the camp as a ‘political-juridical structure’ rather than merely as humanitarian spaces where well-meaning individuals and organisations claim to protect and save the lives of camp inhabitants allows one to raise questions about role of law, power, authority and accountability of those in charge of encampment of refugees.

### **1.3.1.3 The Refugee Camp versus the Refugee Settlement: A Question of Semantics?**

Another concept used in the conversations about refugee protection is the ‘refugee settlement.’ This concept has never been adequately theorised, and it is sometimes used interchangeably with that of the camp. From my earlier research work on refugee rights in Uganda, it is evident that the UNHCR and government officials,

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<sup>43</sup> Guglielmo Verdirame, “Human Rights and Refugees: The Case of Kenya” (1999) 12:1 *Journal of Refugee Studies* 54 at 62.

<sup>44</sup> *Ibid* at 64.

including some non-governmental organisations, often claim that there is a world of difference between refugee camps and refugee settlements.<sup>45</sup> They assert that refugee settlements are better spaces than camps because refugees in settlements are given land and produce their own food unlike camps where refugees depend entirely on external aid. Moreover, there is some level of freedom for refugees in settlements – they can leave the settlements and engage in trade with the local community. Uganda, my country, is often cited as the classic example where there are settlements and not camps.

My thesis, however, is that the difference between camps and settlements is merely semantical because in practice refugees in both spaces share one common aspect or characteristic: they are controlled in concentrated numbers in a relatively small location. From research conducted in Uganda between 1997 – 2005, it was

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<sup>45</sup> Whenever the Refugee Law Project (RLP) released a working paper, such as Working Paper No. 4, on how refugee settlement restricted freedom of movement for refugees (2002), or Working Paper No. 7, on how encampment places constraints on refugees' economic freedoms (2002), both the UNHCR and Government of Uganda, reacted by comparing Uganda's refugee settlements to Kenya's refugee camps. I was 'summoned' by the then UNHCR Representative in Uganda when we released Working Paper No. 4 on freedom of movement and choice of residence for refugees. The Rep expressed his displeasure with our failure to see the benefits of the settlement policy in Uganda, such as the ease of organising repatriation and the costs involved in providing humanitarian aid. He argued that unlike Kenya's refugee camps, Uganda's refugee settlements are not camps. Refugees are free to move in and outside the settlements and are given land and can grow their own food, etc. Ugandan government officials responsible for refugee affairs reacted in a similar way. In my meetings with a former government official at the rank of Commissioner for Refugees, he was angry that we at the RLP failed to see the difference between Uganda's refugee settlements and refugee camps, such as those in Kenya, where refugees are not given land to grow their own food. In practice, however, none of the refugees in Uganda's romanticised settlement system ever achieved self-sufficiency in food or otherwise and continued to depend of international food handouts because the 'land allocated, '0.03 hectares per person, was insufficient and the quality of land extremely uneven', *Rights in Exile supra* note 14 at 37.

demonstrated that refugees in Uganda’s refugee settlements are not free to move when they deem it necessary.<sup>46</sup>

There are several conditions, often arbitrary, that refugees must meet before they can get permission to leave these Ugandan settlements. So, the apparent freedom of movement for refugees in Uganda’s much touted refugee settlements, must be understood in context. From the research in Uganda, two reasons account for this apparent freedom of movement. First, institutional dysfunctions, i.e., inability of relevant agencies to enforce both the rules and policies on which refugees were encamped in settlements. A police survey we conducted in Kampala in 1998 demonstrated how police officers were not knowledgeable of the existence of the now repealed Control of Alien Refugees Act, which imposed restrictions and punishment for refugees. A second reason is the impact of activist researchers, and especially the phenomenal research and advocacy work of the late Barbara Harrell-Bond, that exposed the refugee settlements in Uganda for what they real are: controlled spaces in which the rights and freedoms of refugees were often abused without fear because refugees had no access to remedies.<sup>47</sup> Generally, refugees in Uganda’s romanticised refugee settlements, as refugees in Kenya’s Kakuma and Dadaab refugee camps, have no say in how to live their lives and are often subjected to similar abuses of the human rights.<sup>48</sup>

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<sup>46</sup> See, e.g., *Rights in Exile*, *supra* note 14 at 181 – 182; Lucy Hovil, Tania Kaiser, and Zachary Lomo, “We are all Stranded Here Together”: The Local Settlement System, Freedom of Movement, and Livelihood Opportunities in Arua and Moyo Districts” (2005) Refugee Law Working Paper Series, Working Paper No. 14; Lomo, *supra* note 14, at 37 – 57.

<sup>47</sup> *Rights in Exile*, *supra*, note 14 at 156 – 164; 186 -191.

<sup>48</sup> See, e.g., Kaiser, Hovil, and Lomo, *supra* note 46; Lucy Hovil, “Free to Stay, Free to Go? Movement, Seclusion, and Integration of Refugees in Moyo District” (2002) Refugee Law Project Working Paper No. 4.

Therefore, the refugee settlement, viewed critically and objectively, just like the camp, and in the words of Malkki, 'is a technology or devices of power.'<sup>49</sup> Or, to borrow from Agamben, a refugee settlement is a state of exception where the rule of law is suspended,<sup>50</sup> except that the plots of land (only about 0.03 hectares per person)<sup>51</sup> given refugees provide a perfect stalking horse for the absence of law and freedoms for refugees in the settlements. In addition, in a subtler sense, both camps and settlements symbolise the idea that refugees are a temporary problem whose solution lies in the provision of humanitarian aid vide a care and maintenance paradigm or mechanism in anticipation of repatriation to their countries of origin. Against this background, I use the terms 'refugee camps' and 'refugee settlements' as synonyms.

Furthermore, refugee camps, as used in this dissertation, are limited to those that are officially established or created with the involvement of the UNHCR, either directly or indirectly. Conclusions drawn throughout the dissertation are specific and limited to similarly situated camps.

### **1.3.2 Conceptualising Environmental (Harm) Damage**

A proper discussion of environmental degradation damage would require a robust conceptualisations of what constitutes the environment, and this would in turn require an engagement with the literature in environmental sciences, an interdisciplinary field of study and research which concentrates on the influence that humans wield on the environment and how resulting problems from such influence can be addressed or resolved. Engaging with environmental degradation to that level is beyond the modest goal and scope of my dissertation. Therefore, I

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<sup>49</sup> Malkki, *supra* note 20.

<sup>50</sup> Agamben, *Means without End*, *supra* note 18.

<sup>51</sup> On this see, Verdirame & Harrell-Bond, *supra* note 14 at 37.

focus here on conceptualisations of environmental degradation in the sense of harm to the environment and in the context of refugee encampment and the United Nations concerns about the damage to the environment.

In the context of refugee encampment, Jacobsen, for example, argues that what constitutes ‘environmental degradation is partly in the eyes of the beholder.’<sup>52</sup> She rationalises this assertion submitting that what local people and refugee perceive ‘as necessary or even sustainable use of natural resources may be seen by national governments and international agencies as threats to conservation of particular ecosystems.’<sup>53</sup>

Leach made similar observations in 1992 about the marked lack of consensus amongst actors of what constitutes environmental degradation. She discerned that perceptions of what constitutes environmental degradation, or an environmental problem differed radically between local people in Sierra Leone on the one hand and the national government and international agencies on the other. According to the local community, ‘conversion of tropical forest to agricultural use or replacement with secondary forest under a modified bush-fallow system would not represent environmental degradation’.<sup>54</sup> International actors, however, saw ‘the

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<sup>52</sup> Jacobsen, *supra* note 7 at 20.

<sup>53</sup> *Ibid.*

<sup>54</sup> Melissa Leach, *Dealing with Displacement: Refugee-Host Relations, Food and Forest Resources in Sierra Leonean Mende Communities During the Liberian Influx, 1990-91* (1992) Sussex, IDS Research Report No 22, cited in Richard Black, “Refugees and Environmental Change: Global Issues” (Report presented at an expert consultation entitled, ‘Policy issues on the environmental impact of displacement of populations during the emergency phase: Expert Consultation’, Brussels, 23 – 24 September 2015) at 4 [unpublished].

loss of virgin forest as ‘degradation’, contributing to a loss of biodiversity and a valued natural habitat.’<sup>55</sup>

Black does not explicitly conceptualise what constitutes harm to the environment but problematises notions of environmental degradation associated with the presence of refugees in a given area. He questions the ‘extent to which the presence of refugees in given region leads to permanent environmental change’<sup>56</sup> or a ‘set of short term changes which might disappear once refugees return to their country of origin.’<sup>57</sup> Indeed, Black uses the concept of ‘environmental degradation’ only when quoting or referring to what others have said. Instead, he prefers to talk about ‘environmental change’ instead of environmental degradation.

Outside the refugee studies milieu, the United Nations defines harm to the environment as the ‘deterioration in environmental quality from ambient concentration of pollutants and other activities and processes such as natural disasters.’<sup>58</sup> In this definition, the key elements in environmental harm are depreciation or reduction in the value or condition of the environment and the causes of or factors that contribute to this reduction or depreciation. One of the causes in the reduction of the quality of the environment is ‘ambient concentration of pollutants.’ Ambient concentration of pollutants refers to outdoor pollution, which includes water and land pollution, and air pollution. The sources of ambient air pollution are natural and human activities. According to the World Health Organisations (WHO), human activities far exceed natural sources of air

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<sup>55</sup> Ibid at 4.

<sup>56</sup> Ibid at 5.

<sup>57</sup> Ibid.

<sup>58</sup> United Nations, *Glossary of Environmental Statistics: Studies in Methods, Series F. No. 67* (New York, United Nations, 1996) at 28.



pollution.<sup>59</sup> Some of the human activities that depreciate the quality of the environment, include fuel combustion from motor vehicles (cars and heavy duty vehicles) and industrial facilities, such as manufacturing factories, mines, oil extraction and oil refineries.<sup>60</sup> In addition to ambient concentration of pollutants, other activities and processes may also affect the quality of the environment. These ‘other activities and processes’ may include, for example, activities related to the creation of refugee camps where a large concentration of people are housed in a small location, which may result in depletion of resources within and outside the camp, such as depletion of forests and ground water and pollution of water sources and soil quality; logging activities where vast forests are destroyed in order to harvest wood for commercial purposes or large agricultural activities where vast areas, such as rain forests, are cleared to make way for mechanised, large-scale farming.

Therefore, harm to the environment does not simply happen most of the time as a result of natural forces, but largely the outcome of human activities. It is the result of actions and processes, which presumably involve decision-making, power, and interests. These aspects of the UN definition are applicable to environmental harm resulting from refugee encampment and refugee influxes in general.

Indeed, El-Haggar provides a conceptualisation of what constitutes environmental harm that emphasise human activity:

Environmental degradation is the exhaustion of the world’s natural resources: land, air, soil, etc. It occurs due to crimes committed by humans against nature. Individuals are disposing wastes that pollute the environment at rates exceeding the waste’s rate of decomposition or dissipation and are overusing the renewable sources such as agricultural

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<sup>59</sup> WHO, ‘Ambient air pollution: Pollutants’, online <<https://www.who.int/airpollution/ambient/pollutants/en/>>.

<sup>60</sup> Ibid.

soils, forest trees, ocean fisheries, etc., at rates exceeding their natural abilities to renew themselves.’<sup>61</sup>

El-Haggar’s conceptualisation of environmental harm is relevant to my dissertation because he makes it explicit that environmental harm does not just happen; it involves deliberate decisions, calculated or careless of human beings in their everyday life activities. Indeed, environmental harm in the context of refugee encampment does not just happen; it is the consequence of some deliberate decision-making processes that produce refugee camps which house thousands of refugees in a particular areas, often with limited supply of fuel and other basic necessities for supporting human life. In such circumstances, refugees are left with limited options but to invade existing natural resources within the surroundings of the camps in which they are housed.

Thus, environmental harm as understood in this study is the outcome of human activities, such as the encampment of refugees. Or in the context of sustainable development, environmental harm is the process of utilisation of land and other natural resources that does not meet the threshold for sustainability articulated in the United Nations Brundtland Commission Report.<sup>62</sup> The Brundtland Commission Report defined sustainable development as ‘the development that meets the needs of the present without compromising the ability of future generations to meet their own.’<sup>63</sup> In other words, sustainable development is a:

‘process of change in which the exploitation of resources, the direction of investments, the orientation of technological

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<sup>61</sup> Salah M. El-Haggar, *Sustainable Industrial Design and Waste Management: Cradle-for-Cradle Sustainable Development* (Elsevier Academic Press, 2007) 135.

<sup>62</sup> United Nations, *Report of the World Commission on Environment and Development: Our Common Future* (1987), online:<<https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>>.

<sup>63</sup> Ibid. at Part I chapter 2 para. 1.

development; and institutional changed are all in harmony and enhance both current and future potential to meet human needs and aspirations.’<sup>64</sup>

The creation of refugee camps for huge populations of refugees within a given locality, the lumbering activities of individuals and corporations, national or multinational, the mining activities of multinational corporations, the disposal of chemical wastes, and the pollution of waterbodies resulting from both prohibited or lawful activities of multinational corporations and governments, etc., are examples of uses of land and natural resources that fails to meet the minimum threshold of sustainability that the Brundtland Commission Report suggested. The injurious consequences of the use of land and natural resources that does not integrate or consider other variables, such as the health, education, clean air, water, protection of natural beauty or grazing lands, and disadvantaged groups, often manifest themselves in a variety of ways, including for example, deforestation, accelerated soil erosion, loss of germplasm, depletion of certain natural resources, droughts and increasing desertification, and the depletion of the ozone layer.

That refugee camps, such as the Dadaab refugee camp complex in Kenya, are harmful to the environment is evident from its failure, right from the outset, not only to integrate the immediate needs of refugees in emergency situations with their future aspirations, but also the needs and aspirations of future generations of refugees and local communities on whose area refugee encampment happens.<sup>65</sup> Indeed, the UNHCR and the GoK both acknowledge that the Dadaab refugee camp complex has had serious negative impact on the environment. The UNHCR acknowledges that from ‘an environmental point of view’ the Dadaab refugee camp complex ‘is located in an ecologically fragile area’ and given that ‘it has been in

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<sup>64</sup> Ibid. at para . 15.

<sup>65</sup> Some proponents of refugee camps will argue that there is no scientific evidence to demonstrate that refugee camps are injurious to the environment. On this aspect, see, e.g., Richard Black, *supra* note 54.

existence over a protracted period of time’ and ‘coupled with the high population density, has resulted in significant environmental degradation.’<sup>66</sup> Even Uganda’s much lauded refugee camps or settlements constitute unsustainable use of land and cause damage to or exacerbate existing environmental degradation. In 2019, sixteen NGOs called for ‘urgent action to prevent and mitigate the impact of environmental degradation around refugee settlements in Uganda.’<sup>67</sup>

In the literature, the resulting harm to the environment from refugee camps appears to be construed in the sense of ‘ecological disaster’,<sup>68</sup> ‘land degradation,’ ‘deforestation, soil erosion, water contamination. In this dissertation I theorise these as injurious consequences arising out of the activities of the UNHCR not prohibited by international law or UNHCR’s lawful activities, and by lawful activities here I mean the activities under its mandate to provide international protection to refugees.

### **1.3.3 Conceptualising Accountability in International Law**

#### **1.3.3.1 Some Context**

I believe it is imperative to start with some context before providing a conceptualisation of accountability in international law. I use the term ‘accountability,’ as I stated in the introductory part of this chapter, to mean answerability or responsibility or liability for wrongful acts or injurious consequences of acts that international law does not prohibit and making good for loss or injury suffered as a result. There is, however, no legal definition for, or

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<sup>66</sup> UNHCR, *supra* note 9 at 3.

<sup>67</sup> See, e.g., Finn Church Aid, “Uganda: More Support needed to fight environmental degradation around refugee settlements’ (2019), online < <https://www.kirkonulkomaaanapu.fi/en/latest-news/news/uganda-more-support-needed-to-fight-environmental-degradation-around-refugee-settlements/> >.

<sup>68</sup> Gachurizi, *supra* note 7 at 24.

conceptualisation of, accountability in international law.<sup>69</sup> International lawyers only recently began conceptualising accountability as a legal concept of international law;<sup>70</sup> but they quickly ran into some difficulties. In the first place, how should the term accountability be construed when addressing questions relating to IOs abusing their power and authority? Should accountability be construed narrowly or broadly? Should it be used as a legal term at all or simply a term of art?<sup>71</sup> In the second place, if accountability is to be construed as a legal term, what must be its content and scope, i.e., what must be its indicators or elements and how different should these be from the standard elements comprising the traditional terminology of the doctrine of responsibility in international law? These questions elicited different answers from different scholars and organisations.

The International Law Association's (ILA) Committee on the Accountability of International Organisations (CAIO),<sup>72</sup> for example, concluded in its first report on the subject that a purely legal conceptualisation of accountability is not feasible because, allegedly, of 'the open-endedness flowing almost naturally from the notion of accountability in general.'<sup>73</sup> But a similar argument could be made with respect

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<sup>69</sup> See, e.g., Gerhard Hafner, "Accountability of International Organisation – A Critical View", in Ronald St. John McDonald & Douglas M. Johnston, *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (The Hague: Martinus Nijhoff Publishers, 2005) 585 at 600.

<sup>70</sup> See, e.g., ILA, Committee on Accountability of International Organisations, "First Report" (Taipei Conference, 1998); Hafner, note 69; Bimal N. Patel, "The Accountability of International Organisations: A Case Study of the Organisation for the Prohibition of Chemical Weapons" (2000) 13: 3 *Leiden Journal of International Law* 571; Deirdre Curtin, & Andre Nollkaemper, "Conceptualizing Accountability in International and European Law" (2005) 36 *Netherlands Yearbook of International Law* 3

<sup>71</sup> See, e.g., Curtin and Nollkaemper, *supra* note 70.

<sup>72</sup> The Committee was dissolved in May 2004. On this aspect, See, ILA, 'ILA Committee', online <<http://www.ila-hq.org/index.php/committees>>.

<sup>73</sup> ILA, *supra* note 70, at 586.

to “responsibility” because naturally it means different things to different people in different situations and contexts.

The United Nations’ International Law Commission (ILC), by contrast, makes no reference, explicit or implicit, to the concept of accountability as a foregrounding concept to organise and articulate the rules and principles governing how States or IOs should be held to account for their wrongful acts or the injurious consequences arising from activities not prohibited by international law. In other words, the ILC’s draft articles and commentary on the responsibility of States,<sup>74</sup> international liability for consequences of injurious acts not prohibited by international law,<sup>75</sup> and the responsibility of IOs for their internationally wrongful acts,<sup>76</sup> do not explicitly or explicit use the term accountability.

International law scholars have also reflected on the concept of “accountability,” but with varying views and conclusions. Hafner, for example, has observed that part of the problem in conceptually framing the content of “accountability” as a legal term of international law lies in the difficulty in identifying the elements that must make up the term.<sup>77</sup> He concludes that ‘despite

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<sup>74</sup> See, *Report of the International Law Commission on Its Fifty-Third Session* (UN Doc A/56/10) in *Yearbook of the International Law Commission 2001*, vol 2, part 2 (New York: UN, 2007) at 20 – 143 (UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2)).

<sup>75</sup> *Ibid* at 144 – 170.

<sup>76</sup> See, e.g., “Report of the International Law Commission”, UNGAOR, 64<sup>th</sup> Sess, Supp No 10 (2009), UN Doc A/64/10; for a critique of the ILC’s approach and draft articles on the responsibility of international organisations, see, e.g., E. Paasivirta, & P.J. Kuijper, “One Size Fit All? The European Community and the Responsibility of International Organizations” (2006) 36 *Netherlands Yearbook of International Law* 169; Jose E. Alvarez, “International Organisations’ Accountability or Responsibility?” (2006), *35<sup>th</sup> Annual Conference Proceedings of the Canadian Council on International Law, Ottawa, October 26 – 28, 2006: Responsibility of Individuals, States, and Organisations* at 121 – 134.

<sup>77</sup> See, *supra* note 69, at 600.

its wider use, the term “accountability” escapes *prima facie* any clear definition.<sup>78</sup> Writing in a different context, Brunee agrees and argues that while international lawyers are frequently invoking the concept of accountability, the term ‘has not acquired a clearly defined legal meaning.’<sup>79</sup> And Wellens observes that ‘[g]iven the overarching character of accountability as a concept, an exclusively legal approach to the problems and issues’ relating to the establishment of a comprehensive accountability regime for international organisations is not feasible.<sup>80</sup> Curtin and Nollkaemper, claim that ‘[a]ccountability is a broad term that reflects a range of understandings rather than a single paradigm,’<sup>81</sup> which until, ‘recently...did not figure as a term of art outside the financial contexts of accounting and audit.’<sup>82</sup> Dekker, by contrast, has observed that ‘[i]n international legal discourse the term ‘accountability’ still seems to be most frequently used as a synonym for the traditional international legal concepts of responsibility and/or liability.’<sup>83</sup>

Hafner, in his detailed analysis of the accountability of international

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<sup>78</sup> Ibid at 586 [Suggesting that ‘[o]ne reason’ for not having a clear definition of accountability is that it ‘cannot be translated in other languages’].

<sup>79</sup> Jutta Brunnee, “International Legal Accountability through the Lens of the Law of State Responsibility”, 36 *Netherlands Yearbook of International Law* (2005) 21 at 22.

<sup>80</sup> Karen Wellens, *Remedies Against International Organisations* (Cambridge, United Kingdom & New York: Cambridge University Press, 2002) at 7 – 8.

<sup>81</sup> Deirdre Curtin & Andre Nollkaemper, *supra* note 70 at 3 – 4; [I would argue that the idea that accountability ‘reflects a range of understandings rather than a single paradigm,’ is applicable to most words. Words have various shades of meaning. “Responsibility,” for example has also a range of understandings and does not represent ‘a single paradigm.’]

<sup>82</sup> Ibid at 4.

<sup>83</sup> Ige F. Dekker, ‘Accountability of International Organisations: An Evolving Legal Concept?’, in Jan Wouters, et al (eds.), *Accountability for Human Rights Violations by International Organisations* (Antwerp, Belgium & Portland, Oregon: Intersentia, 2010), at 21.



organisations, however, demonstrates that accountability and responsibility can be conceptualised in terms of the other given the semantic similarities in their definitions. He argues that some elements of accountability, such as the duty of international organisations to comply with applicable law and to be held accountable for violations of this law are traditional concepts of international law. In this respect, he concludes, ‘no separate label such as “accountability” would be required.’<sup>84</sup> I argue that a ‘separate label’ such as ‘accountability,’ that integrates the discrete aspects of the obligations of actors on the international plane for their wrongful acts or for the injurious consequences of their acts that international law does not prohibit under one concept is needed. I believe that a single concept, such as accountability, will simplify or reduce, for want of a better term, what I would describe as the *technicalisation* of the law of international obligations. Moreover, and as I shall demonstrate in subsection 1.3.3.2 of this chapter, the ultimate goal of the existing legal routes, the regime of responsibility and liability, is holding actors who breach their obligations under international law answerable or accountable.

### 1.3.3.2 Framing Accountability as a Legal Term

How does one conceptualise accountability as a term of international law, given the divergence of views in the relevant literature? I attempted to approach it from the canons of statutory and treaty interpretation; I surmised that I could identify one canon of statutory or treaty interpretation, such as the textualist approach, and draw from its principles a template for conceptualising accountability. I was immediately confronted with yet another challenge: why draw from one or this particular canon of treaty interpretation when the Vienna Convention on the Law of Treaties (VCLT) gives more than one principle of interpretation?<sup>85</sup> Even the

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<sup>84</sup> Hafner *supra* note 69 at 601.

<sup>85</sup> See, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 at 340 [Articles 31 – 33].



textualist principle – or ‘ordinary meaning of words’ – of treaty interpretation has its critics.<sup>86</sup> I abandoned this procedure or method and thought of using the dictionary meaning of the term accountability, but what is the difference? Still ordinary meaning of words, right? May be not, because the dictionary meaning requires me to simply flip open a dictionary and check for the term ‘accountability.’ This differs radically from construing the term ‘accountability’ as when used in a treaty. But Hathaway and Foster observe, ‘how does one choose among dictionaries, none of which has any particular legal standing?’<sup>87</sup>

Ultimately, I thought of two possible premises for addressing this challenge of conceptualising accountability as a legal term under international law. First, I thought about approaching the term accountability from the general rules and principles governing obligations, national or international, legal or moral. I surmised that relationships between actors often create rights and obligations which are either explicitly defined in ‘positive law,’<sup>88</sup> or moral rules.<sup>89</sup> From this perspective, certain wrongful conduct that breach obligations owed to other actors

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<sup>86</sup> See, e.g., Myres S. McDougal, Harold D. Lasswell, & James C. Miller, *The Interpretation of Agreements and World Order: Principles of Content and Procedure* (New Haven: Yale University Press, 1967); Myres S. McDougal, “The International Law Commission’s Draft Articles Upon Interpretation: Textualist Redivivus” (1967) 61 *American Journal of International Law* 992; Martin Ris, “Treaty Interpretation and the ICJ Recourse to Travaux Préparatoires: Towards A Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties” (1991) 14:1 *Boston College International and Comparative Law Review* 111 at 114 – 115; Francis C. Jacobs, “Varieties of Approaches to Treaty Interpretation: With Special Reference to Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference” (1969) 18:2 *The International & Comparative Law Quarterly* 318.

<sup>87</sup> James Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd (Cambridge: Cambridge University Press, 2014) at 8.

<sup>88</sup> I use this expression not in the sense of legal positivism, but as rules and principles that have been agreed upon, either as treaties or simply resolutions and arrangements that do not require ratification.

<sup>89</sup> See, e.g. Conrad D. Johnson, “Moral and Legal Obligation” (1975) 72:12 *The Journal of Philosophy* 315.

is either explicitly proscribed by law or moral rules and principles and entails consequences to the actor who breaches an obligation.

Yet, certain activities or conduct may not be unlawful or 'wrongful' *per se*, but nonetheless may produce injurious consequences on people and the environment, for example. The injurious consequences of refugee encampment on the environment and condition of refugees in camps that UNHCR helps create, fund, and administer to provide international protection to refugees, is a good example of this aspect. The activities of the World Bank and the International Monetary Fund (IMF) and their devastating impact on the economic condition and lives of the peoples of the Third World, is another example. Do these entities owe any obligations to the ordinary people that their activities impact in various ways?

Different legal systems have developed legal rules and principles for defining and governing the obligations of various actors and the consequences that flow from a breach any of the obligations. Similarly, international law has also developed a regime of obligations for actors on the international plane, a breach of which entail consequences. I found out, upon scrutinising the regime of obligations under international, especially under the traditional regime of state responsibility as understood, that the underlying idea is that of accountability.

The second premise I considered was the principles of justice and the justice system. I surmised that the goal of a justice system, whether criminal or not, national or international, is not only to vindicate wrongs but also to hold the perpetrators of the injustice to account for their acts or omissions. If that is correct, then it is feasible to draw from the principles of justice certain intuitions for conceptualising accountability as a legal term of international law. Upon reflecting on these two possible approaches, however, I realised that my main research question does not necessarily lead me to interrogate issues of justice *per se*, vis-à-vis UNHCR encampment of refugees, but rather question of *how* UNHCR can be held to account, regardless of whether justice might be one of the outcomes.

Ultimately, I focused on the regime of obligation under international law, not principles of justice, to conceptualise accountability as term of international law. I theorise that accountability is *the underlying theme* of the existing international legal routes or regimes for holding states and other actors answerable, under international law, for their wrongful acts or for the injurious consequences arising from their acts that are not prohibited by international law. If this is correct, what implications flow from it? In the first place, it implies that the overarching objective of the rules and principles of international law governing the conduct of states and other actors is the issue of holding them to account for their acts or omissions. Thus, whether a state or an IO is obligated to pay compensation or reparations for violation of an international obligation, the overarching goal is to hold the state or IO accountable for its acts or omissions.

My thesis that accountability is the underlying theme in the existing regimes for holding subjects of international law accountable is not farfetched. Quentin-Baxter, the then ILC Special Rapporteur on the topic of international liability for the injurious consequences arising out of activities not prohibited by international law, made a fleeting reference to '[t]he theme of accountability comes into prominence precisely because there is a need for a new and imaginative effort to reconcile the widest possible freedom of action with respect of the rights of others.'<sup>90</sup> The context in which he made this statement relates to 'whether lawyers concerned with the problems of liability have to detach themselves from the mainstream of international endeavour in order to apportion responsibilities for human failures.'<sup>91</sup>

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<sup>90</sup> See, "Preliminary report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur" (UN Doc A/CN.4/334 & Add. 1 and 2) in *Yearbook of the International Law Commission 1980*, vol 2, part 1 (New York: UN, 1982) at 250 para 9 (UN Doc A/CN/SER.A/1980/Add.1 (Part 1)).

<sup>91</sup> *Ibid.*

Quentin-Baxter and subsequent Special Rapporteurs never further developed the theme of accountability on the topic and sceptics might argue that this is a strawman's attempt at buttressing the case for adopting accountability as a legal terminology of international law. My response is that while accountability has not been adopted, explicitly, as the concept for framing the rules and principles governing how to hold actors on the international plane answerable for their acts and omission that cause harm or injury to people, property, and the environment, it is the underlying theme of the existing of regimes that seek, in Quentin-Baxter's words, 'to apportion responsibilities for human failures.'<sup>92</sup>

Therefore, if accountability is the underlying goal of existing legal routes for holding states and IOs answerable under international law it is logical, I argue, to *foreground* it as the most accurate label for integrating under once concept the rules and principles of responsibility for internationally wrongful acts and liability for injurious consequences arising out of acts that international law does not prohibit. Thus, understood from the perspective explained here, accountability becomes a 'separate,' but legal 'label,'<sup>93</sup> and takes a legal character as a term of international law.

I believe that the misgivings about conceptualising accountability as a legal term simply because of its alleged broadness or 'overarching character' ignore one fundamental fact: that certain key legal terms in international law that international lawyers take for granted today, such as the term 'responsibility,' were not always legal terms or words of international law. Indeed, one scholar suggests that the term 'responsibility' became a legal term of international law only at the end of the 18<sup>th</sup>

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<sup>92</sup> Ibid.

<sup>93</sup> Hafner, *supra* note 69, at 600.

century.<sup>94</sup> The term ‘responsibility,’ for example, may mean specific things under international law, but it has also various shades of meaning in other contexts. For the ‘reasonable man on the street’<sup>95</sup> or the businessman exporting merchandise across borders or other professions,<sup>96</sup> for example, the term ‘responsibility’ may not mean the same thing as the accountability of a state for its internationally wrongful acts as the international lawyer understands it.

And crucially, from a TWAIL perspective,<sup>97</sup> the term ‘accountability’ rather than ‘responsibility’, connects an actor to its wrongful actions or the injurious consequences of its activities that international law does not prohibit; it connotes the existence of an injustice and and calls for vindication, restoration, and answering the requirements of equity and respect, especially in the context of harm or damage that third parties suffer as a result of the activities of a state, an IO, or an individual acting on the international plane.

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<sup>94</sup> See, e.g., G. Viney, ‘Responsabilite’ (1990) 35 *Arch Phil de droit* 227, as cited in Martti Koskenniemi, “Doctrines of State Responsibility”, in James Crawford, Alain Pellet, Simon Olleson, and Kate Parlett, eds, *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), 45 at 47 footnote 12.

<sup>95</sup> See, e.g., Simon Burall and Caroline Neligan, ‘The Accountability of International Organisations’, GPPi Research Paper Series No.2.

<sup>96</sup> See, e.g., Thomas H. Bivin, ‘Responsibility and Accountability’, in Kathy Fitzpatrick & Carolyn Bronstein, *Ethics in Public Relations: Responsible Advocacy* (Thousand Oaks, California; London, United Kingdom; and New Delhi, India: Sage Publications 2006) at 19 – 38.

<sup>97</sup> The members of the Third World Approaches to International Law (TWAIL) school of thought are committed to a world system that guarantees fairness and equity for all peoples regardless of their geographical location and other distinguishing characteristics and therefore are avowedly committed to constructing and presenting an international law that promotes these objectives.

### 1.3.3.3 The Content and Scope of Accountability Under International Law

I propose that the content and scope of a regime of accountability under international law should comprise general principles of obligations in addition to the existing rules and principles of international law embodied in two possible regimes: the regime that the International Law Commission (ILC) created, and specialised regimes, or self-contained regimes, with their own *lex specialis* on the accountability of states and IOs.

The existing ILC regime comprise three sources of rules and principles governing the accountability of states and IOs for internationally wrongful acts and for injurious consequences arising out of acts international law does not prohibit. I discuss these in Chapter 4. In addition to the ILC regime, there are the self-contained regimes, with their own *lex specialis*, such as the World Trade Organisation (WTO), the European Union, African Union (AU), and the Organisation of American States (OAS), each with its own dispute settlement mechanisms.

I use the expression ‘rules and principles of international law,’ instead of the oft-used preference of the dichotomous concepts, ‘primary rules’ and ‘secondary rules’ of international law, in most works on the law governing the accountability of actors under international law.<sup>98</sup> I believe that the characterisation of the rules and principles governing the regime of accountability of States and IOs as ‘secondary rules’ is misleading.

I argue with Linderfalk that the “primary rule” and “secondary rule” dichotomy is flawed because it implies that the body of rules and principles comprising the law governing the accountability of states and IOs as a set of secondary rules is different, or of lesser legal character, and I would add, from the

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<sup>98</sup> See, e.g., Crawford, et al, eds, *The Law of International Responsibility*, *supra* note 94.

other rules of international law, so-called primary rules of law.<sup>99</sup> In addition, I share Bodansky and Crook’s view that explaining the ‘character of the [draft] articles through the distinction between “secondary” and “primary” rules’ has not only ‘proved elusive and ...unnecessary’ but also ‘arbitrary.’<sup>100</sup>

#### **1.4 Accountability of IOs in the Relevant Scholarly Conversations**

I now turn to reviewing the question of the accountability of IOs in the relevant literature. The critical question is how can IOs be held accountable under international law, for either internationally wrongful acts or the injurious consequences arising out of their activities international law does not prohibit. I focus in this section on conversations in the literature that attempt to answer this fundamental question in relation to UNHCR.

There are few international law based studies on the accountability of UNHCR and subsidiary organs of IOs in general, save Reinisch’s edited volume on challenging the acts of international organisations in which there is a chapter devoted to challenging acts of other United Nations organs, including subsidiary organs, in national courts.<sup>101</sup> I return to Reinisch shortly, but hasten to point out that Wilde is possibly the one pioneering scholar to attempt to address the question of the accountability of UNHCR under international law, albeit focusing on

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<sup>99</sup> Ulf Linderfalk, “State Responsibility and the Primary-Secondary Rule Terminology – The Role of Language for an Understanding of the International Legal System” (2009) 78 *Nordic Journal of International Law* 53 at 54 – 55.

<sup>100</sup> Daniel Bodansky and John R. Crook, “Symposium: The ILC’s State Responsibility Articles, Introduction and Overview” (2002) 96:4 *The American Journal of International Law* 773 – 791.

<sup>101</sup> August Reinisch, ed, *Challenging Acts of International Organizations Before National Courts* (New York: Oxford University Press, 2010).

international human rights law.<sup>102</sup> Writing in 1999, he argues that the UNHCR should be bound by international human rights law when it is, in *de facto* control of refugee camps because ‘it would be inconceivable that UNHCR, as a creature set up by international law to promote international human rights law, was not bound by international human rights law itself.’<sup>103</sup>

In addition, Wilde makes a strong case not only for the human rights obligations of the UNHCR arising from its activities in refugee camps, but also for the compatibility of human rights law with UNHCR’s mandate and for the centrality of human rights in UNHCR’s obligation to promote durable solutions.<sup>104</sup> The key insights that I drew from Wilde’s article are first, how to inscribe the obligations of UNHCR from a human rights perspective, which I discuss in Chapter 5. Second, Wilde identifies UNHCR’s *de facto control* of the activities in the refugee camps as a basis for its human rights obligations under international human rights law. My own research confirms Wilde’s observation and I theorise about it in Chapter 3 and 5. The exercise of power and control, as the *Nicaragua v. United States* case<sup>105</sup> demonstrate, is critical to allocation of responsibility for internationally wrongful conduct in international law.<sup>106</sup>

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<sup>102</sup> Ralph Wilde, “*Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of “Development” Refugee Camps Should be Subject to International Human Rights Law*” (1999) 1 *Yale Human Rights & Development L.J.* 107.

<sup>103</sup> *Ibid* at 116.

<sup>104</sup> *Ibid* at 118 – 119.

<sup>105</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, [1986] ICJ Rep 14.

<sup>106</sup> *Ibid* at 53 – 56 paras 113 – 117.



Other than these two insights, however, my study differs from Wilde in at least two important respects. In the first place, Wilde does not explicitly focus on the question of the accountability of the UNHCR either for its internationally wrongful acts or for the injurious consequences arising out of its decisions that produce refugee encampment in many refugee-hosting states in the global south. I focus on the accountability of UNHCR for the injurious consequences of its activities involving the refugee encampment, both in terms of the harm to the environment and the condition of refugees in the camps. Some thousands of human beings have been compelled to live in refugee camps for decades, such as those in Dadaab Refugee Camp Complex (DRCC) in Kenya, with no solution in sight, condemned to poverty and dependence on international handouts. I believe this spectacle can no longer be characterised as acts of charity or humanitarian work.

In addition, and crucially, Wilde reaches the same conclusion as other international lawyers: ‘the liability of UNHCR to comply with this law [human rights law] is more complex,’<sup>107</sup> and therefore recourse will have to be made to states, which, it is said, have the primary obligation in international law to protect human rights. My project departs from this approach to framing the accountability of IOs, which assumes that states are often the bad guys manipulating IOs for their own national interests. I submit, however, that IOs, as subject of international law, are capable of manipulating some states, especially those in the global south, to achieve their own institutional interests. In this context, I argue that IOs which are in possession of some scintilla of international personality and wield significant influence and power, should be held answerable for either their internationally wrongful conduct or the injurious consequences arising out of their activities that international law does not prohibit. The exception to this assertion, in the context international protection to refugees, is if the evidence indicates that the refugee-

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<sup>107</sup> See Wilde, *supra* note 102 at 121.

hosting states initiate and insist on refugee encampment and have effective control of the camp systems in their countries. But as I demonstrated in Chapters 3 and 5, effective control of the encampment system in most refugee-hosting states in the global south rests with UNHCR.

After Wilde's pioneering article on UNHCR's human rights obligations in refugee camps, some works with specific themes on the UNHCR and the accountability of IOs began to be published. Kinchin's 2013 paper on the UNHCR's accountability in the context of its status as a subsidiary organ of the United Nations (UN) is one recent work that explicitly focuses on the UNHCR's accountability. Kinchin argues that the accountability of the UNHCR should be examined through its relationship with the UN according to a type of accountability she described as *organisational accountability* instead of defining its accountability 'through preconceptions of what that concept *should* entail' (emphasis in original).<sup>108</sup> Taking a 'relationship approach,' she contends that the 'UNHCR's accountability involves identification of its relationships,' with the UN, 'and asking what accountability obligations arise from that relationship, based on a particular type of accountability.'<sup>109</sup> Thus, she focuses on the 'UNHCR's inter-institutional relationships within the UN and poses the question, "what accountability obligations arise when this relationship is considered through legal and organisational accountability?"'<sup>110</sup> Having reviewed the UNHCR's relationships with organs within the UN, the UN General Assembly (UNGA); the Economic and Social Council (ECOSOC); the UN Office of Internal Oversight Services (OIOS); the UN Security Management System (UNSMS); and the the Inter-

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<sup>108</sup> Niamh Kinchin, "UNHCR as a Subsidiary Organ of the UN: Plurality, Complexity and Accountability" (2013) IRPA Working Paper – GAL Series, 4/2013, at 3 [paper on file with author].

<sup>109</sup> Ibid at 10.

<sup>110</sup> Ibid.

Agency Standing Committee (IASC), she concludes that given this ‘complexity of the inter-institutional relationship between the UN and UNHCR,’ it is, to paraphrase her, ‘futile to draw bright lines around its nature.’ In this context of plurality, the UNHCR’s ‘accountability must be understood in relation to that context and not according to traditional notions that are an uneasy fit for the global space.’<sup>111</sup>

Kinchin’s approach to the UNHCR’s accountability radically differs from my study in, at least, two fundamental ways. In the first place, conceptually and theoretically, her concept of the accountability of the UNHCR is premised on the idea that there exists a ‘global space’ beyond the reach of international law, or in her words, ‘[b]eyond the traditional boundaries of sovereignty and international law,’<sup>112</sup> which dictates approaching the accountability of IOs through ‘the relationships of global decision-making.’<sup>113</sup> In contrast, I approach the accountability of the UNHCR, and that of all entities subject to international law in general, from the premise that there exists a system of international law, albeit not perfect, that defines the rights and obligations of all actors on the international plane or in the world, which requires that those actors who violate its precepts must be held answerable or accountable.

In the second place, Kinchin’s approach conceptualises accountability obligations of IOs as a function of the relationships within and between IOs, especially those within the UN system. She makes no reference to international law in this regard. She argues that ‘[i]t is the relationships of global bodies that produce its accountability obligations an appreciation of those obligations, including how

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<sup>111</sup> Ibid at 21.

<sup>112</sup> Ibid at 3.

<sup>113</sup> Ibid at 5.

they interact and conflict with each other is crucial to the successful design and implementation of effective accountability measures.’<sup>114</sup> My project, however, proceeds from the premise that international law creates the obligations of IOs. The internal governance practices and relationships of each IO, while may be relevant when questions about the allocation of accountability of an IO are being considered, international law defines the obligations upon which accountability is to be determined because IOs are a creature of international law.

Other than these differences, however, Kinchin’s discussion of the UNHCR’s functional autonomy in the light of its hierarchical relationship with the UN provided my study with useful insights when I discuss the basis of the UNHCR’s accountability in Chapter 5.

Reinisch’s edited book I referred to earlier published in 2010, focused on ‘common issues concerning judicial review, the reception of international law in the national legal order, policy matters as regards adjudication versus abstention, and surrounding the question of controlling acts of international organizations.’<sup>115</sup> The chapter on the other organs of the United Nations, including subsidiary organs, was relevant to my study only with respect to the feasibility of using national courts as possible avenues for enforcing the accountability of IOs.<sup>116</sup>

Simeon’s edited book on the UNHCR and its supervision of international refugee law<sup>117</sup> and Janmyr’s extended legal examination of the question of the

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<sup>114</sup> Ibid at 5.

<sup>115</sup> Ibid at v and 4.

<sup>116</sup> Jan Wouters & Pierre Schmitt, “Challenging Other Acts of United Nations Organs, Subsidiary Organs, and Officials”, in Reinisch, *supra* note 101, at 77 – 110.

<sup>117</sup> James C. Simeon, ed, *The UNHCR and the Supervision of International Refugee Law* (New York: Cambridge University Press, 2013).

accountability of UNHCR and its implementing partners for the violation of human rights in refugee camps,<sup>118</sup> are two recent examples.

Simeon's edited book on the UNHCR's supervisory function seeks to 'provide a clear roadmap on how the UNHCR could enhance its capacity to supervise international refugee law and the provision of international protection to those most in need – refugees and other forced migrants.'<sup>119</sup> The seventeen chapters in Simeon's book focus on the UNHCR's supervisory function, comparison with other public international law supervisory models and the collaborative role of civil society with the UNHCR in the supervision of international refugee law. None of its chapters scrutinises the UNHCR's accountability when it fails or subverts its supervisory role.

Janmyr, by contrast, examines the accountability of the UNHCR in international law for the security and violation of the rights of populations in refugee camps in the context where the host state is 'unwilling or unable' to provide protection. The scope and focus of the book are, however, limited to the responsibility of UNHCR for camp security, especially in regard to military attacks on refugee camps, and the violation of the rights of refugees and IDPs living in camps. The book's discussion of the responsibility of the UNHCR covers both refugees and internally displaced persons (IDPs) because the UNHCR's competence was expanded by the General Assembly of the United Nations to provide protection to IDPs, albeit in limited scope. The book's main argument is that in certain contexts, the UNHCR could be held responsible for what happens in refugee camps that helps administer or manage.

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<sup>118</sup> Janmyr, *Protecting Civilians in Refugee Camps*, *supra* note 14.

<sup>119</sup> James C. Simeon, *supra* note 117, at 3.

While I benefitted greatly from some of Janmyr's insights in this book, my project differs from her work in four fundamental ways. In the first place, my work employs a different conceptual approach; it adopts accountability as the concept to foreground discussions of UNHCR's wrongdoing while Janmyr adopts responsibility, the traditional concept in public international law for enforcing the obligations of states. As I demonstrate in subsection 1.3.3.2 of this Chapter, the underlying theme in the doctrine of responsibility under international law is accountability and therefore it is rational to foreground accountability as the concept of international law for holding international actors, such as states and IOs, answerable. A second reason I preferred the term accountability to responsibility is that there is also the issue of liability for injurious consequences of activities that international law does not prohibit. Here, as with responsibility, the underlying theme of liability is accountability for the injurious consequences arising out of activities that international law does not prohibit. In this context, accountability is the common theme, and therefore, the most appropriate term or concept for enforcing the obligations of actors under international law. In other words, accountability captures both the wrongful acts of actors and the injurious consequences arising out of their activities that international law does not prohibit.

In addition, Janmyr's analysis of the UNHCR's accountability focuses on two conceptual propositions, namely the '*unable*' or '*unwilling*' state, which are critical in her project to the question of the allocation and determination of the UNHCR's accountability. By contrast, I focus on the sites where refugee encampment decisions are made (Chapter 3) and demonstrate that the notion of the '*unable*' and '*unwilling*' state does not do justice to the complex issues of asymmetrical power relations that produced refugee encampment. Indeed, in the context of the global south, the idea that refugee-hosting states are '*unable*' or '*unwilling*' to provide protection to refugees in their territories is patently flawed. The evidence shows that many of the states in the global south host a disproportionate number of refugees

in comparison to the global north. I question these very conceptual categories as a basis of allocation of responsibility between refugee host states and the UNHCR.

Thirdly, Janmyr adopts a theoretical framework from the legal positivism school of thought on which to anchor investigation of her research questions, gather evidence, and undertake analysis of the evidence. I, in contrast, adopt a conceptual framework that attempts to integrate theoretical approaches from four schools of thought: Socio-Legal, Political Economy, New Haven, and Third World Approaches to International Law (TWAAIL). While legal positivism has important merits, its obsession with the idea of the law *as it is* and legal analyses focusing exclusively on the black letter of the law ignores not only the fundamental aspects of the asymmetries of power relations between various actors but also the processes through which law is produced, applied, or subverted. And while some strands of legal positivism, such as ‘modern’ or ‘enlightened’ or ‘soft’ positivism have departed from this dogmatic position acknowledging that social and political context do matter in legal analysis,<sup>120</sup> the fidelity to black-law analysis is still predominant. A project on accountability of an IO such as the UNHCR that is active in defending its interests on the international plane will, however, have to delve beyond the black letter of the law and grapple with the asymmetries of power relations, and the processes and structures within which various actors in refugee protection flex their power in defending their turf; this is critical to our understanding of the allocation of responsibility and hence accountability of each actor.

Fourthly, Janmyr’s work focuses on the accountability of the UNHCR and its implementing partners for violations of the human rights of populations in refugee camps, namely refugees and IDPs. My study, however, centres on the

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<sup>120</sup> See, e.g., Bruno Simma and Andreas L. Paulus, “The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View” (1999) 93 *American Journal of International Law* 302.

accountability of the UNHCR for both harm to the environment resulting from its acts or omissions in establishing, funding, and managing refugee camps and the conditions in which refugees live in those camps. In other words, my dissertation focuses on the accountability of the UNHCR for its internationally wrongful acts and the injurious consequences arising out of its activities that international law does not prohibit, on the environment and on the condition of refugees in encampment. While I acknowledge that the UNHCR's competence has been broadened through successive resolutions of the United Nations General Assembly, to include IDPs resulting from conflict, my dissertation concentrates on refugee encampment and the resulting harm to the environment and the condition of refugees; I use the term 'refugee' in the sense defined under international refugee law. In a sense, the scope of my project focuses on the original competence of the UNHCR, the provision of international protection to refugees, while Janmyr's work is grounded in the UNHCR's expanded mandate.

The leading contemporary writers in international refugee law focus on the rights of refugees and the obligations of States. While some reference is made to UNHCR's work and, in limited instances, its failures, the analytical focus and substantive discussions of issues relating to the international protection of refugees is the State – not UNHCR.

The three scholars in the area of refugee law are Hathaway, Goodwin-Gil, and Atle Grahl-Madsen. Grahl-Madsen has published several books and articles on international refugee law but his two-volume treatise is best known.<sup>121</sup> Volume one deals with 'those rules of public international law which relate to refugees',<sup>122</sup> and while there is no explicit discussion of UNHCR's accountability, there is reference

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<sup>121</sup> Gudmundur Alfredsson & Peter Macalister-Smith, *The Land Beyond: Collected Essays on Refugee Law and Policy* by Atle Grahl-Madsen (Brill/Nijhoff, 2001), at .x.

<sup>122</sup> Atle Grahl-Madsen, *The Status of Refugees in International Law, Volume I* (Leiden: A.W. Sijthoff, 1966) at 3.



to it in relation to ‘the concept of ‘protection’ in the sense of paragraph 6 of the UNHCR Statute.’<sup>123</sup> In his second volume, Grahl-Madsen inquires, ‘into the nature and extent of the right of States, under existing international law, to give asylum’, and refers to the extent to which, ‘modern international law recognizes a ‘right of asylum’ for the individual.’<sup>124</sup> While the evolution of the concept of asylum is treated in detail, its analytical focus is limited to ‘those rules of international law which are of importance on the Western European scene.’<sup>125</sup>

Hathaway’s 2005 monumental work on the rights of refugees,<sup>126</sup> premised ‘upon a theory of modern positivism,’<sup>127</sup> for example, ‘seeks clearly to adumbrate, in both theoretical and applied terms, the authentic scope of the international legal rights which refugees can bring to bear in states of asylum’.<sup>128</sup> This approach, Hathaway argues, provides a firmer basis for synthesising ‘imperfect norms and mechanism’ in order to pursue ‘meaningful state accountability in the present legal context.’<sup>129</sup> The thrust of Hathaway’s book is an affirmation of the importance of the specific rights of refugees that had come under threat from both governments and scholars who ‘too readily assume that generic human rights law is sufficient

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<sup>123</sup> Ibid at 254.

<sup>124</sup> Atle Grahl-Madsen, *The Status of Refugees under International Law, Volume II* (Dordrecht: Kluwer International, 1972) 7.

<sup>125</sup> Ibid at 7.

<sup>126</sup> James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005).

<sup>127</sup> Ibid at 10.

<sup>128</sup> Ibid at 7.

<sup>129</sup> Ibid.

answer to the needs of refugees.’<sup>130</sup> The book also makes clear what it is not about; for example, it does not ‘seek to explain the work of the institutions charged with the protection of refugees at the domestic or international levels’.<sup>131</sup>

Goodwin-Gill and McAdam, in the third edition of Goodwin-Gill’s book published in 2007, seek to ‘describe the foundations and framework of international refugee law by concentrating on three core issues: the definition of refugees, the principle of *non-refoulement*, and the protection of refugees.’<sup>132</sup> Unlike the first and second editions, they now address the question of ‘the legal responsibilities of international organizations in human rights matters.’<sup>133</sup> Goodwin-Gill and McAdam review the mandates and functions of international organisations (IOs) created to provide protection to refugees, starting from the era of the League of Nations to the United Nations (UN).<sup>134</sup> They, however, do not address the question of the accountability of these organisations for their internationally wrongful acts or the injurious consequences arising out of activities that international law does not prohibit. The thrust of the book, in general, is focused on the obligations of States to protect refugees. I, however, greatly benefited from their discussion of the UNHCR’s standing in general international law.<sup>135</sup>

In addition to the refugee law specific works, I also attempted to review two works that focus on the accountability of IOs for human rights violations. In the

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<sup>130</sup> Ibid at 13.

<sup>131</sup> Ibid.

<sup>132</sup> Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law*, 3rd edn (Oxford: Clarendon Press, 2007).

<sup>133</sup> Ibid at vi, 426 ff.

<sup>134</sup> Ibid at 421 – 446.

<sup>135</sup> Ibid at 430 – 432.

first place, Verdirame's book on the United Nations and Human Rights seeks to address three factual, doctrinal, and philosophical questions about the accountability of the United Nations for human rights violations, albeit it focuses on the doctrinal questions.<sup>136</sup> Verdirame deals with the operational side of IOs, which international law scholars often ignore, and captures how the UN was involved in a consistent pattern of egregious violation of human rights in its humanitarian relief operations (UNHCR), peace support operations, international administration of territory (Kosovo and East Timor, now Timor Leste), and imposition and administration of sanction regimes.

Verdirame convincingly argues that international law imposes binding human rights obligations incumbent upon the UN and its agencies. And while he welcomes the International Law Commission's draft articles on the responsibility of IOs as providing a legal framework or legal route for engaging the accountability of the UN and its agencies for violations of human rights, he concludes that realistically, the draft articles are incapable of resolving the vexing question of the enforcement of the human rights obligations of the UN.<sup>137</sup> My dissertation, in some respects, shares Verdirame's perspectives and I would say, builds on his work, especially on the aspects of the UNHCR's administration of refugee camps. Verdirame focuses on the legal aspects of the UNHCR's administration of refugee camps, but I demonstrate, using empirical evidence, how UNHCR's administration of refugee camps in some refugee-hosting states in the global south happens: the UNHCR appropriates the the framework governance of refugee policy and practice of these states. I also locate the sites within the UNHCR that make its appropriation of the

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<sup>136</sup> Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (Cambridge: Cambridge University Press, 2011) at 1.

<sup>137</sup> *Ibid* at 143.

framework governance of refugee policy and practice in the refugee-hosting states in the global south possible.

The second work in the genre of accountability of IOs for human rights violations I reviewed is Wouters et al's, edited book.<sup>138</sup> In this book, twenty-one contributors explore how IOs may be held accountable for violations of human rights or how such violations of human rights may be attributed to them. In addition to discussing conceptual issues, such as whether accountability or responsibility should be the legal route for holding IOs accountable for human rights violations, the vexing question of whether IOs have human rights obligations since they are not signatories to human rights treaties receives some attention. And crucially, the book addresses questions about the mechanisms for enforcing the accountability of IOs for violations of human rights and the immunity from the jurisdiction of national courts of IOS, and whether a wrongful act should be attributed to an IO or to its Member States or both and under what circumstances.<sup>139</sup> Wouters et al, like Verdirame, address the operational side of the work of IOs, focusing also on the humanitarian and peacekeeping operations and the international administration of territory of the United Nations.

Of particular interest to me in this book was Sandvick's chapter on the UNHCR,<sup>140</sup> which focused on how to frame accountability in the context of the relationship between the UNHCR and refugees in the global south seeking resettlement in the global north. While I greatly benefitted from the book's chapters on contentious legal issues, such as whether IOs are bound by international human rights norms and whether members states of an IO are to be held accountable for

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<sup>138</sup> Jan Wouters, Eva Brems, Stefaan Smis, and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organisations* (Antwerp: Intersentia, 2010).

<sup>139</sup> Ibid at 261 – 267.

<sup>140</sup> Ibid at 287

the human rights violations attributable to the IOs, my work differs fundamentally from the book's discussion of the questions of accountability in the context of the UNHCR and refugee resettlement. The chapter on UNHCR and refugee resettlement frames accountability as measures or 'governance tools' designed to 'achieve legitimacy for bureaucratic interventions.'<sup>141</sup> In contrast, however, my dissertation explicitly addresses the question of how, and to what extent, the UNHCR can be held accountable, under international law, for its contribution to environmental harm and suffering of refugees in the refugee camps that it helps create, fund, and administer.

I also reviewed the relevant literature in the field of international politics and relations and two works stand out: Loescher's and Hammerstad's work on the UNHCR from an international politics and relations perspective. Hammerstad's 2014 book<sup>142</sup> 'explores the rise and decline of the UNHCR as a global security actor' in the 'context of the dramatic shifts in perceptions of national and international security that have taken place after the end of the Cold War.'<sup>143</sup> Hammerstad takes on critics of the UNHCR who argue that the UNHCR abandoned its non-political mandate contending that by their very nature, refugees are always political issues and so the UNHCR's competence and work have always been 'inherently political.'<sup>144</sup> She argues that what should be asked 'are the political factors in the UNHCR's external environment that impede the agency from achieving its goals;

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<sup>141</sup> Ibid at 289.

<sup>142</sup> Anne Hammerstad, *The rise and decline of a global security actor: UNHCR, Refugee Protection and Security* (Oxford: Oxford University Press, 2014).

<sup>143</sup> Ibid at 1.

<sup>144</sup> Ibid at 6.

what strategies does the UNHCR employ to overcome these impediments; and how well have these strategies worked?’

The book’s central argument is that the ‘UNHCR’s leverage vis-à-vis more (materially) powerful actors in the arena of international refugee politics (especially the UNHCR’s donor states) can mainly be found on the ideational and discursive level.’ In other words, the UNHCR’s leverage rested on its ability to generate ideas and influence discourse on issues relating to refugee protection. The theoretical orientation of the book is described as ‘cautious constructivism of the English School kind.’<sup>145</sup> This theoretical orientation allows Hammerstad to ‘show that the study of ideas and discourse is of crucial importance if one is to understand the reasons for and direction of UNHCR’s transformation.’

Hammerstad’s analysis of the UNHCR’s transformations in various contexts provided me with insights that challenged my own conventional wisdom and therefore allowed me to approach the question how far the UNHCR had or did not have effective control over decision-making processes that engendered refugee encampment in the refugee-hosting states of the global south. This has implications for the question of allocation of international accountability for the UNHCR’s part in refugee encampment and the consequences of refugee camps on both the environment and the well-being of refugees in the camps.

My study differs from Hammerstad’s in two aspects, however. In the first place, the conversation in her book is about the reasons and directions that forced the UNHCR to adapt and transform the way it implemented its competence to provide international protection to refugees and to remain relevant to States. The focus of my research question, on the other hand, is about how to hold the UNHCR accountable for its actions or omissions, the external environment in which it is

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<sup>145</sup>Ibid at 8.

operating notwithstanding, that produce refugee encampment, which in turn produced harm to the environment and untold suffering for refugees in camps for many years, and in some camps, such as the Dadaab Refugee Camp Complex (DRCC) in Kenya, for over 25 years, in fact, now 30 years. Secondly, Hammerstad appears to suggest that it is wrong to criticise UNHCR for politicising its work and abandoning the humanitarian imperatives that were meant to define its activities on behalf of refugees and to discount the consequences of doing so for refugee protection; instead we should endeavour to understand the reasons that compelled it to adopt radical changes and transformations to implementing its statutory obligations to refugees.<sup>146</sup>

I, in contrast, interrogated issues beyond the reasons that caused the UNHCR to securitise refugee issues in a post-Cold War era in its calculated move to become relevant to the states that created it. I argue, with Loescher, that partly on the evidence of the UNHCR's ability to independently manoeuvre the treacherous terrain of international politics in order to serve its institutional interests, that the UNHCR is not a passive actor on the international plane. And crucially, the UNHCR enjoys some level of asymmetries of power relations with weak states and non-governmental organizations, to an extent that it has, in some contexts, appropriated the framework governance of refugee policy in those weak states. In these contexts, I submit, that as an independent actor, other legal questions concerning its status in international law notwithstanding, UNHCR should be held to account for its actions or omissions that resulted in encampment of refugees with injurious consequences on the environment and the condition of refugees in encampment.

Loescher, possibly one of the first international relations scholars to use insights from that field to interrogate the work of the UNHCR, published a ground-

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<sup>146</sup> Ibid at 6 – 7.

breaking book in 2001 that critically examines the role of the UNHCR in the past fifty years in world politics and the strengths and drawbacks of its being politically active.<sup>147</sup> He observes that '[w]hile the UNHCR has had many successes over the past 50 years, it has also had many failures.'<sup>148</sup> Among its failures, is an 'organizational culture that makes innovation and institutional change difficult' and '[s]ome UNHCR senior management are arrogant and insensitive to the needs of refugees.'<sup>149</sup> Crucially, Loescher argues that beyond the 'face value' of the 'self-presentation' by the UNHCR of its image and identity, the 'UNHCR has not just been an agent in world politics but a principal actor' and 'the notion that it is a passive mechanism with no independent agenda of its own is not borne out by the empirical evidence of the past half century.'<sup>150</sup>

Loescher's book is not about UNHCR's accountability for its failures. His incisive analyses of the strategic manoeuvring that UNHCR engaged in in order to survive, including expansion of its activities beyond Europe to Africa, however, provided me with valuable ideas both in the initial stages of my research and writing on how to frame and develop the question of UNHCR accountability for the harm to the environment resulting from encampment of refugees and the deplorable conditions under which refugees live in the camps.

I end the review of the conversations in the relevant literature with the monumental works of Holborn. Indeed, Holborn, may be the earliest scholar to have produced a substantive work on the UNHCR. In her book published in

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<sup>147</sup> Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford: Oxford University Press, 2001).

<sup>148</sup> Ibid at 2.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid at 6.



1975,<sup>151</sup> Holborn explains the UNHCR's activities 'during its first twenty-two years, 1951 – 1972'<sup>152</sup> in an 'historical context and the environment within which the UNHCR has worked.'<sup>153</sup> It is the first comprehensive review of the work of UNHCR since it started activities on behalf of refugees and States in 1951; it is a monumental work comprising 50 chapters published in two volumes. Volume 1 covers 29 Chapters while volume 2 has 21 chapters. In the first volume Holborn covers six thematic areas: from the early international efforts on behalf of refugees (1921 – 1952), the establishment of the UNHCR, international protection, the search for solutions in Europe, resettlement of refugee overseas, and refugees in Asia, and the Near and Middle East. In volume 2 she continues with the theme on refugees in Asia, the Near and Middle East and to this she embarks on refugees in Africa, programmes for refugees in some select African countries sheltering the refugees, and concludes with a chapter on some reflections on the growth of UNHCR in 1972.

Holborn's book was useful to my project in two aspects. Firstly, as one of the earliest and oldest intellectual history on the UNHCR, it, in a general sense, enriched my grasp of the historical contexts in which the UNHCR started developing and nurturing relationships with various actors, including governments and other international non-governmental organisations, in order to implement its statutory functions of providing international protection to refugees and helping states to find durable solutions to the refugee problem as understood in the first twenty-two years.<sup>154</sup> How she defines or characterises the nature of these

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<sup>151</sup> Louise Holborn, *Refugees, A Problem of our Time: The Work of the United Nations High Commissioner for Refugees, 1951 – 1972* (Metuchen, New Jersey: The Scarecrow Press Inc., 1975).

<sup>152</sup> Ibid at p. xv.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

relationships was of great interest to me in my search for understanding. Secondly, her explanation of the activities of the UNHCR in Africa, especially its relationship with African governments,<sup>155</sup> provided insights for my understanding of the UNHCR's role in the encampment of refugees in Africa and how, from her perspective, relationships between the UNHCR and refugee-hosting states in Africa were constituted. Moreover, her work provided me with some backdrop against which to place other more recent works, such as Loescher's and Hammerstad's that I reviewed already.

My study differs from Holborn's, however. The most obvious difference is that her work is a grand historical narrative about how the UNHCR implemented its competence during the first twenty-years since 1951. My project, by contrast, is about UNHCR's accountability, under international law, for its refugee encampment activities and the resulting harm to the environment and the deplorable, inhuman and degrading conditions in which refugees live in encampment. While, as with Hammerstad, I agree with Holborn that the external environment in which the UNHCR operates is sometimes treacherous, my study argues that the UNHCR's external environment in itself does not diminish the case for accountability because its exercise of power and the enjoyment of certain rights and autonomy entails its accountability for the use of that power and privilege. That conversation on the accountability aspect of the activities of the UNHCR is missing in Holborn's monumental work.

### **1.5 Gaps in existing Relevant Literature and my contribution**

Despite the evidence that refugee camps negatively affect the environment and refugees, however, few studies, if any, on refugee law, policy, and practice in the global south have explicitly addressed the question of the accountability of the key

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<sup>155</sup> Ibid., and especially Chapter 32.

actors, especially those that have leverage and influence such as the UNHCR. Wilde in his 1999 article and Janmyr in her 2014 book are possibly the only scholars to address the question of the accountability of the UNHCR for the violation of the rights of refugees in camps. Kinchin focused on organisational accountability of the UNHCR and discounted the role of international law in framing the UNHCR's accountability. While Wilde focuses exclusively on refugees, Janmyr's work covers both refugees and internally displaced persons and a more detailed examination of the questions of UNHCR's international accountability than Wilde's. Janmyr, however, accepts refugee encampment as *fait accompli* that does not involve accountability questions; she is only concerned with how to mitigate human rights violations within the refugee camps.

And crucially, leading international refugee law scholars either focus on 'rules of public international law which relate to refugees' and the 'nature and extent of the right of States, under existing international law, to give asylum'<sup>156</sup> or 'seeks clearly to adumbrate, in both theoretical and applied terms, the authentic scope of the international legal rights which refugees can bring to bear in states of asylum'.<sup>157</sup> Yet others 'describe the foundations and framework of international refugee law by concentrating on three core issues: the definition of refugees, the principle of *non-refoulement*, and the protection of refugees'.<sup>158</sup> None of these monumental international law based works address the question of UNHCR's accountability for its part in encamping refugees and the consequences of refugee encampment on the both the environment and condition refugees.

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<sup>156</sup> Grahl-Madsen, *supra* note 124.

<sup>157</sup> Hathaway, *supra* note 126.

<sup>158</sup> Goodwin-Gill & McAdam, *supra* note 132.

The international politics based studies on UNHCR<sup>159</sup> either focus on the alleged dilemmas and political environment in which it operates or simply praise its work; none explicitly question UNHCR's accountability for its role in the decisions that produce refugee encampment and the injurious consequences of this on the environment and the condition of refugees in camps, such as Dadaab and Kakuma refugee camps in Kenya. In addition, works resulting from international conferences often focus on international law and the role of international organisations such as the United Nations and its agencies in resolving the problem of refugee.<sup>160</sup> The question of the accountability of these international agencies is rarely addressed.

All these scholars, each in their own right, are perfectly justified in pursuing a specific area or topic on refugee matters they consider most important to them for a variety of reasons, some of which are given in their respective works. In this context, my study makes a modicum contribution to the body of existing knowledge, focusing attention in an area that could not fit in the previous scholarly works on the UNHCR and international protection of refugees generally.

In the first place, specifically focusing on the accountability of the UNHCR for harm to the environment and refugees resulting from its policies and practices of refugee encampment, allowed me to interrogate the decision-making processes and structures that produce refugee encampment in refugee-hosting states in the global south like no other study, critical or not, about the work of the UNHCR. None of the studies I reviewed in the preceding sections of this Chapter have addressed this important aspect, namely, how the decisions that produce refugee

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<sup>159</sup> See, e.g., Hammerstad, *supra* note 142; Loescher, *supra* note 147.

<sup>160</sup> See, e.g., Allan E. Nash & John P. Humphrey, *Human Rights and the Protection of Refugees under International Law: Proceedings of a Conference held in Montreal November 29 – December 2, 1987* (Halifax, Nova Scotia, The Institute for Research on Public Policy, 1988).

encampment are actually arrived at and who are the actors that actually decides that refugees, as a matter of course, should be assisted in camps only. The conventional wisdom is that refugee encampment is the sole decision of refugee hosting-hosing states in the global south.

Even Janmyr's work, which asserts that the 'phenomenon of refugee camps lies at the heart of this book,'<sup>161</sup> does not provide a methodical interrogation of how the decision making processes the produce refugee camps are made and by whom and the significance of this in implicating the question of allocation of international accountability. But in Chapter 3, I demonstrate that the UNHCR is the architect of refugee encampment in refugee-hosting states in the global south and has effectively appropriated the *framework governance of refugee policy* in many of these states in the global south. This is a significant finding because knowing exactly how the decisions that produce refugee encampment are made or produced has two important implications. First, it provides better insights for the continued campaign to end refugee encampment in the global south and may strengthen the case for alternatives to camps. Second, it raises fundamental questions about how the UNHCR is in practice exercising its supervisory function and how its apparent usurpation of the framework governance of refugee policy of many refugee-hosting states in the global south undermines its other functions of seeking durable solutions for the problems that refugees confront in these countries of refuge.

In the second place, my study is possibly the first to critically review the UNHCR's internal processes and structures for handling or dealing with refugee emergencies and demonstrate how refugee camps are an integral component of is refugee emergency preparedness strategy. Exposing these processes may provide leads for further research that may in future confirm or refute my theories. In addition, understanding these internal processes and structures reveal how the

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<sup>161</sup> Janmyr, *supra* note 14 at 103.

UNHCR over the years has acquired exceptionally high skills and experiences in innovating how to improve on delivering emergency assistance to people in need of international protection, whether refugees or other categories of persons. In other words, from studying the UNHCR's internal processes and structures that produce refugee encampment, I have contributed to a better understanding of the UNHCR's capacity and influence, which most studies have taken for granted.

In the third place, my study shows how the UNHCR's accountability could be enforced using two legal routes consisting existing rules and principles of international law governing accountability: the traditional responsibility for internationally wrongful acts route and the emerging route of international liability for injurious consequences arising out of activities that international law does not prohibit. Most of the studies on the accountability of IOs focus on the internationally wrongful acts route. Where this route is chosen, the focus is on the rules and principles governing the accountability of states, both under customary law and the ILC's draft articles on state responsibility and the rules and principles governing accountability of IOs under the draft articles on responsibility of IOs.

My study, by contrast, in addition to the traditional legal route of responsibility for internationally wrongful acts, includes the legal route of international accountability for injurious consequences arising out of activities that international law does not prohibit. I believe that this latter legal route has more potential for engaging the accountability of actors such as the UNHCR whose activities international law does not prohibit, but do have serious injurious consequences on people, both as individuals and community, property, and the environment.

## **1.6 Conclusion**

Refugee camps are not simply some innocent spaces where humanitarian actors tirelessly work to save lives of human beings labelled refugees. For sure some good intentions and work may be the initial driving force, but a careful scrutiny of

what goes on in these spaces reveal the reality of what these places are: technologies or devices of power and control at the hands of a few people who have a particular vision of what it means to be humanitarian. Refugee camps have serious negative impact on the both the environment, within and the surrounding areas, and the people who live in them. The critical question is who should be held accountable for the harm, both to the environment and the people living in the camp, resulting from refugee encampment? How can that entity, if identified, be held accountable under international law. This, and other related questions, are the central concerns I sought to explore in this dissertation.

## CHAPTER 2 : THEORY AND METHOD

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### 2.1 Introduction

How to develop my main research question and write my dissertation was one of the most challenging dilemmas of my whole experience in undertaking this study. At the root of this dilemma for me was the question or issue that Banakar and Travers aptly capture: ‘the issue of methods and how methods are used by different theoretical traditions.’<sup>1</sup>

I realised that as many scholarly methods exist as theoretical traditions and schools of thought.<sup>2</sup> Across the disciplines and, especially in law, there is no consensus on which method and theory is the correct one for undertaking a particular piece of legal research.<sup>3</sup> What compounds the situation is that beneath the apparently ‘objective’ contestations of theory and method are loaded political undertones and biases.<sup>4</sup> But for some scholars, such as Rubin, the issue of methods

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<sup>1</sup> Reza Banakar & Max Travers, *Theory and Method in Socio-Legal Research* (Oxford: United Kingdom: Hart Publishing, 2005).

<sup>2</sup> See, e.g., For a discussion of the different theoretical approaches to international law, see, e.g., Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford: Oxford University Press, 2016); also see, e.g., Steven R. Ratner and Anne-Marie Slaughter, “Appraising the Methods of International Law: A Prospectus for Readers” (1999) 93: 2 *The American Journal of International Law* 291 – 302; Steven R. Ratner and Anne-Marie Slaughter, eds, *The Methods of International Law* (Buffalo, N.Y.: W.S. Hein, 2004).

<sup>3</sup> See, e.g., Lassa Oppenheim, “The Science of International Law: Its Task and Method” (1908) 2 *The American Journal of International Law* 313; William A. Edmundson, “Why Legal Theory is Political Philosophy” (2013) 19:4 *Legal Theory* 331.

<sup>4</sup> See, e.g., See, e.g., Michael Pendleton, “Rejecting the Dominance of Empirical Legal Scholarship – A Better Way of Choosing, Researching and Writing a Scholarly Article,” in Mike McConville & Wing



in law was settled long time ago until legal scholarship ‘irrevocably dismantled its formalist home’ when some scholars started ‘to link law and other disciplines...’<sup>5</sup>

## 2.2 Method and Theory as Understood in this Dissertation

It is necessary to explain what school of thought, theory, and method as used in the context of this dissertation mean and how that aided my search for answers to the research question and the analyses in the various chapters.

### 2.2.1 School of Thought

I believe that human beings generally have a predisposition to “seeing things” from a specific perspective or worldview or some may see things from different but interconnected perspectives. This worldview may be shared with others, but others may also contest it. I suggest, from this viewpoint, a school of thought, in its simplest sense is a group of people who “see things” from the same perspective or worldview. Indeed, I looked up what a school of thought means in one English Dictionary, *The Oxford English Dictionary*,<sup>6</sup> but discovered that there was more than one definition. One particular definition struck me as compelling:

The body of persons that are or have been taught by a particular master (in philosophy, science, art, etc.), hence in a wider sense, a body of or succession of persons who in some department of speculation or practice are disciples of the same master, or *who*

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Hong Chui (eds.), *Research Methods for Law*, 2<sup>nd</sup> (Edinburgh: Edinburgh University Press, 2017) 231 at 236 – 237.

<sup>5</sup> Edward E. Rubin, “Law and the Methodology of Law” (1997) 3 *Wisconsin Law Review* 521 – 566, at 521.

<sup>6</sup> I chose the Oxford English Dictionary (OED) for this very claim: ‘The Definitive Record of the English Language’, ‘OED/Oxford English Dictionary: The Definitive Record of the English Language,’ <online: <https://www-oed-com.ezproxy.library.ubc.ca/>>.

*are united by a general similarity of principles and methods...(my emphasis)*<sup>7</sup>

From this definition, a school of thought consists of a group of people who share any of a set of philosophical, ethical, normative, legal, political, social, economic, religious, artistic, and scientific ideas about *being* or about cause and effect or substance of a certain phenomenon or phenomena in a given society or society in general. The group or its members may develop or borrow from other groups, procedures and system of ideas or statements to explain the phenomenon or phenomena.

Alternatively, a school of thought is a group of people who simply hold a certain world view about everything in human experience, physical or metaphysical, i.e., whether philosophical, ethical, normative, legal, political, social, economic, religious, artistic, scientific, and are united in theory and method. Thus, each school of thought has a world view and that world view informs or conditions their views, beliefs, and ideas about society, law, economics, politics, religion, etc. These, in turn, informs each school of thought's choices and development of methods and theories for studying and explaining the given phenomenon, e.g., defining what law is and its sources and validity, whether a court, a national court or an arbitration court's decision enunciates a rule of domestic law or of international law, what accountability entails or should entail in international law.

Seen from this perspective, Scholasticism, Legal Positivism, Legal Realism (both American and Scandinavian), Third World Approaches to International

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<sup>7</sup> John Simpson and Edmund Weiner, eds, *The Oxford English Dictionary*, Volume XIV, 2nd (Oxford: Clarendon Press, 1989) at 633.

Law (TWAAIL),<sup>8</sup> Legal Formalism, The New Haven School, Critical Legal Studies, Law and Economic, Feminist Jurisprudence, and International Law and International Relations are schools of thought about law, national or international, but not methods or theories of law. They each, for example, posit theories to explain what law is or the essence of law, or certain legal issues, and adopt some procedures or methods, but they are not theories or the methods of law and legal analysis in themselves.

### 2.2.2 Theory

The term “theory” may be understood in a variety of senses and across disciplinary boundaries in the English-speaking world. A quick look up in an English dictionary of the meaning of “theory,” gives one interesting definition:

A scheme or system of ideas or statements held as an explanation or account of a group of facts or phenomena; a hypothesis that has been established by observation or experience, and is propounded and accepted as accounting for the known facts; a statement of what are held to be the general laws, principles, or causes of something known or observed.<sup>9</sup>

I gleaned three broad senses or understanding of theory from this definition. First, *theory as a set of ideas or statements*. In this category I could, for example, think of several sets of ideas that are held to be the explanation of something, such as a theory of colonialism; a theory of imperialism; a theory of power; a theory of hegemony; a theory of natural law; a theory of law; a theory of international liability, a theory of accountability, and a theory of accident causation. In each of these theories, and without having to go into the details of each theory, there are a

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<sup>8</sup> TWAAIL did not feature in Slaughter and Ratner’s list of what they considered were the ‘methods of international law’; see Slaughter and Ratner, *supra* note 2 at 293 – 294.

<sup>9</sup> Simpson & Weiner, *supra* note 7 at 902.

set of core ideas that are held as explanation for each of these phenomena: colonialism, imperialism, power, hegemony, liability, accountability, and accidents causation. There might be more than one theory for each of these phenomena since in practice there are different schools of thought or worldviews just about everything.

Second, *theory as a hypothesis*. In this sense, a hypothesis explains known facts or facts to be established or discovered about a given phenomenon. But unlike *theory as ideas or statements*, whereby a set of ideas are held to be explanation for a given phenomenon, *theory as a hypothesis* is grounded in observations and experience or experiments from which certain findings and conclusions about a phenomenon are drawn. Some examples of theory as hypothesis grounded in observation and experience from legal scholarship, include a theory of criminal justice as a deterrence to crime, a theory of urban law enforcement, a theory of commercial litigation, and a theory of accountability or responsibility. Examples from the natural and physical sciences, include the theory of motion, the big bang theory, the theory of photosynthesis or the theory of photosynthetic organisms, or Isaac Newton's best known theory of gravity.

A common feature of hypothesis based theories is their reliance on what I describe as *quantitative empiricism*, that is to say, empirical observations or experimentation that generate quantitative data, from which inferences are drawn. Of course, theory as ideas or statements, namely, ideas that are held as an explanation for a phenomenon can be generated from observation as well from other forms of data or facts, such as interviewing a purposively selected category of participants or collecting evidence of certain practices of states that have matured into a custom and therefore rule of international law. In this context, *theory as ideas or statements* can be said to rely on *qualitative empiricism*, that is to say, empirical observation and data collected using qualitative methods.

Third, theory may be considered as *a statement of generally accepted laws, principles or causes of a given phenomenon* that is known or observed. Some examples

include, the theory of international accountability of States (traditionally, theory or doctrine of state responsibility), the theories of the law of contract, and the theory of evidence. In the natural and physical sciences, examples include, Kepler's three laws of planetary motion, Hubble's law of cosmic expansion, or the laws of demand and supply.

Thus, "theory" means simply a statement or set of statements or ideas that explain facts about a given phenomenon and it is in this sense that I use it in this dissertation. I believe, theory is conceptually different from method and a school of thought.

### **2.2.3 Schools of Thoughts and their Theoretical Commitments Relevant to this Study**

A discussion of all the various schools of thought in international law is beyond the scope of my dissertation. Instead, I chose the *Socio-Legal Studies*, *TWAIL*, the *New Haven School*, and *Political Economy* schools of thought and their theoretical commitments as the relevant framework to aid my explanations of the various components of my research question, namely, how to hold UNHCR accountable, and to what extent, under international law, for its contribution to harm to environment resulting from encampments of refugees and the conditions of refugees in the camps which it helps to create, fund, and administer.

There are several issues that I had to understand and explain in my dissertation. I had to understand, for example, how decisions about refugee encampment are made and who makes them. This is important because of the issue of allocation of responsibility for the injurious consequences of refugee encampment to the various actors involved in using refugee camps as a technology for protection refugees protection. A conceptual analysis, for example, of relevant UNGA resolutions establishing UNHCR and subsequent resolutions and cooperation agreements that UNHCR concludes with refugee-hosting states in the global south alone cannot help me achieve this task. In addition, focusing on States as the bad guys would not expose me to the types of asymmetrical power relations

that exist between UNHCR and some the refugee-hosting states in the global south. I needed further facts or information or data to confirm or refute my preliminary findings. In other words, a black-letter approach alone, as Legal Positivism would demand, is not enough. The four schools of thought and their theoretical commitments offered me a variety of lenses with which to examine and analyse the issues.

I explain, albeit briefly, each school of thought and the aspects of its theory that is relevant for my analyses and discussions of the issues in this dissertation in the sections that follow.

### 2.2.3.1 TWAIL

The Third World Approaches to International Law (TWAIL) appears to defy precise definition as the proverbial elephant that some blind persons attempted to define. Thus, some writers and scholars, say TWAIL is ‘a collection of scholars’ committed to ‘identifying the political, cultural and economic biases embedded in the international legal project’<sup>10</sup>; it is ‘not so much a method as a political grouping or strategic engagement with international law.’<sup>11</sup>

Indeed, some have aptly asked whether TWAIL is a theory or a methodology.’<sup>12</sup> Others say TWAIL is ‘a response to decolonisation and end of

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<sup>10</sup> Luis Eslava & Sundhya Pahuja, “Beyond the (Post) Colonial: TWAIL and Everyday Life of International Law” (2012) 45:2 *Verfassung und Recht in Ubersee VRU* 195 – 221 at 195.

<sup>11</sup> Ibid.

<sup>12</sup> On whether TWAIL is a theory, see, e.g., Obiora C. Okafor, “Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?” (2008) 10 *International Community Law Review* 371; on a critique of TWAIL’s theoretical commitments or lack of thereof, see, e.g., John D.

direct European colonial rule over non-Europeans.’<sup>13</sup> Yet, others suggest that ‘TWAAIL is a decentralised network of academics who share common commitments in their concern about the Third World.’<sup>14</sup> Another scholar says, ‘TWAAIL agglomerates different critical scholars’<sup>15</sup> and ‘not a uniform school of thought,’<sup>16</sup> but yet sought to explain the ‘purpose of this school of thought.’<sup>17</sup>

I believe, however, that these various renditions of what TWAAIL means or stands for, while not invidious *per se*, do not accurately capture the *essence* of TWAAIL as an intellectual endeavour. Describing TWAAIL as a ‘response’ or a ‘movement’ or ‘theory’ or a ‘methodology’ or any other conjecture only serves to undermining it as a *serious alternative school of thought* that seeks to not only expose the inherent flaws within the existing international legal rules and principles and legal order, but also provide alternative visions of an international law that embraces the diversity of our earth, equity, and justice.

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Haskell, “TRAIL-ing TWAAIL: Arguments and Blind Sports in Third World Approaches to International Law” (2014) 27:2 *Canadian Journal of Law and Jurisprudence* 383.

<sup>13</sup> Makau Wa Mutua, “What is TWAAIL” (2000) 94 *American Society of International Law, Proceedings* 31 at 31.

<sup>14</sup> James T. Gathii, “TWAAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography” (2011) 3:1 *Trade Law and Development* 26.

<sup>15</sup> Salvador Herencia Carrasco, “The rights of indigenous peoples in the jurisprudence of the Inter-American Court of Human Rights: A Third World Approach to International Law assessment to advance their protection in the Inter-American Human Rights System”, in Giselle Corradi, Koen De Feyter, Ellen Desment, and Katrijn Vanhees, eds, *Critical Indigenous Studies* (Oxford; New York: Routledge, 2018) 158 at 161 [footnote 18].

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid* at 161.

Therefore, I submit that TWAAIL, properly understood, is *a school of thought* of international law. It is a school of thought not because its members share the same theories of international law; *no*, it is a school of thought because its *members share (broadly) common experiences of western European colonial conquest and domination and thus share a special worldview about everything, but most especially the international system that colonialism created.* In other words, TWAAIL is a *world view* about international law that historical and contemporary events shape and continue to inform. TWAAIL is neither *necessarily antithetical* to other schools of thought about international law nor *steeped in historical fallacy* or fantasy, if you like, as a means to create, for lack of a better word, a binary physical and intellectual separation between the global north and the global south.<sup>18</sup> No, TWAAIL, as a school of thought, seeks to mobilise the intellectual power of the peoples of the “third world” or global south in collaboration with sympathisers in the global north, to consistently expose the inherent flaws of existing international law and propose alternative rules and principles of international law that not only redress historical injustices committed against the colonised peoples and their descendants, but also promote equity and justice for all peoples on earth.

Some of TWAAIL’s leading and pioneering scholars and theorists include Ram Prakash Anand, Oji Umozurike, Upendra Baxi, Isa Shivji, Mohammed Bedjaoui, Georges Abi-Saab, Nagendra Singh, and Christopher Weeramantry.<sup>19</sup> Contemporary TWAAIL scholars and theorists include, Karin Mickelson,<sup>20</sup> Vasuki

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<sup>18</sup> See, especially, S.G. Sreejith, “An Auto-Critique of TWAAIL’s Historical Fallacy: sketching an alternative manifesto” (2017) 38:7 *Third World Quarterly* 1511 – 1530.

<sup>19</sup> On these pioneering scholars of TWAAIL, see, e.g., Bupindra S. Chimni, “The World of TWAAIL: Introduction to the Special Issue” (2011) 3:1 *Trade Law and Development* 14 – 25 at 18.

<sup>20</sup> Karin Mickelson, “Rhetoric and Rage: Third World Voices in International Legal Discourse” (1997) 16:2 *Wisconsin International Law Journal* 353 – 420.



Nesiah,<sup>21</sup> B.S Chimni<sup>22</sup>, Antony Anghie<sup>23</sup>, James Gathii<sup>24</sup>, Makau Mutua<sup>25</sup>, and Obiora Okafor.<sup>26</sup> Some have collaborated and published works on TWAIL'S promise and what it can offer in interrogating issues such as individual responsibility.<sup>27</sup> Some scholars, such as Okafor, have posited theories to explain the asymmetrical relationship between “third world” States and supranational entities that are the watchdogs of the capitalist model of social and economic organising.<sup>28</sup>

TWAIL scholars, like in most schools of thought, have different theoretical commitments, many of which are or steeped or anchored in different theoretical models that other schools of thought, such as Marxist, post-colonial, feminist,

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<sup>21</sup> Vasuki Nesiah, “Decolonial CIL: TWAIL, Feminism and the Insurgent Jurisprudence” (2018) 112 *The American Journal of International Law* 313.

<sup>22</sup> See, e.g., Bupindra S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (New Delhi, New Bury Park California: Sage Publications, 1993); Bupindra, S. Chimni, “Third World Approaches to International Law: A Manifesto” (2006) 8 *International Community Law Review* 3; Bupindra S. Chimni & Antony Anghie, “Third World Approaches to International Law and Individual Responsibility in Internal Conflicts” (2003) 3 *Chinese Journal of International Law* 77.

<sup>23</sup> Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge, UK; New York: Cambridge University Press, 2005).

<sup>24</sup> James Gathii, “TWAIL: A Brief History of Its Origins, Its Decentralized Networks and a Tentative Bibliography” (2011) 3:1 *Trade Law and Development* 26.

<sup>25</sup> See, e.g., Makau Mutua, *supra* note 13.

<sup>26</sup> See, e.g., Obiora C. Okafor, “Newness, Imperialism, and International Law Reform in our Time A TWAIL Perspective” (2005) 43:1/2 *Osgoode Hall Law Journal* 171 – 191.

<sup>27</sup> See, e.g., Antony Anghie and Bupindra S. Chimni, *supra* note 22; James Thuo Gathii, Obiora Okafor, and Antony Anghie, “Africa and TWAIL” (2010) 18 *African Yearbook of International Law* 9 – 40.

<sup>28</sup> Obiora C. Okafor, ‘Reconceiving “Third World” Legitimate Governance Struggles in Our Time: Emergent Imperatives for Rights Activism’ (2000), 6 *Buffalo Human Rights Law Review* 1 – 38

constructivism, and liberal have enunciated. TWAIL's theoretical commitment may be summarised into two theses.

First, is what I would call the *Historical domination theory*. International law masquerades as a liberal project committed to distributing universal goods for all peoples within their state structures. TWAIL scholars are, however, alive to how international law came to exist and have undertaken to historicising the blind spots of international law beyond the colonial experience. In this regard, TWAIL scholars profess a particular fidelity to 'a historical perspective' as central 'to understanding the current features of and debates about the international system.'<sup>29</sup> This fidelity to 'a historical perspective' reminded me of the necessity to examine the historical account of refugee encampment as key aspect in the process of searching for answers to my main research question.

Second, is the *imperialism and hegemony theory*. TWAIL scholars theorise that international law is imperialistic and hegemonic despite apparent transformations since the second European war ended in 1945. In other words, international law still fosters imperialistic and hegemonic interests which are pathological forces that perpetuated the domination and subjugation of the peoples of the Third World. For TWAIL scholars, international law is the instrument of continued imperialism and hegemony of western states in the Third World and have committed their intellectual energies to expose the structures and practices of contemporary imperialism, hegemony of states and international intergovernmental institutions, and how they perpetuate injustice against the poor peoples of the Third World.<sup>30</sup>

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<sup>29</sup> Obiora C. Okafor, *supra* note 26 at 178.

<sup>30</sup> For a critique of TWAIL, see, e.g., John D. Haskell, 'TRAIL-ing TWAIL', *supra* note 12; S G Sreejith, *supra* note 18.

### 2.2.3.2 Socio-Legal Studies

Socio-legal studies is a school of thought whose world view about legal scholarship is interdisciplinary. It challenges legal positivism's world view of law as a self-contained system of rules devoid of law's moral predicates. Socio-legal scholars take an 'interdisciplinary approach to analysing law, legal phenomena, and relationship between these and wider society.'<sup>31</sup> This approach embodies a broad group of 'disciplines that applies a social scientific perspective to the study of law, including the sociology of law, legal anthropology, legal history, psychology and law, political science studies of courts, and science-oriented comparativists.'<sup>32</sup> These disparate groups of intellectuals are unified in at least one respect: they share 'a left-to-far-left critical orientation to law.'<sup>33</sup>

The basic tenet of Socio-Legal Studies is that 'analysis of law is directly linked with analysis of the social situation in which law applies'.<sup>34</sup> This implies that context and empiricism are critical to socio-legal inquiry and theorising. In other words, a social-legal approach requires that any study, whether of law and institutional design or legal processes or law and legal decision, should be grounded in its social, economic, political, and legal context.<sup>35</sup> In addition, legal

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<sup>31</sup> British Library, 'Socio-legal studies: an introduction to collections', British Library online: Help for Researchers

<[www.bl.uk/reshelp/findhelpsubject/busmanlaw/legalstudies/soclegal/sociolegal.html](http://www.bl.uk/reshelp/findhelpsubject/busmanlaw/legalstudies/soclegal/sociolegal.html)>.

<sup>32</sup> Brian Z. Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (Oxford: Clarendon Press, 1997) 2.

<sup>33</sup> Id.

<sup>34</sup> David N. Schiff, 'Socio-Legal Theory: Social Structure and Law' (1976) 39 *The Modern Law Review* 287.

<sup>35</sup> For a recent work on this aspect, see, e.g., Banakar & Traver, *supra* note 1.

analysis of a particular problem should be informed by data collected from the field.

A socio-legal approach professes a fidelity to empiricism and a radical re-orientation in analytic approaches from highlighting questions of the validity of law to questions of the function of law in society.<sup>36</sup>

The methods of Socio-Legal Studies largely derive from sociology and the social sciences. In other words, Socio-Legal Studies adapted the traditional research methods employed in the social sciences and sociology for purposes of analysing law and legal studies.

I benefit from one of the tenets of Socio-Legal Studies in two fundamental ways. First, it inspires me to take an interdisciplinary approach to the whole dissertation, thereby reviewing both legal and non-legal documents and methods of data collection and seeing theoretical paradigms beyond the discipline of law. Second, its tenet, namely, that data from the field and not just reliance on the 'analysis of the distinctive vocabulary of the law'<sup>37</sup> should inform legal analysis of a particular problem, influences me to undertake a case study and fieldwork. And thus, my analyses in Chapter 3 and 5 heavily benefits from data collected from the field.

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<sup>36</sup> Schiff, *supra* note 34 at 291.

<sup>37</sup> H.L.A. Hart, *Introduction to John Austin, The Province of Jurisprudence and the Uses of the Study of Jurisprudence* (1954) xv, as cited in Myers S. McDougal & Harold D. Lasswell, *Jurisprudence for a free Society: studies in law, science and policy* (Netherlands; Boston: Martinus Nijhoff, 1992) 9.

### 2.2.3.3 Policy-oriented Jurisprudence (New Haven School)

The policy-oriented jurisprudence, often referred to as the New Haven School, initiated by McDougal, Lasswell, and Reisman,<sup>38</sup> is a school of thought about law that is grounded in social fact and decision-making processes. It offers a ‘coherent and systematic approach to the study of law’<sup>39</sup> and a ‘framework of inquiry’ which takes account of the ‘many variables which affect the process of decision-making other than “legal norms.”’<sup>40</sup> I attempted to summarise in the paragraphs that follow the core theoretical commitment of this school of thought, hopefully, without doing injustice to them.

First, the the New Haven School, theorises that law is a process of authoritative decision and control aimed at achieving common community goals.<sup>41</sup> As such, law must be linked to the social processes ‘of shaping and sharing values in a world community.’<sup>42</sup> Thus, the ‘focus of inquiry must be directed to a social process in which people influence one another consciously or otherwise.’<sup>43</sup>

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<sup>38</sup> On the central ideas of this school, see, Myres S. McDougal and Harold D. Lasswell, *supra* note 37; Myres S. McDougal, Harold D. Lasswell, and W. Michael Reisman, “Theories About International Law: Prologue to a Configurative Jurisprudence” (1968) 8 *Virginia of International Law* 188.

<sup>39</sup> Eisuke Suzuki, “The New Haven School of International Law: An Invitation to Policy-oriented Jurisprudence” (1974) 1 *Yale Studies in World Public Order* 1 – 48 at 4.

<sup>40</sup> *Id* at 6.

<sup>41</sup> Myers S. McDougal, “Law as a Process of Decision: A Policy-Oriented Approach to Legal Study” (1956) 1 *Natural Law Forum* 53 at 56.

<sup>42</sup> Suzuki, *supra* note 39.

<sup>43</sup> *Ibid*.

Second, law serves social values and ends for the community and so when lawyers are dealing with problems, they should inquire beyond the black letter of the law because '[w]hen 'inquiry is focused only upon rules of law – verbalizations – to the exclusion of actual choices or practices – decisions – there can be no assurance that it will have any relevance to what is actually happening in a community.'<sup>44</sup>

The New Haven School has had its critiques.<sup>45</sup> In the first place, it has been claimed that the New Haven School conflates law and politics. Indeed, Schachter argues that it subordinates 'law to policy...it virtually dissolves the restraints of rules and opens the way for partisan or subjective policies disguised as law.'<sup>46</sup> Simma and Paulus charge that the New Haven School's theory about law 'conflat[es] law, political science and politics plain and simple.'<sup>47</sup>

The New Haven School's approach to law as a process of authoritative decision-making, despite criticism, provided me a useful way to grasp how to frame international obligations for the protection of the environment that transcend the statist approaches, to capture the obligations of IOs as well. Seeing law as a process of authoritative decision-making involving the members of the international community allowed me to argue in Chapter 5 that the Stockholm and Rio processes and resultant declaration provide good examples of social and

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<sup>44</sup> McDougal & Lasswell, *supra* note 37, at 18ff.

<sup>45</sup> On criticisms of the New Haven School, see, e.g., Oscar Schachter in a panel discussion of the jurisprudence of Myers S. McDougal entitled, "McDougal's Jurisprudence: Utility, Influence, Controversy" (1985) 79 *American Society of International Law Proceedings* 266.

<sup>46</sup> *Ibid* at 267.

<sup>47</sup> Bruno Simma and Andreas L. Paulus, "The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View" (1999) 93 *American Journal of International Law* 302 at 305.

political processes of decision-making that produced authoritative decisions on how to protect and preserve the environment, which decisions must bind all actors, whether States, IOs, or individuals.

#### 2.2.3.4 Political Economy

The British, or rather Scottish, economist, Adam Smith, is said to have ‘founded the study of political economy in its modern sense as the ‘application of scientific methods of analysis to human society.’<sup>48</sup> But since Smith’s time, the theoretical project of political economy, to paraphrase Mosco, has moved from the scientific study of the relationship between the economy and politics to include four distinct ideas, namely history, social totality, moral philosophy, and practice or praxis.<sup>49</sup> These ideas give political economy its character as a distinctive approach to learning, thinking, and producing knowledge.

Several scholars have observed that there are various schools of thought of political economy. Mosco devotes a whole chapter to discuss the various schools of thought in political economy.<sup>50</sup> Clement and Williams too observe that within political economy there are divergent schools of thought and theorising, which they broadly characterise as liberal and Marxist.<sup>51</sup> Bartholomew and Boyd, however, observed more than three decades ago that a ‘political economy of law

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<sup>48</sup> Wallace Clement & Glen Williams, eds, *The New Canadian Political Economy* (Montreal: McGill University Press, 1989) 4.

<sup>49</sup> See, e.g., Vincent Mosco, *The Political Economy of Communication*, 2<sup>nd</sup> ed (Sage Publications Ltd, 2009) 3, 26ff.

<sup>50</sup> *Ibid* at 37 – 64.

<sup>51</sup> Clement & Williams, *supra* note 48, at 6.

remains relatively unelaborated and untheorized in Canada.<sup>52</sup> Ghai, Luckham, and Francis, in contrast, produced a valuable work that deals with the political economy of law from a Third World perspective.<sup>53</sup> They provide, as one reviewer put it, ‘an excellent overview of the role of law in the expansion of capitalism, the creation of the colonial State, and the nature of the judiciary and legal profession in post-colonial States.’<sup>54</sup>

A detailed discussion of each school of thought and its theoretical commitments is beyond the scope of my dissertation. But I was looking for ideas from theories of political economy that would help me to grasp how decisions that produce refugee encampment are made. I realised that a black-letter law analysis of legal texts, while important, would not provide insights into how decisions to encamp refugee are made and who makes them.

Mosco’s political economy of communication, and his theoretical grounding for the political economy of communication, in particular,<sup>55</sup> appeared to provide me with the theoretical approaches I was looking for. Mosco’s theory rests on basic epistemological and ontological principles that provide a ‘framework for understanding how we know things’ and a ‘foundation for understanding the

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<sup>52</sup> Amy Bartholomew and Susan Boyd, “Towards a Political Economy of Law,” in Wallace Clement and Glen Williams, eds, *The New Canadian Political Economy* (Montreal: McGill University Press, 1989) 212 at 212.

<sup>53</sup> Yash Ghai Robin Luckham, & Francis Snyder, *The Political Economy of Law: A Third World Reader* (Delhi, New York: Oxford University Press, 1987).

<sup>54</sup> Sally Engle Merry, Book Review of *The Political Economy of Law: A Third World Reader*, by Yash Ghai Robin Luckham, & Francis Snyder (1991) 14:2 *Association of Political and Legal Anthropology* 8.

<sup>55</sup> Mosco, *supra* note 49 at 10.



nature of being.’<sup>56</sup> Mosco points out that ontology ‘distinguishes seeing things as either *structures* or as *processes*.’ Using these, he develops a political economy approach that ‘places social processes and social relations and structures at the foreground’ and uses concepts and ideas as entry points to understanding the internal dynamics of a given problem or phenomenon. This approach allows him to study social relations, and particularly power relations that mutually constitute the production, distribution, and consumption of communication services and commodities.<sup>57</sup>

Thus, Mosco’s thesis that we can understand the foundation of the nature of things and social relations through a careful examination and grasping the processes and structures provided me with the theoretical route I was looking for to unlock how refugee encampment decisions are made. I deploy this in Chapter 3 to understand UNHCR’s international process and structures that produce refugee encampment decisions.

#### **2.2.4 Method or Methodology?**

The term “method,” just as the term “theory,” I explained in the preceding section, means different things in different disciplines and contexts. Some leading scholars in international law use the term “method” interchangeably with “theory.”<sup>58</sup> Moreover, another term used quite frequently is “methodology” whose meaning is left to the reader to decipher. The Oxford English Dictionary defines “method” in several ways, but one definition means, ‘[a] special form of procedure adopted in any branch of mental activity, whether for the purpose of teaching and

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<sup>56</sup> Ibid.

<sup>57</sup> Ibid at 24.

<sup>58</sup> See, e.g., Ratner and Slaughter *supra* note 2.

exposition, or for that of investigation and inquiry.’<sup>59</sup> Another definition of method, in a wider sense, refers to, ‘[a] way of doing anything especially according to a defined and regular plan; a mode of procedure in any activity, business, etc.’<sup>60</sup> Adapting these definitions to legal research or scholarship, method could simply mean a procedure of investigating any legal problem.

The procedures for inquiry or investigation may consist of several steps and tools depending on the nature of the problem or question to be addressed. For a typical legal problem, a starting step may be to examine the facts of the problem, extract the material or most relevant facts and, then, frame or ask the relevant legal questions and where and how to find the law to resolve the problem. The next step may involve identifying remedies, legal or otherwise; if legal remedies are identified, this may be located in the texts of legislation or treaties or agreements or in the doctrines enunciated in case law, domestic or international or by leading publicists. In addition, a search will be necessary to find the relevant volumes of the treaty series or the law reports. The problem, in some contexts, may concern issues of governance and accountability of key actors either at the national or international levels. Similar procedures may be identified and applied, but the nature of the problem may require further empirical facts from practical engagements with the key actors involved on the ground. In other words, to address the legal problem identified may require empirical observations.

The data gathered is then analysed through a process of conceptual analysis and the development of argumentation in which the pros and cons of each issue are weighed and thoroughly examined in the light of the theoretical commitments most relevant to the exposition being undertaken or the precedent and legislation

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<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

that most suitably disposes off the issue at hand; these are either sustained, modified, or rejected and, conclusions drawn, and prescriptions made.

Thus, I use the term “method” in this dissertation to mean the procedures for data collection and conceptual analysis. Method, as I understand it, is also conceptually distinct from “methodology.” In some of the literature, “method” and “methodology” are used interchangeably.<sup>61</sup> The term “methodology” originally meant ‘[t]he science of methods.’<sup>62</sup> But it also meant ‘the study of the direction and implications of empirical research, or of the suitability of the techniques employed in it.’<sup>63</sup> In other words, methodology could simply mean the study of the *suitability* (my emphasis) of methods employed in empirical research; it is a science, not a procedure, of studying or scrutinising of methods of conducting research. But in most of contexts in which the term is deployed, it has been ‘weakened to mean little more than ‘method.’<sup>64</sup> Therefore, in this dissertation, methodology is understood as a science of studying or scrutinising methods of conducting research. In other words, methodology is the entire frame of reference or theoretical assumptions undergirding a given study.

### 2.2.5 Conclusion

Method, theory, and school of thought, as understood in this dissertation are distinct, albeit, interconnected concepts. Method is understood as the procedures and techniques used to frame issues, collect data, and interpret and undertake legal analysis. Theory refers to the statement of the core ideas developed for explaining and confirming or refuting known or observed facts about a given phenomenon,

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<sup>61</sup> See, e.g., Rubin, *supra* note 2.

<sup>62</sup> Simpson and Weiner *supra* note 7 at 693.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

say, encampment of refugees or law, domestic or international law. And a school of thought is the world view of a group of people united by a shared world view, theoretical commitment, and methods of understanding and explaining social phenomena. The one aspect that unites all different schools of thought in law, national or international law, is that all lawyers share the same basic procedures of conceptual analysing and discussing legal issues. This method of conceptual analysis is often referred to as the *doctrinal method*.

### **2.3 Methods of Data Collection**

I had the dilemma of choosing between quantitative and qualitative methods and which particular tools of each method to use. I wondered whether to use a survey or to interview purposively selected participants, either as individuals or as a focus group.

I envisaged two main challenges if I were to use a survey method. In the first place, I would need to conduct the survey in more countries in the global south to generate statistically significant data. This was not feasible both in the light of my initial time frame and financial resources, although I had a generous Vanier Graduate Scholarship and CIGI graduate scholarship. In the second place, and crucially, if I used a survey to collect data from UNHCR and government officials participants, how do I address the problem of participant bias. I was certain, from my previous research and work experiences with refugee issues that certain issues or questions, such as refugee encampment, were sensitive to both UNHCR and government officials and neither have wanted the public to know the truth about whose idea refugee encampment really was.

Therefore, UNHCR and government officials have the incentives to conceal their true preferences for refugee encampment because they know that I am studying questions about how to hold them accountable under international law for the injurious consequences of refugees camps on the environment and refugees

in camps which one of them created, funds, and manages. Third, the problem with using a survey was my own bias in framing the survey questions although proponents of quantitative methods often suggest that closed-end questions are allegedly bias-free; I argue that closed-end questions have inherent elements of bias.

The alternative of interviewing purposively selected participants, either in a one-on-one interview or a focus group, also presented its own type of challenges. First, how to identify participants and from which country; second, the difficulty of having to organise a focus group of government or UNHCR officials, or refugees; third, bias both from participants since I would still be asking some direct questions, including the primary question about whose idea refugee encampment was; and fourth, my own bias because of my previous research and work experiences with refugees and interactions with UNHCR and refugee-hosting state government officials in Kenya, Uganda, and Tanzania.

I chose, ultimately, qualitative methods of data collection, both doctrinal and interviews of purposively selected participants, on one-on-one basis or focus group, depending on the circumstances on the ground, to gather the relevant information for writing my dissertation. The doctrinal method allowed me to undertake a document survey, i.e., search databases for primary and secondary sources of data. The interview or empirical approach allowed me to interview participants purposively selected in one country in the global south. I planned for both one-on-one interviews and focus group interviews because of past research experience, especially with regard to interviewing refugees. Officials in charge of refugee affairs, whether UNHCR or refugee-host state government, can change positions about who can stay in the refugee camps, especially for researchers and other persons. If this happened during my fieldwork, then I may not conduct one-on-one interviews. So, while one-on-one interviews with refugees was my preferred tool, I incorporated into my fieldwork plan, alternative B, focus group

interviews. The best way to optimise one's time in such a scenario would be to identify a focus group and conduct interviews with them.

I chose Kenya for my fieldwork because it never used to have refugee camps until 1990. The interviews and participant observations provided me with ways to overcome the likely bias of UNHCR and Government of Kenya (GoK) official participants in responding to my interview questions or in their policy documents. I could look for what Epstein and King describe as '*revealed preferences*,'<sup>65</sup> of participants and the activities of UNHCR in the camps generally to draw inferences about the UNHCR's preference for refugee camps and why Kenya abandoned its *laissez faire* refugee policy and chose refugee encampment and whose idea and decision refugee encampment was.

I chose qualitative over quantitative methods for another reason: the nature of my main research question – framed as a *how-question*, not a *what-question* – albeit both qualitative and quantitative methods are procedures of gathering empirical data. Quantitative methods, while often touted as being scientifically less biased in contradistinction to qualitative methods, focus on proving a 'causal model, or hypothesis'<sup>66</sup> or 'what works.'<sup>67</sup> My dissertation's main research question is not necessarily seeking answers for understanding *causal* links or *what works*, albeit I do interrogate certain aspects of causal links between the decisions that produce refugee encampment and refugee camps and the injurious consequences of refugee camps on the environment and refugees. Nor is my main

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<sup>65</sup> Lee Epstein and Gary King, "The Rules of Inference" (2002) 69:1 *University of Chicago Law Review* 1 at 93 – 94.

<sup>66</sup> Gail M. Sullivan and Joan Sargeant, "Qualities of Qualitative Research: Part I" (2011) *Journal of Graduate Medical Education* 449 at 449.

<sup>67</sup> *Ibid.*

research question seeking to hypothesize qua hypothesize UNHCR accountability under international law, although I do theorise based on the data collected how the decisions that produce refugee encampment are made and identify observable implications that are relevant to the questions of the accountability of the UNHCR, under international law, for its actions or omissions in relation to refugee encampment that cause harm to the environment and refugees in camps it helps create, fund, and administer.

Rather, I am interested in understanding *how* this can be done or achieved in the context of current rules of international law and international politics. This required, among other things, my grasping of how the decisions of refugee encampment are constructed and the role of the main actors in the provision of international protection to refugees in the encampment of refugees to be able to allocate and attribute responsibility for the injurious consequences resulting from refugee encampment on the environment and the conditions of refugees in the camps. Understanding the decision-making processes that produce refugee encampment necessitated performing two tasks: first, reviewing policy documents and reports that the main actors in refugee protection, such as the UNHCR, refugee-host state governments, and international non-governmental organisations produce; and second, interacting with some of key UNHCR and government personnel and refugees in the field in ways that would allow me to probe further how encampment decisions are made and make necessary follow ups and observations.

Therefore, the tools of quantitative methods, such as surveys, would have been inadequate because they rely on closed-end questions that pigeonhole responses or biases. In addition, quantitative methods, generally, rein in or restrict related variables, are extremely controlled, and are mainly driven by synthetic

logic or inductive reasoning.<sup>68</sup> Fieldwork-based qualitative methods of data collection, by contrast, allow for the framing of open-ended questions, which are easily adaptable or flexible to draw or produce more answers or responses in a specific context. The qualitative method focuses on the why and how about a phenomenon and this necessitates a context specific interaction in natural setting where the phenomenon or questions of interest can be intensely observed. That is why it was necessary for me to undertake fieldwork in Kenya and visit a refugee camp and interview individual participants and focus groups and observe intensely the camp processes and structures to be able to grasp how refugee encampment happens and why. In addition, some of the questions I had to ask participants required some explanation not a straightforward ‘yes’ or ‘no’ answers. In this context, qualitative methods allow a participant room for explaining processes, structures, decision, and experiences and make it, as I stated already, possible to look for revealed preferences and minimise bias.

Some objections, however, may be raised to my using qualitative methods of data collection, which are associated with social sciences and humanities research methods, for a dissertation that seeks to understand questions about how UNHCR can be held accountable under international law. Critiques may argue that ‘[l]egal research, or much of it’<sup>69</sup> is ‘different in character from research in other fields because of the peculiarities of law and legal systems’<sup>70</sup> and, therefore, that a more appropriate method of data collection for a main research question

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<sup>68</sup> Ibid.

<sup>69</sup> Denis Pearce Enid Campbell, & Don Harding, *Australian Law Schools: A Discipline Assessment for Commonwealth Tertiary Education Commission, Volume Three* (Canberra: C.J. Thompson, Commonwealth Government Printer, 1987) 309 at para 9.

<sup>70</sup> Ibid.



steeped in law, and especially questions of international law, should have been the traditional method of legal research and analysis: the doctrinal method.

The doctrinal method is regarded as the ‘most accepted methodology in the discipline of law.’<sup>71</sup> In conventional doctrinal research, the researcher takes one or a series of legal questions or propositions as a starting point and defines the research objective and, then, in a library or at home, locates authoritative decisions, applicable legislation, and secondary analyses and discussions of these. The legal researcher, having gathered relevant data, then ‘provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between the rules, explains areas of difficulty and, perhaps, predicts future development’<sup>72</sup> in the particular area of law whence the research question was identified and framed. Indeed, doctrinal research methods or what other scholars refer to as “black-letter-law’ approach,<sup>73</sup> it is claimed, ‘relies extensively on using court judgements and statutes to explain the law.’<sup>74</sup> It ‘aims to systematise and rectify the law on any particular topic by a distinctive mode of analysis of authoritative texts that consists of primary and secondary sources.’<sup>75</sup>

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<sup>71</sup> Terry Hutchinson and Nigel Duncan, “Defining and Describing What We Do: Doctrinal Legal Research” (2012) 17:1 *Deakin Law Review* 83 at 102.

<sup>72</sup> Pearce, Campbell, & Harding, *supra* note 69 at “Appendix 3: Legal Education in Australia: The Submission of Australian Law School Deans to the Commonwealth Tertiary Education Commission, April 1986” at 17.

<sup>73</sup> Mike McConville and Wing Hong Chui, eds, *Research Methods for Law*, 2nd (Edinburgh: Edinburgh University Press, 2017) 4.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

These features of doctrinal research, I would suggest, demonstrate that it is a qualitative method of doing legal research. Indeed, McConville and Chui assert that ‘doctrinal research is qualitative research’ because ‘such research is a process of selecting and weighing materials taking into account hierarchy and authority as well as understanding social context and interpretation.’<sup>76</sup> McConville and Chui further claim that the methods of doctrinal research, ‘such as the identification of relevant legislation, cases, and secondary materials in law can be seen as analogous to a social sciences literature review.’<sup>77</sup> If that is the case, it may be argued that it was unnecessary for me to ‘borrow’ qualitative methods of data collection from social sciences and humanities to collect data to answer a research question that is legal in character. Indeed, Pendleton has advocated that legal scholars should reject the dominance of empiricism – social science style – in legal scholarship.<sup>78</sup>

Empiricism, I submit, if understood beyond the narrow confines of quantitative data and statistical techniques and modelling, is relevant to legal scholarship because legal analyses and synthesis is enriched when conducted on evidence based on observation or experience. I argue with Epstein and King that:

‘[w]hat makes research empirical is that it is based on observations of the world – in other words, *data*, which is just a term for facts about the world. These fact may be historical or contemporary, or based on legislation or case law, the results of interviews or surveys, or the outcome of secondary archival research or primary data collection...’<sup>79</sup>

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<sup>76</sup> McConville & Chui, *supra* note 73 at 42.

<sup>77</sup> *Ibid.*

<sup>78</sup> Michael Pendleton, “Rejecting the Dominance of Empirical Legal Scholarship – A Better Way of Choosing, Researching and Writing a Scholarly Article” in Mike McConville & Wing Hong Chui, eds, *Research Methods of Law*, 2nd (Edinburgh: Edinburgh University Press, 2017) 231 – 250.

<sup>79</sup> Epstein and King, *supra* note 65 at 2 – 3.

Therefore, incorporating empiricism in legal research might lead to a better understanding of the efficacy or limitation(s) of existing rules of law on a particular issue or subject, such as the accountability of IOs under international law, or the regulation of the Internet and criminal activity online.

### **2.3.1 Data from Documents**

I started the process of data collection for answering my research question with a document survey, namely a list of things to do that helped me to get to what I wanted to know about my main research question and how to get them. In other words, I undertook a process of identifying a list of things to do that allowed me to grasp the relationship between my main research question and the data required to answer it.<sup>80</sup>

I identified and reviewed documents, including policy documents and reports on refugee protection that the League of Nations, and the United Nations (UN) organs, such as the General Assembly and the Security Council, subsidiary organs such as the UNHCR, refugee hosting states, and NGOs produce.

#### **2.3.1.1 Documents from the League of Nations**

I started with the work of the League of Nations since it laid the foundation of contemporary international protection of refugees. The work of the League of Nations for refugees started in 1921 and ended in 1946. So, there is a vast body

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<sup>80</sup> Professor Loira Salter, who co-taught the Graduate Research Seminar with Professor Ruth Buchanan, introduced the idea of 'Document Survey' in her class on Advanced Graduate Seminar, Osgoode Hall Law School, York University, in the Winter of 2015. Initially I got wrong the assignment on Document Survey, but when I got feedback and also met her to go over the topic, I finally grasped its fundamentals. It is an excellent technique for get started with one's research topic.

of materials that the League produced on refugee protection during its tenure, which I could not complete reviewing within the time frame of my research project.

Therefore, I decided to focus on reports produced during the first two years of the League's inaugural work on refugees, from April 1921 to December 1923. I chose this time period because I anticipated that it was the League's moment of responding to a "refugee emergency" and therefore issues of refugee accommodation, including encampment might have been high on the agenda. I had to limit further the scope of documents I could review during this time frame. I selected four key sets of documents. The first document is Dr Fridtjof Nansen, the first League High Commissioner for Refugees, first report since taking office in August 1921, on the work accomplished up to March 1922.<sup>81</sup> This report gives a general overview of the assignments that the High Commissioner and his officials had undertaken during the reporting period. It is important because it provides a window into the policies of the first League High Commissioner for Russian Refugees designed to address the Russian refugee crisis in Europe after the first European War or World War I.

The second document is Dr Nansen's report to the Fifth Committee of the Assembly of the League of Nations.<sup>82</sup> This report covers the work 'carried out on behalf of the League of Nations for Russian refugees since the last meeting of the Assembly.' The report 'explains how the League came to take up the question, how we have endeavoured to deal with our task, and the results which we have

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<sup>81</sup> Dr Fridtjof Nansen, "General Report of the Work Accomplished up to March 15<sup>th</sup>, 1922" (1922) 3:4 *League of Nations Official Journal* 341.

<sup>82</sup> League of Nations, "Russian Refugees: Report by Dr Fridtjof Nansen, High Commissioner of the League of Nations, to the Fifth Committee of the Assembly, on September 15<sup>th</sup>, 1922" (1922) 3:11 *League of Nations Official Journal* 1134.

achieved.’<sup>83</sup> One of the key issues the report covers is the best way to help refugees. If this is the case, then it should provide insights into how the League High Commissioner for Russian Refugees addressed the question of the accommodation of Russian refugees, especially whether refugee camps were used in the emergencies. It provides a useful contrast with contemporary approaches to refugee protection, whereby refugee encampment is often defended on the basis of the best way to help refugees.

A third document from the League of Nations comprises information supplied by ten countries hosting Russian refugees about ‘the number and condition of the Russian refugees in their respective territories.’<sup>84</sup> Each of these sets of documents provide valuable information on what each country has done and plans to do for Russian refugees in their territories. In addition, they also address the challenges that refugee-hosting states and refugees faced. The information I gleaned from these reports by Member States of the League of Nations provided, to some extent, a context within which to situate contemporary refugee encampment. An intriguing question for me has been whether right from the outset of the Russian refugee crisis European states adopted encampment policies and if so why and if no, why not. Reviewing the information in these document indicate that European governments of the early twentieth century expressed more solidarity with the Russian refugees and did not emphasize refugee camps as a technology of choice for helping them in their territories.

The fourth group of documents from the League of Nations that I reviewed related to the work of the Greek Refugees Settlement Scheme (GRSS)

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<sup>83</sup> Ibid., at 1134.

<sup>84</sup> League of Nations, “The Question of Russian Refugees” (November 1921) *Official Journal* at 1006.

implemented through an independent settlement Commission.<sup>85</sup> I shall return to the GRSS in detail in Chapter 3 and 5, but suffice to point out here that the GRSS were a solution devised by the League of Nations in collaboration with the Greek government of the time to the problem of over one million Greeks who were forced from Turkey following the war in which the Turkish army captured ‘the whole of Asia Minor’ and Smyrna.<sup>86</sup> The work of the Commission is gleaned from its reports<sup>87</sup> and statements made by its chair before the Council of the League Nations.<sup>88</sup> The reports of the work of the GRSS provide useful contrast to contemporary encampment of refugees under the auspices of the UNHCR.

In addition to these four broad sources information under the auspices of the League of Nations on refugees, I also decided to review the League’s hard-law and soft law documents on refugee protection. Specifically, I identified four soft-law documents, called arrangements of 1922, 1924, 1926, and 1936 and two conventions, the 1933 Convention on the International Status of Refugees and the 1938 Convention on Refugees coming from Germany.

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<sup>85</sup> League of Nations, “The Greek Refugees Settlement Scheme: Note by the Secretary-General” (1923) 4:10 *Official Journal* 1138.

<sup>86</sup> *Ibid.*

<sup>87</sup> See, e.g., “Report on the Operations of the Refugee Settlement Commission for the Second Three Months” (1924) 5:8 *League of Nations Official Journal* 1069 – 1074; “Third Quarterly Report on the Operations of the Refugee Settlement Commission for the Third Three Months” (1924) 5:11 *League of Nations Official Journal* 1718 – 1724.

<sup>88</sup> See, e.g., “Proceedings of the Thirtieth Session of the Council of the League of Nations, Fifth Meeting, Agenda Item no. 1282: ‘Work of the Greek Refugees Settlement Commission’” (1924) 5:10 *League of Nations Official Journal* 1299.

### 2.3.1.2 Documents from the United Nations

The United Nations also produces huge volumes of documentation of various kinds, including on refugee protection since its inception in 1945. I am, however, only interested in documents that will provide me information about issues concerning the accountability of the UNHCR under international law for the injurious consequences of refugee camps on the environment and refugees that it helps create, fund, and administer. Even under these broad terms, I chose to focus on four types of documents. The first set of documents is contained in the UN *Juridical Yearbook*, which contain documentary material of a legal character concerning the United Nations and related inter-governmental organisations.<sup>89</sup> Key legal questions concerning the United Nations and its organs are addressed in the volumes of this document.

The second set of documents relevant to my research question relate to the work of the UN on codification of international law, especially the work of the International Law Commission (ILC) on the law of international responsibility and liability for the injurious consequences arising out of acts that international law does not prohibit. These information are produced yearly both in the ILC's annual reports to the General Assembly of the United Nations and its flagship publication, the *Yearbook of the International Law Commission* and available online.

The third set of documentation relate to the reports of major UN sponsored international conferences on the environment. The earliest of these reports is the UN report on the conference on human environment.<sup>90</sup> This report covers the

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<sup>89</sup> See, e.g., UN, *United Nations Juridical Yearbook 2015* (New York: UN, 2020).

<sup>90</sup> See, *Report of the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14/Rev1 (1972).

proceedings of the UN conference on the human environment held in Stockholm, Sweden, in 1972. The second report covers the proceedings of the Rio Conference of 1992, which is in three volumes.<sup>91</sup> The first volume covers the resolutions adopted by the Conference and in particular the declarations and principles; the second volume covers the proceedings of the Conference; and the third volume contains the statements made by states that attended the conference. This report, like the previous report from the 1972 conference have all the good ideas about how best to conserve the environment and who has responsibility for what, when and how. Thus, it will be useful for my analysis of how refugee encampment relates to the principles and standards enunciated in the report and who bears responsibility for the consequences of encampment on the environment. There are other reports, e.g., the World Summit report<sup>92</sup> and the UN conference on sustainable development.<sup>93</sup>

The fourth set of documents relate to legal materials on the environment, such as the UN Convention on climate change<sup>94</sup> and the Convention on biodiversity.<sup>95</sup>

In addition to broader UN documentation, the UNHCR also produces a variety of documentation on its work for providing international protection to refugees. Some of these include, the UNHCR *Handbook for Emergencies*, now in its

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<sup>91</sup> See, *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26/Rev.1 (Vol. 1) (1992).

<sup>92</sup> See, *Report of the World Summit on Sustainable Development*, UN Doc A/CONF.199/20 (2002).

<sup>93</sup> See, *Report of the United Nations Conference on Sustainable Development*, UN Doc A/CONF.216/16 (2012).

<sup>94</sup> UN, *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107.

<sup>95</sup> UN, *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79.



fourth edition, UNHCR's *Refugee Operations and Environmental Management*, UNHCR *Global Trends*, UNHCR, *Global Reports*, UNHCR Statistical Yearbook, and the High Commissioner's annual reports to the UN General Assembly.<sup>96</sup>

### 2.3.2 Data from Case Law

I located at least two case-law documents of national and international courts. The international case, *the Sufi case*, that the European Court of Human Rights (ECtHR) decided in 2010 concerns two Somali refugees whom the United Kingdom had wanted to return to Somalia or the Dadaab Refugee Camp Complex, in Kenya. The domestic case concerns challenges to Kenya government directive in 2012 that all refugees living in Nairobi and other urban centres must go and live in the Kakuma and Dadaab refugee camps.

How to find the most relevant documents from which to 'mine' data for answering my research question was a real challenge; it was like finding my way through a thick forest. I, however, surmounted this challenge with the help of modern technology in three possible ways. First, I used 'Boolean search logic' to find documents.<sup>97</sup> A Boolean search allows one to combine key words with

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<sup>96</sup> See, e.g., *Report of the United Nations High Commissioner for Refugees*, UNGAOR, 68th Sess, Supp No 12, UN Doc A/68/12 (Part I) (2013); *Report of the United Nations High Commissioner for Refugees*, UNGAOR, 68th Sess, Supp No 12, UN Doc A/68/12 (Part II) (2013); *Report of the United Nations High Commissioner for Refugees*, UNGAOR, 67th Sess, Supp No 12, UN Doc A/67/12 (2012); *Report of the United Nations High Commissioner for Refugees*, UNGAOR, 66th Sess, Supp No 12, UN Doc A/66/12 (2011); *Report of the United Nations High Commissioner for Refugees*, UNGAOR, 65th Sess, Supp No 12, UN Doc A/65/12 (2010).

<sup>97</sup> On this aspect, see, e.g., Ian Dobinson & Francis Johns, "Legal Research as Qualitative Research," in Mike McConville & Wing Hong Chui, *Research Methods for Law* (Edinburgh: Edinburgh University Press, Ltd, 2<sup>nd</sup> Edition, 2017) 18; Jim Alderman, 'Boolean Logic/Boolean Searching' (2014), online: <https://digitalcommons.unf.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1009&context=bliss>>.

modifiers, such as “AND”, “OR,” and “NOT,” to produce the most relevant results one is looking for. Web search engines, such as Google, as well as several databases, actually use Boolean search logic.<sup>98</sup> To look for text books, monographs, and articles on refugee camps and their impact on the environment, I used “keywords” from my research topic and modifiers, e.g., ““refugees” AND “environment””; ““refugees” AND “Environmental Degradation,”” ““refugees AND “camps,”” and “refugee camps” AND ““impact on environment.”” Boolean searching has its limitations, however, because the search terms used are often subject or author oriented and may not produce the results sought.

Second, I browsed online data bases and educational, but commercialised, data bases such as Hein Online, Lexis Advance Quicklaw, and WestlawNext Canada. Browsing involves ‘relying on the structure of a database, where navigation is done by an alphabetical list, a table of contents, a data range, or an index, simply using mouse clicks to find a particular document.’<sup>99</sup> Fortunately, both Osgoode Library and York Libraries hold subscriptions to some of these online data bases and I searched for documents using the structure of the databases such as Hein Online using an alphabetical order, table of contents, or data range or an index. In the event of difficulty, help was always available from the librarians of the Osgoode Hall Law School Library; they were often handy proved to be so valuable.

A third method that I used for identifying relevant documents was scanning through newspapers’ “books section” and events or activities on refugee issues. I focused on newspapers in East Africa because that is where I chose to do my fieldwork and that is also where refugee encampment has been endemic. The

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<sup>98</sup> Ibid.

<sup>99</sup> Dobinson and Johns, *supra* note 97 at 33.

problem with this approach is that newspaper book reviews are declining<sup>100</sup> and one might be searching on barren land.

Finally, from our monthly meetings with my Supervisor, I learnt of a fourth method of searching for documents in the library: physically scan the shelves, whenever picking a particular book within the same row of shelves or when one has sat for long, a break to stretch up tired muscles along the rows of shelves looking for materials, the old-fashioned way also bore some surprising information.

### **2.3.3 Data from Interviews**

When I reviewed the select documents and reports, some gaps existed and the only way to fill the gaps was to interview some of the key actors involved in the provision of international protection to refugees and the refugees themselves. I had to design an interview strategy and determine the questions to ask each group of participants.

#### **2.3.3.1 Preparation for Interviews**

Before I left for fieldwork in Kenya to conduct interviews, I ensured that I was properly prepared. First, I had to think and decide what kind of data or facts I wanted to know that I could not obtain from my review of the documents I identified; second who do I want to interview and what ethical issues needs to be addressed; third what resources and how much of each will I need to be able to conduct the interviews, from transport, accommodation, stationery, ethics clearance, and research permits; fourth, what likely challenges will I encounter once in the field for interviews, e.g., the problem of unforeseen interruptions that

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<sup>100</sup> See, e.g., John Palatella, “The Death and Life of the Book Review” (3 June 2010), online: *The Nation* <<http://www.thenation.com/article/death-and-life-book-review#>>.

result in the postponement of interviews for several days or even weeks or camp officials refusing me permission to stay in the camps; and finally, what type of questions I will ask the participants and where will the interview sites be and how long will each interview session take.

While all these aspects were important if I were to conduct successful interviews, I realised that four of these, ethics clearance with the Human Participants Review Sub-Committee of the Ethics Review Board, York University, obtaining research permit from the Kenya Commission for Science, Technology and Innovation, identifying who to interview, and the sites for interviews were critical. So, I will explained each, a little bit more in the subsections that follow.

### **2.3.3.2 Ethics Review and Approval**

It is mandatory for all York University graduate students undertaking research that involves human subjects to apply for ethics review and approval before they can embark on fieldwork.<sup>101</sup> Thus, I undertook an ethics review process before going for fieldwork in Kenya to conduct interviews with participants I had purposively identified. The Graduate Program, Osgoode Hall Law School, and the Human Participants Review Sub-Committee of the Ethics Review Board, York University, both supervise or oversee the ethics review process to ensure that my project conforms to the standards of the Canadian Tri-Council Research Ethics Guidelines. The Sub-Committee, however, approves the project.

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<sup>101</sup> See, York University, “Research Involving Human Participants, Senate Policy (Formerly titled: Ethics Review Process for Research Involving Human Participants Policy)” (27 June 2013), online: *Secretariat Policies*<<https://secretariat-policies.info.yorku.ca/policies/ethics-review-process-for-research-involving-human-participants-policy/>>.

Before embarking on the ethics review process, however, I had to complete the ‘Tri-Council Policy Statement: Ethical Conduct of Research Involving Humans Course on Research Ethics (TCPS 2: CORE).’ After completing the TCPS 2: CORE course and receiving a certificate, I submitted my research project, *Refugee Camps, Environmental Degradation and Accountability of Actors in Refugee Protection* in February 2017 for ethics review and approval and it was approved on 12 May 2017. I attach to the dissertation the certificate of completion of the Canadian Tri-Council on Research Ethics course as Appendix 1 and the Human Participants Review Sub-Committee’s Ethics Approval as Appendix 2.

### **2.3.3.3 Research Permits and Permission to Visit Dadaab Refugee Camp**

Obtaining a research permit is a mandatory requirement for anyone intending to conduct research in Kenya.<sup>102</sup> Therefore, the first thing, after having secured a place to live in Nairobi, on my first fieldwork trip to Kenya in June 2017, was to follow up my application for research permit with the Kenya National Commission for Science, Technology, and Innovation (NACOSTI). I had started the application process online while still in Toronto, Canada, having established that I need research permit to conduct research in Kenya.

I went to the NACOSTI offices located at Utali House, Uhuru Highway, Nairobi on 16 June 2017 to deliver a reference letter, one of the supporting documents required for completing the application for research permit, from my Graduate Program and to meet officials there and find out how long for I would have to wait before my application for research permit is approved. I had already paid the fee and uploaded some of the key documents required on the NACOSTI website. The official I met told me that, at a minimum, it would take up to 2 weeks;

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<sup>102</sup> NACOSTI, “Application for a Research License” (undated). Online: *National Commission for Science, Technology & Innovation* < <https://research-portal.nacosti.go.ke/> >.

but the normal duration for processing a permit is 3 months. I requested that the Commission use its discretion to expedite the process so that I could receive the permit at least in a week's time since I had uploaded the documents three months earlier before my coming to Kenya. Secondly, I told the officer that I had limited time in Kenya, and I did not want the Kenyan elections scheduled for August 2017 to have minimum impact on my research plans. The officer told me to call her after one week. On 19 June 2017, however, my permit was approved. The permit and letter are attached as Appendix 3 and 4; certain parts of the letter and permit are redacted to conform to the Faculty of Graduate Studies requirements.

In addition, I also needed permission to conduct research in the refugee camps from both the government and UNHCR. I had selected, the Dadaab Refugee Camp Complex because it was the first to be established and one time the largest refugee camp in the world. The Secretary of Security in the Ministry of Interior and Coordination of National Government, however, informed me, during my first fieldwork trip in 2017, that I cannot go to Dadaab Refugee Camp Complex (DRCC). He gave two reasons for denying me permission to go to DRCC. First, allegedly, because of the threat of Al-Shabab terrorist group, who were said to have members in the camp. Second, that as a Ugandan I may likely become a target for the terrorist because Uganda was one of the countries that had sent troops to fight them in Somalia. I was, however, allowed to go to DRCC during my second trip in 2018 and the permit (parts redacted) to conduct research there is attached as Appendix 5.

#### **2.3.3.4 Who to Interview and How to Select them?**

I decided that interviewing the key actors, i.e., UNHCR, government of Kenya officials, NGOs, both national and international, involved in refugee protection, and refugees themselves, would provide me with valuable data for answering part of my main research question. I chose purposeful sampling, a non-probability sampling technique, to select participants based on their knowledge and

experiences. From a review of the relevant literature, I discovered that UNHCR officials, such as the Country Representative and operational staff, the permanent secretaries and refugee commissioners or directors under the relevant Government of Kenya (GoK) ministry, refugees, non-governmental organisations, and leaders of local communities where a refugee camp is located have unique positions that make them likely possess knowledge and experience that can help me understand how the decision-making processes that produce refugee camps are arrived at and who are the key players in this.

My initial plan to conduct all one-on-one interviews with refugees and one or two focus group discussions in the DRCC did not work out for reasons that I had not anticipated. I had planned that for interviews in the refugee camps, I would move into the camps and find accommodation there. I was aware, from my first fieldtrip in 2017, that there were security issues associated with the terrorist group Al Shabab, but I believed that the overall security provided was sufficient to allow me stay in the refugee camps and conduct interviews with individual refugees as much as possible and one or two focus group interviews. But on arrival at DRCC, UNHCR officials told me that I cannot stay in the camp for security reasons. I can hitch a ride to and from the camps with its staff, but I cannot stay in any of the camps. In the circumstances, I could not conduct one-on-one interviews with refugees in the camps. I switched to plan B: adopted focus groups discussions as the main tool for data collection.

#### **2.3.3.4.1 The UNHCR**

From the preliminary review of relevant literature, the UNHCR representative (often referred to simply as the UNHCR Rep) in a given country was shown to be the head of Contingency Planning in refugee emergencies, which provided some hints about UNHCR's critical role in the creation, funding, and management of refugee camps. This, I believed suggest that the Country Rep had knowledge and experience on refugee policy and encampment that other officers may not possess.

Therefore, I decided that I would interview at least the UNHCR Rep in Nairobi, Kenya, the Deputy Rep, and at least one retired UNHCR staff and, where feasible, two officers. I planned also to interview UNHCR officers in the field offices in DRCC. I would interview these officials based on their knowledge and experience.

#### **2.3.3.4.2 Government of Kenya (GoK) and County Authorities**

States bear the primary responsibility of providing international protection to refugees under international law. Therefore, I surmised that people working in specific government ministries under which refugee issues fall have special knowledge about the refugee policies and practices that other government departments not engaged in refugee issues may not have.

I planned, initially, to interview four types of government officials: the minister responsible for refugee affairs; second, the permanent secretaries of the ministry responsible for refugees; third, the commissioners or directors of refugee affairs in the relevant ministry or departments of refugees; and a fourth category, technically not a government official, are the retired government official who worked with refugees, whether minister, permanent secretary, or commissioner or director.

My initial plan was to interview government participants in Kenya, Uganda, and Tanzania because of their vast experience of hosting refugees in camps and settlements, but time and financial constraints compelled me to focus on Kenya. I chose Kenya, as I already stated, because of the three countries I had selected, Kenya was the only one which had no refugee encampment policy until June 1990. So, I was curious why Kenya eventually embraced the refugee encampment mentality and decided that it would provide a better case study to understand how the decisions on refugee encampment are hatched or broached and by whom.



In addition to interviewing central government officials, I planned to interview County government officials, especially officials at the Sub-county level, where the refugee camps are located. I interviewed two officials of the Dadaab Sub-county. It was logistically impossible for me to travel to Garissa to interview the County government officials.

#### **2.3.3.4.3 Refugees**

Refugees are the primary reason the international refugee protection regime was created and encampment policies that purport to implement that protection regime. It was imperative that I interviewed some of them, both those who live in refugee camps and those that live outside the camps, such as in Nairobi. I had planned to interview 20 refugees, purposively selected, 10 women and 10 men.

But it was not possible to have *one-on-one* interviews with refugees in the refugee camps. To be able to have one-on-one interviewed required me to stay in the refugee camp. UNHCR and RAS told me that I cannot live in the camps and conduct interviews. I had to live at the UNHCR Camp Base and then hitch a ride everyday with UNHCR staff going to work in the camps. We arrived at the camps by around 9.00 am and then returned by 1.00 pm or sometimes 2.00 pm. I had, fortunately, envisaged such as scenario and incorporated focus group interviews with purposively selected groups of refugees, such as refugee youth, teachers, and refugee elders.

#### **2.3.3.4.4 Non-governmental Organisations (NGOs)**

The non-governmental Organisations are the blood-life of refugee encampment; without them, the social services provided for refugees and governance structures and systems used to deliver these services would grind to a halt. Given their importance in the refugee encampment equation, it was crucial that I obtained their views on refugee encampment and its consequences on the environment and

refugees. I had anticipated to interview the directors or executive directors of five international NGOs and three local NGOs that have refugee programmes in Kenya.

The international NGOs were generally uncooperative. I had requested interviews with seven of them: Care International, Save the Children, International Committee of the Red Cross (ICRC), International Rescue Committee (IRC), Lutheran World Federation, Medicines Sans Frontier (MSF), Switzerland (MSFCH) Kenya Mission (MSFCH-Kenya Mission), and Jesuit Refugee Services (JRS). LWF accepted to be interviewed; MSFCH-Kenya declined stating that, ‘...unfortunately we cannot participate in the interview due to its background of LAW nature rather than a medical nature as we are a humanitarian medical organisation.’<sup>103</sup>

#### **2.3.3.5 Interview Sites**

I had two main sites for the interviews: Dadaab Refugee Camp Complex (DRCC) and non-camp sites, in Nairobi, Kitale, and Thika. In Dadaab I held focus group discussions or interviews with secondary school students, members of the parents and teachers association (PTA) and the school board, and teachers at Ifo I, Ifo II, Hagadera, and Dagahaley refugee camps. I also interviewed participants from UNHCR, GoK, the LWF, and two refugees participants – a woman and a man.

In Nairobi, I interviewed one participant from UNHCR, GoK participants, refugees, and two Kenyan NGOs. I also interviewed two participants outside Nairobi, in Thika and Kitale.

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<sup>103</sup> E-mail communication with Project Coordinator MSFCH – Kenya Mission – Dadaab Project, 28 March 2018.

#### 2.3.3.6 The Interviews

I wrote to each participant a letter seeking their consent to be interviewed. In the letter, I introduced what my research is about, the ethics approval by York University and research permit from the Kenya National Commission for Science, Technology, and Innovation, and clearance from GoK to do research in the camps. I also indicated to participant their right and freedom to quit the interview any time of their choosing, how I will guarantee and protect their anonymity and confidentiality issues, and how long for interviews will take place.

Furthermore, I stated the period I will store the data and when to destroy it. At the end of the letter, the participant had to sign if they consent to the interview. I also included a sample of the questions the participant will expect me to ask during the interview. The sample questions were submitted to the Ethics Committee, York University, as part of the ethics review process.

It was not possible, however, to give the consent letter to participants of focus group discussions in advance because of logistical issues and the time within which to identify groups and have preliminary meetings with them. Instead, I read to the group the points and ethical issues in the letter and allowed them to ask questions or withdraw their consent and not participate if they believe, for whatever reasons, they are not interested in participating in the discussions or interviews. The one-on-one interviews took between an hour and one and half hours. And the focus group discussions often took at least an hour, especially for the secondary school students' focus groups because of their day's class time-table. Discussions with PTA and School Board members focus groups took at least an hour and half.

I interviewed 4 participants, from GoK, 3 in Nairobi and 1 in DRCC; 2 former government officials, one of whom was also a former UNHCR official; 2

sub-county officials in Dadaab; 6 UNHCR officials; 1 former UNHCR official who worked in Kenya; 2 representatives of local NGOs; 1 representative of an international NGO; 2 refugee focus groups in Nairobi; 10 refugee focus groups in Dadaab; 2 individual refugees in Nairobi; and 2 individual refugees in Dadaab. Thus, I interviewed 21 individual participants from GoK, UNHCR, NGO, and refugees on a one-on-one basis and 89 participants in 12 refugee focus groups in both Dadaab refugee camp complex and in Nairobi. A summary of participants interviewed is presented in Appendix 6.

In addition to the data I collected from fieldwork in Kenya in 2017 and 2018, I also drew from my previous research experiences in Kenya, Uganda, and Tanzania on refugee rights and refugee policy, law, and practice in these countries. I further drew from the work of leading scholars in refugee studies whose works are based on data collected both from documents and fieldwork.

#### **2.3.4 Limitations of the Study**

It is pertinent I address some of the limitations of my study. Since I used qualitative methods to collect data on which I base my theorising and analysis, some limitations are unavoidable. First, the number of participants interviewed is small and therefore not statistically representative and any generalisations can only be made in context. Second, it is difficult to replicate the results of qualitative research because it is based on individual perspectives and data may be difficult to verify. Third, the bias of the researcher, whether conscious or subconscious may affect the data and this may influence the conclusions. Fourth, the quality of data depends on my research skills. Fifth, some critics may argue that not all refugee camps are the same and that the findings from one camp cannot represent conditions in other refugee camps. Therefore, conclusions drawn from the data are limited to similarly situated camps.

I believe, however, that my detailed explanation of the methods I used to collect the data and the advantages of qualitative methods I explained earlier may offset some of these limitations. My detailed explanation of the methods of data collection may facilitate replication of the results of my study. To minimise my own bias and the biases of participants, for example, I used multiple procedures to collect data – fieldwork in Kenya, participant observation, interviews, both *one-on-one* and focus groups, and data from secondary sources – published works and electronic databases or sources.

## CHAPTER 3: REFUGEE CAMPS: LOCATING THEIR FRAMEWORK GOVERNANCE AND THE LOCUS OF ACCOUNTABILITY

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### 3.1 Introduction

In this chapter, I attempt to locate the site where the decisions that produce refugee encampment are made. One of the key aspects inherent in framing the research problem and question in Chapter 1, is how and by whom the decisions that produce refugee encampment in many refugee-hosting states in the global south are made. The answer to this question is directly relevant to answering my main research question, namely, how the UNHCR can be held accountable, and to what extent, under international law, for its contribution to harm to the environment and refugees that results from the refugee camps it helps to create, fund, and administer. If the UNHCR has no role and part at all in the decision-making processes that produce refugee encampment, then my main research question is moot.

Proponents of refugee camps have justified and defended refugee encampment on several grounds. Crisp and Jacobsen, for example, in their robust defence of refugee camps, make four claims about how the decisions that produce refugee encampment are made and by whom.<sup>1</sup> First, Crisp and Jacobsen claim that refugee camps are unavoidable;<sup>2</sup> second, that it is not UNHCR policy to encamp refugees if alternatives are available;<sup>3</sup> third, and crucially, that in most cases it is host governments that insist on the creation of refugee camps;<sup>4</sup> and finally, that in some situations refugees themselves congregate in large groups and form large-scale

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<sup>1</sup> Jeff Crisp & Karen Jacobsen, "Refugee camps reconsidered" (1998) 3 *Forced Migration Review* 27 at 27 – 29.

<sup>2</sup> *Ibid.*, at 27.

<sup>3</sup> *Ibid.*, at 28.

<sup>4</sup> *Ibid.*

settlements that are eventually institutionalised.<sup>5</sup> In their view, critics of camps are naïve at best and simplistic at worst.<sup>6</sup>

I argue, however, that the UNHCR is the chief architect of refugee encampment policies and practices in many refugee hosting states in the global south, despite its rhetorical position on camps in the public domain. In other words, I theorise that the UNHCR is the author of the framework governance of refugee encampment in some refugee-hosting states in the global south. If this is correct, what, then, are the possible practical or, to borrow from Epstein and King, ‘observable implications’ that flow from it? Epstein and King define ‘observable implications’ to ‘mean things that we would expect to detect in the real world if our theory is right.’<sup>7</sup> Thus, in this sense, if my theory is right, what would one expect to detect in the real world if the UNHCR is the architect or author of the framework governance of refugee encampment? In this connection, the real world could be refugee-hosting state’s territory or the international international plane.

I offer this discussion of the possible practical implications of this theory at this point in the chapter, so that the available evidence (including those I gathered during my field work) can be assessed in the light of such possible implications as well.

I envisage at least seven possible practical or observable implications in situations in which the UNHCR is the architect of refugee encampment.

The first observable implication is that if UNHCR is the architect of refugee encampment, its logical to see in practice that the decision-making processes and

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<sup>5</sup> Ibid.

<sup>6</sup> Ibid at 29.

<sup>7</sup> Lee Epstein & Gary King, “The Rules of Inference” (2002) 69 *University of Chicago Law Review* 1 at 62.

structures that produce refugee camps or refugee encampment in refugee-hosting states in the global south reside or are located within UNHCR's internal processes and structures. I call this possible practical implication the *framework governance* implication. I borrowed the concept of 'framework governance' from Okafor's theory of the 'relative appropriation of the "third world" framework governance by entities external to the third world'<sup>8</sup> or simply, "third world" *framework governance* analysis, which I explain in section 1.2. of this chapter.

The second implication, related to the first, is that the UNHCR will then be *de facto* in charge of refugee policy and practice in the relevant context and will therefore also hold significant *de facto* control over almost all aspects of refugee protection policy and practice in the refugee-hosting states, including in relation to refugee camps, but with the exception of the physical security of such places. In other words, refugee-hosting states in the global south would have simply surrendered their protection functions to UNHCR. I call this practical implication the *effective control* implication.

The third implication flowing from the theory that the UNHCR is the architect of refugee encampment in refugee-hosting states in the global south is that the UNHCR is no longer an impartial guarantor (as between the state and the refugee) of refugee rights and freedoms, such as the right to freedom of movement and choice of residence that article 26 of the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention) protects. The right to freedom of movement and choice of residence, I argue, is the most important right for refugees because it is the avenue to various solutions for their situation. I label this practical implication the *refugee rights detractor* implication.

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<sup>8</sup> Obiora C. Okafor, "Reconceiving "Third World" Legitimate Governance Struggles in Our Time: Emergent Imperatives for Rights Activism" (2000) 6 *Buffalo Human Rights Law Review* 1 – 38, hereinafter, Okafor, 'Reconceiving "Third World" Legitimate Governance Struggles.'



The fourth practical implication is that the UNHCR in private or behind-the-scenes, defends refugee encampment and will incentivise and socialise refugee-hosting states in the global south to embrace refugee camps as the most appropriate technology for providing international protection to refugees. I refer to this implication as the *institutional vested interest* implication.

The fifth observable implication is that the UNHCR does in fact exercise some power and influence over state actors in refugee-hosting states in the global south. I call this practical or observable implication the *power and authority* implication. The sceptic might wonder how the UNHCR's exercise of power over state actors in refugee-hosting states in the global south can be an observable implication that flows from the theory that the UNHCR is the architect or author of refugee encampment in some of these states. My response is that without some influence over state actors in refugee-hosting states, many of whom are poorly remunerated, and with limited resources and facilities to perform their functions, it would not be possible for the UNHCR to appropriate the framework governance of refugee policy and practice in these states and author the framework decisions that produce refugee encampment.

The sixth practical implication flowing from the theory that UNHCR is the architect of refugee encampment is that there must be some legal or normative basis, real or apparent, upon which UNHCR derives the authority to use camps as a technology for implementing its mandate. I describe this implication as the *legal or normative basis* implication.

The seventh observable implication identifiable from the theory that UNHCR is the architect of refugee encampment in refugee-hosting states in the global south is that it must be possible, under international law, to hold the UNHCR accountable, wholly or in part, for the injurious consequences of refugee encampment on the environment and the condition of refugees in the camps that it helps create, fund, and administer. This will be the *accountability* implication.

Before I discuss further the evidence that supports these observable implications of my theory that that UNHCR is the architect of refugee encampment in the global south, it is imperative to draw attention to a competing or counter theory, especially from proponents of refugee camps, some of which I have already referred to.<sup>9</sup>

The counter theory posits that refugee camps and refugee encampment are the sole decision of the refugee-hosting states in the global south, as sovereign states. Proponents of this theory would argue that the UNHCR, which is a creation of states, has no power or influence, whatsoever, to resist a refugee-hosting government's refugee encampment policies and practices, even if the UNHCR knows that refugee camps are bad for refugees. Indeed, proponents of this theory may argue that even if the UNHCR, as a matter of principle, does not want refugee camps, operational necessity compels it to use them away. Moreover, proponents of this theory may further argue that historically, it is states which invented the idea of concentrating civilians in camps,<sup>10</sup> long before intergovernmental institutions were created in the twentieth century. It follows, logically, that states would be most interested in camps as an aspect of statecraft. If this counter theory is correct, what observable implications can be identified?

If the counter theory that refugee-hosting states are the architects or authors of refugee encampment is correct, then in practice it must be possible to identify observable implications. First, the decision-making processes and structures that produce refugee camps or refugee encampment would be solely or are entirely located within governmental processes and structures of the state. In other words, the framework governance of refugee policy would be located within governance

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<sup>9</sup> See, e.g., Crisp and Jacobsen, *supra* note 1.

<sup>10</sup> A discussion of the historical origins of camps is beyond the scope of my dissertation, but it is a theme that I will pursue under future areas of research.

processes and structures of the state. I will describe this observable implication as a *framework governance* implication; it is the same as the observable implication of the theory that the UNHCR is the architect or author of refugee encampment.

The second implication is that refugee-hosting governments would be in charge of the refugee camps in their countries and the UNHCR would simply exercise the supervisory function or role that Article 35 of the 1951 Refugee Convention assigns to it. I call this implication the *effective control* implication.

The third one would be that refugee-hosting states are wholly accountable for the injurious consequences resulting from refugee encampment on the environment and the condition of refugees in the camps the state creates and manages. I refer to this as the *accountability* implication.

One other observable implication may be identifiable in contexts where the refugee-hosting state has ‘invited’ the UNHCR to be involved in providing protection to refugees in its territory. If the refugee-hosting state is the architect or author of refugee encampment, one observable implication would be that the UNHCR will try as much as possible to use its resource leverage and influence to socialise or incentivise refugee-hosting states to upholding the gamut of rights and freedoms due to refugees and to abandon refugee encampment. In other words, the UNHCR would be performing properly its supervisory function under Article 35 of the 1951 Refugee Convention; it would especially encourage refugee-hosting states in the global south to embrace the idea of guaranteeing the refugee’s right to freedom of movement and choice of residence in the refugee-hosting state’s territory.

Article 26 of the 1951 Refugee Convention guarantees and protects the refugee’s right to freedom of movement and choice of residence. I would argue that the right to freedom of movement and choice of residence for refugees is one of most important rights because freedom of movement allows refugees access to opportunities unavailable or inaccessible under conditions of encampment and this

increases their economic prospects in having to fend for themselves. Indeed, Dr Fridtjof Nansen, the first League of Nations High Commissioner for Refugees, understood the importance of freedom of movement for refugees as means to securing their independence than his successors and promoted it during his tenure.<sup>11</sup> I will return to freedom of movement in Chapter 5; but suffice to point out that if a refugee-host state is the architect of refugee encampment and restricts the right to freedom of movement for refugees because it has entered reservations to Article 26 of the 1951 Convention, an observable implication is that the UNHCR would work hard to persuade the particular state to revoke the reservations. Evidence of such pro-refugee rights activities of the UNHCR would be discernible from its policy documents and public statements of its officers and praxis in the field. I describe this implication as the *refugee rights guarantor* implication.

Although it is possible to draw out more practical or observable implications from both theories than I have done here, I limit myself to these in the dissertation.

Even then, I will, in this chapter, focus only on a more detailed discussion of the *framework governance* practical implication flowing from both theories, namely, the theory that the UNHCR is the architect of refugee encampment and the counter theory that refugee-hosting states in the global south are the architects of refugee encampment. I do so in order to systematically locate the framework governance and the locus of accountability, i.e., identify the sites where the framework governance on refugee policy is located and determine who should be held accountable for the injurious consequences of refugee encampment both on the environment and refugees.

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<sup>11</sup> See, e.g., League of Nations, *Report by Dr Fridtjof Nansen, High Commissioner for Refugees, Presented to the Council on June 12th, 1924*, Annex 637:Armenian Refugees, C.243.1924 (1924) League of Nations Official Journal 933 at 967.

I take up the other practical implications in Chapter 5.

### **3.2 The UNHCR and the *Framework Governance* of Refugee Policy and Encampment Praxis**

In this section, I provide the evidence that confirms my theory that the UNHCR is the architect of refugee encampment in refugee-hosting states in the global south. One of the things that one would detect in the real world of refugee encampment is that the location of the *framework governance* of refugee policy and practice in refugee-hosting states in the global south has shifted to the UNHCR's internal processes and structures. In this connection, I borrow ideas from theories from TWAIL, Political Economy, and Socio-Legal Studies to explain this shift. From TWAIL, I drew from Okafor's theory on the relative shift to external bodies of "third world" *framework governance*<sup>12</sup>; and from Political Economy, Mosco's political economy theory of communication that focuses on how processes and structures produce social relationships to demonstrate how the framework governance of refugee policy and praxis resides within the UNHCR's internal processes and structures. I will then buttress this with data from the fieldwork.

Okafor's *framework governance* theory (OFGT) posits that the 'location(s) and site(s) of major "third world" policy-making' 'has been acquired by enti[ties] external to "third world" states.<sup>13</sup> These entities include supranational institutions, such as the International Bank for Reconstruction and Development (IBRD), which is popularly referred to as the World Bank, the International Monetary Fund (IMF), and the World Trade Organisation (WTO); transnational corporations (TNC), or certain powerful states.<sup>14</sup> In such cases, 'the relative location of the

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<sup>12</sup> Okafor, 'Reconceiving "Third World" Legitimate Governance Struggles,' *supra* note 8.

<sup>13</sup> *Ibid* at 2.

<sup>14</sup> *Ibid* at 3.

governance and decision-making relevant to that state shift[s],’ ‘in favour of the *external entity that authors the framework decisions that constitute the bulk of the governance pie*’ (my emphasis).<sup>15</sup> And crucially, if the ‘relative framework governance re-locates’ to an external entity, then the strategies that activist movements in the “third world” adopt ‘to resist effectively the scourge of illegitimate governance in the relevant state, must invariably alter in ways that reflect the changing face(s) and location(s) of governance regarding that “third world” state.’<sup>16</sup>

The central idea in OFGT that is relevant to my dissertation is that once the framework governance of a “third world” State shifts to an external entity, it is the external entity that ‘*authors the framework decisions that constitute the bulk of the governance pie*’ (my emphasis). In sections that follow, I deploy Okafor’s theory to demonstrate empirically, based on UNHCR documentation and data from fieldwork in Kenya, how UNHCR’s internal processes and structures ‘author the framework decisions that constitute the bulk,’ to borrow from Okafor’s terminology, of the governance of refugee encampment policies and practice of refugee-hosting states in the global south. In other words, I demonstrate how UNHCR acquires the framework governance of refugee policy and practice of refugee-hosting states in global souths and ‘authors’ the framework decisions constituting the bulk of these States’ refugee policies and practices, or to paraphrase Okafor’s terminology, ‘the refugee governance pie.’

In addition to OFGT, I have also drawn insights from other TWAIL work, especially its fidelity to delving deep into historical accounts to exposing the undercurrents of imperialism and hegemony. It was necessary to trace, historically, albeit briefly, the UNHCR’s interest in refugee encampment to understand its current

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

position on this matter. Also, I received inspiration to think critically about the UNHCR's internal processes and structures and how they play a role in refugee encampment praxis from Political Economy, especially Mosco's theory of processes and structures and how they shape social relations. The Socio-Legal Studies' commitment to empirical data from the field to illuminate the blind spots of the black-letter of the law with real world experience guided me toward, and in preparation for, fieldwork (including the framing of the interview questions and the making of critical observations).

### **3.2.1 The UNHCR's Structures and Processes for Refugee Emergency Management [including Refugee Encampment]**

UNHCR has several structures and processes for implementing its mandate,<sup>17</sup> and these have been re-organised or restructured from time to time as the situations arise or demand. As of 30 June 2019, for example, UNHCR was structured as follows:<sup>18</sup> broadly, Executive Direction and Management (EDM); Division of External Relations (DER); Division of Human Resource; Division Resilience and Solutions (DRS); Division of International Protection (DIP); Division of Emergency, Security, and Supply (DESS); Division of Financial and Administrative Management (DFAM); Division of Human Resources Management (DHRM); Division of Information Systems and Telecommunication (DIST); and Division of Programme Support and Management (DPSM).<sup>19</sup>

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<sup>17</sup> See, e.g., UNHCR, "Operational Support and Management" (2013), online (pdf): *UNHCR Global Report 2013* <<https://www.unhcr.org/en-au/53980a01b.pdf>>.

<sup>18</sup> See, e.g. *Biennial programme budget 2020 – 2021 of the Office of the United Nations High Commissioner for Refugees: Report by the High Commissioner*, EXCOM, Annex V (a), 70th Sess, Agenda Item 6, UN Doc A/AC.96/1191 (2019) 24 at 58, online (pdf) <<https://www.unhcr.org/5d723c477.pdf>>.

<sup>19</sup> *Ibid.*

In addition to these main structures and processes, there are field-based process and structures, such as the regional bureaus and branch offices in refugee-hosting states in the global south. There are, for example, regional bureau in Africa, Asia, and the Middle East – the Africa bureau, bureau for Asia and the Pacific, and the Middle East and North Africa bureau. There are branch offices in both refugee-hosting and non-refugee-hosting states in the global south under the leadership of the UNHCR Country Representative or UNHCR Rep. Each of these discrete structures have clearly defined roles and functions, but they work in collaboration, one with the other; they are the spokes of the wheel that make it work as single unit. I will return to these structures and process in Chapter 5 when discussing the accountability of UNHCR under international law and the question of the attribution of wrongful acts to UNHCR.

The names of some of the structures and processes have changed over the years. In 2019, for example, a new division was created, the Division of Resilience and Solutions (DRS), but the goal remains the same: to provide quality protection to refugees, whether in emergency situations or not. In the 1980s, for example, the structure responsible for developing policies and procedures for responding to refugee emergencies was called, ‘The Emergency Unit.’<sup>20</sup> And in the 1990s it was changed to the Emergency Preparedness and Response Section (EPRS).<sup>21</sup> But the Division of Emergency, Security, and Supply (DESS) currently performs this function.<sup>22</sup>

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<sup>20</sup> UNHCR, *Handbook for Emergencies Part One: Field Operations* (Geneva: Emergency Unit UNHCR, 1982); hereinafter, *Emergency Handbook*, 1st edn (1982).

<sup>21</sup> See, e.g., UNHCR, *The Global Report 1999*, 2nd edn (Bron: Imperimerie, Sezanne, 1999) at 42.

<sup>22</sup> UNHCR Global Report 2013, *supra* note 18 at 7 – 8.



The DESS ‘is the central support mechanism for emergency preparedness and response within UNHCR.’<sup>23</sup> It has four substructures: the Emergency Capacity Management Service (ECMS); the Field Safety Section (FSS); the Supply Management Logistics Service (SMLS); and the Procurement Management and Contracting Service (PMCS). The ECMS ‘provides support to emergency operations through the *development of policies*, guidance and tools, and emergency missions’ (my emphasis),<sup>24</sup> and therefore, is the most relevant of the four substructures of the DESS to questions concerning decision-making processes that produce refugee encampment.

Indeed, the ECMS, with input from the various offices, especially field offices where operations take place, is the structure responsible for framing the normative, substantive, and procedural guidelines for refugee emergency response, such as the *Emergency Handbook*.<sup>25</sup> In other words, one of the UNHCR’s structures identifies and defines the phases and processes of refugee emergency preparedness and response. The processes are the preparedness and management steps and actions that UNHCR field staff in the areas of operation must take and implement, such as the contingency planning, to respond to a refugee emergency.<sup>26</sup>

How the refugee emergency structures and the processes function, can be gleaned from the UNHCR’s flagship publication on refugee emergencies, *Handbook*

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<sup>23</sup> Ibid at 7.

<sup>24</sup> Ibid.

<sup>25</sup> See, e.g. UNHCR, *Preparedness Package for Refugee Emergencies: A Reference Guide to Risk Analysis, Preparedness, and Contingency Planning* (Geneva, DESS/ECMS, UNHCR, First edition, 2014), available online (pdf): UNHCR, *The UN Refugee Agency* <<http://www.coordinationtoolkit.org/wp-content/uploads/UNHCR-Interactive-Preparedness-Package-for-Refugee-Emergencies.pdf>> (Hereinafter, *PPRE*, 1st edn, 2014).

<sup>26</sup> Ibid, at 4.4 – 4.53.

*for Emergencies*, first released in 1982 and revised in 1998, 2007, and 2015.<sup>27</sup> The 2015 edition, which ‘replaces all previous print editions’<sup>28</sup> is the fourth edition and is digital and the latest edition. The title of the *Handbook* has changed a bit in this fourth edition, from *Handbook for Emergencies*, as it was styled in the previous three editions, to a longer title, *Emergency Handbook: A UNHCR guide for agile, effective and community based humanitarian response* (hereinafter *Emergency Handbook*).<sup>29</sup> And while the latest digital edition ‘replaces all’ the older editions, I will draw substantially from the older editions as well for two reasons.

First, because the earlier editions provide insights into how the decisions making processes that produced most of the refugee encampments in the global south, and especially in countries such as Kenya, which had no refugee encampment policy until the refugee influx of the early 1990s, were made. Second, the fourth edition, has attempted, subtly to respond to criticism of refugee encampment and presents perspectives about refugee encampment that were not held by UNHCR in the past. In a way, it allowed me to grasp how UNHCR responds to criticism of some of its bad policies.<sup>30</sup>

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<sup>27</sup> UNHCR, ‘About’ in UNHCR, *Emergency Handbook: A UNHCR guide to agile, effective community based humanitarian emergency responses*, 4th edn (Geneva, Division of Emergency Support Services (DESS), 2015), online:< <https://emergency.unhcr.org/about>>.

<sup>28</sup> Ibid.

<sup>29</sup> See, *Emergency Handbook*, 1st (1982), *supra* note 20.

<sup>30</sup> In 2014 UNHCR published the *Preparedness Package for Refugee Emergencies: A Reference Guide to Risk Analysis, Preparedness, and Contingency Planning*, which provides a detailed guide on how UNHCR country and regional offices and bureau prepare for and respond to refugee emergencies. But in 2018, a second edition or version was published, which is a revised version of the first edition. The second edition of the PPRE comes after my fieldwork in Kenya in 2017 and early 2018 where I had interviewed some UNHCR staff as participants on the accountability of main actors in refugee protection for the consequences of refugee camps on the environment and conditions of refugees in camps. Also, I requested consent for

The *Emergency handbooks* provide valuable evidence that confirms my theory that the UNHCR is the architect or author of refugee encampment in refugee-hosting states in the global south. One participant who played a key role in the establishment of two refugee camps in Kenya, the Dadaab Refugee Camp Complex (DRCC) and Kakuma Refugee Camp (KRC), in 1990, stated that, ‘We relied on the *handbook for emergencies for everything we did*’ (my emphasis).<sup>31</sup> In other words, in responding to Kenya’s request to so-called donor countries for help with dealing with the influx of refugees in the 1990s, UNHCR in Kenya followed the *Emergency Handbook*.

What is more, a critical review of the first and second editions of the *Emergency Handbook* for example, reveal that not only are refugee camps an integral component of UNHCR’s refugee emergency response strategy, they are also its preferred device or technology for implementing its competence to provide international protection to refugees, especially for refugees in the global south, its caveats in public that camps are not good for refugees notwithstanding. If this is the case, then refugee-hosting states in the global south, such as Kenya, which had in the past a laissez fair refugee protection system had not all that much room for manoeuvre; it was take it or leave it. In other words, if refugee camps are already an integral component of the UNHCR’s refugee emergency response, refugee-hosting states had little room, if any, to present alternative non-encampment-based policy frameworks that best served their interests and the interests of the refugees they hosted. Some critics may argue that it is possible that Kenya, or other refugee-

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interview with one of the Assistant High Commissioners. One of the key questions I asked participants was whose idea is refugee encampment in Kenya, since Kenya never had refugee camps till 1990. The second edition of the PPRE, however, has redacted all references to refugee camps or camps, i.e., all references to camps been removed. Moreover, the second edition of the PPRE now has a subheading on ‘Accountability to Affected Populations’, at 9, which the first edition of 2014 did not have.

<sup>31</sup> Interview with Participant CGO.001FO, 25 July 2018.

hosting states, acquiesced in the UNHCR's appropriation of its *framework governance* of refugee policy and praxis and creating refugee camps because of converging or joint interests, namely, that Kenya realised that refugee encampment might promote its interests, such as security and economics. My brief response here is that there is evidence to suggest, at least in the case of Kenya, that Kenya initially did not see refugees as security and economics threat. It refused to give the UNHCR land for refugee camps and at some point, there was a fall out between the UNHCR Representative in Kenya and one of the senior Kenyan government officials on refugee issues in Kenya. I will return to this aspect in section 3.3.

Furthermore, from the various editions of the *Emergency Handbook*, one can grasp the UNHCR's interest in camps. In the first edition published in 1982, for example, the UNHCR starts with a statement that can easily mislead one to think that it is not interested in refugee camps. It claims that 'refugees are often most able to help themselves, and thus be least reliant on outside assistance if they are not grouped together in highly organised camps.'<sup>32</sup> It then calls on '[p]rogramme planners to overcome their instinct to endorse camps because they are convenient for delivery of outside emergency assistance.'<sup>33</sup> Then it acknowledges the drawback of camps:

That early convenience too often becomes a long-term burden for refugees, host governments and donors alike. Small, less formal groupings of refugees, provided their protection, access to land and related economic rights are assured, often enjoy much better prospects of self-sufficiency than large highly planned but artificial settlements.<sup>34</sup>

Yet, the UNHCR ends up endorsing the use of camps when it argues that:

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<sup>32</sup> See, *Emergency handbook*, 1st ed (1982), *supra* note 20, at vi.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

Nonetheless, refugee settlements of the camp type seem to be here to stay. The various pressures of mass influx on countries of asylum and the occasional need to group refugees together for their own protection make it probable that these unsatisfactory and artificial institutions will survive.<sup>35</sup>

Ultimately, the UNHCR's point is that the refugee camp is a necessary evil that it seeks to sanitise and normalise:

This handbook seeks to make even these institutions as “un-camplike” as possible and ensure that with active refugee participation they achieve an appropriateness in terms of service and infrastructure that neither sets them too far apart from local communities around them nor puts them in so close a dependence on international assistance that they can never escape it.<sup>36</sup>

This is a case of history repeating itself. A similar mindset of sanitising the British concentration camps for Boers and Africans during the second Anglo-Boer of 1899 – 1903, known for their deplorable conditions,<sup>37</sup> is attributed to British camp officials and the colonial office. British colonial camp officials or ‘camp experts’, as Forth would put it, in South Africa during the second Anglo-Boer war also believed that camps could be made ‘un-camp-like’ or normalised with ‘proper siting, sanitary provisions, and disciplinary arrangements.’<sup>38</sup> The British also ran concentration camps for the Mau Mau in Kenya, but I did not come across evidence that points to similar view of making these camps ‘un-camp-like.’<sup>39</sup> Forth

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<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> See, e.g., Emily Hobhouse, *The Brunt of the War and Where it Fell* (London: Methuen & Co., 1902).

<sup>38</sup> Aidan Forth, *Barbed-Wire Imperialism: Britain's Empire of Camps, 1876 – 1903* (Oakland: CA, University of California Press, 2017) at 212.

<sup>39</sup> A discussion of the British Concentration camps in Kenya during it repression of the uprising against colonial rule is beyond the scope of my dissertation. On works that attempt to discuss the concentration

notes that British “camp experts’ played a pivotal role propagating and to a certain extent exonerating civilian concentration camps as legitimate instrument of liberal empire.’<sup>40</sup> And the colonial office agreed with the ‘camp experts’ prognosis that the South African Anglo-Boer war concentration camps, in their improved manifestation ‘were ‘deserving of imitation.’’<sup>41</sup>

The evidence suggests, however, that it is never possible to sanitise the refugee camp and make it “un-camplike” as UNHCR wishes to portray or as their progenitors, the British imperial camp officials wished.<sup>42</sup> The British camp officials’ prediction that their camps were ‘deserving of imitation’ as technologies of statecraft, have, however, indeed come to pass.

### **3.2.2 The Phases of the UNHCR’s Refugee Emergency Preparedness Response and Refugee Encampment**

Decisions, explicit and implicit, about refugee camps or refugee encampment, can be gleaned or read from themes or topics covered in the *Emergency Handbooks*, especially the phases or stages through which UNHCR accomplishes refugee emergency preparedness and response. These themes or topics and phases have been described in different terminology or phraseology in the various editions of the *Emergency Handbooks*, but their goals remain the same: to respond effectively to

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camps during the Mau Mau war for independence, see, e.g., David Anderson, *History of the Hanged: Britain’s Dirty War in Kenya and the End of Empire* (London: Orion Publishing Group, 2005); Caroline Elkin, *Imperial Reckoning: The Untold Story of Britain’s Gulag in Kenya* (New York: Henry Hold & Co/Macmillan Publishers, 2005)

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> See, e.g., Michel Agier, *Managing the Undesirables: refugee camps and humanitarian government* (Malden: MA, Polity Press, 2011); Guglielmo Verdigrade & Barbara Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism* (New York: Berghahn Books, 2005).

any refugee emergency anywhere in the world. In the first edition of the *Emergency Handbook*, for example, themes or key topic areas relevant to refugee encampment include, ‘needs assessment and immediate response,’<sup>43</sup> ‘implementing arrangements and personnel,’<sup>44</sup> and ‘site selection, planning, and shelter.’<sup>45</sup>

These themes are expanded and revised in the second, third, and fourth editions of the *Emergency Handbook*. In the second edition, for example, the needs assessment and immediate response is now described as ‘initial assessment, immediate response’<sup>46</sup>; the implementing arrangements and personnel, is now ‘implementing arrangements’<sup>47</sup>; and site selection, planning, and shelter, remain the same,<sup>48</sup> but new themes are added, such as ‘contingency planning’<sup>49</sup> and ‘operations planning.’<sup>50</sup> In the fourth and latest digital edition of the *Emergency Handbook*, the themes are further developed to reflect lessons learnt and the changes that have occurred since the third edition was published in 2007, especially in the light of the

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<sup>43</sup> See *Emergency Handbook*, 1st edn (1982), *supra* note 20, at 16 – 19; on this topic, also see, UNHCR, *Needs Assessment Handbook* (Geneva, Division of Programme Support and Management, UNHCR, 2017).

<sup>44</sup> *Ibid.*, at 24 – 30.

<sup>45</sup> *Ibid.*, at 56 – 67.

<sup>46</sup> See, UNHCR, *Handbook for Emergencies*, 2nd edn (Geneva: UNHCR, 1998) at 42 – 47 [Hereinafter, *Emergency Handbook*, 2nd edn].

<sup>47</sup> *Ibid.* at 68 – 81.

<sup>48</sup> *Ibid.* at 135 – 147.

<sup>49</sup> *Ibid.* at 36 – 39.

<sup>50</sup> *Ibid.* at 50 -54.



expansions in the UNHCR's mandate and increasing civil society criticism of refugee encampment policy.<sup>51</sup>

Emergency preparedness themes have been radically reorganised and redefined in the digital edition in seven broad topic areas: 'getting ready,' 'protect and empowering,' 'developing the response,' 'leading and coordinating,' 'staff well-being,' 'security,' and 'media.'<sup>52</sup> Under these topics, stand-alone, yet integrated, refugee emergency preparedness and response themes are developed.

I identified the *Preparedness Package for Refugee Emergencies* (PPRE), a key stand-alone component of the digital edition of the *Emergency Handbook*, as one of the chief approaches and process where refugee encampment decisions and policies are developed and implemented. I, however, tried, as much as possible, in my analysis and discussions to juxtapose the processes in the PPRE with those in earlier edition of the *Emergency Handbooks*. Doing so allowed me to figure out whose idea refugee encampment really is and whether there was any serious consideration of alternatives to refugee encampment. In addition, I also buttressed some of the observations and inferences with data from fieldwork.

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<sup>51</sup> The US Committee for Refugees and Immigrants (USCRI) has been one of several civil society groups that have relentlessly attempted to challenge refugee encampment policies. For their most recent report on the issue, see, e.g., USCRI, "Lives in Storage: Refugee Warehousing and the Overlooked Humanitarian Crisis" (December 2019), online (pdf): *US Committee for Refugees and Immigrants* <<https://reliefweb.int/sites/reliefweb.int/files/resources/USCRI-Warehousing-Dec2019-v4.pdf>>; also see the Refugee Law Project, School of Law Makerere University, Kampala Uganda, working paper series, no. 4, 7, and 14, on refugee encamp and effects on refugee rights and livelihoods, available online <<https://www.refugeelawproject.org/resources/working-papers/>>.

<sup>52</sup> See, UNHCR, *Emergency Handbook*, 1st edn (1982), *supra* note 20.



The PPRE is, according to its first edition,<sup>53</sup> which I use here, ‘a graduated system of preparedness activities that increases as the risk of refugee emergency increases.’<sup>54</sup> The UNHCR Rep ‘in each country is accountable for initiating and leading timely preparedness for refugee emergencies.’<sup>55</sup> The PPRE consists four main processes: minimum preparedness,<sup>56</sup> analysing refugee emergency risk,<sup>57</sup> advanced preparedness,<sup>58</sup> and scenario-based contingency planning.<sup>59</sup> These four process, I believe constitute the decision-making processes that produce refugee camps or refugee encampment, among other solutions for responding to refugee emergencies. The decisions of encampment to be found in these process are not radically different from those found in the earlier editions of the *Emergency Handbooks*. The same ideas, however, have simply been recast in sophisticated vocabulary under the PPRE approach and process, itself elegantly prepared and presented. I will focus on minimum preparedness (MP), which I renamed as minimum preparedness process (MPP); advanced preparedness (AP), which I call advanced prepared process (APP); and scenario-based contingency planning (SBCP), which I describe as scenario-based contingency planning process (SBCPP). I focus on these to demonstrate how refugee encampment is an integral aspect of the UNHCR’s refugee protection strategy. Where feasible, and as already stated, I

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<sup>53</sup> See, *supra* note 25.

<sup>54</sup> *Ibid.*, at iii.

<sup>55</sup> *Ibid.*, at 1.3.

<sup>56</sup> *Ibid.*, at 1.2 – 1.18.

<sup>57</sup> *Ibid* at 2.4 – 2.10.

<sup>58</sup> *Ibid* at 3.4 – 3.6.

<sup>59</sup> *Ibid* at 4.4 – 4.30.

will also make references to the older editions of the *Emergency Handbook* to illustrate how these same processes were described and defined.

### **3.2.2.1 The Minimum Preparedness Process and Refugee Encampment**

The MPP is the first phase or stage of the PPRE approach and process. The MPP defines the actions to be taken during a refugee emergency. UNHCR describes these as the minimum preparedness actions (MPAs). These are actions ‘that all UNHCR offices world-wide must accomplish to maintain responsible minimum level of preparedness for refugee emergencies.’<sup>60</sup> The MPAs are developed at the country and regional office or Headquarter (HQ) regional bureau levels. The PPRE provides templates for these. UNHCR develops the MPAs ‘in support of government preparedness, but the UNHCR Rep in each refugee-hosting state is responsible for ensuring that the MPAs are actually developed and maintained.’<sup>61</sup>

There are five MPAs under the country-level MP: ‘management, coordination and external relations’<sup>62</sup> (MCER); ‘protection’<sup>63</sup>; ‘basic needs and services’<sup>64</sup> (BNS); ‘supply’<sup>65</sup>; and administration.’<sup>66</sup> The decisions on refugee encampment are imbedded in the BNS and Supply MPAs . The BNS covers aspects such as food security; water, sanitation, and health (WASH); camp management; education;

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<sup>60</sup> Ibid at vii and 1.6.

<sup>61</sup> Ibid at 1.7.

<sup>62</sup> Ibid at 1.11 – 1.13.

<sup>63</sup> Ibid at 1.13.

<sup>64</sup> Ibid at 1.14.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

nutrition; health; non-food items (NFIs); and livelihoods and it has five MPAs.<sup>67</sup> Two of MPAs (B3 and S2) give direction to UNHCR staff on decisions and actions that have refugee encampment implications.<sup>68</sup> Under the third MPA, for example, UNHCR staff in country offices world-wide are directed to ‘[i]dentify **emergency refugee shelter and settlement solutions** in potential refugee receiving areas’ (emphasis in original).<sup>69</sup> Moreover, the staff are to ‘[i]nclude specific consideration for settlement in rural areas and urban settings, as applicable.’ The specific considerations include ‘the identification of possible camp sites’ in rural areas, and the ‘determination of the average rent for a family apartment’ in urban settings.<sup>70</sup> A critic may argue that this does not necessarily imply that the UNHCR is wedded into the idea of establishing camps but are considering both options for sheltering refugees when a refugee emergency does occur. My response is simple: if encampment is not *the* preferred technology, the UNHCR planners could have also included alternative to camps in rural areas, such as refugees settling amongst the local communities. Moreover, under the fourth MPA, staff are directed to ‘[d]evelop the possible composition of standard shelter solutions’<sup>71</sup> with suggested examples in parenthesis of ‘use of local materials?’<sup>72</sup>

Refugee encampment is not embedded, explicitly, within the Supply MPAs. One can draw, however, inferences of the UNHCR’s preference for refugee encampment from one of the MPAs that give direction to UNHCR staff to conduct

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<sup>67</sup> Ibid at 3.18.

<sup>68</sup> Ibid at 3.14.

<sup>69</sup> Ibid at 1.14 B3.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid at 1.14 B4.

<sup>72</sup> Ibid.

market survey of resources and equipment. Under the third Supply MPA, UNHCR staff are required to '[u]ndertake a market survey on the availability of heavy machinery (earth removing equipment for site construction) and transport services (trucks)' (emphasis in original removed).<sup>73</sup>

I drew the logical (and even obvious) inference, from these references and supported by the data, that shelter materials and heavy machinery, usually bulldozers or earth removing equipment for site construction, are strong indications of preparations for refugee camps or refugee encampment. One participant who played a key role in the creation of the DRCC in Kenya in 1990 had this to say:

In a short time, we realised that more camps were needed and had to be made. But by the time we developed Ifo I, we realised that we made grave mistakes. The Germany organisation, I believe it was GTZ, were hired to prepare the site for the establishment of Ifo I, but they simply brought bulldozers and razed everything to the ground – it cleared all the vegetation and creating some of the serious problems of environmental concern.<sup>74</sup>

This participant acknowledged mistakes were made when heavy machinery was used to clear sites for camps. Thirty or so years since the establishment of the DRCC, it is doubtful that UNHCR learnt any lessons from its mistakes of using refugee camps as a technology to implement its mandate for providing international protection to refugees. If anything, 'earth moving equipment for site clearing' remains the standard operation tools for site clearance, as the direction to UNHCR country offices developing MPAs show.

At the regional office or regional HQ bureau levels, the MPAs do not make any explicit or implicit references to actions or decisions on refugee encampment

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<sup>73</sup> Ibid at 1.14 S3.

<sup>74</sup> Interview, 25 July 2018.

in refugee emergencies but they do not rule them out either. Refugee encampment is already embedded in the PPRE process at the country level and at the regional level offices. Moreover, in the process of deciding what needs to be included in the PPRE, regional offices and regional HQ bureaus, and indeed, ‘many UNHCR staff worldwide’ were consulted and provided their input in the PPRE process.<sup>75</sup> In addition, the regional offices also provide oversight to ensure the decisions and policies for refugee emergency, including decisions on refugee shelter and settlement, are fully adhered to. In their oversight responsibilities, the regional office or HQ regional bureau, UNHCR staff are to, for example, ‘[s]upport country operations with their undertaking of timely and effective Minimum Preparedness Actions.’<sup>76</sup>

Basic needs and resources also featured in the first, second, and third editions of the *Emergency Handbook*, as one of the key thematic areas upon which the decisions on refugee encampment were also made.<sup>77</sup> But some editions, such as the first edition, provide a glimpse of likely decisions on refugee camps and refugee encampment right at the introductory remarks. These opening remarks were often framed in benign or more accurately, rhetorical statements such as, ‘[t]he refugees are often most able to help themselves, and thus least reliant on outside assistance, *if they are not grouped together in highly organised camps*’ (my emphasis).<sup>78</sup> Or remarks which attempt to call on ‘[p]rogramme planners to overcome their instinct to

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<sup>75</sup> See, *supra* note 25 at iv [Acknowledgements].

<sup>76</sup> *Ibid.*, at 1.20, HQ3.

<sup>77</sup> See, *supra* note 20, at 16 – 19, ‘Chapter 3: Needs Assessment and Immediate Response’ ; *Emergency Handbook* 2<sup>nd</sup> edn, note 46, at 40 – 47, Chapter 5, ‘Initial Assessment, Immediate Response’, and *Emergency Handbook*, 3<sup>rd</sup> edn (Geneva, UNHCR Emergency Preparedness and Response Section, 2007), Section 12, Site Selection, Planning and Shelter,’ at 204 – 224.

<sup>78</sup> See, *Emergency Handbook*, 2<sup>nd</sup> edn, *supra* note 46, at vi.

endorse camps because they are convenient...'<sup>79</sup> Readers are, however, reminded that '[n]evertheless, *refugee settlements of the camp type seem to be here to stay*'<sup>80</sup> (again, my emphasis). After the caveats have been made, decisions on refugee encampment begin to appear under the main themes or chapters that deal with 'needs assessment and immediate response'<sup>81</sup> and 'site selection, planning, and shelter.'<sup>82</sup> Under the needs assessment and immediate response, for example, are sub themes, such as 'the location of refugees,' the 'characteristics of location' and the 'criteria for site selection.'<sup>83</sup>

The difference, for example, between 'needs assessment and immediate response' in the earlier editions of the *Emergency Handbook* and 'basic needs and services' (BNS) under the digital edition is that the same ideas of refugee encampments are now embedded in some technical jargon, PPRE, Minimum Preparedness (MP) and Minimum Preparedness Actions (MPAs) and Advanced Preparedness (AP) and Advance Preparedness Actions (APAs). The similarity between the decisions-making process that produce refugee encampment developed in the older and newer digital editions of the *Emergency Handbook* is that refugee encampment decision are made in the process of determining the basic needs and services for refugees during a refugee emergency response through a UNHCR-led refugee emergency response.

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<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid at 16 – 19.

<sup>82</sup> Ibid at 56 – 67; see also, *Emergency Handbook*, Second Edition, 1998 [chapter or Section 12, 'Site Selection, Planning and Shelter'] at 132 – 147; *Emergency Handbook*, Third Edition [chapter or Section 12, 'Site Selection, Planning and Shelter'] at 204 – 224.

<sup>83</sup> Ibid at 18; also see, *Emergency Handbook*, Second Edition,

### 3.2.2.2 Advanced Preparedness Process and Refugee Encampment

The advanced preparedness process (APP) for refugee emergency is a decision-making process that guides UNHCR country and regional offices to take specifically defined actions, the advanced preparedness actions (APAs), beyond MP once a minimum or high risk refugee emergency scenario has been detected through the analysis of refugee emergency risk process.<sup>84</sup> In other words, the APP provides an ‘additional preparedness measure’ after a ‘risk analysis indicates a “medium risk” of a refugee emergency occurring.’<sup>85</sup> The APA under the APP are said to ‘constitute a set of actions which lead towards setting up an emergency response operation’<sup>86</sup> and ‘include the partner based and scenario-based contingency planning process.’<sup>87</sup> The APAs provide ‘a step by step guideline for UNHCR and partners.’<sup>88</sup>

The APP has five APAs: management, coordination and external relations (MCER)<sup>89</sup>; protection<sup>90</sup>; basic needs and services (BNS)<sup>91</sup>; supply; and scenario-based contingency planning (SBCP).<sup>92</sup> The APA checklist of action is not

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<sup>84</sup> See, *PPRE*, First Edition 2014, *supra* note 25 at vii.

<sup>85</sup> *Ibid* at 3.4 – 3.5.

<sup>86</sup> *Ibid* at 3.6.

<sup>87</sup> *Ibid*.

<sup>88</sup> *Ibid* at 3.7.

<sup>89</sup> *Ibid* at 3.8 – 3. 13.

<sup>90</sup> *Ibid* at 3.12 – 14.

<sup>91</sup> *Ibid* at 3.14 – 3.18.

<sup>92</sup> *Ibid* at 4.4 – 4. 53.

‘exhaustive,’<sup>93</sup> but ‘includes the essential preparedness actions that will facilitate the emergency response during the initial phase’<sup>94</sup> of a refugee emergency.

Refugee encampment policies are explicitly embedded in the protection and BNS APAs. Under the seventh protection APA, UNHCR staff are directed to ‘[e]stablish a protection monitoring system for refugees that can be activated immediately when an influx takes place.’<sup>95</sup> This protection monitoring system is for both ‘camp and non-camp’<sup>96</sup> refugees. The issue of protection monitoring is not explicitly addressed as such in the earlier edition of the *Emergency Handbook*. Protection was handled as a separate chapter; there is no discussion of monitoring protection.<sup>97</sup> Decisions on monitoring covered questions or issues arising from distribution of commodities to refugees<sup>98</sup> or monitoring water quality and availability in the earlier editions of the *Emergency Handbook*.<sup>99</sup> Critics may, however, argue that including protection monitoring for both camp and non-camp refugees in the APA integrates flexibility and discretion into the emergency response system so that the UNHCR staff can deal with inevitabilities during and emergency; it does not imply that the UNHCR staff are wedded to camps. My response, however, is that the evidence shows the opposite. From the focus group interviews and even *one-on-one* interviews with refugees during the fieldwork in

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<sup>93</sup> Ibid at 3.5.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid at p. 3.14 P7.

<sup>96</sup> Ibid.

<sup>97</sup> See, e.g., *Emergency Handbook*, 2nd edn (1998), *supra* note 46 at 12 – 23.

<sup>98</sup> Ibid at 153; also see, *Emergency Handbook*, 3<sup>rd</sup> edn (2007), *supra* note 77 at 229 – 234.

<sup>99</sup> See, *Emergency Handbook*, 3<sup>rd</sup> edn (2007), *supra* note 77 at 245.



Kenya, almost all participant said they had no choice in the decision to live in camps; the UNHCR told them that if they wanted to receive material assistance, it can only be in a refugee camp. This shows that refugee encampment is ‘wedded’ into the emergency and protections system; it is the preferred technology. Similarly, from my work with refugees in Uganda, the UNHCR made material assistance contingent on refugees accepting to live in the camps.

The BNS has three APAs relevant to refugee encampment. The second BNS APA requires UNHCR country offices staff to ‘*decide on the refugee shelter and settlement strategy*’,<sup>100</sup> albeit they should do this with their senior management and in ‘consultations with the government authorities’ (my emphasis).<sup>101</sup> The suggested refugee shelter and settlement strategy should at least include ‘non-camp, camp, rural, dispersed etc...?’<sup>102</sup> Critics, once again, may, however, argue that merely including camps in the refugee emergency shelter strategy does not necessarily imply that the UNHCR is wedded to refugee encampment. Again, the evidence demonstrates that the rhetoric and practice do not match; material assistance to refugees in most refugee-hosting states in the global south is contingent upon the refugee accepting encampment, unless the refugee passes the UNHCR’s vulnerability criteria. And crucially, the directive in the second BNS categorically states the the UNHCR country staff have to ‘*decide on the refugee shelter and settlement strategy*’ (my emphasis). In other words, it is the UNHCR officer who first has to decide the strategy for refugee shelter and settlement, and it is usually the UNHCR Representative in the given country who leads the emergency response. A critic may, however, still argue that the UNHCR staff or office has to agree on sites with host government. I would argue, however, that in practice, most of these

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<sup>100</sup> See, *PPRE*, 1st edn (2014), *supra* note 25 at 3.14 B2.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

governments have limited room to manoeuvre once they have been approached with a decision on refugee shelter that the UNHCR Representative in the host country has already taken, but which is then presented to the host government as a 'suggestion' for discussion.

The fifth APA of the BNS APAs explicitly provides the UNHCR country staff some direction on refugee encampment. If the UNHCR staff decide that refugee camps are the shelter option, then they have to do four things. In the first place, they are to '[i]dentify potential camp locations together with government authorities, conduct site assessments, and agree on sites(s).'<sup>103</sup> Second, if they agree on site(s), then they should '[a]ssess the maximum hosting capacity of each site and develop a master site plan for each site.'<sup>104</sup> Third, the UNHCR staff should '[a]gree on actors to implement camp assistance sectors, starting with the construction of the camp infrastructure (shelters, WASH facilities, health clinics, etc...), and including camp management.'<sup>105</sup> And fourth, the UNHCR staff should '[i]dentify and contract suppliers(s) for rental of heavy earth moving equipment for ground and access preparations at the site, as required.'<sup>106</sup> A critic may, however, ask, what is the point here? There is nothing in this fifth APA to suggest that refugee encampment is the UNHCR's preferred technology for providing international protection to refugees in the global south. I argue, however, that including the refugee camp in the emergency response strategy is indicative of the UNHCR's interest in camps. Indeed, the third edition of the UNHCR's *Emergency handbook*, made it explicit that one of the advantages of 'good site selection, planning, and

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<sup>103</sup> Ibid at 3.16 B5.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

shelter' is that it will 'uphold UNHCR's protection mandate.'<sup>107</sup> This, however, has been removed in the digital edition, I argue, precisely because of mounting criticism over the years of refugee encampment, which activists labelled as refugee warehousing.<sup>108</sup> Thus, the UNHCR's refugee emergency planners are mindful of critics of refugee encampment and careful how they present refugee encampment in its emergency policy document. One can, however, read between the lines and, buttressed by empirical evidence, discern the UNHCR's interests in refugee encampment.

One can also infer the UNHCR's interest in refugee encampment from the ninth APA of the BNS APAs. Under this APA, UNHCR country offices staff are instructed to '[i]dentify and implement priority projects/activities or the benefit of the refugee hosting community, to strengthen their coping mechanisms and enhance absorption capacity outside of camps where this is a viable strategy.' The UNHCR staff are to '[c]onsult with local government authorities via appropriate channels on their priority needs.'<sup>109</sup>

### **3.2.2.3 The Scenario-Based Contingency Planning Process and Refugee Encampment**

UNHCR's scenario-based contingency planning process (SBCP) explains to its staff how to develop contingency plans for regional and country levels refugee

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<sup>107</sup> See, *Emergency Handbook*, 3rd edn (2007) at 207.

<sup>108</sup> USCRI, *supra* note 51; for earlier works on the campaign against refugee warehousing, see, e.g., Merrill Smith, "Development with Refugee Rights? A Civil Society Response" (2004) 28:5 *Fordham International Law Journal* 1479; Angela W. Muthee, "End refugee warehousing" (2008), *Capstone Collection* 306, online: *School of International Training, Digital Collections*<<https://digitalcollections.sit.edu/capstones/306>>.

<sup>109</sup> See, *PPRE*, 1st edn (2014), *supra* note 25 at 3.18, B9.

emergence preparedness.<sup>110</sup> A contingency planning toolbox is included or annexed to the SBCP process, which provides further guidance on the content and formatting of a contingency plan (CP) or '[p]rovides planners with pre-made tools, templates, and formats to assist in quickly drafting a refugee emergency contingency plan.'<sup>111</sup> The SBCP is a decision-making process whereby UNHCR country and regional offices staff decide on the key strategic issues, such as the nature and type of shelter or settlement for refugees, that must be addressed in a refugee emergency to be included any refugee emergency contingency planning (CP).<sup>112</sup>

The SBCP addresses a multiplicity of issues on how to prepare for a refugee emergency in a given country or region under four broad topics: focus on emergency response,<sup>113</sup> good practice standard for contingency planners,<sup>114</sup> regional-level contingency planning,<sup>115</sup> and country-level contingency planning.<sup>116</sup> I focus here on two broad areas that I believe demonstrate how the decision-making processes that produce refugee encampment work: the key strategic issues relating to refugee protection to be included in a refugee emergency and the response strategy. The former are discussed under the topic of 'focus on emergency

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<sup>110</sup> Ibid at vii.

<sup>111</sup> Ibid at vii.

<sup>112</sup> Ibid at 4.4.

<sup>113</sup> Ibid at 4.4 – 4.7.

<sup>114</sup> Ibid at 4.8 – 4.9.

<sup>115</sup> Ibid at 4.10 – 4.29.

<sup>116</sup> Ibid, at 4.30 – 4.53.

response'<sup>117</sup> while the latter are explained under 'regional-level contingency planning'<sup>118</sup> and 'country-level contingency planning' respectively.<sup>119</sup>

There are strategic issues that UNHCR believes should be included in any refugee emergency contingency planning. These are refugee protection,<sup>120</sup> assuaging the concerns of national authorities with respect to refugees entering their territories,<sup>121</sup> adjusting existing refugee assistance systems to accommodate a new refugee emergency,<sup>122</sup> a clear vision,<sup>123</sup> refugee shelter and settlement,<sup>124</sup> assistance to refugees,<sup>125</sup> and the operational necessity of refugee camps.<sup>126</sup> Three of these are directly relevant for my purpose: refugee shelter and settlement strategy, assistance strategy, and the operational necessity of camps.

The UNHCR's relevant statements appear benign on their face. Under the strategic issue of refugee shelter and settlement, for example, UNHCR planners of country and regional refugee emergency contingency planning are informed that refugee shelter and settlement is 'another important element of the protection

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<sup>117</sup> Ibid at 4.4 – 4.7.

<sup>118</sup> Ibid at 4.10 – 29.

<sup>119</sup> Ibid at 4.30 – 4.53.

<sup>120</sup> Ibid at 4.4 – 4.5.

<sup>121</sup> Ibid at 4.5.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid at 4.6

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

response strategy'<sup>127</sup> and that *'[d]ecisions in this regard are particularly hard to reverse once taken'*<sup>128</sup> (my emphasis). Therefore, *'[c]amps are to be considered as a last resort option'*<sup>129</sup> (again, my emphasis). Instead, *'[t]he default strategy should first look into how refugees can be accommodated in the host community.'*<sup>130</sup> In addition, under the operational necessity of camp, UNHCR country and regional planners of refugee emergency contingency plans are informed that, 'camps may be the only feasible operational option immediately available,'<sup>131</sup> but this largely depends on 'the existing capacity of host country and rate of the influx,'<sup>132</sup> i.e., refugee influx. In this context, therefore, 'appropriate specific camp locations need to be identified with the host government as part of the response strategy.'<sup>133</sup> And crucially, the refugee emergency 'response strategy should be based on field assessments of locations for camps'<sup>134</sup> (emphasis in original removed).

Thus, in addition to the key strategic issues that UNHCR planners must include in a refugee emergency contingency plan, the response strategies to be included in both regional and country level contingency planning also provide a window into grasping how decisions on refugee encampment are made within UNHCR's internal structures and processes. I will focus, however, on the country-

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<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

level response strategies because ‘operational details are to be included in the country-level CPs’<sup>135</sup> and not regional contingent plans (CPs), albeit refugee encampment decisions are also embedded in regional level CP.<sup>136</sup> Another reason to focus on country level response strategy for refugee emergency is that ‘[c]ountry-level contingency planning is one of the required Advanced Preparedness Actions (APAs).’<sup>137</sup> In the second edition of the PPRE, however, SBCP is said to be ‘an APA that is context-specific and non-mandatory.’<sup>138</sup>

At the country-level refugee emergency contingency planning, either the UNHCR Rep, concerned regional office, or the UNHCR HQ bureau initiates the contingency planning process. Whether the UNHCR Rep or regional office, for example, initiates the contingency planning process, however, the partners from the concerned response agencies must be involved in the refugee emergency contingency planning.<sup>139</sup> The response strategy that the UNHCR Rep or regional office or HQ bureau adopts is ‘the practical strategy that they envision for responding to the potential refugee emergency in the country of asylum.’<sup>140</sup> And crucially, the response strategy is ‘the basic premise of the CP and reflects what partners agree will be the best way to respond to the planning scenario.’<sup>141</sup>

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<sup>135</sup> Ibid at 4.18.

<sup>136</sup> Ibid at 4.26.

<sup>137</sup> Ibid at 4.30.

<sup>138</sup> See, UNHCR, *Preparedness Package for Refugee Emergencies (PPRE): A reference guide for preparedness*, Version 2 – 2018 at 32.

<sup>139</sup> See, *PPRE*, 1st edn (2014), *supra* note 25 at 4.31

<sup>140</sup> Ibid at 4.44.

<sup>141</sup> Ibid.

The UNHCR country offices or UNHCR Rep or regional offices are directed to '[d]evelop a macro-level scenario and context specific response strategy narrative,'<sup>142</sup> which 'should outline the best achievable approach to be followed to ensure the protection of the arriving refugees.'<sup>143</sup> The UNHCR country office staff are to address basic strategy questions and five types of questions have been suggested, but the list is not exhaustive and show that camps are an integral component of the UNHCR's refugee emergency strategy:

Where will the population be settled (upon arrival/medium term – specify locations). Urban locations, rural, scattered, *camps*? What services need to be provided at the various stages (entry points, way stations, transit locations, settlement) and to whom (refugees, host communities, authorities)?<sup>144</sup> (my emphasis).

Critics may, however, argue that merely including camps in a set of questions to guide the UNHCR's emergency response planners in contingency planning does not in itself show that camps are the UNHCR's technology of choice for providing international protection to refugees. My response, however, is twofold: first, and as I stated already in subsection 3.2.2.2, the third edition of the UNHCR's *Emergency Handbook* does state that managed camps and their location will help uphold UNHCR's protection mandate<sup>145</sup>; second, the UNHCR does not have to explicitly state in its refugee emergency response strategy documents that refugee encampment is its preferred device for providing protection to refugees. Where, however, it does not only include refugee camps as part of its response to refugee emergency but also has practically created, funded, and managed camps in refugee-hosting states in the global south for decades, it is legitimate to draw inferences

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<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

<sup>145</sup> *Emergency Handbook*, 3rd edn (2007), *supra* note 77 at 207.



regarding its interest in refugee encampment from its processes and structures that plan and execute refugee emergency responses.

In addition to these questions, the UNHCR's country office planners of a refugee emergency contingency plans are directed to consider in their response strategy the issue of the essential services for *non-camp and camp based refugees* (my emphasis). The question of essential services for non-camp refugees 'should only be included in the CP if some or all refugees will be settled in the community.'<sup>146</sup> Similarly, the question of essential services for *camp refugees* should be included in the CP only if 'some or all the refugees will be settled in camps.'<sup>147</sup>

Refugee encampment appears in several other parts or sections of the contingency planning guide with templates, but the most important point about a contingent plan the UNHCR country offices produce at the end of contingency planning activities or exercise is that it '*is a record of the decisions taken during the planning process*'<sup>148</sup> and '*reflects serious policy decisions and commitments*,'<sup>149</sup> which, I submit, produce, among other things, refugee encampment (my emphasis).

In earlier editions of the *Handbook for Emergencies*, the UNHCR's interest and preference for refugee encampment may be inferred from its guide for field staff on questions of site selection, planning, and shelter. According to the third edition of the *Emergency Handbook*, '[t]he layout, infrastructure and shelter of a camp will have a major influence on the safety and well-being of refugees.'<sup>150</sup> Moreover, a 'good site selection, planning and shelter' will, among other things, '*uphold UNHCR's*

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<sup>146</sup> See, *PPRE*, 1st edn (2014), *supra* note 25 at 4.45.

<sup>147</sup> *Ibid.*, at 4.47.

<sup>148</sup> *Ibid.*, at 4.18.

<sup>149</sup> *Ibid.*

<sup>150</sup> *Emergency Handbook*, 3rd edn (2007), *supra* note 77 at 207 para 1.

*protection mandate*<sup>151</sup> (my emphasis). In other words, a good camp, will uphold the UNHCR mandate to provide international protection to refugees in the refugee-hosting states in the global south.

### 3.2.3 The UNHCR's Revealed Preference for Refugee Camps

Epstein and King observe that people generally:

‘do not know or cannot articulate, why the act as they do, in other situations, they refuse to tell, *in others they are strategic both in acting and answering scholars questions*’ (my emphasis).<sup>152</sup>

While Epstein and King made this observation in the context of quantitative research, it was at the back of my mind as I reviewed the UNHCR's internal documents and when I was conducting interviews with participants during fieldwork in Kenya. The UNHCR is strategic both in its public articulation of its position on refugee encampment and in the rendition of refugee encampment in the phases of its refugee emergency preparedness response: it casts refugee encampment as an operational necessity, a last resort option, not its deliberate preferred default approach to providing international protection to refugees. Indeed, it claims throughout the different editions of its *Emergency Handbook*, including the most recent PPRE approach and process, that ‘[c]amps are to be considered as a last resort option. The default strategy should first look into how refugees can be accommodated in the host community.’<sup>153</sup> This has been a standard

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<sup>151</sup> Ibid at 207 para 4.

<sup>152</sup> Lee Epstein & Gary King, “The Rule of Inference” (2002) 69 *University of Chicago Law Review* 1 at 93.

<sup>153</sup> See, *PPRE*, 1st edn (2014), *supra* note 25 at 4.6, also see, *Emergency Handbook*, (1982), *supra* note 20 at v.

caveat, right from when the first edition of the *Emergency Handbook* was published in 1982 to the present.

So, how do I surmount the UNHCR's strategic rendition of encampment in its internal processes and structures on refugee emergency response in ways that does not explicitly expose its interest in or preference for refugee encampment? Epstein and King suggest that in situations such as this, a creative way around this problem is to look for what they described as the *revealed preferences* of the participant, which can be directly observable in real behaviour.<sup>154</sup> This was one reason I had to incorporate fieldwork into my project. Indeed, observing the UNHCR's behaviour in practice in Kenya, Uganda,<sup>155</sup> and Tanzania,<sup>156</sup> for example, reveals its interest and preference for camps to self-settlement for refugees despite its rhetoric that refugee encampment should be considered a last resort option. In Uganda, the UNHCR was the first to complain that the activities of the Jesuit Refugee Service (JRS) for urban refugees in Kampala, were undermining the encampment policy because many more refugees, especially those with urbanite background were resisting being sent to the refugee settlements that the UNHCR funded.

In Kenya, for example, the UNHCR staff participants I interviewed spoke approvingly of refugee camps when I asked them other questions, such as what were the considerations for choosing refugee camps over other alternatives and

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<sup>154</sup> *Emergency Handbook*, (1982), *supra* note 20 at 94.

<sup>155</sup> I was part of a European Union (EU) and Ford Foundation-funded umbrella project on refugees rights in and out of refugee camps in Kenya and Uganda from 1997 to 1999. The late Dr Barbara Harrell-Bond was the principal investigator and I was a legal research officer on the project. Also, I directed the Refugee Law Project of the School of Law, Makerere University, from 2001 to 2006.

<sup>156</sup> I conducted research in the Nyarugusu and Mtabila refugee camps on refugee rights in November 2008, as extension of the EU and Ford Foundation-funded project.

what were the criteria for selecting sites for refugee camps.<sup>157</sup> The participants' responses to these questions are revealing. One participant, who had said that refugee encampment was the decision of the GoK, for example, had this to say on the considerations for refugee camps:

Three considerations. The first is security. *It is easier for us to manage refugees when in a camp than if they were scattered all over.* Second, availability of land which is sparsely populated or land unclaimed by anyone. Thirdly, restriction on movement. Most of Kenya's refugee camps were created with refugee repatriation in mind (my emphasis).<sup>158</sup>

Another participant gave other reasons for considering refugee encampment:

Two main considerations. First, *accessing refugees; it is easier for us to access refugees and monitor violations of refugee rights when they are in one place. It also makes it easier for refugees to access UNHCR.* Second, logistics. Coordinating humanitarian aid for refugees – supplies such as food and non-food items and facilities – *in a camp setting is much easier and less costly* (my emphasis).<sup>159</sup>

It is ironical that refugee encampment is justified based on monitoring the violation of the rights of refugees, yet the act of encampment itself denies refugees the right to freedom of movement and choice of residence, which Article 26 of the 1951 Refugee Convention protects.

Another way I used to find out whose idea and decision to encamp refugees was to interview refugees both in Nairobi and in DRCC. I asked refugees questions such as, 'How did you come to live here?' and 'How were the decision to come and live here arrived at?' Some of the responses were revealing. In a focus group discussion comprising seven participants, when I asked the group how did you

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<sup>157</sup> The same participants were reticent in their responses to the question whose idea refugee encampment in Kenya was and tended to answer that it was the decision of the GoK.

<sup>158</sup> Interviewed 1 March 2018.

<sup>159</sup> Interviewed 3 March 2018.

come to live here, one participant stated that, ‘We came here because we were told it is here that we shall find help.’<sup>160</sup> And when I probed further, ‘Who told you to come here?’, the answer came almost in a chorus, ‘UNHCR.’<sup>161</sup> But one participant added, ‘And also the government of Kenya.’<sup>162</sup> For refugees living in urban areas, one participant stated:

It was not the will of UNHCR that we stay here in urban areas. If one is sick with chronic illness, one is allowed to live as an urban refugee. UNHCR, however, tells us that they do not have a budget for urban refugees, and we have to take care of ourselves.<sup>163</sup>

I also interviewed at least two participants from the local government in Dadaab sub-county about their role in the creation of the camps. I asked what led Kenya to move away from its policy of freedom of movement and choice of residence for refugees to their encampment and isolation. One participant had this to say:

The local authorities were not involved in the decisions to use refugee camps to protect refugees. It was the government of Kenya (GoK); it was a decision taken by the central government and imposed on the local communities here.<sup>164</sup>

I also asked the same participant what role UNHCR played in the GoK’s decision to move refugees to camps, the participant stated that:

UNHCR had influence on the decision to house refugees in camps in Kenya. UNHCR convinced the government of Kenya to give the land for creating the refugee camps and I would say that that in itself is a

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<sup>160</sup> Focus Group Interviews, 22 February 2018.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

<sup>163</sup> Interviewed, 27 March 2018.

<sup>164</sup> Interviewed, 7 March 2018.

decision by UNHCR to use camps for helping refugees. After they, I mean UNHCR, had acquired Ifo I & II, they used the GoK to get more land for the camps. Then the people by 2007 became sensitised and demanded to be consulted.<sup>165</sup>

The interviews with participants from the GoK were also as revealing about whose idea and decision refugee encampment was and what led Kenya to adopt refugee encampment. Some participants said the decision of refugee encampment was a joint one between UNHCR and the GoK. Others said it was government of GoK but on further probing, also said it was a joint decision. Others suggested it was UNHCR but framed their responses carefully as if afraid of letting the cat out of the bag. One participant whom I asked what led Kenya to adopt refugee camps since it never had them up to 1990, had this to say:

At the height of the influx of Somali refugees, the Department of Refugee Affairs (DRA) was created and it operated within UNHCR offices. Government literally seconded staff to the DRA which was within UNHCR. The Somali refugees were initially kept in camps in Mombasa (does not remember the name of the camp). Then they were moved to Dadaab. I think because those behind their move there wanted them to be close to Somalia but other (*sic*) Somali refugee were moved to Kakuma refugee camp.<sup>166</sup>

I asked this same participant a follow up question, whether refugee encampment was the sole decision of the GoK, or donors and other organisations influenced the decision to adopt refugee camps as a condition for providing aid to Kenya so that Kenya could handle the refugee influx, especially after the fall of the Said Barre regime in Somalia. This participant, a senior official, stated that, '[i]t

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<sup>165</sup> Ibid.

<sup>166</sup> Interviewed on 21 August 2017.

was most likely a collaboration between UNHCR and the government of Kenya.’<sup>167</sup>

And on further probing:

When you look at the way the designated refugee areas are managed, you can see that UNHCR had influence on the decision to move the refugees to designated areas. The decision to move refugees to designated areas was mainly influenced by the need to mobilize humanitarian aid for the refugees. UNHCR and the other humanitarian organisations needed to mobilize aid for refugees, and it was necessary to have a designated place for the refugees to handle the aid, especially distribution.<sup>168</sup>

So, refugee encampment can serve as an instrumentality of raising funding and resources because it guarantees visibility of both the refugees and work of the UNHCR and other international NGOs. It relieves the refugee-hosting government of worries about resources to meet the needs of refugees.

In addition, one can further glean the UNHCR’s interest in and preference to refugee encampment from some of its policy positions on, for example, refugees living in urban centres. The UNHCR stated, in its 1997 Urban Refugee Policy, for example, that urban refugees, ‘while constituting less than 2% of UNHCR’s refugee caseload (and less than 1% of the total caseload of concern to the High Commissioner), demand a disproportionate amount (estimated at 10 – 15%) of the organizations’ human and financial resources.’<sup>169</sup> Donor countries have become allegedly selective and not interested in refugees living in urban centres and is the main factor driving this policy.<sup>170</sup> Indeed, critics would argue that my focus on the UNHCR’s role in refugee encampment is misplaced because western donor

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<sup>167</sup> Ibid.

<sup>168</sup> Ibid.

<sup>169</sup> UNHCR, *UNHCR Comprehensive Policy on Urban Refugees* (Geneva, 25 March 1997) at 5 para 21.

<sup>170</sup> Ibid.

countries do exert some significant influence on the UNHCR's refugee protection work, including its encampment policies. The evidence, however, points to the contrary. In the first place, UNHCR's own preferences and priorities in refugee protection also do inform donors' decision on whether to fund urban refugees. UNHCR had already created the impression that urban refugees are expensive and that the camp offers a cheap alternative. Donors states are going to consider that in their funding decisions for the UNHCR. In the second place, the UNHCR is not a passive actor when it comes to refugee policy and practice, especially in the global south; the UNHCR influences, significantly, many donor countries about refugee encampment and refugee policy and practice in the global south. Indeed, many donor states sometimes take whatever the UNHCR tells them about refugees in some refugee-hosting states in the global south as truth.<sup>171</sup> In the third place, the relationship between the UNHCR and donor states is far more nuanced and requires separate treatment and beyond the scope of my dissertation.

The long-term support for refugees in urban centres, it is alleged, might not only create a dependency syndrome among refugees, but also 'favours unjustly the individual treatment of urban cases compared to those in rural settlements or camps.'<sup>172</sup> With this mindset, it should not be surprising that the UNHCR is interested in refugee camps.

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<sup>171</sup> While directing the Refugee Law Project (RLP), from 2001 to 2006, I interacted with some of the officials from embassies of leading donor countries, such as the United States, the United Kingdom, and the Netherlands in Uganda. The officials I met often repeatedly appreciated the RLP's evidenced-based working papers series that exposed some of the flaws in UNHCR approach to refugee protection in Uganda and confirmed concerns refugees had reported to them, which they in the past often dismissed based on information from the UNHCR. RLP's working papers, however, provided alternative and credible sources of information to confirm what UNHCR tells them about the concerns that refugees bring to their attention.

<sup>172</sup> UNHCR Comprehensive Policy on Urban Refugees, *supra* note 169 at 5 para 23.



### 3.2.4 Some Inferences from the Data about the UNHCR's authorship of Refugee Encampment

One inference from the preceding review of the UNHCR's internal process and structures for refugee emergency response is that refugee encampment is an integral part of the emergency response strategy. It is possible to infer, from both its rendition of camps as devices of operational necessity in emergency situations and its *revealed preferences*, that in practice, the decisions that produce refugee encampment are 'authored,' to paraphrase Okafor, within the UNHCR's internal processes and structures, such as the *PPRE* and earlier versions of its *Emergency Handbook*. In other words, the UNHCR is the architect of the majority of the framework decisions on refugee encampment. That UNHCR is in fact an architect of refugee encampment is a key finding, which challenges the conventional wisdom that often projects the UNHCR as simply a passive actor and subservient to the dictates and whims of refugee-hosting states in the global south who actually decide on refugee encampment.<sup>173</sup>

Second, the significance of the UNHCR's authorship of the framework decisions on refugee encampment in the global south escapes scrutiny in virtually all the relevant literature on the subject – even in the entries that come to the closest to meeting this mark. Janmyr's excellent work, for example, neither explains how encampment happens nor UNHCR's role in creating refugee camps. This was not her focus, however. Wilde's pioneering and helpful inquiry into the UNHCR's accountability also does not engage with the question of the decision-making processes that produce refugee encampment. Loescher is the one scholar that gives some hint about UNHCR's interest in refugee encampment, but his work largely focuses on the political and international relations dimension of the issues. He does not therefore provide a discussion of UNHCR's internal processes and structures

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<sup>173</sup> See, e.g., Gaim Kibreab, "Why Governments Prefer Spatially Segregated Settlement Sites for Urban Refugees" (2007) 24:1 *Refugee* 27.

for refugee emergency preparedness response and how refugee encampment is an integral aspect. Verdirame and Harrell-Bond's groundbreaking work on refugee policy and practice in Kenya and Uganda attempts to address how the framework governance of refugee policy and practice in Kenya shifted to UNHCR, but they do not locate the sites within the UNHCR that made that shift possible.

### **3.3 Refugee-hosting states in the Global South and the *Framework Governance of Refugee Policy and Encampment***

I now turn to consider the counter theory, namely that refugee encampment is the sole decision of the refugee-hosting states in the global south, as sovereign states, and not UNHCR. In short, refugee-hosting states in the global south are the architects of refugee encampment. If this is right, then one of the things that can be observed is that the framework governance of refugee policy is located within the processes and structures of governance of the refugee-hosting state in the global south.<sup>174</sup> In other words, the refugee-hosting states in the global south are the authors of the majority framework decisions that constitute the policies and praxis of refugee protection, including refugee encampment.

I used Kenya as a case study to observe whether the framework governance of refugee policy is located within the internal processes and structures of governance of refugee-hosting states in the global south, as the sceptics would argue. I chose Kenya because earlier research indicated that Kenya never used to have refugee encampment policy and practice until the early 1990s.<sup>175</sup> If that is the case, why did Kenya abandon its *laissez-faire* refugee policy and embrace refugee encampment. As I stated in Chapter 2, I also drew from my earlier research experiences on refugee issues in Uganda, Kenya, and Tanzania and from some of the most relevant literature, such as Verdirame and Harrell-Bond on Sudan and

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<sup>174</sup> See, e.g., Crisp and Jacobsen, *supra* note 1, Gaim Kibreab, note 173.

<sup>175</sup> See, e.g., Verdirame and Harrell-Bond, *Rights in Exile*, *supra* note 42 at 31 – 34.

Loescher on the Algerian refugee crisis and the UNHCR's role in refugee encampment in these countries.

I briefly review Kenya's refugee policy and practice before and after 1990 in the light of empirical evidence to help confirm or refute the counter theory that refugee-hosting states in the global south are the sole architects of refugee encampment.

### **3.3.1 Kenya's Framework Governance of Refugees Before October 1990**

Kenya's refugee policy and practice prior to the opening of refugee camps in 1990 allowed refugees in Kenya to work, move, and settle anywhere, especially in towns and cities, in Kenya. Verdirame and Harrell-Bond in their groundbreaking work on refugee policy and practice in Kenya and Uganda noted that, 'Kenya operated a policy of benign neglect, allowing refugees to settle freely in towns and cities to secure their own means of livelihood as best as they could.'<sup>176</sup> Indeed, all participants from GoK and some from UNHCR confirmed that before 1990, there were no refugee camps, save for a reception or transit centre at Thika, that the Immigration Department, in collaboration with the National Refugee Secretariat (NRS), under the Ministry of Home Affairs, ran for screening refugee applications for refugee status. One participant, a GoK official, said,

[b]efore the period you are talking about, i.e., before the establishment of camps in 1990, refugees were handled by the immigration department and the refugees were given Alien ID Cards. The Class M visas was given to those who had Alien ID card and when they found work, it allowed them to work. The refugees were mainly from Uganda and some of my teachers were Ugandan refugee teachers. Then, refugees could move

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<sup>176</sup> Ibid at 31.

freely around in Kenya. There were no formal programmes as we have them today.<sup>177</sup>

Verdirame and Harrell-bond further note that, '[u]p to 1991, the Kenyan government conducted refugee status determination'<sup>178</sup> and the National Refugee Secretariat (NRS) 'administered a small, open reception centre at Thika where destitute asylum-seekers could reside during the process.'<sup>179</sup> And crucially, refugees at the Thika reception centre who were 'granted status were expected to move out of [the] reception centre and settle outside,'<sup>180</sup> i.e., anywhere in Kenya.

Thus, before 1991, the evidence shows that Kenya was the author of the framework decisions that constituted its governance of refugee affairs on its territory. In other words, the framework governance of refugee policy and practice was located within Kenya's processes and structures of governance; an external entity had not yet appropriated or acquired it. The evidence further shows that Kenya, despite having control of its framework governance of refugee policy, did not encamp refugees. In other words, refugee camps were not considered an integral aspect of the framework decisions that constituted governance of refugee affairs in Kenya.

The evidence of Kenya's refugee policy and practice before 1990, therefore, contradicts the counter theory that refugee-hosting states are the sole architects of refugee encampment and invalidates the observable implication that the refugee

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<sup>177</sup> Interviewed, 28 August 2017.

<sup>178</sup> Verdirame and Harrell-Bond, *Rights in Exile*, *supra* note 42 at 31.

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid* at 32.

hosting state's internal processes and structures will produce refugee encampment. This demands an explanation. It implies two possible things. First, that a refugee-hosting state in the global south can, under certain conditions or for certain reasons, be in full control of its framework governance and yet not consider refugee encampment as a technology of governing refugee affairs. Second, it suggests that refugee encampment is *not always* or *not necessarily* the idea of a refugee-hosting state in the global south. Other external forces or interests may be involved. It certainly was not the path Kenya took Kenya before 1990s (although this does not mean that it could not have changed course after that year).

### **3.3.2 Kenya's Framework Governance Shifts after 1990**

Kenya's open-door refugee policy and practice ended in 1991. Beginning in late 1990, Kenya received an influx of refugees from some of its neighbouring countries, i.e., Somalia, Ethiopia, Sudan, Uganda, and from other East and Central African countries, such as Rwanda Burundi, and the Democratic Republic of the Congo (DRC). The arrival of many refugees in Kenya raised several issues for the GoK. One participant, a former senior Kenyan government official, who was among the first officers given the responsibility for addressing the problem at early stages of the refugee influxes into Kenya, recalls:

Before 1991 we had Thika Reception Centre which was used to handle refugees in Kenya. Then most of the refugees were from Uganda and other countries in the region. In general, there were less than twenty thousand refugees. The refugee problem was minimal, and it was easy to handle and integrate them into Kenyan society because most were employable and therefore easy to employ or relocate to the US and Canada. In 1991, the refugee population, however, increased. I came into the refugee issues in February 1991 and I was made in charge of the Thika Reception Centre. I saw the explosion of the refugee problem. That is when Somalia collapsed following the overthrow of Siad Barre. During that same period, the Ethiopian refugees arrived, following the fall of Mengistu's government. But the Ethiopian refugees brought with them the Sudanese refugees who had fled the civil war in Sudan and sought refuge in Ethiopia and had been in refugee camps there...Then

the refugee numbers exploded from handling just about one thousand at the Reception Centre to handling over twenty thousand.<sup>181</sup>

The increase in refugee numbers definitely put Kenya's open-door refugee policy and praxis to the test. How Kenya responded to the influx and the implications of that response are subject to competing interpretations from different perspectives, but one of the most important aspects is that – in the end and no matter who authored the policy – Kenya embraced refugee camps as the technology with which to respond to the early 1990s refugee crisis it confronted.

The official version from GoK is that the shift in policy was authored from within normal government processes and structures. One participant, another former senior official, remembered that:

The events in Somalia, namely the civil war there, led the move away from the policy of freedom of movement and residence to encampment. Thika, before 1991, was a transit centre with a manageable number of refugees, especially the class and profile of the refugees were, I would say, the typical or normal refugee...And the numbers of refugees were overwhelming. In a week, 20,000 were arriving in Kenya – they were coming from all over – through the coast and the north-eastern Kenya. This raised several issues in terms of management: issues of sanitation, resources, and law and order. The camp arrangement became immediately the most feasible or imperative approach to dealing with issues of physical safety, receiving humanitarian assistance, and the security of the people, i.e., security of the people entering into Kenya and the security of those in host communities.<sup>182</sup>

The official version of how Kenya made the shift from open-door, *laissez-faire*, refugee policy and practice to refugee encampment, however, cannot hold in the face of the totality of the available evidence and masks how the 'balance of power,'

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<sup>181</sup> Interviewed, 18 March 2018.

<sup>182</sup> Interviewed, 2 April 2018.

to borrow the phraseology from Verdirame and Harrell-Bond, on refugee policy and practice in Kenya shifted from GoK to an external entity. In other words, the official version of how Kenya made a shift to refugee encampment masks how external entities acquired or appropriated the *framework governance* of refugee policy and practice in Kenya. Critics may, however, argue that the UNHCR seed met fertile GoK soil. In other words, even if UNHCR broached the idea of refugee encampment, it must have found some interest within the GoK. First, it is possible the critics are right. Second, a more nuanced analysis in the context in which the GoK found itself, especially when it was in dire need of financial and other resources to handle the refugee influx, shows that it had limited options but to embrace encampment. In the paragraphs that follow, I endeavour to set out that context and the time when the balance of power shifted or when GoK lost its framework governance on refugee policy and practice to an external entity.

Verdirame and Harrell-Bond sketch out both the possible time when the ‘balance of power’ on refugee policy in Kenya started shifting away from the GoK to some external entity and when it actually shifted. In 1991, Verdirame and Harrell-Bond point out, Kenya attempted to raise funds on its own, without going through entities such as the UNHCR, to deal with the refugee crisis that was unfolding and, in fact, succeeded in ‘raising some funds from the EU through the Lomé IV Convention.’<sup>183</sup> But a ‘serious conflict developed between the permanent secretary, home affair, and the UNHCR representative’<sup>184</sup> after Kenya’s initial success in raising funds without UNHCR involvement. In the end, Kenya surrendered funding-raising to UNHCR and ‘acquiesced in the encampment of refugees’ after it resisted refugee encampment for many years, and agreed ‘to

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<sup>183</sup> Verdirame & Harrell-Bond, *supra* note 42 at 34.

<sup>184</sup> *Ibid.*

provide land, albeit for the most part in inhospitable areas.’<sup>185</sup> Thus, it was the UNHCR, not the GoK, actually set up the refugee camps and administered them, unlike the Thika reception centre which the GoK administered. Crucially, the GoK had no effective control over the camps and its officials’ visits to the camps ‘had to be negotiated with UNHCR.’<sup>186</sup> Against this background, Verdirame and Harrell-Bond addressed aspects of the dynamics that produced refugee encampment in Kenya. This section of Chapter 3 builds on this part, but in a more direct and general way because it delves deeper into the UNHCR’s internal processes and structures that make such shifts in balance of power vis-a-vis the *framework governance* of refugee policy and practice in some refugee-hosting states in the global south.

Despite this account from two leading scholars in the field, the UNHCR participants I interviewed in Kenya for my study either feigned ignorance about how refugee encampment decisions were made in Kenya or stated that it was the decision of the GoK. Others, upon further probing, said it was a joint decision. There was one exception: one participant, a senior official was candid and forthright about refugee encampment in Kenya. He said,

‘It was not the idea of Kenya to have camps. They did not want camps, especially in locations such as Dadaab because Kenya had issues with its eastern region...’<sup>187</sup>

I further probed that if it was not Kenya’s idea to encamp refugees, how, then, did it come to have refugee camps and what was the role of external entities, such as the UNHCR in the encampment decisions? The senior official stated:

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<sup>185</sup> Ibid at 33.

<sup>186</sup> Ibid.

<sup>187</sup> Interviewed 31 August 2017, Nairobi, Kenya.



The role of UNHCR, indeed it was the whole international community that supported the idea of creating the camps, was to facilitate the creation of the camps. It was assumed then that the camps would be temporary.<sup>188</sup>

In contrast to the senior official, however, one former senior official involved with the setting up of DRCC and Kakuma refugee camp initially stated, albeit implicitly, that refugee encampment was the decision of the GoK, arguing that ‘The decision on who lives where in Kenya is made by the Government of Kenya.’<sup>189</sup> On further probing, however, the same official stated:

To some extent the GoK did not want camps. I witnessed Kenya government officials forcibly returning refugees to Somalia. But the refugees continued coming and GoK allowed UNHCR to locate proper places where refugee camps were to be established.<sup>190</sup>

Crucially, however, this same participant said something in a July 2011 communication with a retired professor in Oxford which reveals how the GoK initially resisted to give land for refugee encampment and how UNHCR overcame that resistance.<sup>191</sup> I quote extensively from this e-mail communication, given the

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<sup>188</sup> Ibid.

<sup>189</sup> Interviewed, 25 July 2018.

<sup>190</sup> Ibid.

<sup>191</sup> I believe a bit of background on how I got this email communication between the late Dr Harrell-Bond and this participant is necessary. In the first place, I had a long working and research relationship with the late Dr Barbara Harrell-Bond, first under a EU-Ford Foundation umbrella research project on refugee rights in and outside refugee camps in Kenya and Uganda from 1997 – 1999 and throughout my tenure as director of the Refugee Law Project from 2001 to 2006; then I spent over a year working with her in Oxford from October 2010 to January 2012. While at Oxford, I used to brainstorm with her on issues concerning refugee policy and practice in Africa and the global south in general. It was during my time with her in Oxford that I started asking her questions about refugee encampment in Kenya which their book, *Rights in Exile: Janus-Faced Humanitarianism* does touch on but not in much detail. I wanted to know more about how the camps were created and the role of UNHCR since in the book they say Kenya was reluctant to encamp refugees. She told me she would ask around to find out some people who can give me the details I needed. Eventually in 2011, she forwarded to me her email communication with this participant. Upon returning to Uganda, however, I forgot all about it till when I started my doctoral studies at Osgoode Hall Law School, York University, Toronto, Canada, in the fall of 2014. Even then, I had

revealing nature of the behind-the-scenes dealings, which are rare to come across because, as he pointed out in the e-mail, nothing was put in writing, and even when put in writing, might be classified not for public consumption. Because of the significance of this piece of evidence, I have decided to quote at length to illustrate how the decision-making processes that produce refugee encampment operate in practice:

The GoK represented by the Ministry of Home Affairs (MHA), *was extremely reluctant to grant land for sheltering refugees*, often referring to Kenya as “the island of tranquillity” within the region. They made no secret of their roundups of refugees – including Somali women and children in the far northeast of the country – onto GoK lorries and forcibly returning them from where they came. I witnessed such occurrences myself, as did other relief workers those months of 1991 (my emphasis)....

During the course of negotiations for the use of Kenyan land, UNHCR recognized the obvious limitations of the GoK. UNHCR readily offered to provide equipment and materials to strengthen the capacity of both the security forces as well as the civilian authorities. Vehicles, radios and communication equipment, and even shelter and food were provided as incentives in order to secure the firm decision and ultimate approval of the GoK in acquiring the relatively large Dadaab Refugee Camp Complex. Suffice to say that subsequent land negotiations between HCR and GoK for additional refugee camps transpired far more easily, with the Kakuma site negotiations passively relatively smoothly and without controversy. By that stage, UNHCR had earned the GoK’s respect and, needless to say, the GoK had recognised the many benefits (hundreds if not thousands of jobs; financial support; the goodwill of the international community, etc) that befell the country and the GoK in offering asylum to refugees.<sup>192</sup>

The Kenyan Minister of Home Affairs and National Heritage confirmed in Parliament in October 1995 that UNHCR did provide material support to the GoK during a question time session in Parliament that focused on ‘Hosting Somali

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forgotten about the e-mail until I found this participant and it was during the interviews with the participant that I remembered the email Barbara had forwarded to me.

<sup>192</sup> E-mail to Dr Barbara Harrell-Bond, 27 July 2011, available on file with author.

Refugees.<sup>193</sup> The Minister was asked how much compensation UNHCR had paid to the GoK for hosting the Somali refugees. He responded that UNHCR paid nothing to the GoK, but hastened to add that ‘UNHCR builds police posts, administrative police posts and also buys some vehicles for those security personnel to ensure that there is enough security.’<sup>194</sup> Members of Parliament may not have known the context in which the UNHCR was building police and administrative police posts and providing vehicles, but we do now know, thanks to this participant’s communication with the Oxford professor to whom he had addressed the email.

Similarly, in Uganda, the UNHCR ‘top[ed] up’ the salaries of government officials dealing with refugees,<sup>195</sup> ‘provided equipment – vehicles and computers,’<sup>196</sup> fuel, and paid customs duty for imported vehicles as incentives that allowed it to appropriate the framework governance of refugee policy and practice in Uganda, especially refugee encampment.<sup>197</sup>

And crucially, in 2014 a new refugee camp was created at Kalobeyei, officially referred to as the ‘Kalobeyei Integrated Settlement,’ to decongest the Kakuma refugee camp in north western Kenya. It is said to be modelled on the Ugandan refugee settlements.<sup>198</sup> But the UNHCR, and not the GoK applied for

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<sup>193</sup> GoK, *Kenya National Assembly Parliamentary Debates (Official Report), Daily Hansard*, 7th Parliament, 4th Session, Volume 7, Number 59 (18 October 1995) at 2033.

<sup>194</sup> Ibid.

<sup>195</sup> See, Verdirame & Harrell-Bond, *Rights in Exile*, *supra* note 42 at 37.

<sup>196</sup> Ibid at 38.

<sup>197</sup> Ibid at 37 – 38.

<sup>198</sup> Interviewed, 31 August 2017.

environmental impact assessment (EIA).<sup>199</sup> If refugee-hosting states are the architects of refugee encampment, why would it be the UNHCR to apply for environmental impact assessment? Would it not have been the relevant government entities communicating between each other to sort out the EIA requirement? Why would a government that controls refugee policy in its territory negotiate land with the UNHCR for encamping refugees? Why would an external entity take responsibility for environmental impact assessment of a site for a refugee camp if it has no interest in refugee encampment? The UNHCR and GoK participants were reticent about these questions but one can read between the lines and together with observations on the ground, decipher the revealed preferences of each and conclude who actually authors the framework decisions that produce refugee encampment in Kenya.

UNHCR's appropriation of the framework governance of refugee-hosting states is not only limited to the experiences of Kenya and Uganda. Karadawi<sup>200</sup> and Harrell-Bond,<sup>201</sup> each in separate works on refugee policy and practice in the Sudan, details how the UNHCR appropriated the framework governance of refugee policy from the Sudanese Government (GoS) between 1980 and 1983, when Sudan faced a similar refugee crisis, as Kenya, with hundreds of thousands of refugees from neighbouring countries, including Ugandan refugees.

Kenya and the Sudan are, by no means, not the only countries, faced with a refugee crisis, whose framework governance shifted to UNHCR. UNHCR has a

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<sup>199</sup>See, NEMA, 'EIA – 1262 \_UNHCR for Kalobeyei New Campsite' (2016), online: *National Environment Management Authority, EIA/SEA Report* <[https://www.nema.go.ke/index.php?option=com\\_content&view=article&id=131&Itemid=290](https://www.nema.go.ke/index.php?option=com_content&view=article&id=131&Itemid=290)>.

<sup>200</sup> Ahmed Karadawi, *Refugee Policy in the Sudan, 1967 – 1984* (New York: Berghahn Books, 1999).

<sup>201</sup> Barbara E. Harrell-Bond, *Imposing Aid: Emergency Assistance to Refugees* (Oxford, New York, Nairobi: Oxford University Press, 1986).

historical interest in refugee encampment that can be traced to its early years as it struggled to survive in an emerging post-second European war cold war world order.<sup>202</sup> The refugee crises during the early phase of the cold war in the 1950s provided the UNHCR with the golden opportunity to demonstrate its relevance to states. The Algerian war of independence from France and the resulting refugee crisis of 1954 - 1962, is one classic example. Indeed, Loescher and Ruthstrom-Ruin are two scholars, in separate works, that claim that the Algerian refugee crisis provided the UNHCR the platform to launch itself as a global United Nations refugee agency.<sup>203</sup>

A detailed historical account of the refugee crises during the early phase of the cold war, including the Algerian refugee crisis are beyond the scope of my dissertation, but suffice to point out two important points about the Algerian refugee crises relevant to my discussions here. First, that when Tunisia, in 1957, and later Morocco, requested the UNHCR for material assistance for the Algerian refugees they were hosting, there were no refugee camps. The refugees were already in Tunisia for three years since the outbreak of the war of independence from France in 1954 and the UNHCR official, Arnold Rorholt, who was sent to investigate the situation reported in December 1958 that ‘Tunisian authorities were against the setting up of camps and that I had agreed with them.’<sup>204</sup> Moreover,

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<sup>202</sup> See, especially, Gil Loescher, *UNHCR and World Politics: A Perilous Path* (New York: Oxford University Press, 2002); Anne Hammerstad, *The rise and decline of a global security actor: UNHCR, refugee protection, and security* (Oxford: Oxford University Press, 2014).

<sup>203</sup> Cecilia Ruthstrom-ruin, *Beyond Europe: The Globalization of Refugee Aid* (Lund: Lund University Press, 1993); Gil Loescher, *supra* note 202.

<sup>204</sup> UNHCR, “Report on Mission to Morocco and Tunisia made by A. Rorholt, December 1958” (1959), online (pdf): *UNHCR Research Archives Mission Report*<<https://www.unhcr.org/research/archives/4417e74b2/report-mission-morocco-tunisia-made-rorholt-december-1958.html>> at 7 para. 32.

‘there were no camps in these areas and the refugees are spread over many districts in much the same way and in the same kinds of dwellings as in Morocco.’<sup>205</sup> Similarly, in Morocco, Rorholt had noted in his 1958 report that, ‘the authorities, do not at present, seem to favour the establishment of camps in Morocco.’<sup>206</sup> And yet, at the time the UNHCR got involved with Algerian refugees in their countries, Morocco and Tunisia were not party to the 1951 Refugee Convention given its temporal limitation to events in Europe. And crucially, that Morocco and Tunisia were not in favour of refugee encampment for over three years further buttresses my point that a refugee-hosting state in the global south can, under certain conditions or for certain reasons, be in full control of its framework governance and yet not consider refugee encampment as a technology of governing refugee affairs.

The second important point to note is that the idea of refugee encampment in both Tunisia and Morocco remained one of the options the UNHCR did not rule out, even when it was clear that these two states were not initially in favour of refugee encampment. Indeed, Rorholt noted in his 1958 report that ‘it may be that later on the setting up of camps may be necessary’ and that, ‘I am inclined to agree that a proportion of the refugees should be established in organised camps,’<sup>207</sup> but with the caveat that ‘this should not be a general measure.’<sup>208</sup>

But when Felix Schnyder became High Commissioner, that changed. Refugee encampment became the *modus operandus* for UNHCR’s operations in Tunisia and Morocco. Loescher observes that when Felix Schnyder became High

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<sup>205</sup> Ibid., at 6, para 29.

<sup>206</sup> Ibid., at 2, para 10.

<sup>207</sup> Ibid at para 50.

<sup>208</sup> Ibid.

Commissioner in 1960, he envisaged repatriation as the most feasible solution to the Algerian refugee crisis:

Algeria was by far the most important issue confronting Schnyder when he took office. From the beginning of its aid operation for Algerian refugees, the UNHCR believed that repatriation, not resettlement, was the only feasible approach to the problem. *Refugees were held in camps in anticipation of a successful, organized repatriation at the end of the war (my emphasis).*<sup>209</sup>

Loescher notes that the Algerian refugee repatriation ‘was successfully completed within three months’<sup>210</sup> and that Schnyder believed that repatriation of the refugee could only succeed if the UNHCR launched activities of ‘actual integration of these refugees in the economy of their country.’<sup>211</sup> Thus, the UNHCR launched reconstruction activities in Algeria to integrate the returning refugees. Loescher concludes that UNHCR’s ‘operating procedures’<sup>212</sup> for the Algerian repatriation and reconstruction ‘became a blue-print for the UNHCR actions and policies in practically all subsequent repatriations.’<sup>213</sup> Indeed, almost all participants from UNHCR gave repatriation as an important consideration for refugee encampment.

Therefore, the evidence shows that refugee-hosting states in the global south are not necessarily the architects of refugee encampment, even in cases where the framework governance of refugee policy is located or sited within their internal

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<sup>209</sup> Loescher, *supra* note 202 at 106.

<sup>210</sup> *Ibid* at 107.

<sup>211</sup> *Ibid*.

<sup>212</sup> *Ibid* at 108.

<sup>213</sup> *Ibid*.



governance processes and structures, as the cases of Kenya before 1990 or Sudan or Tunisia and Morocco illustrates. Rather, a pattern emerges that demonstrates that before the intervention of external entities, such as the UNHCR and international NGOs, refugee-hosting states in the global south, with their meagre resources, do not respond to the unfolding emergency with refugee encampment as their preferred technology of choice. Instead, refugee-hosting states often allow refugees to settle amongst the population and generally leave them to fend for themselves, of course, with the support of the local host communities.

In this context, the theory that refugee-hosting states in the global south are the architects of refugee encampment is patently flawed and its proponents, such as Crisp and Jacobsen<sup>214</sup> and Kibreab,<sup>215</sup> for example, ignore UNHCR's role in tilting the balance of power between itself and refugee-hosting states in its favour, often taking advantage of certain weaknesses within these refugee-hosting states and stereotyped assumptions held in the global north about refugee-hosting states in the global south.<sup>216</sup> In fact, none of the proponents of refugee encampment, such as Crisp and Jacobsen, make any reference to the behind-the-scenes negotiations and methods that UNHCR uses to induce refugee-hosting states to surrender their *framework governance* to UNHCR and embracing refugee encampment as the case of Kenya illustrates.<sup>217</sup>

Proponents of the theory that refugee-hosting states in the global south are the architects of refugee encampment might still remind readers of how these states ruthlessly enforce refugee encampment policies in their countries. Kenya, in

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<sup>214</sup> Crisp & Jacobsen, *supra*, note 1.

<sup>215</sup> Kibreab, *supra* note 173.

<sup>216</sup> On this aspect, see, e.g., Harrell-Bond, *Imposing Aid*, *supra* note 201 at 13 – 14.

<sup>217</sup> See, *supra* note 172; also see, *supra* note 193.



December 2012, for example, ‘decided to stop reception, registration and close down all registration centres in urban areas with immediate effect. All asylum/seekers will be hosted at the refugee camps.’<sup>218</sup> There are two possible responses to this type of contention. First, once the refugee-hosting State has lost the balance of power to UNHCR and its framework governance to UNHCR and other external entities, the only semblance of its authority and sovereignty is its ability to enforce refugee encampment, often in the name of security, even without a scintilla of evidence linking refugees to increase in crime. Of course, critics may argue that enforcement of refugee encampment also suits the interests of the government in the specific time and context. If that is correct, and if context matters, one is hard put to explain how a country, such as Kenya, that had seen the benefits of its laissez-faire refugee policies of the past, and that had attempted to resist refugee encampment, had better interests in enforcing refugee encampment.

Second, and crucially, a refugee-hosting state’s enforcement of refugee encampment must be understood in the broader context of the same state’s enforcement of neo-liberal economic orthodoxy and conditionality that the agents of capitalism, such as the World Bank and IMF impose on these states. It is often the case that these hapless states claim that they are the authors of the economic reforms that they were undertaking and have fiercely enforced the reforms, such as the structural adjustment programmes of the 1980s and early 1990s with disastrous consequences on the people. And yet, many of these same states later come out to disown the programmes as not their own or blame these institutions for undermining their programmes.<sup>219</sup> As Okafor demonstrates, external entities, such

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<sup>218</sup> See, *Kituo Cha Sheria & 7 others v. Attorney General*, in the High Court of Kenya, Petition 19 of 2013 consolidated with Petition 115 of 2013 (on file with author).

<sup>219</sup> See, e.g., Mwanguhya Charles Mpigi & Agness Nandutu, “Uganda: Museveni Blasts IMF, World Bank”, *The Monitor* (20 October 2004).

as the World Bank and IMF, or even some powerful states, have acquired the sites or locations of the framework governance on key economic and other governance issues of many “third world” states. It is the external entities that ‘authors the frame decisions that constitute the bulk of the governance pie’<sup>220</sup> in these states.

Given the orientation of all the evidence available, I argue that refugee encampment, for most refugee-hosting states in the global south, and certainly in Kenya, has tended to be an external conditionality that external entities, such as UNHCR and its implementing partners, mostly international non-governmental organisations, introduce to refugee-hosting states for a variety of reasons, including institutional interests. In the case of the UNHCR’s praxis of refugee encampment, as I have demonstrated in section 3.2 of this chapter, refugee camps are an integral component of its refugee emergency response strategy. It is presented to states as a necessary technology, albeit for temporary period, and often the security concerns and fears of states are exploited to drive the message home.<sup>221</sup> And where there is some resistance, as the case of Kenya demonstrated, key government officials are incentivised and socialised into embracing and owning refugee encampment.<sup>222</sup>

In this context, it should not come as a surprise to the keen observer that refugee encampment in Kenya, for example, coincided with an influx of a refugee emergency in which the UNHCR was involved. My thesis is that the UNHCR ‘proposes’ refugee encampment to a refugee-hosting state facing a refugee crisis, as the most feasible solution to the emerging crisis, giving the state the security

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<sup>220</sup> Okafor, *supra* note 8 at 3.

<sup>221</sup> Indeed, the UNHCR justifies refugee encampment on the security concerns of refugee-hosting states in its third edition of the *Emergency Handbook*; see, *supra* note 77 at 31 para 75.

<sup>222</sup> See, *supra* note 192; also, see, *supra* note 193.

implications of refugees and how encampment is the technology to minimise those risks.<sup>223</sup>

Even critical refugee law, policy, and praxis scholars such as Verdirame and Harrell-Bond missed this subtle manoeuvring that UNHCR adopts to assert itself and appropriate the *framework governance* of refugee policy in a refugee-hosting state, such as Kenya, that never had a refugee encampment policy. Indeed, Verdirame and Harrell-Bond instead noted that ‘rather than challenge the camp policy’ of refugee-hosting states,

UNHCR and even NGOs supported it for the perceived advantages that this concentration and isolation of the refugee population provided: administrative efficiency, the ability to control refugees, and the facilitation of the ‘voluntary’ repatriation of refugees.<sup>224</sup>

The UNHCR cannot challenge refugee encampment policies in refugee-hosting states in the global south because it is the chief architect of encampment. How can the UNHCR challenge itself about a technology it is interested in? The UNHCR succeeded, however, in normalising the camp as its standard technology for implementing its mandate in the global south, using rhetorical assertions that portray it as against refugee encampment in general. Some High Commissioners, such as Sadako Ogata<sup>225</sup> and Ruud Lubbers<sup>226</sup> publicly claimed that refugee camps are not good for anybody and that UNHCR’s goal is to make refugee encampment unnecessary. Yet, in practice, the organisation these former High Commissioners

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<sup>223</sup> *Emergency Handbook*, 3rd edn (2007), *supra* note 77 at 31 para 75.

<sup>224</sup> See, Verdirame and Harrell-Bond, *supra* note 42 at 18 and 273.

<sup>225</sup> Sadako Ogata, “Keynote Address at the Opening Ceremony of the PARinAC Global Conference”, Oslo, Norway, 6 June 1994, as cited in Verdirame & Harrell-Bond, *Rights in Exile*, *supra* note 42 at 287.

<sup>226</sup> Ruud Lubbers, ‘A refugee camp – no matter how well it is run – is no place to spend a child-hood,’ in a statement addressing the allegations of the exploitation of refugee children in West Africa, 1 March 2002.

headed continues to put high premium on refugee camps in their refugee emergency response strategy. And I noted in subsection 3.2.1, this rhetoric, that camps are not good for refugees, was articulated in the first edition of the *Emergency Handbook*, but quickly qualified with statements that the camp can be sanitised anyway. Indeed, the UNHCR's praxis over the decades does not support its rhetorical claims that refugee camps are bad for refugees. It is possible that things might change in the near future, especially in the context of the Syrian refugee crisis whereby the majority of the Syrian refugees live in urban centres; in this context, the UNHCR will start to adapt to this increasing reality. Indeed, in 2014 the UNHCR released its policy on alternatives to refugee camps.<sup>227</sup> A discussion of this new policy is beyond the scope of my dissertation.

### 3.4 Conclusion

In the first place, the evidence confirms my theory is correct, namely, that the UNHCR is the architect of refugee encampment in many refugee-hosting states in the global south. Also, the observable implication of this theory is correct; the *framework governance* of refugee policy is located within UNHCR's internal processes and structures. The counter theory, namely, that refugee-hosting states in the global south are the architects refugee encampment, however, did not hold true because states that retained their *framework governance* of refugee policy and practice did not automatically use refugee camps for providing protection. In other words, the observable implication that if states are the architects of refugee encampment, then the *framework governance* of refugee policy would be located within the governance processes and structures of the refugee-hosting states contradicted the counter theory. Using Kenya, Sudan, Tunisia, and Morocco refugee emergencies,

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<sup>227</sup> UNHCR, *UNHCR Policy on Alternative to Camps* (2014), online (pdf): *UNHCR, Protection, Statelessness* <<https://www.unhcr.org/protection/statelessness/5422b8f09/unhcr-policy-alternatives-camps.html>>

it was shown that these states did not automatically adopt refugee encampment as the preferred device for responding to the refugee influxes in their territories. In fact, all of them never at first considered refugee encampment, until UNHCR became involved with the refugee influxes in their territories.

In the second place, UNHCR uses refugee encampment as a form of aid conditionality in much the same way that the two leading neo-liberal financial institutions, the World Bank and the IMF, demand of “third world” states conditions for financial and other forms of loans for growing their economies. These conditionalities take various forms, including surrendering the *framework governance* of key policy decisions on how to grow the economy, institutional reform, and governance issues.

In the third place, if refugee encampment is an integral component of the UNHCR’s refugee emergency response strategy and it appropriates the *framework governance* of refugee-hosting states and tilts the balance of power in its favour, then accountability for the injurious consequences of refugee encampment on the environment and refugees must follow the locus of the *framework of governance* that authors the decisions to encamp refugees. I develop this aspect in more detail in Chapter 5.

## CHAPTER 4: THE REGIME OF ACCOUNTABILITY UNDER INTERNATIONAL LAW

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### 4.1 Introduction

In Chapter 1, I conceptualised accountability as answerability and argued that accountability is the underlying theme of the law of state responsibility and international liability for the injurious consequences arising from acts that international law does not prohibit. If that is the case, then it is logical to foreground accountability as a legal term for describing and prescribing the rules and principles governing the the wrongful acts or injurious consequences arising from activities that international law does not prohibit of both state and non-state actors as subjects of international law. In this context, the content and scope of the rules and principles of a regime of accountability under international law would comprise the existing rules and principles of responsibility for internationally wrongful acts and liability for injurious consequences arising out of activities international law does not prohibit, despite the existing gaps in these rules and principles.

In this chapter I analyse the content and scope of the rules and principles governing the regime of accountability under international law. I argue that international law provides a legal route, or a legal regime, for engaging the accountability of states and other actors who violate its precepts. If this is correct, at least some five practical or observable implications may be detected. First, it means, in practice, that international law has well-developed legal rules and principles that constitute a regime of accountability. Second, it implies that international law has well-developed institutions and processes for ensuring accountability. Third, it suggests that international law's regime of accountability is accessible to any injured party or person seeking redress for injury or harm suffered as a result of either the wrongful acts or the injurious consequences arising from activities of an actor on the international plane that international law does not prohibit. Fourth, it implies that it should be possible to hold any actor, such as UNHCR, accountable for their

wrongful acts or the injurious consequences of their acts that international law does not prohibit. Fifth, it is possible that the regime of accountability under international, just like any other structures and processes that human beings have created, suffers from inherent deficiencies and flaws that allows some actors to evade scrutiny and accountability.

There is nevertheless a competing or counter theory to the theory that international law provides a regime for engaging the accountability of actors who violate its precepts. A possible competing theory, from a TWAIL perspective, for example, could be that international law is hegemonic and imperialistic, or otherwise facilitates the domination of certain actors in other parts of the world, especially in the global south. Therefore, international law is ill-equipped to provide an equitable legal route for engaging the accountability of actors who violate its precepts. If this theory is right, it will also have some identifiable practical or observable implications.

The first observable practical consequence from this theory is that the rules and principles that constitute the current regime of accountability in international law are skewed in favour of protecting the hegemonic and imperialistic interests of powerful actors, states or otherwise. The second implication, which is related to the first, is that weaker actors (e.g., weaker states or IOs), will disproportionately be subjected to higher standards of accountability than powerful states or IOs. The third observable implication is that the existing rules and principles may not provide the legal route for engaging the accountability of international intergovernmental actors, principal or subsidiary, such as UNHCR, for the consequences of their activities that international law does not prohibit.

The fourth practical implication is that, even assuming that within the hegemonic and imperialistic structure and bias of international law there are some legal routes to engaging the accountability of international intergovernmental actors such as UNHCR, these legal routes or avenues may not be accessible to many weaker people, especially refugees in refugee camps in the global south. The fifth, which is

somehow related to the fourth, is that there are barriers, such as the privileges and immunities of IOs, to any attempts at engaging their accountability.

In this chapter, I focus on my theory and counter-theory about international law providing some legal route for holding actors on the international plane accountable and one observable implication for each to analyse the rules and principles constituting the regime of accountability under international law. As such, I structure the discussion in this chapter under four main sections. Section 4.1 is this introduction. In section 4.2, I focus on the rules and principles constituting the regime of accountability under international law. Here, I briefly trace the origins and sources of the rules and principles constituting the regime of accountability under international law, first, in state practice and, second, in the codification work of the United Nations International Law Commission (ILC). Then I proceed to discuss the rules and principles governing the accountability of states (subsection 4.2.1); and IOs (subsection 4.2.2). A discussion of the rules and principles governing the accountability of individuals, multinational corporations, and international non-governmental organisations is beyond the scope of my dissertation, which is focused on the accountability of an international intergovernmental organisation. In addition, a discussion of the institutions and process of the regime of accountability under international law is beyond the scope of my dissertation. I take up the first observable implication of the counter theory, namely, that the rules and principles that constitute the current regime of accountability in international law are skewed in favour of protecting the hegemonic and imperialistic interests of powerful actors, states or otherwise in section 4.3. I conclude the discussions in this chapter in section 4.4.

## **4.2 The Regime of Accountability Under International Law**

I start the analysis of the rules principles of a regime of accountability under international law with the theory that international law provides a legal route, or a legal regime, for engaging the accountability of states and other actors who violate its precepts. If this is correct, then, international law has well-developed legal rules



and principles that constitute a regime of accountability that can be observed in real life situations. In the sections that follow, I will identify and explicate these rules and principles.

In the first place, the rules and principles constituting the existing regime of accountability under international law comprise those governing the accountability of states and the accountability of international organisations (IOs) for: (a) internationally wrongful acts; and (b) the injurious consequences arising out of acts or activities that international law does not prohibit.

In the second place, the existing rules and principles of accountability under international law for both IOs and state actors initially evolved from inter-state relations. In other words, the rules and principles governing the regime of accountability under international law first concerned the wrongful conduct of states and are said to be more developed than those governing the accountability of other actors.<sup>1</sup>

In the third place, when the dictates of international life compelled states to create international organisations (IOs) for harmonising their competing interests, it became apparent, as years passed by, that IOs were also capable of committing internationally wrongful acts. The imperative necessity to regulate their conduct and hold them accountable required the development of rules and principles with which to engage their accountability.

Therefore, there are rules and principles governing the accountability of states and IOs for their internationally wrongful acts. The rules for state accountability

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<sup>1</sup> See, James Crawford and Simon Olleson, 'The Nature and Forms of International Accountability', in Malcolm Evans (ed.), *International Law*, 1<sup>st</sup> edn (Oxford: Oxford University Press, 2003) 445 at 446; Crawford and Olleson, however, changed the title to their chapter contribution to in the 5<sup>th</sup> edition to the book to "The Nature and Forms of International Responsibility," replacing 'accountability' with 'responsibility.'

evolved from custom and are now codified, albeit states have not ratified them. The International Law Commission (ILC) completed its study and codification of the rules and principles governing the accountability of states for their internationally wrongful acts in 2001 and adopted draft articles and commentary thereto.<sup>2</sup> The ILC submitted the draft articles on state accountability for internationally wrongful acts and commentary to the United Nations General Assembly (UNGA) recommending the General Assembly (GA) to ‘take note of the draft articles on State responsibility for internationally wrongful acts in a resolution and that it annex the draft articles to the resolution.’<sup>3</sup> The ILC further recommended that the GA consider:

‘convening an international conference of plenipotentiaries to examine the draft articles on the responsibility of State for internationally wrongful acts with a view to concluding a convention on the topic.’<sup>4</sup>

Similarly, the ILC undertook to study the topic of the accountability of IOs for their internationally wrongful acts and the codification of the rules and principles of international law governing their accountability and completed this task in 2011. It adopted ‘draft articles on the responsibility of international organisations for internationally wrongful acts’ and with commentary thereto.<sup>5</sup> The ILC submitted the draft articles and commentary thereto to the UNGA, recommending that the UNGA ‘take[s] note of the draft articles on the responsibility of international organisations in

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<sup>2</sup> See, “Report of the International Law Commission on the work of its fifty-third session” (UN Doc, A/56/10) in *Yearbook of the International Law Commission* 2001, vol 2, part 2 (New York: UN, 2001) at 17 para 11 and at 25 para 70 – 73 [“Report of the ILC”].

<sup>3</sup> Ibid at 25 para 72.

<sup>4</sup> Ibid para 73.

<sup>5</sup> See, “Report of the International Law Commission on the work of its sixty-third session” (UN Doc. A/CN.4/SER.A/2011/AD.1 (Part 2)) in *Yearbook of the International Law Commission* 2011, vol 2 part 2 (New York: UN, 2011) at 18 para 17.

a resolution, and to Appendix them to the resolution.’<sup>6</sup> Furthermore, the ILC recommended that the UNGA ‘consider...the elaboration of a convention on the basis of the draft articles.’<sup>7</sup> So far states have not concluded a convention pursuant to the ILC’s recommendation.

In the fourth place, there is a distinct set of rules and principles governing the accountability of states and IOs for acts that are not characterised as internationally wrongful. The ILC studied these under the topic of international liability for the injurious consequences of acts that international law does not prohibit. It completed studying and codifying part one of the topic on ‘international liability for injurious consequences arising out of acts not prohibited by international law (Prevention of Transboundary Harm from Hazardous Activities)’ in August 2001 and submitted to the UNGA draft articles and commentary thereto.<sup>8</sup> Furthermore, the ILC completed work in 2006 on the second part of the topic, and adopted ‘draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.’<sup>9</sup> In completing the second part of the topic, the ILC effectively completed its work on the topic, ‘international liability for injurious consequences arising out of acts not prohibited by international law’ and submitted the draft principles to the UNGA recommending that it ‘endorse[s] the principles by a resolution and urge States to take national and international action to implement them.’<sup>10</sup>

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<sup>6</sup> Ibid at 39 – 40 para 85.

<sup>7</sup> Ibid.

<sup>8</sup> See, “Report of the ILC, *supra* note 2 at 17 para 12 and at 145 para 91 – 93.

<sup>9</sup> See, “Report of the International Law Commission on the work of its fifty-eighth session” (UN Doc. A/CN.4/SER.A/2006/Add.1 (Part 2) in *Yearbook of the International Law Commission 2006*, vol 2 part 2 (New York: UN, 2006) at 17 para 14 and at 57 paras 60 – 63.

<sup>10</sup> Ibid at para 63.

#### **4.2.1 Rules and Principles of International Law Governing the Accountability of States**

In this section I review and explain the rules and principles governing the accountability of states under customary international law and the the ILC's draft articles on the accountability of states.

##### **4.2.1.1 Rules and Principles of Customary International Law**

Since the existing regime of accountability under international law emerged from inter-state relations,<sup>11</sup> it is imperative to commence a brief discussion of the regime with the the rules and principles of international law that emerged from state practice.<sup>12</sup> A detailed discussion of the various expressions of state practice and customary international law in general is beyond the scope of this chapter.<sup>13</sup> It suffices, however, to point out that the rules and principles governing the accountability of states under international law have been conventionally referred to as the law of state responsibility or simply state responsibility.

I will here summarise at least five main rules and principles from customary law that govern the accountability of states: protection of aliens, their property and reparation; basis of accountability; when is a wrongful act an act of state; attribution acts of officers to state; and the point in time when the accountability of the state is triggered. Some of these principles such as those concerning the basis of

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<sup>11</sup> See, e.g., George Nolte, 'From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations' (2002), 13 (5) *European Journal of International Law*, 1083 -1098; Pierre-Marie Dupuy, 'International Law of State Responsibility: Revolution or Evolution?' (1989), 11 (1) *Michigan Journal of International Law*, 105 -128.

<sup>12</sup> See, e.g., *The Case of the SS "Lotus"* (1927) PCIJ (*Series A*) No.10 at 18.

<sup>13</sup> For a recent discussion of customary international law from a TWAIL perspective, see B S Chimni, "Customary International Law: A Third World Perspective" (2018) 112:1 *The American Journal of International Law* 1.

accountability and when an act of an officer is considered an act of the state are critical to a regime of accountability under international law and can be, in specific contexts, extrapolated to other actors, such as the UNHCR. That is precisely what the ILC did when it was codifying the rules and principles for a regime of the accountability of IOs. I return to this aspect under subsection 4.2.1.2 of this chapter.

In the first place, the rules and principles concerning the duties a state owed foreign nationals on its territory was settled both in practice and theory and formed an important aspect of the international regime of accountability of the state for injury an alien suffers on its territory. Two most pronounced principles concerns the duties of a state to respect and protect the property rights of aliens and to make reparation for injury an alien suffers, whether with respect to property or other interests.<sup>14</sup>

In the second place, the issue of what constituted the basis of a state's accountability for injury to aliens on its territory under international law was settled amongst states in their bilateral relations with each other. Among state practitioners, the prevailing rule and principle was that 'some wrongful invasion of the rights of an alien by an agent of the State'<sup>15</sup> was required. In other words, the "wrongful acts or omissions" by the State or its agents'<sup>16</sup> was the basis for the accountability of the state for injury to aliens.

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<sup>14</sup> See, e.g., Ian Brownlie, *Principles of Public International Law*, 7th edn (Oxford: Oxford University Press, 2008) at 519 – 544; Francis J. Nicholson, "The protection of foreign property under Customary International Law" (1965) 6 *Boston College Law Review* 391 – 415; *The Oscar Chinn Case* (1934) PCIJ (Series A/B) No. 63; *Case Concerning the Factory at Chorzow* (1927) PCIJ (Series A) No. 9.

<sup>15</sup> See, e.g., Edwin M. Borchard, "Theoretical Aspects of the International Responsibility of States" (1929) *Max Plank Institute for Comparative Public Law and International Law* 233 at 225.

<sup>16</sup> *Ibid* at 226.

There was also the issue concerning the acts of an officer of government. And the question was when is an act of an officer considered an act of the state under international law? Does a state incur international accountability immediately when an official of the state wrongfully injures an alien? Borchard argues that the practice amongst states does not support this position. In practice, the international accountability of a state is not engaged '*immediately* when an official of the state wrongfully injures an alien, but only when it is evident that the local remedy is unavailable or ineffective.' It is only when the alien has no access to effective local remedies that 'international responsibility commences, for it is an indication that the State is unwilling or unable to make good the wrong of its officer... and hence must assume international responsibility.'<sup>17</sup>

The point in time when the accountability of a state is triggered was a fundamental and controversial question. The prevailing principle on when the accountability of the state commences posited that the accountability of the state for the wrongful act of its officer is triggered or commences 'after local remedies have failed.'<sup>18</sup> The PCIJ later 'overruled' the principle that the accountability of the state is not immediately engaged when it breaches an international obligation in its decision in the *Phosphates in Morocco* case.<sup>19</sup> In this case, the Italian Government instituted proceedings against the French Government before the PCIJ concerning phosphates in Morocco. The Italian government alleged that certain decisions of the Moroccan and French authorities with respects to phosphates prospecting in Morocco constituted a monopolisation of Moroccan phosphates contrary to certain

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<sup>17</sup> Ibid at 230 – 231; for recent developments, see, e.g., Djamchid Momtaz, "Attribution of Conduct to the State: State organs and entities employed to exercise elements of governmental authority" in Crawford, et al, *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) at 237 – 246.

<sup>18</sup> Borchard, *supra* note 15 at 234.

<sup>19</sup> *Phosphates in Morocco* (1938) PCIJ (Series A/B) No. 74 at 16.

provisions of the Franco-German Convention of 7 April 1911 concerning Morocco, to which Italy had acceded. In the alternative, the Italian government further alleged that the Moroccan Mines Department's decision to reject the application of its national, one Mr. Constantino Tassara, as transferee of phosphates prospecting licenses he had acquired from French citizens, 'to be recognised as the discoverer of the deposits covered by the said licenses,' amounted to an expropriation without compensation of a vested right. This was an unlawful international act.

The PCIJ held that it had 'no jurisdiction to adjudicate on this dispute',<sup>20</sup> i.e., it had no jurisdiction to entertain the Italian claim against France, because the facts constituting the dispute 'did not arise with regard to situations or facts subsequent to the ratification by France of the compulsory jurisdiction' of the Court.<sup>21</sup> The most relevant part of the PCIJ's judgment to the point under discussion here, namely, whether a state's accountability for internationally wrongful act is engaged immediately after its organ commits the unlawful act or after the injured alien's exhaustion of local remedies, relates to the Court's observations on the alternative claim of the Italian government, namely, that the decision of the Moroccan Mines Department to expropriate its national's vested rights, without compensation, was an internationally wrongful act and engaged the accountability of France immediately. The Court said:

In its application, the Italian Government has represented the decision by the Department of Mines as an unlawful international act, because that decision was inspired by the will to get rid of the foreign holding and because it therefore constituted a violation of the vested rights placed under the protection of international conventions. That being so, it is in this decision we should look for the violation of international law – a definitive act which would, by itself, directly involved international responsibility. This act being attributable to the State and described as contrary to the

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<sup>20</sup> Ibid at 29.

<sup>21</sup> Ibid.



treaty rights of another State, international responsibility would be established *immediately* between the two State' (my emphasis).<sup>22</sup>

The Court, in summary, affirms the theory that the wrongful act of an officer of State immediately engages the accountability of State. The PCIJ's successor, the ICJ, has applied this principle, for example, in the *Corfu Channel* case and the *Military and Paramilitary activities against Nicaragua* cases. The ILC has incorporated this rule in its draft articles on the responsibility of states for internationally wrongful acts, to which I now turn in subsection 4.2.1.2.

#### **4.2.1.2 Rules and Principles of International Law Governing the Accountability of States Emanating from the ILC's Codification Work**

The rules and principles governing the accountability of states as the ILC has codified them now consist of two broad aspects: accountability for internationally wrongful acts and accountability for the injurious consequences arising out of acts that international law does not prohibit.<sup>23</sup> The rules and principles governing the accountability of states for injurious consequences arising out of acts that international law does not prohibit are, in contrast, contained in two draft documents: the 'draft articles on the prevention of transboundary harm from

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<sup>22</sup> Ibid., at 28.

<sup>23</sup> See, "Report of the ILC," *supra* note 2; for scholarly works, see, e.g., James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge, U.K., New York: Cambridge University Press, 2002); James Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect" (2002) 96:4 *The American Journal of International Law* 874 – 890; Daniel Bodansky & John R. Crook, "Symposium: The ILC's State Responsibility Articles: Introduction and Overview" (2002) 96:4 *The American Journal of International Law*, 773 – 791; James Crawford, et al (eds.), *The Law of International Responsibility* (New York: Oxford University Press, 2010) 187 – 717.



hazardous activities'<sup>24</sup> and the 'draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.'<sup>25</sup>

The ILC's draft articles on accountability of states for internationally wrongful acts, unlike the regime governing the accountability of states under customary international law, no longer focus on bilateral relations between states and the rights and economic interests of alien nationals on their territories. The issue of the protection of the rights and economic interests of alien nationals, whether natural or juridical persons, is now addressed under a separate regime of rules and principles governing diplomatic protection.<sup>26</sup>

#### **4.2.1.2.1 Accountability for Internationally Wrongful Acts**

The organising principle of the scheme of the draft articles on the accountability of states is the *idea of the internationally wrongful act of the state as the basis of accountability* under international law. The scope of issues addressed under this organising concept are broad.<sup>27</sup> Thus, the draft articles contain rules and principles governing what constitutes a wrongful act; attribution of a wrongful act to a state; the breach of international obligation; the accountability of a state for the wrongful act of another state; the circumstances precluding wrongfulness; reparation for injury; serious breaches of obligations under peremptory norms of general international law; the invocation of the accountability of a State; and countermeasures.<sup>28</sup>

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<sup>24</sup> See, "Report of the ILC," *supra* note 2 at 146 para 97.

<sup>25</sup> See, "Report of the ILC," *supra* note 5 at 58 para 65.

<sup>26</sup> See, "Report of the ILC," *supra* note 9 at 23 – 56.

<sup>27</sup> See, e.g., Bodansky & Crook, *supra* note 23.

<sup>28</sup> See, "Report of the ILC", *supra* note 2 at 26 – 30 para 76.

I focus here on the general rules and principles governing an internationally wrongful act, rules and principles governing attribution of wrongful acts to a state, and rules and principles governing the breach of an international obligation because I believe these aspects are foundational steps in any attempts at investigating whether a state's accountability is engaged. In other words, the rules and principles governing an internationally wrongful act, attribution of wrongful act to a state, and breaches of an international obligation help in determining whether a State has complied with an international obligation.

#### **4.2.1.2.2 General Rules and Principles governing what Constitutes an Internationally Wrongful Act**

The general rules and principles undergirding what constitutes an internationally wrongful act of a state are set out in Articles 1, 2, and 3 of the draft articles on responsibility of states for internationally wrongful acts. The basic principle underlying the draft articles, i.e., articles 1 – 59, is articulated in Article 1, which stipulates that, '[e]very internationally wrongful act of a state entails the international responsibility of that State.'<sup>29</sup> In other words, when a state breaches international law, its accountability is engaged. A wrongful act therefore is a breach of any international obligation. It implies that the accountability of the state is engaged immediately it commits an internationally wrongful act. In framing the concept of a wrongful act in this way, the ILC followed international judicial opinions or precedent that had already 'overruled' the dominant principle in the early twentieth century that enunciated that the accountability of the state for the wrongful act of its officers is only engaged after the injured alien had exhausted local remedies. Under

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<sup>29</sup> Ibid at 26; also see, *ibid* at 32.

the authority of the *Phosphates in Morocco* case, the accountability of the state is immediately engaged when it commits an ‘unlawful international act.’<sup>30</sup>

Similarly, under the authority of the *Corfu Channel* case, a state’s accountability for an internationally wrongful act is engaged *immediately*.<sup>31</sup> In that case, two British destroyers, the *Saumarez* and *Volage*, struck mines in Albanian territorial waters and sustained serious damage. Albania denied knowledge of the mining of its territorial waters, claiming that it has no naval capacity and no knowledge who might have done it. The Court concluded, based on evidence and several assumptions, that Albania had knowledge of the minelaying of the Corfu Channel, because ‘there was a close Albanian surveillance over the straight’<sup>32</sup> around the period the two British warships were struck by the mines. Based on this conclusion, the Court held that ‘Albania is responsible under international law for the explosion which occurred on October 22<sup>nd</sup>, 1946 in Albanian waters, and for the damage and loss of human life which resulted from them...’<sup>33</sup> Several other judicial and arbitral authorities affirm the principle that the international wrongful act of a state engages its accountability.<sup>34</sup>

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<sup>30</sup> See, *supra* note 19.

<sup>31</sup> *Corfu Channel Case (United Kingdom v Albania)*, [1949] ICJ Rep 4.

<sup>32</sup> *Ibid* at 22.

<sup>33</sup> *Ibid* at 23.

<sup>34</sup> See, e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] ICJ Rep 14 [holding that US activities in and against Nicaragua constituted a breach of US international obligations at 146 para 92]; *Dicken Car Wheel Company (USA) v United Mexican States* (1931), Vol IV RIAA at 669 (United Nations Reports of International Arbitral Awards (RIAA)) [observing that, ‘Under international law...in order that a State may incur international responsibility it is necessary that an unlawful international act is imputable to it, that is, there exist a violation of a duty imposed by an international juridical standard’ at 678].

The principles laying out the integral components of a wrongful act are stipulated in Article 2 of the draft articles.<sup>35</sup> Article 2 stipulates that a state is said to have committed an internationally wrongful act when two things have occurred: an act or omission ‘is attributable to the state under international law’ and the act or omission ‘constitutes a breach of an international obligation of the state.’ In other words, there are two components to what constitutes an internationally wrongful act under the principles enunciated in Article 2. The first component is that the wrongful act must be attributable to the state under international law, not national law. The second component requires that the wrongful act must constitute a breach of an existing international legal obligation of the state. These principles, as explained in subsection 4.2.1.1, were enunciated through state practice or customary international law and the ILC simply codified and clarified them. Under the authority of the *Dickson Car Wheel* case, for example, the Commission stated that for a national of the claimant Government’s claim to succeed, it ‘is indispensable’ that ‘that two elements co-exist: an unlawful international act and a loss of injury suffered by a national of the claimant Government.’<sup>36</sup> The claim must fail if any of these two components are lacking.<sup>37</sup>

The last general principle governing what constitutes an internationally wrongful act relates to the issue under what legal regime an act may be characterised as an internationally wrongful act. Article 3 of the draft article enunciate the principle that international law is the legal regime under which a state’s act is to be

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<sup>35</sup> “Reports of the LC, *supra* note 2 at 2.

<sup>36</sup>See, *Dicken Car Wheel*, *supra* note 34 at 678.

<sup>37</sup> *Ibid.*

characterised as internationally wrongful even if that same act is considered lawful under national law.<sup>38</sup>

The commentary to Article 3 explains its import, indicating that Article 3 embodies ‘two elements.’<sup>39</sup> An act of a state is characterised as internationally wrongful only if that act ‘constitutes a breach of an international obligation.’<sup>40</sup> It is irrelevant that the state’s act ‘violates a provision’ of its ‘own law.’ In addition, a state cannot escape international law’s characterisation of its act as wrongful even if that act conforms to its national law.<sup>41</sup>

#### **4.2.1.2.3 Rules and Principles Governing Attribution of Internationally Wrongful Act to a State**

The rules and principles governing the attribution of internationally wrongful acts to a state are covered under articles 4 – 11 of the ILC’s draft articles on the accountability of states for internationally wrongful acts.<sup>42</sup> They define or specify the conditions under which an act of the state is attributable to that state for purpose of determining its accountability under international law.<sup>43</sup> The ILC identified eight key issues that are critical to attributing a wrongful act to a state, which form the basis of the rules and principles.

The first issue, which Article 4 addresses, concerns organs of a state whose wrongful act or omission is considered the act of that state. Under national law, the

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<sup>38</sup> “Report of the ILC,” *supra* note 2 at 26.

<sup>39</sup> *Ibid* at 36 para 1.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid*.

<sup>42</sup> “Report of the ILC,” *supra* note 2 at 26.

<sup>43</sup> *Ibid* at 39 para 7.

state comprises various organs, e.g., the executive, parliament or legislature, the judiciary, ministries, departments, authorities, public corporations with separate legal personality, territorial units, entities with other functions, etc. The rules enunciated in Article 4 stipulates that international law holds the state accountable for all the acts of these different organs acting in their various capacities while exercising governmental functions of the state. It is immaterial what position these entities hold in the organisation of the state, including having a separate legal personality under national law.

The second issue concern a person or entity, technically not organs of the state, but is vested with power to exercise elements of governmental authority on behalf of the state. Article 5 covers this aspect and stipulates that the act or omission of such a person or entity in exercise of powers vested in them are considered, under international law, acts of the state, as long as they are acting in that capacity and in that specific instance or occasion.

The third issue relates to a situation where a state places one of its organs at the disposal of another state. The rules for attributing the wrongful act of such an organ placed at the disposal of another state are provided in Article 6. The act of such a person or entity placed at the disposal of another state, when acting in exercise of elements of governmental authority of the state at whose disposal it was placed, are considered, under international law, the act of the state that placed the person or entity at the disposal of another state.

In addition, there is the situation or case where an organ of state or a person or entity vested with the power to exercise elements of governmental authority exceeds their authority or contravenes the instruction given. The rule enunciated to address this scenario is laid out in Article 7. The act of an organ of state or person or entity clothed with power to exercise governmental authority are considered act of the state even if the organ, person, or entity, exceeds the authority vested in them or simply violates or flouts the instruction it was given.

Another issue critical to questions of attributing wrongful acts to the state under international law concerns the act of a person or group of persons acting on the instructions of or under the influence of or control of a state. The rules of attributing the act to the state are stipulated in Article 8. The rule is that the act of a person or group of persons acting on the instruction or direction or control of the state are considered an act of that State.

The ILC also considered the issue of what when happens a person or group persons exercising governmental authority in the absence or default of the official authorities commits a wrongful act under international law. This scenario is addressed in Article 9. The rule articulated in Article 9 considers the act of a person or group of persons acting in exercise of elements of governmental authority to be an act of the State in such circumstances.

The acts of insurrections or movements also raise questions regarding attributing such acts to a state under international law. Are the acts of groups seeking self-determination or revolutions that take over the state from previous groups attributable to the state? Article 10 of the draft articles is devoted to defining the rules for attributing acts of insurrections and movements to the state under two possible occurrences. In the first place, the act or acts of an insurrection or movement are considered the act of the state if it becomes the new Government of the state (Article 10 (1)). In the second place, the act or acts of an insurrection or movement are considered acts of the state under international law if it succeeds in establishing a new state in a part of a territory of pre-existing state or territory under its administration (Article 10 (2)). Some examples of insurrection or movements that eventually become new states, include the newest state of the world, South Sudan, created in 2011, or Croatia or Bosnia Herzegovina, established after the disintegration of Yugoslavia in the 1990s.

The operation of the rule enunciated in Article 10 (1) and (2), i.e., the attribution of acts of insurrections or movements to a state, is without prejudice to the attribution

to a state any act, however related to that of the movement, which is already considered an act of the state under articles 4 to 9 (Article 10 (3)).

The draft articles also address the issue of how to deal with a situation, under international law, where a state acknowledges an act and adopts it as its own. Article 11 defines the rule for dealing with this type of situation and provides that acts which are not attributable to the state under the preceding articles, namely, articles 4 to 10, shall be considered acts of that state under international law.

#### **4.2.1.2.4      Accountability for Injurious Consequences of Acts International Law does not Prohibit**

In the preceding sections I explicated the rules and principles governing what constitutes an internationally wrongful act of a state and how to attribute an internationally wrongful act to a state under various circumstances or scenarios when dealing with the issue of the accountability of the state under international law. I now turn, in this subsection to elucidate the rules and principles governing the accountability of states and IOs for the injurious consequences arising out of acts not prohibited by international law.

The ILC's work of developing and codifying international rules and principles governing states and IOs accountability for injurious consequences of their activities that international law does not prohibit is a welcome addition to the corpus of existing rules and principles of accountability that focus on the internationally wrongful acts of states and IOs. As I stated in Chapter 1, certain activities or conduct may not be unlawful or 'wrongful' *per se*, but nonetheless may produce injurious consequences on people and the environment, for example. The injurious consequences of refugee encampment on the environment and condition of refugees in camps that the UNHCR helps create, fund, and administer to provide international protection to refugees, is a good example of this aspect. In addition, in Chapter 3 I demonstrated how the UNHCR is the architect of refugee encampment; and the UNHCR concedes that the encampment of refugees in its Dadaab Refugee Camp Complex (DRCC) 'has resulted in significant environmental



degradation.’<sup>44</sup> In Chapter 5, I will attempt to develop the case for the UNHCR’s accountability based on the concept of accountability for the injurious consequences of activities that international law does not prohibit.

As we have seen, the ILC decided to split the topic of international liability for injurious consequences arising out of activities that international law does not prohibit into two sub-topics: *prevention of transboundary harm* and *loss from transboundary harm* arising out of hazardous activities.<sup>45</sup> On the prevention sub-topic, it adopted, in 2001, *the draft articles on the prevention of transboundary harm from hazardous activities*. And on the loss sub-topic it adopted the *draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities* were adopted in 2006. These two documents codify the existing rules and principles governing the accountability or the consequences of any legal obligation arising out of activities international law does not prohibit.

#### **4.2.1.2.5 Rules and Principles Emanating from the Draft Articles on Prevention of Transboundary Harm**

Prevention *is the organising principle of accountability* under the regime of the draft articles on the prevention of transboundary harm comprising 19 articles. The ILC states that prevention connotes both a procedural and obligatory sense.<sup>46</sup> This contrasts sharply with the regime of accountability under the draft articles on accountability of states whose organising principle is the concept of the *internationally*

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<sup>44</sup> UNHCR, “Project Proposal for Environmental Rehabilitation of the Dadaab Refugee Hosting Region, Kenya’ (undated, on file with author. Obtained from UNHCR during fieldwork in 2018) at 3 [“Project Proposal for Environmental Rehabilitation”].

<sup>45</sup> See, “Report of the International Law Commission to the General Assembly on the work of its forty-ninth Session” (UN Doc. A/52/10) in *Yearbook of the International Law Commission 1997* (New York: UN, 1997) at 59 para 165 and 168 (A/CN.4/SER.A/1997/Add.1 (Part 2).

<sup>46</sup> “Report of the ILC,” *supra* note 2 at 148 para 98 sub-para 1.

*wrongful act*. Under this concept, the ILC developed a broad array of rules and principles that govern issues from the constitutive element of the concept itself to, for example, reparations, and countermeasures.

The prevention regime of accountability, unlike the internationally wrongful act regime, that seeks to compensate, and remedy injury already suffered, however, seeks to prevent injury or harm before it occurs, as much as feasible. In this context, the concept of prevention produces rules and principles of accountability, which places ‘emphasis upon the duty to prevent as opposed to the obligation to repair, remedy, or compensate.’<sup>47</sup>

The scope of the 19 articles on prevention of transboundary harm, while not as broad as that of the draft article on the accountability of states for internationally wrongful acts, envisage scenarios that facilitate the state of origin and the state likely to be affected and other states of concern in ensuring that preventive measures are put in place before an activity that has potential transboundary harm can be authorised.

I review a few articles of the Draft Articles on Prevention of Transboundary Harm to give an idea of what the rules and principles governing issues of preventing transboundary harm and consequences, if any for failure to take preventive measures. The focus or scope of the 19 articles are articulated in Article 1, which provides that the articles ‘apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.’<sup>48</sup> The activities covered under the articles are limited to those that international law does not prohibit. The scope of the articles are further limited under Article 2(d) of the draft articles, which defines the meaning of “State of origin,” as

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<sup>47</sup> Ibid sub-para 2 (*General Comment*).

<sup>48</sup> “Report of the ILC,” *supra* note 2 at 146.

‘the State in the territory or otherwise under the jurisdiction or control of which the activities referred to article 1 are carried out.’ Thus, subparagraph (d) of Article 2 further limits the scope of the draft articles to activities carried out in the territory of the State or other territory under the State’s jurisdiction or control.

The rules and principles in the draft article also depend on a set of concepts that are laid out in Article 2 of the draft articles. Key among them are ‘risk of causing significant transboundary harm’ and ‘harm.’ The concept of ‘risk of causing significant transboundary harm,’ is defined in subparagraph (a) of Article 2 to include, ‘risks taking the form of a high probability of causing significant transboundary harm and low probability of causing disastrous transboundary harm.’<sup>49</sup>

The ILC states in its commentary to Article 2 that the ‘concept of ‘risk of causing significant transboundary harm’ refers to combined effects of the probability of occurrence of an accident and the magnitude of its injurious impact.’<sup>50</sup> In other words, the threshold of what constitutes a transboundary harm from hazardous activity is ‘the combined effect of “risk” and “harm.”’<sup>51</sup> The ILC concludes that, ‘[a] definition based on the combined effect of “risk” and “harm” is more appropriate for these articles, and *the combined effect should reach a level that is significant*’ (emphasis in original).<sup>52</sup> Under this conceptual scheme, the ILC claims, ‘[t]he obligations of

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<sup>49</sup> Ibid.

<sup>50</sup> Ibid at 152.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

prevention imposed on States are thus not only reasonable but also sufficiently limited so as not to impose such obligations in respect of virtually any activity.<sup>53</sup>

The ILC's draft articles on the prevention of transboundary harm focus on hazardous material that cause harm across and beyond borders. The issue is whether the injurious consequences of refugee camps on the environment and refugees can be characterised as activities that cause transboundary harm. Some critics may argue that while refugee camps are capable of causing irreparable damage to the environment and refugees who have lived under conditions of encampment, some for over 25 years, they may not cause transboundary harm. Moreover, the critics may further take issue with the idea of using laws or rules created to govern the accountability of actors whose legitimate activities cause transboundary harm to holding accountable entities such as the UNHCR whose encampment activities may not necessarily cause transboundary harm.

My response is twofold. First, that any damage to the environment is likely to have transboundary effects either in the short or the long run regardless of whether the source of harm is from, for example, activities that are explicitly hazardous, such as smelting metal from its ores or activities that are implicitly hazardous, such as refugee encampment. One of the most visible consequences of the refugee camp on the environment is deforestation and soil erosion, which can have both localised and regional impacts. The UNHCR concedes that the DRCC has had a negative impact on the environment: '[t]wenty years ago, shelter construction materials were readily available within a radius of 0-5 km from the refugee camp. Presently refugees travel between 40 to 70 km for the same items.'<sup>54</sup> Moreover, this 'has resulted in destruction of over 3,000 hectares of land in and around the Dadaab refugee camp complex.'<sup>55</sup>

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<sup>53</sup> Ibid.

<sup>54</sup> 'Project Proposal for Environmental Rehabilitation', *supra* note 44 at 3.

<sup>55</sup> Ibid.

Widespread deforestation, whether of tropical rainforests or other form forest for small or large scale economic activities or encampment ‘could disrupt the movement of water in the atmosphere causing major shifts in precipitation that could lead to drought’ across countries.<sup>56</sup> This in turn could affect agricultural productivity and create food shortages.

Second, since harm done to the environment in one state’s territory has potential transboundary impacts, it is legitimate to extrapolate or extend the rules and principles developed to govern accountability for the injurious consequences of hazardous activities to those that are not characterised explicitly as hazardous.

#### **4.2.1.2.6 Rules and Principles on Allocation of Loss in Case of Transboundary Harm**

The draft principles on the allocation of loss in case of transboundary harm define a set of rules and principles governing the accountability for states for loss in case of transboundary harm, without prejudice to the regime of accountability of states for internationally wrongful acts. The draft principles on allocation of loss attempt to embody the spirit of the Rio Declaration on Environment and Development.<sup>57</sup>

The Draft Principles, consisting 8 Principles, focus on accidents that occur when hazardous activities are being carried out regardless of the state of origin’s compliance with its obligations under international law. The concern is that accidents from hazardous activities have a transboundary reach and can cause harm and loss to other states, including their nationals. In this context, the Principles seek

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<sup>56</sup> Fred Pearce, “Rivers in the Sky: How Deforestation is Affecting Global Water Cycles” (2018), online: *Yale Environmental 360* < <https://e360.yale.edu/features/how-deforestation-affecting-global-water-cycles-climate-change>>.

<sup>57</sup> “Report of the ILC,” *supra* note 9 at 58 para 66.

to create a regime of accountability that guarantees compensation for those who suffer loss in case of transboundary harm resulting from hazardous activities.

The scope of the draft principles on the allocation of loss in the case of transboundary harm from hazardous activities that international law does not prohibit are limited to ‘transboundary damage caused by hazardous activities not prohibited by international law.’<sup>58</sup> The principles also define the nature, threshold, and victims of damage resulting from transboundary damage. The damage has to be *significant* and to persons, property, or the environment.<sup>59</sup> The damage can be ‘loss to life or personal injury<sup>60</sup>’; or ‘loss of, or damage to property, including property which form part of the cultural heritage<sup>61</sup>’; or ‘loss or damage by impairment of the environment<sup>62</sup>’; or costs of reasonable measures of reinstatement of the property, or environment, including natural resources<sup>63</sup>; or ‘the costs of reasonable response measures.’<sup>64</sup>

The principles have two main purposes, compensatory and preservative. In the first place, the principles provide a legal route to ‘prompt and adequate compensation to victims of transboundary damage.’<sup>65</sup> Secondly, the principles seek to ‘preserve and protect the environment in the event of transboundary damage, especially with

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<sup>58</sup> Ibid at 58 para 66 [Principle 1].

<sup>59</sup> Ibid at 58 para 66 [Principle 2 (a)].

<sup>60</sup> Ibid at 58 para 66 [Principle 2 (a)(i)].

<sup>61</sup> Ibid at 58 para 66 [Principle 2 (a)(ii)].

<sup>62</sup> Ibid at 58 para 66 [Principle 2 (a)(iii)].

<sup>63</sup> Ibid at 58 para 66 [Principle 2 (a) (iv)].

<sup>64</sup> Ibid at 58 para 66 [Principle 2 (a)(v)].

<sup>65</sup> Ibid at 58 para 66 [Principle 3].

respect to mitigating damage to the environment and its restoration or reinstatement.<sup>66</sup>

The regime of compensation envisaged under Principle 4 obliges states to ‘take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located in its territory or otherwise under its jurisdiction or control.’<sup>67</sup> In addition, the measures should include at least four main aspects.

In the first place, the measures must impose liability on the operator or other person, or entity and such liability does not require proof of fault.<sup>68</sup> Moreover, any ‘conditions, limitations, or exceptions to such liability shall be consistent with draft principle 3.’<sup>69</sup> In the second place, the measures should include the requirement that the operator or person or entity ‘establish and maintain financial security such as insurance, bonds or other financial guarantees which cover claims of compensation.’<sup>70</sup> In third place, the measures should include, in appropriate cases, the requirement for the establishment of industry-wide funds at the national level.<sup>71</sup> And crucially, the state of origin should ensure that additional financial resources are available in the event that measures already in place are insufficient to provide adequate compensation.<sup>72</sup>

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<sup>66</sup> Ibid.

<sup>67</sup> Ibid at 58 para 66 [Principle 4 (1)].

<sup>68</sup> Ibid at 58 para 66 [Principle 4 (2)].

<sup>69</sup> Ibid.

<sup>70</sup> Ibid at 58 para 66 [Principle 4 (3)].

<sup>71</sup> Ibid at 58 para 66 [Principle 4 (4)].

<sup>72</sup> Ibid at 59 para 66 [Principle 4 (5)].

Principle 5 lays out the rules governing how states should respond in the event of ‘an incident involving a hazardous activity which results or is like to result in a transboundary harm.’<sup>73</sup> The first set of three rules impose obligations on the state of origin while the last two set of rules on the state that a transboundary harm impacts or affects. The state of origin is under obligation to ‘promptly notify all States affected or likely to be affected of the incident and the possible effects of the transboundary harm.’ Secondly, it ‘shall ensure, with appropriate involvement of the operator, that appropriate response measures are taken and should, for this purpose rely upon the best available scientific data and technology.’<sup>74</sup> In addition, the state of origin, should ‘consult with and seek’, as appropriate, ‘the cooperation of all States affected or likely to be affected to mitigate the effects of transboundary damage and if possible eliminate them.’<sup>75</sup>

Principle 5 also imposes obligations on the state affected and the states concerned in the event of a transboundary damage occurring. The state affected or likely to be affected by a transboundary damage ‘shall take all feasible measures to mitigate and if possible, to eliminate the effects of such damage.’<sup>76</sup> The states concerned should, where appropriate, seek the assistance of competent international organisations and other States on mutually acceptable terms and conditions.’<sup>77</sup>

The draft principles, just like the draft articles on prevention of transboundary harm, do not appear to cover injurious consequences arising out of activities that do not fall under the “hazardous activities” category. Some examples included the

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<sup>73</sup> Ibid at 59 para 66 [Principle 5].

<sup>74</sup> Ibid at 59 para 66 [Principle 5 (b)].

<sup>75</sup> Ibid at 59 para 66 [Principle 5 (c)].

<sup>76</sup> Ibid at 59 para 66 [Principle 5 (d)].

<sup>77</sup> Ibid at 59 para 66 [Principle 5 (e)].



activities of the World Bank, especially its driven economic reform programmes in the global south, such as dam constructions which has devastating impact on both the environment and livelihoods of the most vulnerable; the refugee encampment activities of the UNHCR, which are not technically “hazardous activities’ and may not have visible transboundary consequences.

#### **4.2.2 Rules and Principles of International Law Governing the Accountability of IOs**

The existing rules and principles governing the accountability of IOs are contained in the ILC’s draft articles on the responsibility of international organisations for internationally wrongful acts.<sup>78</sup> The draft articles, as their title suggests, are still in draft, i.e., not yet become a convention or treaty, and are therefore not binding. They, however, are so far the only source of rules concerning the accountability of IOs.

In addition, the draft articles on the prevention of transboundary harm from hazardous activities’ and the draft principles of the allocation of loss in the case of transboundary harm arising out of hazardous activities’ that I have explained under subsection 4.2.1.2 are also another source for the rules and principles governing the accountability of IOs.

The draft articles, following the template of the draft articles on the accountability of states for their internationally wrongful acts, also attempt to embody customary law on the accountability of an international IO. The rules and principles embodied in the draft articles cover a broad spectrum of issues concerning the accountability of IOs, ranging from rules for attributing wrongful acts or conduct to an international IO to rules and principles on the implementation of its accountability. I will only focus here on rules that define what constitutes an

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<sup>78</sup> “Report of the ILC”, *supra* note 5 at 40 para 87 [Article 3].

international IO's wrongful acts or conduct, and the rules and principles concerning the attribution of wrongful acts or conduct to an IO.

I focus on these aspects of the draft articles for two for two reasons. In the first place, reviewing the provisions of the draft articles which define what constitutes an international organisation's wrongful act and how that wrongful act is attributed to the organisation provided me some insights as to what they contain and whether they are applicable to the case of UNHCR's accountability for the injurious consequences arising out of its refugee encampment activities in some refugee-hosting states in the global south. The second reason is that an analysis of the rules and principles defining what constitutes an internationally wrongful act of an international IO and how that act is attributable to the organisation are the main pillars upon which the whole edifice of the rules governing the regime of the accountability of international organisations rest.

#### **4.2.2.1 Rules Defining the Wrongful Act of an International IO Under the ILC's Draft Articles**

Draft article 1 of the draft article on the accountability of international organisations for internationally wrongful acts lays out the first general rule governing the accountability of international organisations. It defines the scope of the rules and principles embodied in the draft 67 articles on the responsibility of international organisations. Draft article 1 stipulates that the rules and principles shall apply only to 'an internationally wrongful act' of an international organisation.<sup>79</sup>

The organising concept of the draft articles is 'an internationally wrongful act.' It is the same organising concept used in the draft articles on the accountability of states. This has one important implication: it means that international law, not national law, determines what constitutes a wrongful act.

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<sup>79</sup> Ibid at 40 para 78 [Article 1].

The draft articles on the accountability of IOs also lay out the general principle when the accountability of an international IO is engaged. This is embodied in draft article 3, which stipulates that, ‘Every internationally wrongful act of an international organization entails the international responsibility of the international organization.’<sup>80</sup> In theory individuals who suffer injury as a result of the wrongful act of an IO may invoke its accountability under other systems of law, such as municipal law or regional law. The draft articles, however, consider acts characterised as wrongful acts under international law.<sup>81</sup>

#### **4.2.2.2 Rules and Principles for Attribution of Wrongful Acts to IOs**

The ILC draft articles on the accountability of international organisations (IOs) provide for rules governing the attribution of three types or sources of acts or conduct to an IO: acts *exclusive* to an IO; wrongful acts or conduct of *another* IO or a state; and the wrongful acts of *a state*.

The general rule of attributing wrongful acts to an IO are modelled on the template of draft article 4 (on attribution of wrongful acts to states) of the Draft Articles on the Responsibility of States for Internationally Wrongful acts.<sup>82</sup>

#### **4.2.2.3 Rules and Principles on Attribution of Exclusive Acts of an IO**

The general rule is framed in sub-paragraph 1 of Article 6, and stipulates that,

The conduct of an organ or agent of an international organization in the performance of the functions of that organ or agent shall be considered an act of that organization under international law

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<sup>80</sup> “Report of the ILC,” *supra* note 5 at 40 para 87.

<sup>81</sup> *Ibid* at 47 sub-para 3 of commentary to Article 1 of the draft articles.

<sup>82</sup> “Report of the ILC,” *supra* note 2.

whatever position that organ or agent holds in respect of the organisation.<sup>83</sup>

Thus, the acts of an organ or agent of an IO are acts of that IO. Sub-paragraph 2 of draft article 6 provides that the internal rules of the IO apply to determining functions of its organs and agents. Based on Article 6 (1), the acts of officers of the UNHCR or its implementing partners in refugee encampment, if acting as an agent of UNHCR, would be attributable to UNHCR. I return to the question of attributing wrongful acts to UNHCR in Chapter 5, but it suffices to point out here that in practice, however, the General Counsel of the UN, would insist that acts of the subsidiary organs of the UN, even if they are independent and enjoy some legal personality, are attributable to the UN.<sup>84</sup>

The general rules and principles that draft 6 enunciates on the attribution of acts of organs or agents of an IO simply codified existing customary law. Indeed, it is settled law, under the authority of the *Reparations for Injuries* case,<sup>85</sup> that the acts of an organ or agent, whether as a particular natural or legal person, of an IO are acts of that IO and are attributable to it. An agent according to the authority of the *Reparation for Injuries* case, is ‘any person who, whether a paid official or not, and whether permanent or not, has been charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts.’<sup>86</sup> In other words, draft article 6 (1) reproduces settled customary law. If this is the law, then the acts of UNHCR’s organs, such as the Country Rep or operational and implementing partners through whom it acts in delivering essential services to

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<sup>83</sup> “Report of the ILC,” *supra* note 5 at 55.

<sup>84</sup> See, United Nations, *United Nations Juridical Yearbook 1996* (New York, United Nations 2001) 448 at 449.

<sup>85</sup> *Reparations for injuries suffered in the service of the United Nations Case, Advisory Opinion* [1949] ICJ Rep 174.

<sup>86</sup> *Ibid* at 177.

refugees in encampment are the acts of the UNHCR and should be attributable to it.

It is also settled law, under the authority of the *Effects of Awards* case,<sup>87</sup> that the wrongful act of an agent of an IO engages its accountability. In the *Effect of Awards* case, the ICJ held that when the Secretary-General, in his capacity ‘as the chief administrative officer of the United Nations Organization....concludes ...a contract with a staff member, he engages the legal responsibility of the Organization, which is the juridical person on whose behalf it acts.’<sup>88</sup> Similarly, in the *Certain Expenses* cases,<sup>89</sup> the ICJ, affirming its advisory opinion in the *Effect of Awards* case, held in effect that when the Secretary-General acts on the authority of the Security Council or the UNGA, the responsibility of the UN may be engaged ‘and the General Assembly has no alternative but to honour these engagements.’<sup>90</sup>

In addition to addressing questions of attributing conduct of organs or agents of an IO, the draft articles on the accountability of IOs also define the rule for attributing the acts of an organ or agent of another IO or State placed at the disposal of an IO. Draft article 7 of the draft articles enunciates this rule and stipulates that,

The conduct of organs of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law as an act of the latter organization if the organizations exercises effective control over that conduct.

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<sup>87</sup> *Effect of awards of compensation made by the U.N Administrative Tribunal Case, Advisory Opinion* [1954] ICJ Rep 47.

<sup>88</sup> *Ibid* at 53.

<sup>89</sup> *Certain expenses of the United Nations Case, Advisory Opinion* [1962] ICJ Rep 151.

<sup>90</sup> *Ibid* at 169.

In other words, if IO *y* places at the disposal of another IO *t*, an organ or agent *p*, and *t* has effective control over *p*, then any wrongful act that *p* commits in the performance of its functions for *t* shall be attributable to *t*. The converse is also true: even if *y* placed *p* at the disposal of *t*, but *y* controls *p*, then the wrongful act of *p* will be attributable to *y*.

This aspect of attribution of wrongful acts is crucial to questions concerning UNHCR's accountability in respect of refugee encampment activities that are generally implemented through organs or agents of other IOs, including private IOs in the non-governmental organisations genre, and organs of the State. In this context, agency relationships may be established, and this is crucial to questions of attribution of wrongful conduct to UNHCR in the context of refugee encampment activities in refugee camps in some refugee-hosting states in the global south.

The draft articles also address the question of to whom to attribute acts of an organ or agent that acts *ultra vires* the authority or capacity conferred upon it. The rule for attributing *ultra vires* acts to an IO is enunciated in draft article 8. It is settled law, under the authority of *Certain Expenses* case,<sup>91</sup> that the wrongful act of an organ or an agent acting in excess of its authority are attributable to the entity that clothed it with the authority to perform certain functions. In that case, i.e., the *Expenses* case, the ICJ expressed the opinion that the accountability of of an IO may entail in relation to the third parties as a result of an *ultra vires* act of an agent.<sup>92</sup> And more recently, this rule was confirmed, for example, in the *DRC v. Uganda* case,<sup>93</sup> where the ICJ held, among other things, that the conduct of the Ugandan army, the Uganda

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<sup>91</sup> Ibid.

<sup>92</sup> Ibid at 168.

<sup>93</sup> *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 168.

Peoples Defense Forces (UPDF), regardless of whether they acted in excess of the authority conferred upon them or in contravention of express instructions, was attributable to the Ugandan state.<sup>94</sup>

#### **4.2.2.4 Rules and Principles Governing Attribution of Acts of Another IO**

Draft articles 14 to 17 define the rules governing the attribution of the wrongful acts of an IO in its relationship with another IO under certain scenarios. One such scenario is where the IO aid or assists another IO in committing an internationally wrongful act. The rule in draft article 14 covers this scenario and it stipulate, in effect, that an IO that aids or assists another IO in the commission of an internationally wrongful act is accountable if it does so with the knowledge of the circumstances of the internationally wrongful act and that that act would be internationally wrongful if it had been committed by that organisation.<sup>95</sup> In other words, if an IO commits a wrongful act with the aid or assistance of another IO, the wrongful act is attributable to the IO that provides the aiding and assistance as long as it had knowledge of the circumstances in which the internationally wrongful act was committed.

Another scenario is where in the relationship between two IOs, one directs or controls another in the commission of an internationally wrongful act. Draft article 15 lays out the rule for attributing such wrongful act. The internationally wrongful act that an IO commits while another IO directed or controlled it is attributable to the IO doing the direction or controlling as long as the controlling IO had knowledge of the circumstances of the internationally wrongful act.<sup>96</sup> In other words, the international accountability of the IO directing or controlling another IO in the commission of an internationally wrongful act is engaged if it had knowledge of the

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<sup>94</sup> Ibid at 242 para 214.

<sup>95</sup> “Report of the ILC,” *supra* note 5 at 41.

<sup>96</sup> Ibid.

circumstances of the internationally wrongful act and the act would be an internationally wrongful act if it had committed the wrongful act itself but not the other organisation.

Draft articles 16 and 17 enunciate rules governing attribution of wrongful acts to an IO in the context of the IO's use of coercion and circumvention of its international obligations respectively. Draft article 16 stipulates that an IO's accountability is engaged if it coerces a state or another IO to commit an act that would not be internationally wrongful, but for its coercion and its knowledge of the circumstances in which it procured the act.<sup>97</sup> Draft Article 17 provides that the accountability of an IO is engaged if it circumvents its international obligations under two situations. In the first situation, it adopts a binding decision on its member states or IOs to commit an act it is aware would be internationally wrongful if it had committed that act itself. In the second scenario, the IO, to circumvent its international obligation, authorises its member states or IOs to commit an act that if it had committed itself, would be an internationally wrongful act.<sup>98</sup>

#### **4.2.2.5 Rules and Principles governing Accountability of a State vis-à-vis Conduct of an IO**

A state may be held internationally accountable for the acts of an IO. This happens under several scenarios stipulated in draft articles 58 to 62 of the draft articles on the responsibility of IOs. Under draft article 58, a state may be held internationally accountable for the acts of an IO if the state *aids or assists that IO in committing the internationally wrongful act* as long as the state had knowledge of the circumstances under which it aided and assisted the IO in committing the internationally wrongful act and the wrongful act would still be internationally wrongful if the state had

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<sup>97</sup> Ibid.

<sup>98</sup> Ibid.



committed it.<sup>99</sup> The exception to this rule is that an act of a state member of an IO done in accordance with the rules of the organisation does not engage the international accountability of the State under the terms of draft article 58 (1).<sup>100</sup>

Under draft article 59, a state may be held internationally accountable for the acts of an IO if that state directs or controls an IO's commission of an internationally wrongful act as long as it does the direction and control of the IO's commission of the wrongful act with knowledge of the circumstances of the internationally wrongful act and that if that act would still be internationally wrongful if the state committed it.<sup>101</sup> The exception to this rule is that an act of a state member of an IO done in accordance with the rules of the IO does not engage the international accountability of that state under the terms of draft article 59 (1).<sup>102</sup>

The draft articles also address scenarios where a state may coerce an IO to commit an internationally wrongful act or circumvent its international obligations, taking advantage of an IO's competence in the subject matter. Draft articles 60 and 61 cover these aspects. Under draft article 60, a state is internationally accountable if it coerces an IO to commit an act, but for the state's coercion, would have been an internationally wrongful act of the IO and the state does so with the knowledge of the circumstances of the internationally wrongful act.<sup>103</sup> In addition, a state is internationally accountable if it circumvents its international obligation, taking advantage of the IO's competence of the subject matter from which arises the state's international obligation, thereby causing the IO to commit an act, which if the state

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<sup>99</sup> Ibid at 45 [article 58 (1)].

<sup>100</sup> Ibid [article 58 (2)]

<sup>101</sup> Ibid [article 59 (1)(a)(b)].

<sup>102</sup> Ibid [article 59 (2)].

<sup>103</sup> Ibid, sub-para 1(a)(b) of draft art. 60, at 45, para. 87.

had committed itself, would have constituted a breach of the state's international obligation. And crucially, in these circumstances, the state is held accountable regardless of whether the act in question is an internationally wrongful act of the IO.<sup>104</sup>

Thus, a refugee-hosting state could be held accountable for the wrongful activities of the UNHCR under draft articles 58 – 62, such as refugee encampment, if it can be shown that the state directed and controlled the UNHCR's refugee encampment activities. Many critics of refugee-hosting states would argue that I should have focused on the accountability of states for the consequences of refugee encampment on the environment and refugees instead of the UNHCR. My response is that one of the main assumptions upon which the relationships between the UNHCR and refugee-hosting states in the global south are often examined or critiqued is fundamentally flawed. It is often assumed that UNHCR is a vulnerable and passive actor on the international plane with no influence on states. I have demonstrated in Chapter 3 that this is not the case in practice. UNHCR does possess some significant influence and power over some of these, often, poor governed refugee-hosting states in the global south.

The ILC's commentary to draft article 61 suggest that the jurisprudence of the European Court of Human Rights (ECtHR) on questions regarding individuals right to access national courts to vindicate an IO's violation of their rights vis-à-vis immunity from legal process that the IO enjoys before national courts influence its content. Indeed, the commentary reviews two such cases, *Waite and Kennedy*<sup>105</sup> and

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<sup>104</sup> Ibid [article 61(2)].

<sup>105</sup> *Waite and Kennedy v Germany* [GC], No. 26083/94, [1999] I EHRR 410 [*White & Kennedy*]

the *Bosphorus* case.<sup>106</sup> *Waite and Kennedy*, very briefly, involves a claim against Germany for failure to protect the complainants' right to fair hearing, which arose from an employment related dispute where the complainants had attempted to seek redress in Germany Courts against the decision of their employer, a regional IO, the European Space Agency (ESA), to terminate their employment. The *Bosphorus* case, in contrast, concerns a suit against an applicant brought against Ireland to protect its right to property after Ireland implemented a regulation of the European Community which also was implementing a resolution of the UN Security Council (UNSC).

In *Waite and Kennedy* the ECtHR observed that the immunity of an IO from the jurisdiction of national courts may have 'implications as to the protection of fundamental rights' and absolving Contracting States 'from their responsibility under the Convention', for violations of rights by the IO that states create and clothe with immunity 'would be incompatible with the purpose and object of the Convention.'<sup>107</sup> In *Bosphorus*, the ECtHR stated that when States transfer functions to IOs and immunise them, they cannot free themselves from the obligations they assumed under the ECHR.<sup>108</sup>

#### **4.2.2.6 Rules and Principles governing attribution of wrongful Act of an IO to States**

The last scenario considered with respect to accountability of a state for the wrongful acts of an IO is where a state may be held internationally accountable for the internationally wrongful act of an IO of which it is a member. Under draft article 62, a state member of an IO is accountable for the internationally wrongful act of that IO if the state accepts responsibility for the wrongful act towards the injured party or

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<sup>106</sup> *Bosphorus Have Yollari Turixm Ve Ticaret Anonim Sirketi v. Ireland* [GC], No. 45036/98, [2005] VI EHRR 157 -158 [*Bosphorus*].

<sup>107</sup> *White & Kennedy*, *supra* note 105 at 410 para 67.

<sup>108</sup> *Bosphorus*, *supra* note 106 at 157 -158.

it has led the injured to to rely on its acceptance of accountability for the internationally wrongful act of the IO of which it's a member.<sup>109</sup>

Generally, draft articles 58 to 62 enunciate rules and principles that govern when the international accountability a state might be engaged for the internationally wrongful act of an IO. This aspect is often referred to as the doctrine of the derivative or secondary accountability of the state for the internationally wrongful acts of an IO.<sup>110</sup>

Legal opinion amongst international law scholars, however, is divided on whether a state's international accountability is engaged on account of the wrongful acts of an IO of which it is a member.<sup>111</sup> Some writers argue that, in the absence of a general rule or theory on limited liability under international law, the wrongful acts of an IO engage the secondary responsibility of its member States.<sup>112</sup> Other groups, e.g., those under the Institute of International Law (ILA) suggest that it is a dangerous proposition to hold states accountable for the wrongful acts of an IOs of

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<sup>109</sup> "Report of the ILC," *supra* note 5 at 45 [article 62(1)].

<sup>110</sup> On this aspect, see, e.g., Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardian* (Cambridge: Cambridge University Press, 2011).

<sup>111</sup> For a review of the authorities on this aspect, see, e.g., Chattharanjan Felix Amerasinghe, "Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent" (1991) 85 *The American Journal of International Law* 259 at 265 – 269; also see, Andrew Stumer, "Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections" (2007) 48:2 *Harvard International Law Journal* 553.

<sup>112</sup> See, e.g., Henry G. Schermers & Niels M. Blokker, *International Institutional Law: Unity within Diversity*, 5th edn (Leiden, Boston: Martinus Nijhoff Publishers, 2011).

which it is a member.<sup>113</sup> The Institute believes that ‘[i]f members were liable for the defaults of the organization, its independence and personality would be likely to become increasingly a sham.’<sup>114</sup>

The ILA has suggested that due to policy considerations and the interest to maintain the independence of IOs, espousing a general principle of international law attributing the wrongful acts of an IO to member states would be inappropriate and counterproductive.<sup>115</sup>

Moreover, even leading scholars of international institutional law have changed their views on whether member states of an IOs should be held accountable for the wrongful acts of the organisation, thereby further destabilising the doctrinal position on this issue. Some scholars, such as Schermers and Seidl-Hohenveldern who had held the view that member states of an IO would be liable, except where provisions in the constitutive instrument limit liability, now hold the view that member states do not incur secondary responsibility or accountability for an IO’s internationally wrongful acts.<sup>116</sup>

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<sup>113</sup> “The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations towards Third Parties” in *Institute of International Law Yearbook 1995*, vol 66, part I (Lisbon: Institute of International Law, 1995) at 249.

<sup>114</sup> Ibid at 257; also, see, Andrew Stumer, *supra* note 111, for a critique of the concerns of those opposed to the idea of secondary responsibility of member states for the wrongful acts of IOs at 553, 570 – 80.

<sup>115</sup> “The Legal Consequences for Member States,” *supra* note 113 at 419 para 121.

<sup>116</sup> Compare Henry Schermers, *International Institutional Law*, 2<sup>nd</sup> edn (Alphen aad den Rijn: Sijhoff & Noorshoff, 1980) at 780 with Schermers and Blokker, *supra* note 112 at 1007; Ignaz Seidl-Hohenveldern, *Corporations in and Under International Law* (Cambridge, UK: Grotius Publications Ltd, 1987) at 121 with Ignaz Seidl-Hohenveldern, “Liability of Member States for Acts and Omissions of an International Organization”, in S. Schelmmmer-Schulte & K. Tung, eds, *Liber Amico rum Ibrahim F.I. Shehata: International Finance and Development Law* (The Hague: Kluwer, 2001) 727 at 739.

Even judicial and arbitral decisions are inconsistent on whether the secondary accountability of a state may be engaged for the internationally wrongful act of an IO.<sup>117</sup> In the *Westland Helicopters Ltd*<sup>118</sup> case, for example, the defendants, *Arab Organisation for Industrialisation* (AOI), decided to cease operations after a peace agreement between Israel and Egypt in 1979. Westland filed for arbitration seeking to recover damages for breach of contract from the OAI and its four member states. The Arbitration Tribunal found in favour of Westland, pointing out that while the AOI had distinct legal personality, under general principles of law, member states responsibility entailed for AOI's liabilities.<sup>119</sup> On appeal, the Court of Appeal of Geneva found in favour of the AOI, pointing out that member states were not signatory to the arbitration agreement and therefore the Arbitration Tribunal lacked jurisdiction.<sup>120</sup> Westland appealed to the Federal Supreme Court which upheld the decision of the Court of Appeal pointing out that the AOI possessed distinct personality and enjoyed total independence from member states and as a result its activities could not be said to have been carried out on behalf of the member states.<sup>121</sup>

Another classic example of courts not embracing the doctrine of the secondary accountability of states for the internationally wrongful acts of an IO of which they are members is the collapse of the International Tin Council (ITC) in 1985. Several companies and banks instituted a series of court cases in English courts against the ITC. One of the main legal issues was whether member states of the ITC could be held accountable for the wrongful acts of the ITC. In effect, the question whether the

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<sup>117</sup> For a discussion of judicial precedent and practice on this subject, see, e.g., Amerasinghe, *supra* note 111.

<sup>118</sup> *Westland Helicopters Ltd v. Arab Organisation for Industrialisation* [1994] 80 I.L.R. 595.

<sup>119</sup> *Ibid* at 613.

<sup>120</sup> *Ibid* at 622, 640, 641.

<sup>121</sup> *Ibid* at 658.

secondary accountability of states is engaged for the internationally wrongful act of an IO of which they were members was canvased at length. Indeed, several scholars have discussed, in greater detail, the ITC cases.<sup>122</sup> The Court of Appeal<sup>123</sup> and the House of Lords,<sup>124</sup> however, held that there was no general rule of international law that provided for the secondary accountability of member states for the internationally wrongful acts of an IO.

### **4.3 Limitations of Existing Rules and Principles Governing the Regime of Accountability Under International Law**

I now turn to discussing the theory that international law is hegemonic and imperialistic and therefore is ill-equipped to provide an equitable legal route for engaging the accountability of certain actors who violate its precepts. I focus here on one of the observable implications I had identified flowing from it, namely, that the rules and principles that constitute the existing regime of accountability under international law are skewed in favour of protecting hegemonic and imperialistic interests of powerful actors, states or otherwise.

#### **4.3.1 Bias in Rules and Principles Governing what Constitutes an Internationally Wrongful Act**

The bias inherent in the rules and principles governing what constitutes an internationally wrongful act as the basis of international accountability of states and IOs under international law is one of the key pieces of evidence I can adduce to

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<sup>122</sup> See, e.g., Romana Sadurska & Christine Chinkin, “The Collapse of the International Tin Council: A Case of State Responsibility?” (1989-1990) 30 *Virginia Journal of International Law* 845; and Ignaz Seidl-Hohenveldern, “Failure of Controls in the Sixth International Tin Agreement” in N. Blokker & S. Muller, eds, *Towards More Effective Supervision by International Organizations: Essays in Honour of Henry G. Schermers* (Dordrecht: Martinus Nijhoff, 1994) volume I at 255, 270.

<sup>123</sup> See, e.g., *J.H. Rayner (Mincing Lane Ltd) v. Dept of Trade and Industry and Others and Related Appeals* [1989] 1 Ch 72.

<sup>124</sup> *J.H. Rayner (Mincing Lane Ltd) v. Dept of Trade and Industry and Others and Related Appeals* [1990] 2 AC 418.



buttress the observable implication that the rules and principles that constitute the existing regime of accountability under international law are skewed in favour of protecting hegemonic and imperialistic interests of powerful actors, states or otherwise. This bias can be seen at several levels, but it is most explicit in three key areas.

First, international law is biased in placing far greater importance on private individual interest and capital in the formulation of rules and principles of the international accountability of the state.<sup>125</sup> In other words, the earliest rules and principles governing the international accountability of states in their bilateral relations placed more emphasis on an alien's property rights at the expense of the indigenous communities.<sup>126</sup>

International law has since privileged the property rights of aliens, whether natural or juridical persons, over and above the rights and interests of the indigenous people. Yet, much of the property interests of aliens in foreign countries, especially in territories 'discovered'<sup>127</sup> or 'acquired' or declared *terra nullius* in the global south and north America, were, and continue to be, land and cultural artefacts that white settlers of European origin forcibly took, with support of their colonial governments,

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<sup>125</sup> See, Monica Garcia-Salmones Rovira, *The Project of Positivism in International Law* (Oxford: Oxford University Press, 2013); also see, e.g., Odette Mazel, "The Evolution of Rights: Indigenous People and International Law" (2009) 13:1 *Australian Indigenous Law Review* 140 – 158.

<sup>126</sup> See, e.g., Francis J. Nicholson, "The Protection of Foreign Property Under Customary International Law" (1965) 6:3 *Boston College Law Review* 391 – 415.

<sup>127</sup> On how Europeans used the doctrine of discovery as the 'legal' means to expropriate the lands of the people they conquered, see, e.g., Jennifer Reid, "The Doctrine of Discovery and Canadian Law" (2010) 30:2 *The Canadian Journal of Native Studies* 335 – 359; also see, e.g., United Nations, ECOSOC, "Doctrines of Discovery, Used for Centuries to Justify Seizure of Indigenous Lands, Subjugate Peoples, Must Be Repudiated by the United Nations, Permanent Forum Told" (Meetings Coverages and Press Releases, 8 May 2012), online <<https://www.un.org/press/en/2012/hr5088.doc.htm>>.



from the indigenous communities. In many states in the global south, for example, and especially in Sub-Saharan Africa, most of the fertile lands were taken away from the black people, who were forced onto barren margin lands.<sup>128</sup>

International law protects these egregious acts of wanton dispossession, either explicitly or through penalising states that attempt to reform land ownership in ways that make it possible for the dispossessed indigenous peoples to have access to their fertile lands. Such acts automatically constitute internationally wrongful acts of the state and engage its accountability and consequently pay reparation or desist and restore the land to the aliens, many of whom have acquired the nationality of convenience of the state.<sup>129</sup> There is more emphasis on the human rights of foreign nationals; the rights of the indigenous people, who were injured when their lands were forcibly taken is immaterial in the eyes of international law. Therefore, while international law provided a legal route for aliens to vindicate their rights, it had no such avenues for the indigenous people who suffered injury at the hands of the alien.

This bias inherent in the rules and principles governing the accountability of states for internationally wrongful acts that privileges foreign nationals' property and rights above that of the indigenous people has continued to the present time, but in a different form. International law continues to protect foreign companies operating in many parts of the world, especially in the global south using new language, such as 'Agreement on Trade-Related Aspects of International Property Rights' or General Agreement on Trade in Services.' These legal mechanisms invidiously perpetuate

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<sup>128</sup> See, e.g., Jeremie Gilbert & Valerie Couillard, "International Law and Land Rights in Africa: The Shift from State's territorial possession to Indigenous People's Ownership Rights" in Robert Home, *Essays in African Law* (Pretoria: University of Pretoria Press, 2011); Michelo Hansungule, "Who owns land in Zimbabwe? In Africa?" (2000) 7 *International Journal on Minority and Group Rights* 305 – 340.

<sup>129</sup> S.N. Guha Roy, "Is the Law of Responsibility of States for Injuries to Aliens Part of Universal International Law?" (1961) 55:4 *The American Journal of International Law* 863 – 891.

the dominance of western transnational companies over the economies of peoples in the global south.<sup>130</sup> These legal frameworks on face value promote free international trade that purportedly produces wealth for everybody, but in reality, they perpetuate conditions of poverty and undermine standards of living.

Yet, none of the consequences of their activities that are injurious to the economies of the states in the global south constitute *internationally wrongful acts* that should engage the accountability of the transnational corporation or the state of origin. There is, instead, strong resistance to characterising as internationally wrongful acts of corporations that operate in various countries in the global south in search of bigger profit margins that cause so much destruction both of the environment and the livelihoods of thousands of people in the global south.<sup>131</sup>

The second level of bias in the rules and principles governing accountability for internationally wrongful acts under international law can be observed in the activities of supranational financial institutions such the International Bank for Reconstruction (IBRD) or more commonly known as the World Bank and the International Monetary Fund, created after the second European War and with several subsidiaries. These institutions rose to prominence, especially with the triumph of neo-liberal economic orthodoxy that Ronald Reagan, in the United States, and Margaret Thatcher, in the United Kingdom, championed in the 1980s and have since then become the dominant drivers of what Baxi describes as ‘market-

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<sup>130</sup> Robert Hunter Wade, “What Strategies are Viable for Developing Countries? The World Trade Organisation and the Shrinking ‘Development Space’” (2003) 10: 4 *Review of International Political Economy* 621 – 644; Isaac O.C. Igwe, “WTO and the Dynamic of Freed Trade: The Challenges of International Trade Law in a Divided Economic World” (2019) 5:2 *Athens Journal of Law* 169 – 190.

<sup>131</sup> See, e.g., Robert McCorquodale, “Corporate Social Responsibility and International Human Rights” (2009) 87 *Journal of Business Ethics* 385 – 400.

friendly' economics globally.<sup>132</sup> This pursuit of neo-liberal economic orthodoxy culminated with the establishment of the World Trade Organisation (WTO) in 1995 and a global financial system that western European states engineered around the same time. The conclusion of the WTO agreements was a triumph for neo-liberal economic orthodoxy: it established what its proponents consider an open, rule-based, market-friendly international trading system.

These international trade rules and norms in combination with the rules and norms of the global financial system that western European States helped create in the 1980s<sup>133</sup> provide effective rights and protection for capital to move freely around the world where it can maximise returns and profit for shareholders. While the free movement of capital from one 'market' with low returns to another 'market' with higher returns has benefits for some in the short-run, the majority poor are often the losers, in the long-run, with millions condemned to poverty because their means of livelihoods, either in the form jobs or land are lost to the highest bidders of the system. In other words, international law has constructed a global institutional order that, as Pogge puts it, 'continually and foreseeably produces vast excesses of severe poverty and premature death,'<sup>134</sup> but without these being characterised as internationally wrongful acts, which must engage the accountability of the architects of the system with the relevant legal consequences.

The third level of bias in the rules and principles governing internationally wrongful acts and international accountability is international law's failure to characterise as internationally wrongful acts of colonialism and imperialism, i.e., the

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<sup>132</sup> See, Upendra Baxi, *The Future of Human Rights* (Oxford: Oxford University Press, 2002).

<sup>133</sup> On this aspect, see, e.g., Rawi Abdelal, "Writing the rules of global finance: France, Europe and Capital liberalisation" (2006) 13: 1 *Review of International Political Economy* 1 – 27.

<sup>134</sup> Thomas Pogge, 'Recognized and Violated by International Law: The Human Rights of the Global Poor' (2005), 18 *Leiden Journal of International Law*, 717 – 746, at 722.

acts of certain western European states and their nationals conquering the indigenous people in far lands, dispossessing them of the lands, and subjugating and dominating them. The colonial and imperial project, some leading TWAIL scholars argue, gave birth to international law.<sup>135</sup> While technically colonialism ended after the second European war, with many former colonial projects of European colonial powers becoming ‘independent’ states, starting from 1950s and till up to the 1990s, these states continue to remain under the influence and control of their former colonial powers.<sup>136</sup>

A final bias in the rules and principles governing international accountability of states for internationally wrongful acts relates to the skewing of the rules in favour of the strong. The ILC draft articles codify obligations ‘owed to the international community as a whole’, a breach of which entitles a group of states to take collective measures against the state that is claimed to have breached such an obligation.<sup>137</sup> The problem is that the article framing this obligation does not specify the legal means authorised for carrying out enforcement action against the state alleged to have breached the obligation. The intervention of NATO in Libya to effect a regime change under the cloak of a United Nations resolution and France masterminding another regime change in Cote D’ Voire under the cloak of another United Nations resolution are classic reminders that the rules and principles of accountability under international law continue to serve specific hegemonic and imperialist interests.

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<sup>135</sup> See, e.g., Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge, New York: Cambridge University Press, 2007); Mohammed Bedjaoui, *Towards a New International Economic Order* (New York, London: Holmes & Meier Publishers, 1979).

<sup>136</sup> DW, “France and Africa: Why are ex-colonies in Africa so important to France?” (2017), online <<https://www.tni.org/en/publication/the-limits-of-law>>.

<sup>137</sup> “Report of the ILC,” *supra* note 2 at 29 [draft article 48(1)(b)].

#### **4.3.2 The Limitations of the Rules and Principles Governing Liability for the Injurious Consequences arising from Activities International Law does not Prohibit**

The idea that injurious consequences arising from activities that international law does not prohibit can be the basis for liability has the potential to provide an alternative legal route to holding IOs accountable under international law. Indeed, some of the activities of entities such as the UNHCR, which engage in humanitarian work, have the potential to cause irreparable harm both to the beneficiaries of their work and the environment.

I, however, explained in subsection 4.2.1.2 that the ILC's draft articles on prevention of transboundary harm and draft principles on allocation of loss in case of transboundary harm from hazardous activities limit the potential of this legal route to activities considered most dangerous or hazardous and with a transboundary reach. I believe that it is a significant omission to limit the scope of harm from activities that international law does not prohibit to those that are explicitly hazardous and can cross borders of states. This omission is significant because it excludes the activities of certain global institutions, as Pogge aptly describes it, that 'continually and foreseeably produces vast excesses of severe poverty and premature death.'<sup>138</sup>

Yet, I believe that the issue of liability for the injurious consequences arising out of acts that international law does not prohibit is critical to any contemporary system of accountability that seeks to hold accountable all those whose activities, while technically do not appear to violate the precepts of international law or do not cause harm across borders, do have serious negative consequences on others and their property. The central idea in the concept of liability for injurious consequences arising out of acts international law does not prohibit is that obligations might exist in situations where it would appear that there is no

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<sup>138</sup> Thomas Pogge, *supra* note 134 at 722.

particular wrongful act or omission by a state or IO. In other words, legitimate acts or activities of a state, a private company in a given state, or an IO, such as the UNHCR, may give rise to injurious consequences or harm to persons, property, and the environment. In such instances, it is imperative that the entity responsible for causing the injury must either restore or compensate, at a minimum, the injured. In other words, it must be possible to hold internationally accountable the specific actor, be it a state, a corporation, or an IO, such as the UNHCR, for the injurious consequences of their otherwise lawful or legitimate activities.

The activities of certain IOs in areas of the economy, such finance, monetary policy, and investment; and in the area of humanitarian intervention, such as refugee emergencies, have caused injurious consequences for millions of people around the world.<sup>139</sup> Some concrete examples include the refugee encampment activities of the UNHCR in some refugee-hosting states in the global south; the neo-liberal economic reform policies and conditionalities of the World Bank and the International Monetary Fund (IMF); and the World Trade Organisation (WTO) rules that compel countries to open up markets and remove any measures considered a barrier to free movement of goods and services.

Indeed, at face value, UNHCR's refugee emergency response policies of refugee encampment are deliberately crafted in a language that evokes sympathy for the refugee and may be said to serve core humanitarian principles and objectives. The injurious consequences of encampment are invisible through the black-letter of the policy documents that UNHCR produces. And moreover, sometimes the momentary visitor to the refugee camp, guided to see some particular parts of the camp, will not see or grasp that what he or she is being shown

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<sup>139</sup> On how World Bank funded projects affect millions of people in the global south, see, e.g., International Consortium of Investigative Journalists (ICIJ), "New Investigation reveals 3.4m displaced by the World Bank" (2015), online < <https://www.icij.org/blog/2015/04/new-investigation-reveals-34m-displaced-world-bank/> >.

is a huge torture chamber, housing thousands of human beings psychologically tortured for decades in what authors of encampment consider ‘safe’ places them.

Similarly, the injurious consequences of the economic and financial reform policies that the Bretton Wood institutions impose on developing countries are invisible in their reports crafted, and to borrow Malone’s expression, in ‘fairly technical terms drawing on catatonia-inducing Communiqués.’<sup>140</sup> But there is overwhelming evidence that both UNHCR’s refugee encampment policies and the neo-liberal economic reform policies of the Bretton Wood institutions, for example, often result in serious injurious consequences for the environment, refugees living in encampment, and the citizens of countries implementing foreign imposed neoliberal economic reforms. Crucially, the way these institutions push reforms preclude the search for alternatives that, on the balance, might provide a far more equitable way of resolving the economic problems or addressing the humanitarian needs of refugees.

Despite these realities, the ILC’s draft articles on this topic do not *explicitly* address the issue of the accountability of IOs for the injurious consequences arising from their activities that international law does not prohibit. In this context, and paraphrasing former Special Rapporteur Robert Quentin-Baxter on this topic, a new ‘system of obligations under which the causal connections between legitimate activity and the occurrence’<sup>141</sup> of harm create obligations and basis for accountability, is needed. It is possible, however, for international law to accommodate and foster the progressive development of such a system of

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<sup>140</sup> David M. Malone, Book Review of *The Law of Global Governance* by Eyal Benvenisti, (2016) 110 *The American Journal of International Law* 135 at 136.

<sup>141</sup> “Fourth Report on international responsibility for injurious consequences arising out of acts not prohibited by international law, by Robert Q. Quentin-Baxter, Special Rapporteur” (UN Doc. A/CN.4/373 and Corr. 1& 2) in *Yearbook of the International Law Commission 1983*, vol 2, part 1, (New York: UN, 1983) 201 at 202 para 3.



international accountability that includes IOs for the injurious consequences of their activities that international law itself does not prohibit.

I believe existing rules and principles of international law are woefully inadequate for dealing with the accountability of IOs for the injurious consequences arising from their activities that international law does not prohibit for at least two interrelated reasons. In the first place, for a very long time, international law has failed to see the causal connection between the activities of IO and the harm they have caused to millions of people. In the second place, international law has failed to identify and define obligations for IOs, such as the UNHCR, for the injurious consequences arising from their activities that international law does not prohibit. In addition, international law has failed to at least recognise and develop an international tort and a duty of care that would require that IOs must, to borrow and paraphrase Lord Atkinson's oft-cited dictum, 'take reasonable care to avoid acts or omissions which IOs reasonably foresee would likely injure your neighbour.' And 'who, then, is an IO's neighbour'? The answer, to paraphrase Lord Atkinson again, 'seems to be persons who are so closely affected by the actions of an IO that it ought to reasonably have those persons, such as refugees, in contemplation as being so affected when an IO, such as the UNHCR, is directing its 'mind' to the acts or omission which are likely to be called into question.'

And the question is why has international law failed to see these gaps vis-à-vis the activities of IOs and the harm they cause? I believe Rovira and Chimni, in separate works, provide some pertinent reasons. Rovira, for example, in her book, convincingly demonstrates the link between economic imperatives and existing rules of international law.<sup>142</sup> She points out, correctly, I believe, that international legal positivist purged international law of its transcendent quality and instead private individual interests, or capital, were given preference in the formulation of

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<sup>142</sup> See, *supra* note 125.



the rules and principles of public international law. In other words, economics is the real framework or premise of positivist international law.<sup>143</sup> And if this is the case, then, the rules will not surprisingly focus on the protection of economic interests.

In addition, Chimni, in a recent insightful account of ‘the evolution, formation, and function of customary international law,’ has similarly exposed the relationship between the apparently benign character of one of the key components of existing international law, customary international law, and economics.<sup>144</sup> Chimni persuasively argues, among others, that ‘there is an intimate and inextricable link between the rise, consolidation, and expansion of capitalism in Europe since the nineteenth century and the evolution of CIL.’<sup>145</sup>

#### **4.4 Conclusion**

I draw some conclusions from the preceding discussion. First that international law does provide some legal route for engaging the accountability of actors who violate its precepts. The regime of accountability is organised around two different conceptual apparatus. The first is the concept of the ‘internationally wrongful act’ and the second is the concept of international liability for ‘injurious consequences’ arising from acts not prohibited by international law.’

The second main conclusion is that there are serious gaps in the existing rules and principles governing international accountability of actors whose activities

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<sup>143</sup> Ibid at 3.

<sup>144</sup> B S Chimni, “Customary International Law: A Third World Perspective” (2018) 112 *The American Journal of International Law* 1 at 4.

<sup>145</sup> Ibid.

international law does not prohibit, but these activities nonetheless do cause serious injury to third parties.

Third, the rules and principles governing accountability for internationally wrongful acts originally focused on the protection of the economic interests of the foreign nationals because the project of positive international law was always to protect and legitimate economic interests of the powerful members of the western European state. In other words, the rules and principles governing international accountability, whether for internationally wrongful acts or for international liability for injurious consequences arising from acts that international law does not prohibit, to borrow the phraseology of Rovira, are ‘written in the idioms of private law.’

Finally, writing the rules and principles of international accountability in the ‘idioms of private law’ has consequences for the weak in society, such as refugees, migrants, the poor, and indigenous peoples. Private law options such as tortious liability do not receive the same treatment as private law options for commercial transactions; private law options for commercial transactions and contract are inherently biased towards achieving economic interests. In fact, international law has resisted the idea of developing rules and principles to govern international torts.

A fair and just regime of international accountability must integrate several disparate elements – social interests, economic interest, and political interests – into one whole and in a balanced way. A starting point is an urgent realisation for the need for rules and principles that define a duty of care for all actors vested with power and authority that they shall do no harm and where harm occurs, deliberate or accidental, they have an obligation to restore or mitigate the harm or damage done to third parties.

## CHAPTER 5: THE UNHCR'S ACCOUNTABILITY UNDER INTERNATIONAL LAW

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### 5.1 Introduction

In this Chapter, I turn squarely to the dissertation's research question, i.e., *how, and to what extent, can the office of the United Nations High Commissioner for Refugees (UNHCR) be held accountable, under international law, for its contribution to the harms to the environment and lives of refugees resulting from refugee encampment in refugee camps that it helps create, fund, and manage?*

In chapters 3 and 4, I set the more immediate context for this chapter and I believe it is necessary to recap the main themes from these two chapters. In Chapter 3, I posited two countervailing theoretical propositions to help grasp the decision-making processes that produced refugee encampment and locate the locus of accountability for the consequences of refugee encampment on the environment and refugees. In the first place, I theorised there that the UNHCR is the architect of refugee encampment, identified possible observable implications flowing from this theory, and demonstrated how the UNHCR appropriates the *framework governance* of refugee policy of many refugee-hosting states in the global south through its refugee emergency preparedness responses. I argued that refugee encampment is an integral component of the UNHCR's refugee emergency response and as a result, refugee-hosting states have little room to manoeuvre but to embrace refugee encampment.

In the second place, I addressed a counter theory or a competing theory that my sceptics are likely to posit, namely that refugee-hosting states in the global south are the architects of refugee encampment. I also identified practical or observable implications flowing from this theory and I demonstrated, on the evidence from Kenya, buttressed with further evidence from the works of leading scholars on Sudan and the Algerian refugee crisis of the 1950s and 1960 in Morocco, and

Tunisia, that refugee-hosting states in the global south are not the architects or original authors of refugee encampment. Instead, external entities, such as the UNHCR, with vested interests in refugee encampment, are the real authors of the framework decisions that produce refugee encampment, but then they incentivise and socialise these refugee-hosting states into embracing refugee encampment and owning it up as if it is their initiative.

The main conclusion of Chapter 3 is that external entities, such as the UNHCR, have long since appropriated the *framework governance* of refugee policy and practices in some refugee-hosting states in the global south. In other words, external entities are the *authors of the framework decisions* that produce refugee encampment in refugee-hosting states in the global south. Therefore, accountability for the injurious consequences of refugee encampment in refugee-hosting states in the global south must follow the site where the *framework governance* that produces refugee encampment is located.

Similarly, in chapter 4, I advanced two counter-vailing theoretical propositions about the regime of accountability under international law. In the first place, I theorised that international law provides a legal route through which to hold accountable actors that violate its precepts. I identified some practical implications that flow from this theory and reviewed the existing rules and principles constituting the regime of accountability under international law. I argued that international law provides two possible legal routes for holding accountable actors who violate its precepts. One route is through the concept of the *internationally wrongful act* of a state or an IO. The other route is through the assignment of *liability for injurious consequences arising from acts that international law does not prohibit*.

In addition to these two legal routes for holding actors accountable under international law, there are other possible legal routes for accountability, the so-called *lex specialis* or *self-contained* legal routes that I explained in Chapter 1. These

self-contained legal routes can be found especially with regional entities, such as the African Union (AU), the Organisation of American States (OAS), and the European Union (EU). In addition to regional entities with *lex specialis* legal routes of accountability, certain treaty-specific regimes also contain them. Some examples of these include, the United Nations Convention on the Law of the Sea, which contains a provision for responsibility of member for failure to comply with obligations or for any violations of the Convention, and the WTO and its dispute settlement mechanism.

In the second place, I posited a competing theory, especially from a TWAIL perspective, that challenges the theory that international law provides a legal route through which to hold accountable actors that violate its precepts. The counter theory posits that international law is patently hegemonic and imperialistic and, therefore is, ill-equipped to provide an equitable legal route for engaging the accountability of actors who violate its precepts. I argued that international law is shrouded in inherent biases that privilege economic interests, and especially private economic interest of western states and their multinational corporations above other equally important interests, such as equity and justice for people in the global south, who these multinational corporations and western States, especially former colonial masters, have perennially dominated and exploited.

Thus, in this context, how can the UNHCR be held accountable, under international law, for: 1) harm or damage to the environment resulting from refugee camps; and 2) harm to the lives of refugees in the camps that it creates, funds, and administers? I answer these questions in the rest of this Chapter. I submit that the UNHCR can be held accountable, in principle, under international law, using either the *internationally wrongful act* route or the route of the *liability for injurious consequences* arising out of activities that international law does not prohibit. I say UNHCR can be held accountable ‘in principle’ because in practice engaging the accountability of an IO is saddled with several hurdles, and especially the

inherent bias in the rules and principles of these two legal routes and explained in Chapter 4.

In this Chapter, I argue, based on the evidence in Chapter 3, that accountability for refugee encampment and its consequences on the environment and the conditions of refugees in the camps must follow the locus of the *framework governance* of refugee policy and practice. In other words, I theorise that accountability is a function of the locus or site of power and authority that produce refugee encampment, i.e., accountability must follow the locus of power that produce refugee encampment. What are the practical or observable implications of this theory? In other words, what can be observed in the real world about this theory? At least some three observable implications can be identified. The first such implication is that the *effective control* of the refugee camps is located within the processes and structures that produce refugee encampment. This observable implication of *effective control* is the same as that flowing from my theory that the UNHCR is the architect of refugee encampment in refugee-hosting states in the global south. If the UNHCR is the architect of refugee encampments, it must be possible to observe in practice that it *effectively controls* what goes on in the camps. Thus, to say that *effective control* is one of the observable implications flowing from the theory that the UNHCR is the architect of refugee encampment means that it must be possible to detect things the UNHCR does in the real world of refugee encampment which leads to the conclusion that it is indeed *effectively in control* of the refugee encampment system.

The second one, which is related to the first observable implication, is that a significant amount of the resources – financial and material resources – for running the camp system are not only being mobilised within the site or processes and structures that produce refugee encampment, but also that the entity that exercises the *framework governance* of the camps has *effective control over these resources*. And the third practical implication, albeit not explicit from the theory that accountability is a function of the locus or site of power and authority that produced refugee

encampment, is that, the entity, the UNHCR in my case, enjoys a large measure of competence or capacity and independence to perform its functions on the international plane, i.e., carry out activities in the territories of states, both signatory and non-signatory to the 1951 Refugee Convention.

This last practical implication is important because it goes to the core of the question of engaging the international accountability of an IO. If the UNHCR does not enjoy a measure of capacity and independence, questions arise whether it can be held accountable as an independent entity for its internationally wrongful acts or injurious consequences arising out of its activities that international law does not prohibit.

In order to organise its argument as systematically as possible, the chapter is organised as follows. Following the present introductory section, section 5.2 addresses the question of the basis of the UNHCR's accountability. In section 5.3 the questions of the UNHCR's accountability for internationally wrongful acts is considered. Section 5.4 explicates the feasibility of achieving UNHCR's accountability via the route of assigning responsibility to it for the injurious consequences arising out of activities that international law does not prohibit. In section 5.5 the question of attributing wrongful acts to the UNHCR as a necessary condition for engaging its accountability under international law is considered. Section 5.6 takes on the intimately connected question of the UNHCR's exercise of effective control over refugee encampment as a necessary requirement for engaging its accountability. In section 5.7 the procedural aspects and obstacles to the UNHCR's accountability are considered and section 5.8 concludes the discussions in the chapter.

## **5.2 The Basis of the UNHCR's Accountability Under International Law**

A sceptic may concede that international law does provide some legal routes for holding accountable actors who violates its precepts, but still challenge the basis for the UNHCR's accountability under international law. A key concern here would

be that the UNHCR is not a state, but is merely a subsidiary organ of the United Nations General Assembly (UNGA), another creation of states.<sup>1</sup> In other words, because the UNHCR is a subsidiary organ of the UN, it is not an independent international organisation (IO) in possession of international legal personality. Therefore, it is not subject to the regime of accountability under international law.

I argue that the legal basis of the UNHCR's accountability under international law is a function of its status, capacity, and the obligations incumbent upon it under international law. The legal status of the UNHCR is distinct from its capacity under international law. I argue, on the authority of the *Reparation for Injuries* case, that in explicating the status and capacity of the UNHCR under international law, it is imperative to scrutinise both its constituent instrument as well as what it does in practice. When approached in this way, however, it will be discovered that the UNHCR is a unique entity that has capacity to act on the international plane with a great measure of autonomy from its parent organ, the United Nations, and performs activities on the international plane of a universal nature.

### **5.2.1. The Status of the UNHCR Under International Law**

The obvious aspect of the UNHCR's status is that it is, as already alluded to, a subsidiary organ of the UNGA.<sup>2</sup> The matter, however, is not as straightforward as it appears because the Charter of the United Nations, which provides for the creation of subsidiary organs under Article 7, does not define the expression

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<sup>1</sup> See, *Statute of the Office of the United Nations High Commissioner for Refugees*, GA Res 428 (V), UNGAOR, 5th Sess, Supp No. 20, UN Doc. A/1775 (1950) at 46 [*Statute of UNHCR*]; Guy S. Goodwin-Gill, "The Office of the United Nations High Commissioner for Refugees and the Other Sources of International Refugee Law" (2020) 6:1 *International and Comparative Law Quarterly* 1 at 2 -ff.

<sup>2</sup> *Statute of UNHCR*, *supra* note 1 at 46.



‘subsidiary organ.’<sup>3</sup> Moreover, subsidiary organs, and as Szasz has rightly observed, come in various forms, both simple and complex.<sup>4</sup> According Szasz, these complex subsidiary organs, or what he describes as quasi autonomous bodies (QABs), ‘are in effect, mini-intergovernmental organisations.’<sup>5</sup> In other words, QABs are mini-international organisations because they ‘consist of at least one political body and an executive head who directs a special secretariat for the organisation.’<sup>6</sup> Some of the examples of QABs include, the UNHCR, United Nations International Children’s Education Fund (UNICEF), United Nations Development Programme (UNDP), and the United Nations University (UNU).<sup>7</sup>

The *Repertory of the Practice of the United Nations Organs*,<sup>8</sup> however, defines a subsidiary organ to mean:

one which is established by or under the authority of a principal organ of the United Nations in accordance with Article 7, paragraph 2, of the Charter, by resolution of the appropriate body. Such an organ is an integral part of the Organisation.’<sup>9</sup>

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<sup>3</sup> See *Article 7, Repertory of the Practice of the United Nations*, vol1 (1945 – 1954) at 124, online (pdf): *United Nations Codification Division Publications* <[https://legal.un.org/repertory/dtSearch/Search\\_Forms/dtSearch.html](https://legal.un.org/repertory/dtSearch/Search_Forms/dtSearch.html)> [Repertory of UN]; also see, Danesh Sarooshi, ‘The Legal Framework Governing United Nations Subsidiary Organs’ (1996) 67:1 *British Yearbook of International Law* 413 at 415.

<sup>4</sup> Paul C. Szasz, “The Complexification of the United Nations System” (1999) 3 *Max Planck Yearbook of United Nations Law* 1 at 5.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Repertory of UN*, *supra* note 3.

<sup>9</sup> UN, *Repertory of the Practice of the United Nations Organs*, Supplement 1, Vol 1, (1954 -1955) 100.

According to the *Repertory*, subsidiary organs that the principal organs of the United Nations establish are an integral part of the UN.<sup>10</sup> Indeed, the practice seems to support this view. In some of the cooperation agreements that the UNHCR concludes with refugee-hosting states, for example, it is often stipulated that the UNHCR ‘is an integral part of the United Nations.’<sup>11</sup> Moreover, a 1996 legal opinion of the Office of Legal Affairs, UN Secretariat, concerning the UN Institute for Training and Research (UNITAR), opined that, ‘As a subsidiary body of the United Nations, UNITAR is not an international organisation established by intergovernmental agreement.’<sup>12</sup> From this perspective, an entity acquires the status of an IO only if it is established *vide* intergovernmental agreement. In this context, the question of the status of UNHCR, as a subsidiary organ of the UN, from the perspective of the Office of Legal Affairs of the Secretariat, is moot because it is an integral part of the UN. In other words, it is neither a mini-intergovernmental organisations, whatever that means, as Szasz suggest, nor a fully-fledged separate IO.

The status of the UNHCR, and of any other subsidiary organ of an IO for that matter, I argue, however, is contestable from a functional perspective. Under the authority of the *Reparations for injuries* case,<sup>13</sup> I argue that the status of an IO, even if expressly provided for in its constitutive instrument, may be deduced from its competence, functions, intention of its creators, and what it does in practice. In the

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<sup>10</sup> Ibid.

<sup>11</sup> See, e.g., *Cooperation Agreement between the Office of the United Nations High Commissioner for Refugees and the Government of the Republic of the Congo. Brazzaville, 17 December 2004, 2296 UNTS 295 at 306*. For a legal analysis of UNHCR cooperation agreements, see, e.g. Majorleine Zieck, *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (The Hague; London: Martinus Nijhoff, 1997).

<sup>12</sup> United Nations, *United Nations Juridical Yearbook 1996* (New York: United Nations 2001) 448 at 449.

<sup>13</sup> *Reparation for injuries suffered in the services of the United Nations Case* [1949] ICJ Rep 174 [*Reparations for injuries case*].

*Reparations for injuries* case, the International Court of Justice (ICJ) was asked to answer the question whether the United Nations had ‘the capacity to bring an international claim’ against a State in the event of one of the United Nations’ agents suffering injury in circumstances involving the responsibility of that state. Although in this case the ICJ was not asked to address questions of the status of the United Nations *per se*, its approach to answering the question of capacity placed before it is instructive and provide, I would argue, a general template that can be applied to other types of legal questions concerning IO, principal or otherwise, such as about the status of a subsidiary organ under international law. The Court said it was necessary to look beyond the black-letter of the Charter of the UN, but at the same time read the Charter in context to answer the question whether the UN had capacity to bring an international claim. The Court said it is necessary to look at the nature of the organisation; its purposes and principles; its characteristics; its functions and activities; the needs of the community (in this case the international community); and the intentions of those who created it be able to answer the question before it. Based on these criteria, the Court concluded that the United Nations was vested with the capacity to bring an international claim as of right when one of its agents suffers injury in circumstances involving the responsibility of a member state of the United Nations.

I believe it is possible to transpose these criteria to the question of the status of a subsidiary organ of an IO, such as the UNHCR, which is a subsidiary organ of the UN. The UNHCR was created by a resolution of the United Nations General Assembly (UNGA) and its functions defined in a Statute annexed to the resolution.<sup>14</sup> The functions of the UNHCR are stipulated in Chapter II of the Statute and involve undertaking activities of a global nature, such as promoting any measures, through agreements with governments, calculated to improving the

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<sup>14</sup> See, *Refugees and Stateless Persons*, GA Res 319 A (IV), UNGAOR, 4th Sess, Supp No. 20, UN Doc. A/1251 & Corr. 1 and 2 (1950) at 36 – 37; Statute of UNHCR, *supra* note 1 at 46 – 48.

situation of refugees, promoting the admission of refugees into the territories of states, and promoting the conclusion and ratification of international conventions on the protection of refugees. I return to say more on this aspects in subsection 5.2.3, but suffice to point out here that evident that a subsidiary organ, such as the UNHCR, is an international organisation when one considers its functions and activities, its characteristics, and the intentions of its creators. It follows that the mere fact of a principal organ of the United Nations creating a subsidiary organ does not preclude the subsidiary organ so created from possessing legal status of an IO.

The idea that formal constitutive instruments are not the only basis for determining the status of an IO finds support amongst several writers.<sup>15</sup> Dale, for example, has observed that ‘perhaps the most striking examples of international bodies with no formal constitution are the many subsidiary organs of the United Nations, established by resolution of either the General Assembly or the Security Council, usually the former.’<sup>16</sup> And Dales goes on to give five examples of subsidiary organs that the United Nations has created, including the UNHCR.<sup>17</sup> Dale and Verdirame are perhaps the only scholars to assert that subsidiary organs have international status. Dale argues that the largest of the subsidiary organs have the attributes of IOs. Moreover, ‘subsidiary organs tend to be as highly organised as the United Nations itself; and there is no reason to deny them the status of

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<sup>15</sup> See, e.g., Hugo J. Hahn, “Euratom: The Conception of an International Personality” (1958) 71:6 *Harvard Law Review* 1001 at 1045 - 1046; Finn Seyersted, *Objective International Personality of International Organisations: Do their Capacities Really Depend on their Constitution?* (Copenhagen: Krohn Bog Trykkeri, 1963); Amos Jenkins Pearle, *International Governmental Organisations Constitutional Documents* (The Hague: Nijhoff, 1974) vol 1 Part 1.

<sup>16</sup> William Dale, “Is Commonwealth an International Organisation?” (1982) 31 *International and Comparative Law Quarterly* 451 at 456.

<sup>17</sup> *Ibid.*

international organisation.’<sup>18</sup> Verdirame, discussing the legal nature of operational or subsidiary programmes of the UN, has argued that, ‘[a] programme that has complete control over its activities... should be treated as a discrete legal person...’<sup>19</sup>

In addition to a functional approach to determining the status of an entity such as the UNHCR, and taking a cue from the *Reparation for injuries* case, I argue that international law determines whether an entity is an IO. In the *Reparation for injuries* case, the International Court of Justice (ICJ) opined that fifty states representing the vast majority of the international community created the United Nations in accordance with international law.<sup>20</sup> In the relevant literature, much emphasis has been placed on the point that subsidiary organs are not separate international entities or organisations because they are creatures of resolutions and accompanying statutes of principal organs and not treaties.<sup>21</sup> I argue that resolutions of IOs are part of the corpus of international law and an entity created through such legal route, i.e., a resolution of the principal or parent organ, is an IO.

Against this background, I conclude that on the basis of what the UNHCR actually does in practice over the decades since its creation in 1951 and international law, it possesses the status of an international organisation. This is not the same as saying it possesses international personality, an aspect I now turn to in the next subsection.

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<sup>18</sup> Ibid.

<sup>19</sup> Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (New York, Cambridge UK: Cambridge University Press, 2011) at 17.

<sup>20</sup> *Reparation for injuries* case, *supra* note 13 at 185.

<sup>21</sup> See, e.g., Szasz, *supra* note 4 at 6; Goodwin-Gill, *supra* note 1 at 2 – 3ff.

### 5.2.2 The Capacity of the UNHCR Under International Law

Whether the UNHCR can be held accountable under international law also depends on whether it has the capacity to perform its functions upon the international plane. That, in turn, implies that the UNHCR must possess a measure of international personality.

In the relevant literature, however, it is often claimed that a subsidiary organ does not have a separate international personality, but partakes that of its parent organ. The Office of Legal Affairs, at the Secretariat of the UN, for example, has opined that subsidiary organs do not possess separate international legal personality from that of the UN even if they have the legal capacity to perform certain functions on the international plane.<sup>22</sup> The Secretariat, in the final analysis, takes the position that regardless of what subsidiary organs do in practice on the international plane, they,

do not possess international personality separate from that of their parent organizations and thus cannot perform international acts or incur international obligations, except as expressly authorized by their parent bodies upon demonstrations of possessing “full powers”. Their capacities are therefore derived from the personality of the parent body.<sup>23</sup>

Some scholars have also taken a similar view or position, namely, that subsidiary organs do not have separate legal personality. Szasz, for example, argues that while subsidiary organs of the United Nations do ‘enjoy considerable degree of autonomy from their parent organs,’ they ‘lack independent legal personality but

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<sup>22</sup> See “Questions of Juridical Personality and Legal Capacity in Relation to United Nations Agencies, Programmes and Funds” in *United Nations Juridical Yearbook 1994*, part 2 (New York: UN, 1994) 478 para 43 (UN Doc. ST/LEG/SER.C/32).

<sup>23</sup> *Ibid* at 479 – 480.

partake that of the United Nations.’<sup>24</sup> Goodwin-Gill, observes that while the capacity of certain subsidiary organs to act in the private sphere is beyond doubt, ‘they do not possess a legal personality of their own.’<sup>25</sup> And crucially, Goodwin-Gill states that ‘UNHCR’s standing in international law – its international legal personality – derives directly from the United Nations.’<sup>26</sup>

I beg to, however, differ from the conventional position on this matter. Drawing from the jurisprudence of the ICJ and the Permanent Court of International Justice (PCIJ), I argue that subsidiary organs created in accordance with international law and performing functions upon the international plane with a significant degree of autonomy should be treated as separate international persons. And crucially, there is nothing inherent in the nature of the constitutive documents establishing subsidiary organs or international law to support the claim that subsidiary organs must always derive their international personality from that of their parent organ. In fact, the idea that an entity derives its international personality from a principal entity does not find support in the jurisprudence of the international courts.

Thus, I will first briefly review the jurisprudence of the international courts on how they have approach the question of capacity and international personality under international law and then conclude the discussion with what I believe to be the capacity of the UNHCR under international law.

The PCIJ, for example, dealt with four cases between 1922 and 1926 concerning interpretations of the powers of the International Labour Organisation

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<sup>24</sup> See, *supra* note 4 at 6.

<sup>25</sup> Goodwin-Gill, *supra* note 1 at 4.

<sup>26</sup> *Ibid.*

(ILO) with respects to certain of its activities.<sup>27</sup> I focus on the advisory opinion on the *Competence of the ILO to Regulate Incidentally the Personal work of the Employer*.<sup>28</sup> At issue before the PCIJ was ‘whether it is within the competence (*compétence*) of the International Labour Organization to “draw up and propose labour legislation which, in order to protect certain classes of workers, also regulates incidentally the same work when performed by the employer himself.’<sup>29</sup> Several arguments were placed before the Court, but the Court held that ‘so far as concerns the specific question of competence now pending’ before it, ‘it may suffice to observe that the Court in determining the nature and scope of the measure, must look to its practical effect rather than to the predominant motive that may be conjectured to have inspired it.’<sup>30</sup> In other words, the Court has to factor in praxis in determining the competence of the ILO to draw up and propose labour regulation that may incidentally affect work that an employer performs.

Similarly, in the *European Commission for the Danube* case, the PCIJ was called to answer, among other questions, the question concerning the territorial extent of the authority or jurisdiction of the European Commission into the sectors of the Danube between Galatz and Braila vis-à-vis the jurisdiction of the Romanian authorities. The Court made some very pertinent observations about the legal capacity of an international organisation I found relevant to the issue at hand, and I quote a little bit more in detail:

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<sup>27</sup> For the PCIJ’s advisory opinions on the ILO’s competence, see, e.g., ICJ website at: <<https://www.icj-cij.org/en/pcij-series-b>>.

<sup>28</sup> *Competence of the International Labour Organization to regulate, incidentally, the Personal Work of the Employer* (1926) PCIJ (Series B) No. 13.

<sup>29</sup> *Ibid* at 12.

<sup>30</sup> *Ibid* at 19.



When in one and the same area there are two independent authorities, the only way in which it is possible to differentiate between their jurisdictions is to differentiate between their functions allotted to them. *As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it* (my emphasis).<sup>31</sup>

Thus, taking a functional approach in the light of the explicit provision of the Definitive Statute establishing the powers of the European Commission of the Danube, the PCIJ ruled in effect that as long as the constitutive or definitive instrument defining the powers of an IO places no restriction on it, its legal capacity to perform certain tasks assigned to it may be implied from both the constituent document and upon its functions in practice.

The ICJ put the matter to rest in its pioneering advisory opinion in the *Reparation for injuries* case,<sup>32</sup> namely, that the powers and legal capacity of an IO, whether principal or subsidiary, do not depend on whether it is an integral part of another entity, but on the powers, express or implied, and functions that the constitutive instrument bestowed upon it and what it does in practice to achieve the purpose for which it was created.

In *Reparations for injuries* case, the UN General Assembly, in a resolution, in December 1948 noted with concern that a ‘series of tragic events which have lately befallen agents of the United Nations engaged in the performance of their duties’ and the needs for better protection and reparation for those agents fallen in the course of duty. The UN General Assembly decided to submit two broad legal questions to the ICJ for advisory opinion, one on the capacity of the UN to espouse

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<sup>31</sup> *Jurisdiction of the European Commission of the Danube Between Galatz and Braila* (1927) PCIJ (Ser. B) No. 14 at 64.

<sup>32</sup> *Reparations for injuries* case, *supra* note 13.

an international claim in its own name and the second question, depending on whether the answer of the Court to the first question is affirmative, how to reconcile the UN's action and the rights of the agent's state of nationality.<sup>33</sup>

For present purposes, however, the most relevant question, is the first legal question on the capacity of the UN to espouse an international claim, framed as whether the United Nations, 'as an organisation, has the capacity to bring an international claim against the *de jure* or *de facto* government with a view to obtaining reparation due in respect of damage (a) to the United Nations, (b) to the victim or to persons entitled to claim through him.' In other words, at issue were a set of related questions, such as 'in the international sphere,' has the United Nations 'such a nature as involves the capacity to bring an international claim?'<sup>34</sup>; 'has the Charter given the Organization such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect'; and crucially, '*does the Organization possess international personality?*' (my emphasis).<sup>35</sup>

The Court acknowledged that these questions were not 'settled by the actual terms of the Charter' of the United Nations and some concepts, such as the concept of international personality are shrouded in doctrinal controversy. The Court suggested that the answers to these questions lay in understanding 'what characteristics' Members of the United Nations 'intended thereby to give the Organization.' In the first place, the Court said it understood the concept of international personality to 'mean that the Organisation,' i.e., the United Nations, 'is recognised as having that personality, it is an entity capable of availing itself

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<sup>33</sup> Ibid at 175.

<sup>34</sup> Ibid at 178.

<sup>35</sup> Ibid.

obligations incumbent upon its Members.’<sup>36</sup> The Court concludes with an oft-quoted passage, that ‘international personality is indispensable’ if an IO is to perform its functions:

*The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable (my emphasis).*<sup>37</sup>

If international personality is an indispensable attribute of being an IO, it must follow that such an IO must have the power and legal capacity to espouse a claim ‘against the *de jure* or *de facto* government with a view to obtaining reparation to the victim or to persons entitled to claim through him.’<sup>38</sup> In yet another oft-quoted passage, the Court stated:

*The Charter does not expressly confer upon the Organization the capacity to include, in its claim for reparation, damage caused to the victim or persons entitled through him. The Court must therefore begin by inquiring whether the provisions of the Charter concerning the functions of the Organization, and the part played by its agents in the performance of those functions, imply for the Organization power to afford its agents limited protection that would consist in bringing a claim on their behalf for reparation for damage suffered in such circumstances. Under international law, the Organization must be deemed to have those powers, which though not*

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<sup>36</sup> Ibid.

<sup>37</sup> Ibid at 178.

<sup>38</sup> Ibid at 187.

*expressly provided in the Charter, are inferred upon necessary implication as being essential to the performance of its duties (my emphasis).*<sup>39</sup>

Thus, the ICJ, building on what the PCIJ had already started in the *competence of the ILO* and the *European Commission of the Danube* cases, enunciated this principle of law governing questions about the nature and capacity of an IO to this effect: that whether an organisation possesses international legal personality is contingent upon the powers, express or implied in its constitutive instrument, and the functions that its creators clothed it with and the activities that it carries out in practice on the international plane.

The Court makes some pertinent conclusions relevant to my argument on personality and capacity of IOs, principal or subsidiary. First, that the United Nations ‘was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon the international plane.’<sup>40</sup> Moreover, the Court further concluded, the United Nations, ‘could not carry out the intention of its founders if it was devoid of international personality.’ And crucially, in ‘entrusting certain functions to it, with the attendant duties and responsibilities,’<sup>41</sup> members of the United Nations, ‘have clothed it with the competence required to enable those functions to be effectively discharged.’<sup>42</sup>

Second, the Court draws a clear difference between the personality of a state and that of an IO; ‘a State possesses the totality of international rights and duties

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<sup>39</sup> Ibid at 182.

<sup>40</sup> Ibid at 179.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

recognized by international law,<sup>43</sup> whereas the ‘rights and duties of an entity’ such as the United Nations, ‘must depend upon its purposes and functions as specified in or implied in its constituent documents and developed in practice.’<sup>44</sup> Thirdly, ‘Member have endowed the Organization with the capacity to bring international claims necessitated by the discharge of its functions.’<sup>45</sup>

I argue that applying these legal principles to the UNHCR, it possesses some measure of international legal personality, independent of that of the United Nations, necessary for it to discharge its mandate of providing international protection to refugees and helping states to find durable solutions to the problem of refugees. In fact, the UNHCR has undertaken monumental tasks of providing international protection to refugees and finding in some contexts, solutions to the problem of refugees in many countries around the world,<sup>46</sup> while compounding the situation for other refugees, especially those under its encampment regimes. In other words, the UNHCR has been able to perform its functions with considerable autonomy and independence, and despite fundamental problems with its refugee encampment policies, upon the international plane.

The UNHCR has a worldwide presence and the capacity to establish such a global footprint is explicitly stipulated in Articles 1, 8 (b), 10, 12, and 16 of its Statute<sup>47</sup> and in subsequent resolutions of the UNGA which have not only removed

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<sup>43</sup> Ibid at 180.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> On this aspect, see, e.g., UNHCR, *The State of the World's Refugees* (Oxford: Oxford University Press, 1998); UNHCR, *Global Report 2010* (Geneva, UNHCR, 2010)

<sup>47</sup> Statute of UNHCR, *supra* note 1 at 47.

temporal limitations, but also expanded the scope of its substantive mandate.<sup>48</sup> Moreover, UNGA resolutions 319 (IV) of November 1949<sup>49</sup> and 428 (V) of 14 December 1950, which are the constituent documents of the UNHCR, enjoin Member States ‘to cooperate with the United Nations High Commissioner for Refugees in the performance of his functions concerning refugees falling under the competence of his Office...’<sup>50</sup>

In addition, the UNHCR has concluded several agreements with refugee hosting states, both those that are party and non-party to the 1951 Convention in order provide international protection to refugees, and now increasingly persons of concern to it, and finding permanent solutions to refugee problems.<sup>51</sup> These agreements vary in nature and scope. Under Article 8 (b), for example, UNHCR is vested with the power to promote ‘the conclusion and ratification of international conventions for the protection of refugees.’<sup>52</sup>

The various aspects of the UNHCR’s competence, function, participation in making international rules, acquisition of rights and subjection to obligations under international law, capacity to dispatch representatives to refugee hosting states, and enjoying privileges and immunities for its staff and installations, taken together lead to the conclusion that UNHCR possesses rights and duties on the international

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<sup>48</sup> See, *Implementing actions proposed by the United Nations High Commissioner for Refugees to strengthen the capacity of his Office to carry out its mandate*, GA Res 58/153, UNGAOR, 58th Sess, UN Doc. A/RES/58/153 (2003) at para 9 [Implementing actions proposed by the UNHCR].

<sup>49</sup> See, *Refugees and Stateless Persons*, GA Res 319 IV, UNGAOR, 4th Sess, UN Doc. A/1251 & Corrs. 1 and 2 (1950) at 36.

<sup>50</sup> See, Statute of UNHCR, *supra* note 1 at 46 para 2 of resolution 428 (V), 14 December 1950.

<sup>51</sup> See, e.g., *Implementing actions proposed by the UNHCR*, *supra* note 48 at para 9.

<sup>52</sup> Statute of UNHCR, *supra* note 1 at 47 [Article 8 (a)].

plane and may be regarded as an actor, separate from the United Nations. If this is the case, then, it should be held accountable, under international law, for its internationally wrongful acts or the injurious consequences arising out of its activities international law does not prohibit.

### **5.2.3 The UNHCR's Obligations under International Law**

Accountability under international law is a function of a breach of an international obligation. For UNHCR to be held accountable under international law for its contribution to harm to refugees in encampment conditions and environmental harm that results from the encampment of refugees in refugee camps that it helps create, fund, and manage in refugee-hosting states in the global south, I have to demonstrate the UNHCR has international obligations incumbent upon it in relation to the protection of the environment and refugees and locate or identify the sources of its obligations.

The ILC in its commentary to the Draft Articles on the Responsibility of IOs opines that IO's international obligation 'may result from a treaty binding an international organization or from other source of international law applicable to the organization.'<sup>53</sup> If this is the case, what is the source of the UNHCR's international obligations? I submit that UNHCR, as an IO, has obligations under general international law and specific instruments – resolutions and treaties – that define its competences. I consider each in turn.

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<sup>53</sup> See, "Report of the International Law Commission on the Work of its Sixty-third Session" (UN Doc. A/63/10) in *Yearbook of the International Law Commission 2011*, vol 2, part 2 (New York: UN, 2018) at 53 para 2 of Commentary to Article 4 (UN Doc A/CN.4/SER.A/2011/Add.1 (Part 2) [Report of the ILC].

### 5.2.3.1 The UNHCR'S Obligations under General International Law

I submit that the UNHCR, as an actor on the international plane, with rights and duties, has international obligations incumbent upon it under general international law, under the authority of the *Interpretation of the Agreement of 25 March 1951*.<sup>54</sup>

In this case, the key legal issue, which the Court re-wrote, in essence, was about the WHO's 'power to exercise...the right to select the location of the seat of its headquarters or a regional office'<sup>55</sup> and whether the 'power to exercise that right is or is not regulated by reason of the existence of obligations vis-à-vis Egypt.'<sup>56</sup> This issue arose because Sub-Committee A of the Regional Committee for Eastern Mediterranean region of the World Health Organisation (WHO) comprising 20 Arab States, including Egypt, adopted, during a special session held in Geneva, May 1980, a resolution by 19 votes to 1 recommending that the WHO Regional Office for the Eastern Mediterranean be transferred from Alexandria, Egypt, to Amman, Jordan 'as soon as possible.'<sup>57</sup> Sub-Committee A adopted this resolution after the 1978 Camp David Agreement between Egypt and Israel, which most Arab states opposed. The recommendation, however, divided members of the WHO, including its World Health Assembly, and eventually the United States suggested that the matter be submitted to the ICJ for an advisory opinion before the transfer of the regional office could be implemented.

The most relevant aspect of this case to the issue of the UNHCR's obligation under discussion here is the Court's observations with respect to the powers and

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<sup>54</sup> *Interpretation of the Agreement of 25 March 1951 Between the World Health Organization and Egypt* [1980] ICJ Rep 73 [Interpretation of the Agreement Case].

<sup>55</sup> *Ibid* at 89 para 37.

<sup>56</sup> *Ibid*.

<sup>57</sup> *Ibid* at 86 para 31.



obligations of IOs vis-à-vis states and also the obligations of IOs generally under international law. The Court made four pertinent observations that are relevant here. In the first place, the Court took judicial notice, based on the written and oral statements presented before it, that there is amongst some officials of IOs ‘*a disposition to regard international organizations as possessing some form of absolute power to determine and, if need be, change the location of the sites of their headquarters and regional offices*’ (my emphasis).<sup>58</sup> This observation, namely, that IOs tend to assume that they possess some form of absolute power is critical to the questions about their obligations and international accountability under international law, at least from my professional experiences,<sup>59</sup> and possibly the experiences of many scholars and researchers in the global south, where IOs carry out many of their functions.

In the second place, the Court reminded proponents of such an attitude or view that states actually ‘possess sovereign power’ to accept or reject the location of the headquarters or regional offices of an IO in their territories.<sup>60</sup> In other words, states, despite transferring some of their sovereign power to IOs, retain the ultimate indicia of authority on key decisions with respect to IOs. In the third place, and related to the second observation, and following its observation on this issue in the *Reparation for injuries* case, the Court reiterated its position on the status of IOs, that

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<sup>58</sup> Ibid.

<sup>59</sup> In 1998 and 2005 I had to square it off with two different representatives of the UNHCR in Uganda who were not happy that the work of the Refugee Law Project which I was directing was challenging their decisions and they tried to intimidate me into silence. I had to remind them that the UNHCR is not above the law; yes, it enjoys some privileges and immunities, but these were not meant to shield it from its wrongful decisions that violate the rights and freedoms of refugees it is supposed to protect. In all my interactions with officials of the UNHCR in Uganda, the impression I got was that these officials believed that the UNHCR and the UN were some sort of ‘super-States’ above the law, national or international and should not be questioned.

<sup>60</sup> Interpretation of the Agreement case, *supra* note 54 at 89 para 37.

‘there is nothing in the character of international organizations to justify their being considered as some form of “super-State.”’ Fourth, and crucially, the Court stated that:

International organizations are subjects of international law and, as such, *are bound by any obligations incumbent upon them under general rules of international law*, under their constitutions or under international agreements to which they are parties (my emphasis).<sup>61</sup>

Some scholars agree with the court’s conclusion that IOs are subjects of international law and, therefore, under international law, owe international obligations and are bound by principles of general international law. Verdirame, for example, submits that the court’s conclusion that IOs are bound under general rules of international law implies ‘customary international law of universal or quasi-universal applicability and for general principles of law.’<sup>62</sup> Benvenisti argues that IOs as international legal persons are subject to general international law.<sup>63</sup> Some scholars, however, are less optimistic and even question the significance of the Court’s oft-cited statement for the conclusion that the principles of general international law bind IOs. Daugirdas, for example, argues that the Court’s ‘opinion offers nothing to bolster its statement that international organisations, as subjects of international law, are bound by general rules of international law.’<sup>64</sup>

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<sup>61</sup> Ibid at 89 – 90 para 37.

<sup>62</sup> Verdirame, *supra* note 19 at 71.

<sup>63</sup> See, e.g., Eyal Benvenisti, *The Law of Global Governance* (The Hague: The Hague Academy of International Law, 2014) at 99.

<sup>64</sup> Kristina Daugirdas, “How and Why International Law Binds International Organizations” (2016) 57:2 *Harvard International Law Journal* 325 at 333.

### **5.2.3.2 The UNHCR's Obligations under its Statute, the 1951 Refugee Convention, and Principle of International Environmental Law**

I argue here that the United Nations General Assembly (UNGA) resolutions and Statute establishing the Office of the UNHCR, subsequent resolutions of the UNGA, Article 35 of the 1951 Convention and 1967 Protocol, and the principles of international environmental law, do create international obligations for the UNHCR.

#### **5.2.3.2.1 The UNHCR's Obligations Under Its Statute**

Article 1 of the Statute provides that the UNHCR 'shall assume the function of providing international protection to ... refugees who fall within the scope of the present Statute...' This article makes UNHCR's obligation to refugees implicit: providing them international protection. The obligation to provide international protection encompasses a whole set of activities undertaken by UNHCR in order to realise the protection of refugees. Although such activities are often cast as humanitarian, they impose legal obligations on the UNHCR.

In addition, Article 8 (a) of the Statute enjoins the High Commissioner to not only promote the 'conclusion and ratification of international conventions for the protection of refugees' but also to 'supervising their application...' Thus, in addition to the obligation of providing international protection, the UNHCR has the obligation of supervising international conventions for the protection of refugees. This obligation has a direct correlation with UNHCR's primary obligation of providing international protection to refugees because international conventions are one means of realising the international protection of refugees.

#### **5.2.3.2.2 The UNHCR's Obligations Under the 1951 Refugee Convention**

The 1951 Refugee Convention reiterates UNHCR's supervisory obligations. Paragraph 6 of the Preamble of the 1951 Convention recalls that 'the United

Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees...’ The supervisory obligation envisaged in the Statute and the preamble is broad and covers any international convention for the protection of refugees and I would argue that international human rights conventions form part of the genre of conventions that enhance the protection of refugees. If this is the case, then international human rights law does impose some international obligations on UNHCR, a breach of which constitutes an internationally wrongful acts, which in turn engages UNHCR’s international accountability.

Under Article 35(1) of the 1951 Convention Contracting States ‘shall in particular facilitate’ the UNHCR’s ‘duty of supervising the application of’ the 1951 Refugee Convention. I argue that one of UNHCR’s duties of supervising the application of the Convention includes ensuring that States protect and promote the right of refugees to freedom of movement and choice of residence within their territories that Article 26 of the Conventions guarantees for refugees lawfully in the territories of States parties.

Similarly, Article II (1) of the 1967 Protocol requires States to cooperate with UNHCR, including cooperation in relation to facilitating the UNHCR’s ‘duty of supervising the application of the present Protocol.’ In addition to the duty of Contracting States to facilitating UNHCR’s duty of supervising the Convention and Protocol, Contracting States are obliged under Article 35 (2) to provide the UNHCR, ‘in the proper form, with information and statistical data’ concerning the condition of refugees, the implementation of the 1951 Convention, and laws and regulations relating to refugees in force in the territory of a Contracting State.

My thesis is that UNHCR’s duty of supervising the 1951 Convention and its 1967 Protocol and making reports on the conditions of refugees, the application of the Convention, and laws and regulations in force in host States are all interconnected and collectively perform one critical purpose: enhance the powers

and UNHCR's effectiveness in discharging its primary function of providing international protection to refugees.<sup>65</sup> In this respect, the duties are owed to refugees and members of society. UNHCR's duty of supervision and reporting is to ensure that Contracting States fulfil their obligations under the Convention, such as guaranteeing refugees the right to freedom of movement, which is a critical right because it provides a legal route for refugees to accessing and enjoying other fundamental human rights.

UNHCR's encampment policies, seen from this perspective, in fact, subvert the core principles of refugee protection and as some of the cases in the global south, and in countries such as Kenya, demonstrate, contributed to significant damage to the environment around refugee hosting areas. Crucially, encampment undermines the well-being of refugees, especially the creation of situations where refugees are stuck in camps without any feasible solution for decades, what the UNHCR calls 'protracted refugee situations.'<sup>66</sup>

#### **5.2.3.2.3 The UNHCR's Obligations Under International Law Relating to the Environment**

I next consider the rules and principles of international environmental law in creating obligations for UNHCR vis-à-vis its refugee encampment activities. There is no general international legal instrument which defines the obligations of the

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<sup>65</sup>On UNHCR's supervisory functions, see, e.g., Majorleine Zieck, "Article 35 of the 1951 Convention/Article II of the 1967 Protocol", in Andreas Zimmermann, ed, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011) at 1459; W. Kalin, 'Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond', background paper for the 2<sup>nd</sup> expert roundtable, Cambridge, UK, 9 -10 July 2001, commissioned by UNHCR as part of the Global Consultations on International Protection (on file with author); V. Turk, 'UNHCR's Supervisory Responsibility', 14 (1) *Revue Quebecoise de droit international* (2002) 135.

<sup>66</sup> UNHCR, *The State of the World's Refugees: Human Displacement in the New Millennium* (Oxford: Oxford University Press, 2006) 105.

various actors – states, IOs, multinational or transnational corporations, and individuals in relation to protection of the environment.

Since the seminal case of the *Trail Smelter Arbitration*,<sup>67</sup> general rules and principles of international environmental law have emerged from ‘international treaties, agreements, and custom.’<sup>68</sup> Soto has identified and summarised these principles and I adopt his formulation.<sup>69</sup> These principles include, prohibition on causing damage to the environment, good neighbourliness and international cooperation, preventive action, precautionary principle, duty to compensate for harm to the environment, sustainable development, and common but differentiated responsibility.<sup>70</sup> I argue, with Soto, that the international community may apply these principles to matters of protecting the environment.<sup>71</sup> I specifically argue that even if these principles originally targeted states, some of them can be extrapolated to other actors on the international plane, such as IOs, transnational corporations, and individuals; and that they too have an international obligation not to damage the environment.

The *Trail Smelter Arbitration* case enunciated the general principle of customary international law prohibiting states from causing transboundary damage to the

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<sup>67</sup> *Trail Smelter Case (United States v Canada)* (1938), 3 UNRIAA at 1905 (United Nations Reports of International Arbitral Awards) [Trail Smelter]; also see, e.g., Karin Mickelson, ‘Rereading Trail Smelter’ (1994) 31 *Canadian Yearbook of International Law/ Annuaire Canadien de droit internationale* 219.

<sup>68</sup> See, Max Valverde Soto, “General Principles of International Environmental Law” (1996) 3 *ILSA Journal of International and Comparative Law* 193 at 194.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*; also, see, e.g., Philippe Sands, *Principles of International Environmental Law*, 2nd edn (Cambridge: Cambridge University Press, 2003), 231 – 289.

<sup>71</sup> *Ibid.*

environment of another state or other states. In this case a Canadian company operated a smelter on Canadian territory, but fumes from the smelter caused damage across the Canada/US border in Washington State, in the United States of America. At issue, among other issues, was ‘whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so to what extent?’<sup>72</sup> The Tribunal observed that addressing this question raised yet another issue, namely, ‘whether the question should be answered on the basis of the law followed in the United States or on the basis of international law.’<sup>73</sup>

The Tribunal, having reviewed some of the decisions of the United States Supreme Court in cases on air and water pollution involving some of the US states, answered:

The Tribunal, therefore, finds that... *under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of a serious consequence and the injury is established by clear and convincing evidence (my emphasis).*<sup>74</sup>

This oft-quoted conclusion of the Tribunal is generally considered to have enunciated the rule that defines a general duty or obligation of a state or states not to cause damage to the environment of other states; or not to cause damage or allow its territory to be used to cause damage to the environment in other states or areas beyond its national jurisdiction.<sup>75</sup> This principle has been followed in cases such as

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<sup>72</sup> Trail Smelter, *supra* note 67 at 1962.

<sup>73</sup> Ibid at 1963.

<sup>74</sup> Ibid at 1965.

<sup>75</sup> See, e.g., Daniel Bodansky, Jutta Brunnee, and Ellen Hey, *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2008).

the *Corfu Channel* case and the *Legality of the Threat or the Use of Nuclear Weapons* case. In the *Corfu Channel* case, two British warships struck mines in Albanian waters. The ICJ held, among other things, that the Albanian authorities obligations to notify both the British warships and the shipping community in general of the existence of a minefield in Albanian territorial waters was based on ‘certain general and well-recognised principles,’ including the principle that ‘every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.’<sup>76</sup>

And in the *Legality of the Threat or the Use of Nuclear Weapons* case, the ICJ was asked to give advisory opinion on whether ‘the threat or the use of nuclear weapons in any circumstances is permitted under international law.’<sup>77</sup> Some of the states, in their written and oral submissions before the Court, argued that ‘any use of nuclear weapons would be unlawful by reference to existing norms relating to the safeguarding and protection of the environment.’<sup>78</sup> The Court reaffirmed the existence of a general obligation incumbent upon states to protect the environment:

The existence of the general obligation of State to ensure that activities within their jurisdiction and control respect the environment of other States or areas beyond national control is now part of the corpus of international law relating to the environment.<sup>79</sup>

This rule also finds expression in the two international United Nations declarations on the environment, the Stockholm Declaration on Human

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<sup>76</sup> *Corfu Channel Case (United Kingdom v Albania)* [1949] ICJ Rep 4 at 22.

<sup>77</sup> *Legality of the Threat or Use of Nuclear Weapons Case* [1996] ICJ Rep 226 at 227.

<sup>78</sup> *Ibid* at 241 para 27.

<sup>79</sup> *Ibid* at 242 para 29.



Environment, 1972<sup>80</sup> and the Rio Declaration on Environment and Development, 1992.<sup>81</sup> Both Principle 21 of the Stockholm Declaration on Human Environment and Principle 2 of the Rio Declaration, acknowledges the sovereign rights of states to exploit their own natural resources and to pursue their own environmental policies, but reminds them of their ‘responsibility to ensure that activities in their jurisdiction and control do not cause damage to the environment of other States or areas beyond the limit of national jurisdiction.’<sup>82</sup>

Thus, there is a rule of international law laying down a general obligation on states to ensure that activities carried out within their jurisdiction do not cause damage to the environment across borders in another state’s territory or jurisdiction. Fitzmaurice has argued that this rule is ‘one of the few uncontested norms of customary international environmental law in the environmental field.’<sup>83</sup>

I submit, however, that this general rule on the obligation of a state not to cause damage to the environment of other states has transformed into a general principle of international law, which should now bind all actors, including IOs. Since the *Trail Smelter* case through to the Stockholm and Rio Declarations on the environment, for example, there is ample evidence, which demonstrates that the activities of certain IOs, such as the World Bank and the UNHCR, do cause

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<sup>80</sup> *Report of the United Nations Conference on the Human Environment* (Stockholm, 1972), UN Doc A/CONF.48/Rev.1 (1973) [UN Stockholm Report 1973].

<sup>81</sup> *Report of the United Nations Conference on Environment and Development* (Rio de Janeiro, 3 – 14 June 1992), UN Doc A/CONF.151/26 (Vol 1) (1993) [UN Rio Report 1993].

<sup>82</sup> *Ibid* at 5; also see *UN Stockholm Report 1973*, *supra* note 80 at 3.

<sup>83</sup> See, e.g., Malgosia Fitzmaurice, “International Responsibility and Liability,” in Daniel Bodansky, Jutta Brunnee, & Ellen Hey, *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2008) 1011 at 1013.

damage the environment.<sup>84</sup> In this context, the status quo is no longer tenable, period. In other words, we can no longer justify restricting these norms to states exclusively, thus ignoring the evidence that the activities of some IOs, such as the UNHCR and the World Bank, in the territories of these states do cause harm to the environment and to human beings.

I argue, however, that, from a New Haven School of Thought approach to law, a general rule of international law imposing obligations on both states and IOs for causing environmental damage is already in existence. If I take the New Haven School's idea of law as a process of authoritative decision and control aimed at achieving common community goals,<sup>85</sup> and that law serves social values and ends for the community, then, I submit that the Stockholm and Rio processes on the human environment and development of 1972 and 1992 respectively have laid down a general principle of international law that defines the obligations of all actors, states, IOs, and individuals not to cause damage to the environment.

### **5.3 The UNHCR's Accountability for Internationally Wrongful Acts**

To hold the UNHCR accountable based on the concept of the internationally wrongful act, I must do three things. First, identify an act(s) or omission(s), observable in practice, that, viewed from an international law perspective, would

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<sup>84</sup> See, e.g., Regis Garandau, Stephan Edwards, & Mark Maslin, "Biophysical, socioeconomic and geopolitical impacts assessment of large dams: an overview," (undated) online (pdf) <<https://www.ucl.ac.uk/hazard-centre/sites/hazard-centre/files/mega-dam-overview.pdf>>.

<sup>85</sup> For an introduction to this school of thought, see, e.g., E. Suzuki, "The New Haven School of International Law: An Invitation To A Policy-Oriented Jurisprudence," (1974) 1 *Yale Studies in World Public Order* 19; On the central ideas of this school, see, Harold D Lasswell & Myers S McDougal, *Jurisprudence For a Free Society: Studies in Law, Science, and Policy* (Dordrecht; Boston: Martinus Nijhoff Publishers, 1992) vol 1; Myers S McDougal, Harold D Lasswell, & W Michael Reisman, "Theories About International Law: Prologue to a Configurative Jurisprudence," (1968) 8 *Virginia Journal of International Law* 188.

constitute an internationally wrongful act; second, the act(s) is attributable to UNHCR; and third, the act breaches UNHCR's international obligation.<sup>86</sup>

To identify and define the internationally wrongful acts UNHCR has committed for which it has to be held accountable under international law, I return to Chapter 3, where I theorised that UNHCR is the chief architect of refugee encampment policies and practices in many refugee-hosting states in the global south.

I identified seven practical or observable implications flowing from this theory, but three, most relevant here, however, are: (a) the observable implication that if the UNHCR is the architect of refugee encampment, it is likely that it no longer is an impartial guarantor of refugee rights and freedoms; (b) the observable implication that UNHCR in private or behind-the-scenes *actively* incentivises and socialises refugee-hosting states in the global south into embracing and owning up refugee encampment as their initiative; and (c) the practical observation that UNHCR exercises some power and influence on the international plane and capable of identifying its interests and defending those interests.

The criteria for determining whether a particular act of the UNHCR vis-à-vis refugee encampment is wrongful, are the specific rights and freedoms of refugees provided in the 1951 Convention relating to the Status of Refugees (hereinafter, 1951 Refugee Convention) as amended in 1967. Additional criteria can be found in the Statute of the Office of the UNHCR and instruments and principles of international environmental and human rights law.

Thus, it is possible to determine the nature of the internationally wrongful act(s) for which UNHCR should be held internationally accountable applying the criteria from the above sources to the practical implications. Two possible such acts

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<sup>86</sup> See, Report of the ILC, *supra* note 53, at 40 para 87 [article 4].

are the violation of refugees' right to freedom of movement and choice of residence and the act of inducing refugee-hosting states in the global south to embrace refugee encampment in breach of their obligations to refugees under the 1951 Refugee Convention to the extent of reservations entered on specific articles.

### **5.3.1 Refugee Encampment and the Violation of Refugees' Right to Freedom of Movement and Choice of Residence As Wrongful Act**

The essence of the observable implication (a) that if UNHCR is the architect of refugee encampment, it is likely that UNHCR is no longer an impartial guarantor of refugee rights and freedoms in practice is that the UNHCR cannot at one and the same time be both the author of the framework decisions that produce refugee encampment in refugee-hosting states in the global south and an advocate for the freedom of movement and choice of residence of these refugees. In other words, the UNHCR, at least in some of the refugee-hosting states in the global south, has not unequivocally promoted certain refugee rights that are inconsistent with its institutional interests, such as the right to freedom of movement and choice of residence for refugees in the global south. Since the UNHCR has vested institutional interest in refugee encampment,<sup>87</sup> it could not at the same time be inclined to promote the right to freedom of movement and choice of residence for refugees.

What are these interests? The UNHCR, I argue, has two interests in refugee encampment. First, from an operational perspective, UNHCR is interested in ensuring cost-effective delivery of aid to refugees in situations of refugee emergencies, access to refugees, and the repatriation of refugees to their countries of origin. In other words, costs, logistics, security, accessing refugees, and organised

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<sup>87</sup> On how UNHCR's institutional interests might influence its strategic posturing, see, e.g., Barb Wigley, *The State of UNHCR's Organisational Culture* (Geneva, UNHCR, EPAU/2005/08, May 2005), online <<https://www.unhcr.org/428db1d62.pdf>>.

repatriation are key considerations in refugee encampment.<sup>88</sup> One participant said thus, when asked what were the main considerations for refugee encampment:

Two main considerations. The first consideration was accessing refugees; camps make it is easier for us to access refugees and monitor violations of refugee rights when they are in one place. It also makes it easier for refugees to access UNHCR. The second was logistics – transporting humanitarian aid is expensive, but having refugees in one place in the camp makes it easier to deliver assistance to them.<sup>89</sup>

There is, for sure, some valid case to be made for these underlying assumptions for refugee encampment; they, however, are justifiable in the short run. Second, and the main reason, refugee camps provide visibility for the work of the UNHCR and visibility in turn justifies the UNHCR's continued relevance and existence.<sup>90</sup> Indeed, thanks to the millions of refugees held in camps in some refugee-hosting states in the global south, the General Assembly of the United Nations gave UNHCR a permanent mandate 'until the refugee problem is solved.'<sup>91</sup> In UNHCR speak, camps are a means 'to uphold UNHCR's protection mandate.'<sup>92</sup>

I must place this submission in historical context. UNHCR has learnt from experience, a turbulent experience right from birth, how to navigate the treacherous terrain of international politics, and especially how to make states see its relevance.

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<sup>88</sup> For an early work that addresses the underlying assumptions informing the UNHCR's interest those of its implementing partners in refugee encampment in the global south, and especially in Africa, see, e.g., Barbara E. Harrell-Bond, *Imposing Aid: Emergency Assistance to Refugees* (Oxford; New York; Nairobi: Oxford University Press, 1986) at 8 – 13.

<sup>89</sup> Interviewed, 3 March 2018.

<sup>90</sup> See, e.g., Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford: Oxford University Press, 2011).

<sup>91</sup> See, Implementing actions proposed by the UNHCR, *supra* note 48 at para 9.

<sup>92</sup> UNHCR, *Emergency Handbook*, 3rd edn (Geneva: UNHCR, 2007) at 208.

Thus, from 1958 to mid-1960s, for example, UNHCR actively campaigned for the end of refugee encampment in a Europe that was emerging from a bloody war and embarking on a reconstruction process that received support through the Marshall Plan.

Yet, at the same time, from 1958 – 1962, the UNHCR was appropriating the *framework governance* of refugee policy and practice in Tunisia and Morocco, moving refugees into refugee camps because its High Commissioner at the time, Felix Schnyder, had concluded that repatriation, not resettlement, was the only solution for the Algerian refugees, which as Loescher rightly argues, provided the blue-print for its subsequent interventions in Africa and the global south.

The end of refugee encampment in western Europe had consequences for the UNHCR's relevance because integrating refugees into host communities allowed local and central authorities in these countries to reclaim their *framework governance*. The UNHCR was reduced to the supervisory role that the 1951 Refugee Convention assigned to it. UNHCR's role diminished and that meant reduction not only in staff and activities in western developed countries, but also in livelihoods for retrenched UNHCR staff.

The UNHCR's involvement with refugee crises in the global south, starting with the Algerian refugee crisis of 1954 – 1962, however, provided it the life-line that made it relevant and became a global actor in refugee issues. Therefore, if the UNHCR is to launch a similar campaign in the global south to end refugee encampment, promoting the capacities of refugee-hosting states, such as Kenya which had already open-door policies that allowed refugees in their territories to settle anywhere in the country, UNHCR's significance and relevance will diminish and there are those within the organisation that do not wish to lose the better paying jobs that UNHCR provides.

Regardless of the justification for refugee encampment, however, it is a flagrant violation of the rights of the affected refugees' to freedom of movement and

choice of residence that article 26 of the 1951 Refugee Convention protects. It is also a breach of the UNHCR's supervisory obligations under Article 35 of the 1951 Refugee Convention and its mandate to provide international protection to refugees as stipulated in its Statute.

Therefore, whether seen from the refugee rights lens or the UNHCR's supervisory obligations under the 1951 Refugee Convention or its overall mandate under its Statute, I argue that *refugee encampment constitutes an internationally wrongful act*.

The UNHCR has made material assistance to refugees contingent upon their accepting to live in the refugee camps. From the 12 focus group interviews, participants unanimously said they would not have come to the camp if they had options to live anywhere, or had the resources with which to meet their everyday basic needs such as food and accommodation on arrival. One elderly participant in one of the focus groups shared his family's experiences of why they ended up in the camp: 'We came here because we were told that it is here, that we shall find help.'<sup>93</sup> And when asked, 'Who told you to come here?', she responded, 'It was UNHCR.'

And another participant in this group interjected:

The decision to come here is not ours. We could have gone to Nairobi, Garissa, or simply lived amongst the community but we needed help and we were told the only way to get help was if we moved to a refugee camp.<sup>94</sup>

In the end, all the eight other participants in this focus group all agreed with what the first participant said, namely, that they ended in the camp because UNHCR told them that if they need material help, they must go to the camp.

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<sup>93</sup> Interviewed with FG06, 22 February 2018.

<sup>94</sup> Ibid.

It had become known to most refugees arriving in Kenya after 1991 that if they needed material help, they can go to the “UN”, but the “UN” can only help them if they go to a refugee camp, where they will be provided with everything. A participant in another focus group put it this way:

We considered alternatives, such as going to find a place in towns or villages amongst the Kenyans, but we quickly realised that we had no alternatives. We did not have money or identity documents to choose to live in other places, such as in town or villages here in Kenya. *And, moreover, we had been already told that if you want help from the UN, they will take you to the camp. So, we simply decided to come here in this camp (my emphasis).*<sup>95</sup>

The “UN” here meant the UNHCR; indeed, most refugees often referred to UNHCR simply as the UN.

I inferred from the twelve focus group interviews that the decision to live in camps, for most refugees, was not voluntary. Refugees were faced with a stark reality of take it or leave it, and in their most vulnerable state, they accepted to go to the camps, where many have lived now for over two decades, with no solutions in sight. One participant in a focus group interview captured the essence of this point:

We came here because UNHCR said that if we do not come here, we cannot get help. We ran because of war from our country and we had nothing and needed help. So, we came here.<sup>96</sup>

Seven other participants in this group agreed that UNHCR told them that they must go to the refugee camps if they want help. In other words, going to the camp was conditioned on their getting, what is supposed to be international help.

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<sup>95</sup> Interviews with FG01, 20 February 2018.

<sup>96</sup> Interviews with FG04, 21 February 2018.



In yet another focus group interview, one participant used the UNHCR logo to capture the apparent contradiction in terms in the plight of refugees vis-à-vis their right to freedom of movement and choice of residence and the mandate of the organisation that is supposed to provide them with international protection:

A refugee is a vulnerable person. Have you seen the UNHCR Logo? Does the image of the person – supposedly a refugee between the purportedly protecting hands of the UNHCR have eyes, legs, hands? Even the food the refugees receive, they don't know where it comes from. I was brought up here after riot police attacked Thika refugee transit camp. I did not want to come here.<sup>97</sup>

And my follow up question, if this participant had not wanted to come to the camp, how did others come to live here in the camp, elicited a response from another participant in the group that refugees understood that their encampment constrained them from enjoying their human rights and fundamental freedoms, including the right to freedom of movement and choice of residence:

This question is like asking a refugee how did come to be a refugee? Like my colleague has said, we refugees are formless under the UNHCR logo – no hands, no eyes, no legs, no rights, no freedoms, etc. *We are simply being carried from place to place as UNHCR chooses* (my emphasis).<sup>98</sup>

The consequences of refugee encampment are, however, dire for refugees: they lose being human; they lose fundamental freedoms of being human, such as the freedom of movement and choice of residence. Indeed, the restriction on freedom of movement for refugees in the DRCC was one of the dominant themes that emerged from the twelve focus groups I interviewed in Kenya in 2017 and 2018. In a focus group interview, one of the participants captured the sentiments of the group when responding to my question, 'How do you find living here?':

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<sup>97</sup> Interviews with FG10, 10 March 2018.

<sup>98</sup> Ibid.

It is like we are in a prison. It is like an open prison though; and yet, we cannot leave this apparently open place any time we would wish to go out and look for solutions to some of our pressing and sometimes emergency needs. We are entirely dependent on UNHCR for everything.<sup>99</sup>

Yet another participant in the group sought to emphasise the issue of limitation on freedom of movement and the dependency it engenders:

I would say one of the main challenges of living here, in this place, is limited freedom of movement. As my colleagues have said, we are here like in an open prison, yet we cannot leave this place. We depend entirely on UNHCR and its agencies.<sup>100</sup>

Refugees who ventured outside the camps without permission risked arrest, detention, and even torture. One participant explained the extent of restriction on freedom of movement and the consequences of being caught outside the camps without permit:

We are not allowed to leave this place; I mean the camp; We cannot leave this place for 1 Km away. If they find a refugee outside the 1 km radius, he or she will be arrested and beaten.<sup>101</sup>

The situation is no better even if one had decided to seek permission before leaving the camp. Indeed, those refugees who sought to leave the camps following the rules find obstacles along the way that make it impossible to leave the camp:

We are not allowed to leave the camps. Yet, the Government of Kenya has given us alien identity cards. These cards are useless because when we attempt to leave the camps, the real cards that matter are cash. In most cases, when we attempt to leave the camp for whatever reason, the security agents at the various road blocks do not recognise the alien identity cards; instead they will ask us for a written movement permit, which is a document that has to be approved by six government officers: the deputy County

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<sup>99</sup> Interviews with FG04, 21 February 2018.

<sup>100</sup> Ibid.

<sup>101</sup> Interviews with FG01, 20 February 2018.

Commissioner (DC); the Sub-County security head; the Refugee Affairs Secretariat manager, the police/CID.<sup>102</sup>

The experiences of refugees living in urban areas, such as Nairobi, on freedom of movement, sharply contrasts with those of refugees under encampment in refugee camps. Refugees residing in urban places, such as Nairobi, do face the challenges of everyday living, but they are far more confident and optimistic about prospects of life than their counterparts in the refugee camps. The freedom to move freely without having to seek movement permits and the ability to make critical life decision, including choosing where to live, emerged the dominant themes from the two focus group interviews I conducted in Nairobi in 2017 and 2018.

One participant, in the 2017 focus group interview, for example, stated that ‘generally living here is much better than living in camps.’<sup>103</sup> And when I further probed ‘why or how living here is better than in the camps?’, the response was exuberant: ‘There is freedom of movement. I can choose to move to any part of Kenya without having to go through that cumbersome and corruption ridden process to get a movement permit.’<sup>104</sup> The other seven participants nodded in agreement.

### **5.3.2 Inducing refugee-hosting states in the global south to embrace refugee encampment as an Internationally Wrongful Act**

The essence of my theory that UNHCR is the author of the framework decisions on refugee encampment in refugee-hosting states in the global south and the essence of one of the practical or observable implications, which I identified flowing from this theory is that the UNHCR in private or behind-the-scenes *actively* incentivises and socialises refugee-hosting states in the global south into embracing and owning

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<sup>102</sup> Interviews with FG10, 10 March 2018.

<sup>103</sup> Interviews with FG01N, 1 September 2017.

<sup>104</sup> Ibid.

up refugee encampment as their own initiative. One participant who was involved in the creation of the DRCC explained how UNHCR in Kenya succeeded in securing the acquiescence of the GoK in refugee encampment:

During the course of negotiations for the use of Kenyan land, UNHCR recognized the obvious limitations of the GoK. HCR readily offered to provide equipment and materials to strengthen the capacity of both the security forces as well as the civilian authorities. *Vehicles, radios and communication equipment, and even shelter and food were provided as incentives in order to secure the firm decision and ultimate approval of the GoK in acquiring the relatively large Dadaab Refugee Camp Complex. Suffice to say that subsequent land negotiations between HCR and GoK for additional refugee camps transpired far more easily, with the Kakuma site negotiations passing relatively smoothly and without controversy.* By that stage, UNHCR had earned the GoK's respect and, needless to say, the GoK had recognised the many benefits (hundreds if not thousands of jobs; financial support; the goodwill of the international community, etc) that befell the country and the GoK in offering asylum to refugees (my emphasis).<sup>105</sup>

Once a refugee-hosting state has received incentives from the UNHCR and the advantages of refugee encampment communicated to the relevant government officials responsible for refugee affairs in the country, their governments own up refugee encampment as their own initiative. Kenya, after resisting for some time refugee encampment, is now an avid proponent of refugee encampment giving all sorts of justifications.

The UNHCR breaches its obligation to supervise the 1951 Refugee Convention whenever it induces refugee-hosting states in the global south to provide land for refugee camps, contrary to the provision of the 1951 Refugee Convention, such as Article 26 which guarantees the right to freedom of movement and choice of residence. In other words, the UNHCR's acts of inducing refugee-hosting states, using incentives, to embrace refugee encampment contrary to the

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<sup>105</sup> E-mail to Dr Barbara Harrell-Bond, 27 July 2011, available on file with author.

international obligations of those states under the 1951 Refugee Convention constitute an internationally wrongful act.

#### **5.4 The UNHCR's Accountability for Injurious Consequences arising from its Activities that International Law Does Not Prohibit**

I now turn to addressing UNHCR's accountability using the concept of the injurious consequences arising out of activities that international law does not prohibit. I proceed on the premise, for purposes of my dissertation, that international law does not, technically speaking, prohibit the encampment of refugees; indeed, the status of refugee camps under international law is ambiguous.<sup>106</sup> I focus on two main areas: accountability for harm to the environment resulting from refugee encampment and conditions for refugees in camps amounting to what the European Court of Human Rights has characterised as torture within the framework of the Convention on Human Rights. I address each aspect in the subsections that follow.

##### **5.4.1 The UNHCR's Accountability for Harm to the Environment**

Refugee encampment is all- recognise too-often both a cause of environmental harm to surrounding lands or areas and a factor that may also exacerbate already ongoing harm to the environment in the area and vicinity of encampment. In Kenya, for example, as the discussion below shows, the UNHCR, GoK, and the Dadaab subcounty officials that the Dadaab Refugee Camp Complex (DRCC) has negatively impacted the environment.

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<sup>106</sup> I am working on a separate project on this topic, "The status of refugee camps under international law".

Refugee encampments, by the UNHCR's own reckoning, have resulted in, to use the UNHCR's own terminology, 'environmental degradation' in Dadaab.<sup>107</sup> The UNHCR notes that the DRCC is 'located in an ecologically fragile area characterized by low rainfall, prolonged droughts and seasonal flooding.'<sup>108</sup> And crucially, the DRCC 'has been in existence for over a protracted period of time which, when coupled with the high population density, *has resulted in significant environmental Degradation*' (my emphasis).<sup>109</sup>

Some of the local officials in Dadaab were even more forceful and concerned about the negative impact or destructive impact that the DRCC has had on the environment. One participant stated that when the decision to establish refugee camps in Dadaab were being made, the consequences of the the camps on the environment were never discussed. Another participant stated that,

[b]efore devolution, there was a gap between the UNHCR and the local community. Indeed, there was no collaboration between UNHCR and the various government units and players in this region. This was a real issue. Proper engagement with UNHCR only started after devolution in 2013. But it is too little too late. If there was proper coordination, there could possibly have been less destruction and damage resulting from refugee camps. *Sadly, the impact of refugee camps on the environment is vast; it goes up to a 50-km radius* (my emphasis).<sup>110</sup>

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<sup>107</sup> See, UNHCR, 'Project Proposal for Environmental Rehabilitation of Dadaab Refugee Hosting Region, Kenya' (Three-Project, 2017 – 2019; proposal undated but available on file with author; document obtained during fieldwork in Kenya, February – April 2018) at 3 [Project Proposal for Environmental Rehabilitation].

<sup>108</sup> Ibid at 3.

<sup>109</sup> Ibid.

<sup>110</sup> Interviewed, 6 March 2018.

The destructive impact of refugee encampment on the environment in Kenya, for example, and as I noted in Chapter 3, caught the attention of some Members of Parliament from the regions where refugee camps were located. In October 1995, for example, it was raised under “Question 494: Hosting Somali Refugees” and the Minister of Home Affairs and National Heritage, as it was then known, under whose docket refugees fell, was asked, among other questions, whether the GoK had any estimates about the monetary impact of the damage that refugees and encampment has caused to environment.<sup>111</sup> The Minister responded that,

...in 1993 the UNHCR Headquarters in Geneva sent an expert to do costing as a result of the destruction of forests at Dadaab, Kakuma, another camp near Malindi. We have not received the report yet... We shall get the money and we shall re-forest the area where destruction has been caused by the refugees. But right now, I do not have the figure.<sup>112</sup>

It is plausible to infer from the Minister’s statement to Members of Parliament that UNHCR is aware of the environmental consequences of its refugee encampment policies and practice. Indeed, in 2017 UNHCR developed a three-year, \$6,430,000, project proposal on ‘environmental rehabilitation of Dadaab refugee hosting region.’ The project’s ‘overall objective ...is to restore the ecological integrity of the region that has been impacted negatively as a result of hosting a large population of refugees for a period of over twenty-five (25) years.’<sup>113</sup>

Therefore, there is ample evidence that UNHCR actively contributed to the damage to the environment in refugee hosting areas, in Kenya. It is likely that refugee camps in other refugee-hosting states in the global south have a similar

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<sup>111</sup> GoK, *Kenya National Assembly Parliamentary Debates (Official Report), Daily Hansard*, 7th Parliament, 4th Session, Volume 7, Number 59 (18 October 1995) at 2033.

<sup>112</sup> *Ibid* at 2034.

<sup>113</sup> Project Proposal for Environmental Rehabilitation, *supra* note 107 at 5.

impact on the environment. Indeed, in taking to steps to rehabilitate the environment of the Dadaab refugee-hosting region of Kenya, the UNHCR has acknowledged the role of refugee encampment in contributing to the harm to the environment.

#### **5.4.2 The UNHCR's Accountability for Harms to the Lives of Refugees in Encampment**

The conditions of life for refugees in encampment, to use the description of one refugee participant, is 'very harsh.' I set out in full what this participant said in one of the focus group interviews, which other participants in the group unanimously agreed with, when I asked the group the question, 'How do you find living in this place?':

Living here is terrible; it is very harsh life. We have no income, no freedom of movement, no food. If we had alternatives, we could leave this place immediately. We are basically forced to live here because they restrict assistance to be given to refugees if they accept to live in camps. If this assistance could be given where we choose to live, it would be far much better. But they decided that assistance can be received if we live in such a hostile place. Desperate, what can we do? It is better than nothing.<sup>114</sup>

And when I further probed, 'Who are "they"?' The response almost came in a chorus, "UNHCR", save one participant who added, 'And the government of Kenya.'<sup>115</sup> Sometimes simple things, such as renewing an identity card (ID card) and how material assistance in the camp is managed, can be tortuously agonising experiences for refugees in the camps in some refugee-hosting states in the global south. A participant in one focus group interview demonstrates illustrates this experience:

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<sup>114</sup> Interview with FG01, 20 February 2018.

<sup>115</sup> Ibid.



I would say that there is a total lack of responsibility on the part of UNHCR on how the affairs of the refugees are managed. I have been trying to renew my ID for the last three years but without success. Here in the refugee camps, we have no choice. We take what we are given. Sometimes a refugee is seriously sick and may need to have a balanced diet, including eating lots of vegetables. But it is very difficult to find these here in the camps; vegetables are scarce here.

Food security and health emerged major issues causing lots of anxiety amongst refugees in all the focus group interviews. In one focus group, a participant articulated a point that other participants agree with unanimously:

We face lots of challenges here. First of all, the food they give us here is inadequate. We are given 4 kg per person for a month. And this does not include other basic needs, for example, sauce, fuel for cooking. Secondly, there are no health services here for critical health problems or cases that cannot be treated here in the camp. Seeking alternatives outside the camp is very difficult.<sup>116</sup>

The issue of inadequate food in refugee camps caught the attention of the UN Human Rights Council Advisory Committee in a 2008 report. The Committee found that ‘large numbers of refugees and displaced persons in many camps run by the Office of the United Nations High Commission (UNHCR) are seriously and continuously underfed.’<sup>117</sup> In addition, it further found that in ‘some camps over 80 per cent of all children under 10 suffer from anaemia and are incapable of following the UNHCR school programmes, for example.’<sup>118</sup>

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<sup>116</sup> Interview with FG05, 22 February 2018.

<sup>117</sup> See, “Report of the Advisory Committee on its First Session”, UNHRC, 1st Sess, UN Doc. A/HRC/AC/2008/1/2 (2008) at 16.

<sup>118</sup> *Ibid.*, at 16; also see, e.g., Natali Dukic & Alain Thierry, “Saharawi Refugees: life after the camps” (1998) 2 *Forced Migration Review* 18 at 19.

And crucially, the former High Commissioner, Antonio Guterres, acknowledged the intolerable levels of malnutrition in ‘several refugee camps’<sup>119</sup> in his address to the Third Committee of the United Nations General Assembly on 9 November 2009. Yet, decades later, the situation of food security for refugees in encampment remains precarious.

Another participant in another focus group emphasized the issue of health and especially access to certain life-saving services, such as blood transfusion:

In addition to the food problems, we have very poor health services here. MSF is in charge of health here. There are cases when refugees have serious illnesses that require blood transfusion, but they don’t have blood. In some cases, refugees die.<sup>120</sup>

I tried to establish which branch of MSF this participant was referring to and I found out that MSF Switzerland (MSF-CH) Kenya Mission (MSF-CH Kenya Mission) was handling health services in DRCC. My request to them for interviews so that I could corroborate some of these concerns was, however, declined on the ground that they ‘cannot participate in the interview due to its background of LAW nature rather than a medical nature as we are a humanitarian medical organisation.’<sup>121</sup>

There is nothing more stressful than living in uncertainty. Refugee participants in the focus group interviews raised the issue of uncertain future in the camps in

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<sup>119</sup> See, UNHCR, “Statement by Antonio Guterres, United Nations High Commissioner for Refugees, to the Third Committee of the United Nations General Assembly, 60<sup>th</sup> Session, New York, 9 November 2005”, online: UNHCR <<http://www.unhcr.org/437dedfe2.html>>.

<sup>120</sup> Interview with FG06, 22 February 2018.

<sup>121</sup> E-mail communication with Project Coordinator MSFCH – Kenya Mission – Dadaab Project, 28 March 2018 (available on file with author).

various ways, but one particular participant in one focus group put it succinctly, ‘We live in uncertainty in this place. We don’t know what will happen tomorrow because we are always being told that we shall be moved to another camp.’<sup>122</sup>

Thus, the evidence discussed here supports the argument that conditions in refugee camps, taken as a whole, all-too-often constitute torturous, inhuman and degrading treatment and offend both national and international human rights law. I use the expression ‘international human rights law’ to cover regional instruments as well. In fact, the European Court of Human Rights (ECtHR) has ruled in the *Sufi and Elmi* case of 2010 that *conditions in Dadaab Refugee Camp Complex (DRCC) in Kenya amount to torture within the ambit of Article 3 of the European Convention on Human Rights*.<sup>123</sup> I agree.

The *Sufi* case involves two separate cases of two Somali nationals, *Abdisamad Adow Sufi* and *Abdiazizi Ibrahim Elmi* who were to be deported to Somalia following their conviction and sentencing for a number of offences in the United Kingdom (UK). Sufi and Elmi applied to the ECtHR for protection against their eminent deportation to Somalia after they lost their initial appeals and were aware that other available legal remedies under the Immigration law of the UK will not be successful. Sufi and Elmi argued before the ECtHR that they will be at real risk of ill-treatment contrary to Article 3 or 2 of the European Convention for Human Rights (ECHR) if deported to Somalia.

The main issue in this case was whether substantial grounds have been shown for believing that Sufi and Elmi would face a real risk of being subjected to treatment contrary to Article 3 of the ECHR if expelled or returned to Somalia. The

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<sup>122</sup> Interviews with FG08, 23 February 2018.

<sup>123</sup> Case of *Abdisamad Adow Sufi and Abdiazizi Ibrahim Elmi v. United Kingdom*, Applications no. 8319/07 (28 November 2011) at para 291.

Court considered the arguments and evidence of the parties and especially the contention of the UK government that even if Mogadishu is not safe, internal flight alternatives would be available to both Sufi and Elmi elsewhere in Somalia, such as the southern part of Somalia.<sup>124</sup> The applicants in response argued that because of the high level of violence and insecurity in Mogadishu and across Somalia, there was at least a reasonable likelihood that they would be forced into IDP camps. In this context, the dire humanitarian conditions in the IDP camps, namely ‘lack of basic necessities of life such as food, water, and healthcare’, and the makeshift settlements be taken into account in assessing compliance with Article 3.<sup>125</sup>

The Court also assessed conditions in Dadaab Refugee Camps, thereby going beyond reviewing the humanitarian conditions in IDP camps in Somalia to determine whether the internal flight alternative was feasible for Sufi and Elmi. The Court’s assessment of conditions in Dadaab Refugee Camp Complex supports my submission that refugee encampment constitutes an act of torture and an internationally wrongful act under international law.

The Court methodically evaluated the huge documentary evidence that the parties submitted and found that despite the presence of the UNHCR in Dadaab camps, the ‘camps are severely overcrowded’<sup>126</sup> and the ‘allocation of water insufficient.’<sup>127</sup> In addition, the Court further established that there was ‘insecurity within the camps with high levels of theft and sexual violence’<sup>128</sup> and that there were reports that ‘the Kenyan authorities had been taking advantage of vulnerable

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<sup>124</sup> Ibid at para 256 – 264.

<sup>125</sup> Ibid at para 251 – 255.

<sup>126</sup> Ibid at para 288.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid at para 289.

refugees by recruiting them to fight for the Transitional Federal Government in Somalia.<sup>129</sup> Furthermore, the Court established that ‘refugees were not permitted to leave the camps, except in exceptional circumstances, and refugees found outside the camps without “movement passes” were arrested, fined and imprisoned for months at a time.’<sup>130</sup>

On the basis of the evidence, the Court:

...considers that the *conditions both in the Afgooye Corridor and in the Dadaab camps are sufficiently dire to amount to treatment reaching the threshold of Article 3 of the Convention*. IDPs in the Afgooye Corridor have very limited access to food and water, and shelter appears to be an emerging problem as landlords seek to exploit their predicament for profit. Although humanitarian assistance is available in the Dadaab camps, due to extreme overcrowding access to shelter, water and sanitation facilities is extremely limited. The inhabitants of both camps are vulnerable to violent crime, exploitation, abuse and forcible recruitment. Moreover, the refugees living in – or, indeed, trying to get to – the Dadaab camps are also at real risk of *refoulement* by the Kenyan authorities (my emphasis).<sup>131</sup>

In the final analysis, the ECtHR took judicial notice of the terrible conditions in the DRCC, and I would argue that conditions in similarly situated refugee camps are the same. Critics would argue otherwise, but any semblance of difference between similarly situated refugee camps in refugee-hosting states in the global south is semantical. Indeed, in reviewing the relevant conservations on the subject in Chapter 1, the evidence shows that refugee camps negatively affect the dignity of refugees who live in them, albeit proponents of refugee encampment such as

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<sup>129</sup> Ibid.

<sup>130</sup> Ibid para 290.

<sup>131</sup> Ibid at para. 291.

UNHCR ignore the evidence.<sup>132</sup> Crucially, the ECtHR pronounced itself on these conditions as constituting cruel, inhuman, and degrading treatment within the ambit of Article 3 of the ECHR.

Sceptics may argue that the *Sufi* decision was handed down a decade ago and that the conditions in the DRCC may no longer be the same, especially given that some of the refugee have been repatriated to their countries of origin. In which case, some of the key considerations that influenced the Court's decision, such as overcrowding, limited access to safe water, and restriction on refugees' freedom of movement<sup>133</sup> no longer exist. The evidence, however, shows that some of these issues are inherent in the nature of encampment itself so much so that any modicum changes resulting from repatriation do not radically and suddenly eliminate these problems. As recent as 2018, refugees in DRCC still lack basic needs such as water and food and restriction on freedom of movement remain:

Life here is hard with many challenges. We lack certain basic needs, such as water, food, health services, and difficulty travelling because we lack transport and there are also restrictions imposed on our freedom of movement.<sup>134</sup>

Even when some food items are provided, they are often of poor quality or not the staple food:

We receive certain food items, such as sorghum but we do not have the money to pay for grinding; how do we eat it? We do not have firewood to cook the food; how do we eat it? If we go to

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<sup>132</sup> Guglielmo Verdirame & Barbara Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism* (New York: Berghahn Books, 2005) [Rights in Exile]; Michel Agier, *Managing the Undesirables: Refugee Camps and Humanitarian Government* (Malden: Polity Press, 2011) [Managing the undesirables].

<sup>133</sup> The *Sufi* case, *supra* note 123 at para 290.

<sup>134</sup> Interview with FG02, 20 February 2018.

look for firewood in the community, we are harassed and even our women are raped. How do we live?<sup>135</sup>

Another participant described their situation in the camp this way:

There is no freedom of movement here and yet food provided for us here is inadequate. And food rations are given after long delays, sometimes after 40 days and only 2kg of sorghum, half litre of cooking oil, and a piece of soap. They have been giving us sorghum for the last four years.<sup>136</sup>

And while the Court was not asked to address itself to the responsibility and accountability of the actors who created the conditions it declared illegal, its evaluation of the evidence and conclusions drawn confirm that internationally wrongful acts are being committed in refugee camps.

The picture that emerges of the refugee camp is that it is a space of asymmetrical power relations, helplessness, and torture for refugees. The refugee camp, as Agamben aptly captures in his theorisation of the camp, is indeed a phenomenon that is both a paradox and ‘a political juridical structure.’ The refugee camp is a paradox because it is a state of exception where the rule of law is suspended and yet this state of exception is the result of the exercise of power that the law defines and validates or sanctions. Second, the camp is not simply or merely a humanitarian space where well-meaning organisations and individuals, having travelled thousands of miles, leaving the comfort of their homes and loved ones in the far flanged ends of one world, claim to protect and save lives of vulnerable camp inhabitants; no, the refugee camp is a ‘political juridical structure’ where power is

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<sup>135</sup> Interview with FG09, 23 February 2018.

<sup>136</sup> Interview with FG06, 22 February 2018.

exercised without the slightest sense of fear of being held accountable for its abuse. This state of affairs, I argue, is the same for all similarly situated refugee camps.<sup>137</sup>

### **5.5 The Attribution of Wrongful Acts to the UNHCR**

I now turn to the question of attributing to the UNHCR wrongful acts or omissions as part of the process of engaging its accountability under international law. The critical question is whether the acts such as refugee encampment, violation of refugees' right to freedom of movement and choice of residence, and the torturous life under conditions of encampment, which I identified and explained in the preceding sections of this Chapter are attributable to the UNHCR.

Under the rules and principles governing the regime of accountability I explained in Chapter 4, committing an internationally wrongful act is one of the ways the international accountability of an IO is engaged.<sup>138</sup> An internationally wrongful act of an IO consists of two elements.<sup>139</sup> The first element is that the wrongful act or omission is attributable to the IO under international law and the second is that the act or omission constitutes a breach of the IO's obligation.<sup>140</sup>

The rules and principles for attributing wrongful acts to IOs are laid out in draft articles 6 to 9 of the ILC draft articles on the accountability of IOs. As explained in Chapter 4, Article 6 (1) lays the general principle that the acts of an

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<sup>137</sup> See, e.g., *Rights in Exile*, *supra* note 132; *Managing the undesirables*, *supra* note 132; Lucy Hovil, "Free to Stay, Free to Go? Movement, Seclusion and Integration of Refugees in Moyo District" (2002) Refugee Law Project Working Paper Series, Working Paper No.4.

<sup>138</sup> See, "Report of the ILC", *supra* note 53 at 40 para 87 [article 3].

<sup>139</sup> *Ibid* [Article 4].

<sup>140</sup> *Ibid* [Article 4 (a) and (b)].



organ of an IO are the acts of that organisation and are attributable or imputable to it. It is worth quoting the article here for clarity:

The conduct of an organ or agent of an international organization in the performance of functions of that organization shall be considered an act of that organization under international law, whatever the position the organ or agent holds in respect of the organization.

The ILC uses the term “conduct” to mean both acts or omissions of an IO or State.<sup>141</sup> I use these terms interchangeably throughout this section of my dissertation. Thus, the general principle is that the acts or omissions of an official or agent of an IO are the acts of that IO. It follows that the acts or omissions of organs or agents of UNHCR are considered acts or omissions of UNHCR, under international law.

Three types of internationally wrongful acts, however, can be attributed to UNHCR: its exclusive acts; the acts of another IO; and the acts of a state. I focus here on UNHCR’s exclusive acts, which covers the acts and omissions of its organs and agents in the performance of their official functions. I will not discuss attribution of ultra-vires acts or omission of UNHCR’s organs or agents here due to space limitations.

#### **5.5.1 Attributing to the UNHCR Wrongful Acts of its Organs**

I treat the UNHCR processes and structures that produce refugee encampment decisions I discussed in Chapter 3 as organs of UNHCR. I focus especially on UNHCR structures and processes at the branch offices located in refugee-hosting states in the global south.

The branch offices in refugee-hosting states are under the leadership of the UNHCR rep and are the organ that implements UNHCR’s refugee encampment

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<sup>141</sup> Ibid at 52.

policies. This is because, as I demonstrated in Chapter 3, the UNHCR Rep ‘in each country is accountable for initiating and leading timely preparedness for refugee emergencies.’<sup>142</sup> In Kenya in 1991, for example, it was the UNHCR rep that activated the UNHCR’s emergency response strategy and demanded for land for refugee encampment and initiated negotiations with the GoK for land for refugee camps, with of course, the approval of UNHCR headquarters.<sup>143</sup> In addition to the branch office in Nairobi, UNHCR also has sub-offices in Dadaab Refugee Camp Complex (DRCC) and Kakuma Refugee Camp. In this context, the refugee encampment activities of the UNHCR officers in both the branch and sub-offices in Kenya, carried out in the performance of their official functions, are acts of the UNHCR’s organs and are attributable to it.

In Chapter 4 I asserted that it is settled law that the wrongful acts of the organ of an IO are attributable to that organisation and went on to explain how draft Article 6 (1) enunciates existing rules principles of customary international law on attribution of acts of organs or agents of an IO to that organisation. In other words, draft Article 6 simply codified existing customary law. I buttressed that claim with some leading authorities from the ICJ and I return here to two of these authorities the *Effect of Awards*<sup>144</sup> and *Certain Expenses*<sup>145</sup> as authority to support my argument that the wrongful acts of the internal organs of the UNHCR are attributable or imputable to it. In the *Effect of Awards case*, the United Nations Secretary-General requested for supplementary appropriations of \$179,420 for financial year 1953 ‘for the purpose of covering awards made by the United Nations Administrative

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<sup>142</sup> See, e.g., UNHCR, *UNHCR Global Report 2013: Operational Support and Management*, online<<https://www.unhcr.org/en-au/53980a01b.pdf>>, at 1.3.

<sup>143</sup> Interviews with participant, 25 July 2018.

<sup>144</sup> *Effect of Awards of Compensation made by the UN Administrative Tribunal* (1954) ICJ Rep 47.

<sup>145</sup> *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter) Advisory* (1962) ICJ Rep 151.

Tribunal in eleven successful cases that United Nations staff had filed against the Organisation for wrongful termination of services. Some ‘important legal questions’ were, however, said to ‘have been raised in the course of debates in the Fifth Committee with respect to that appropriation.’<sup>146</sup>

The General Assembly decided to request the International Court of Justice (ICJ) for an advisory opinion on the matter. The key question it asked the ICJ to advise on was whether the General Assembly had ‘the right on any grounds to refuse to give effect to the award of compensation made by’ the Administrative Tribunal ‘in favour of a staff member of the United Nations whose contract of service has been terminated without his assent.’<sup>147</sup> The ICJ held that when the Secretary-General, in his capacity ‘as the chief administrative officer of the United Nations Organization...concludes ...a contract with a staff member, he engages the legal responsibility of the Organization, which is the juridical person on whose behalf it acts.’<sup>148</sup> In other words, if the officials of the UN wrongfully terminate the services of a staff member without his or her assent or consent, then, the wrongful act of the official in whichever departments or divisions of the United Nations, is attributable to it.

In the *Certain Expenses* case, the ICJ reiterated its decision in the *Effect of Awards* case, namely, that the acts of the Secretary-General, as chief administrative officer of the United Nations, are attributable to the United Nations.

Both cases involved expenditures of the United Nations, but in the *Certain Expenses* case, the expenditures concerns operations of the United Nations in the Congo and the Middle East. The General Assembly, through various resolutions,

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<sup>146</sup> Ibid at 48.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid at 53.

had authorised certain expenditures for ‘financing the United Nations operations in the Congo and the Middle East.’ The legal question the ICJ was requested to answer was ‘whether certain expenditures which were authorized by the General Assembly to cover the costs of the United Nations operation in the Congo...and the operations of the United Nations Emergency Force in the Middle East..., “constitute ‘expenses of the Organization’ within the meaning of Article 17, paragraph 2, of the Charter of the United Nations.”’<sup>149</sup>

The Court observed, among other things, that when the Secretary-General of the United Nations acts on the authority of a resolution of the Security Council or the UNGA, and incurs financial obligations, the ‘amounts must be presumed to constitute “expenses of the Organisation.”’<sup>150</sup> In other words, the acts of the Secretary-General of the United Nation, performed in the exercise of his functions, are attributable to the United Nations. Indeed, the Court noted that if the Secretary-General incurs obligations when acting on the authority of the Security Council or the General Assembly, ‘the General Assembly “has no alternative but to honour these engagements.”’<sup>151</sup>

Similarly, the wrongful acts of the organs of the UNHCR are attributable to it. Thus, when organs of the UNHCR, such as the branch offices and the sub-offices in refugee-hosting states in the global south, acting on the authority and direction of other internal organs such as the Division of Emergency Security and Supply (DESS) and the Division of Resilience and Solutions (DRS), for example, initiate and implement refugee encampment, their wrongful acts or omissions are attributable to the UNHCR because their acts are acts of the UNHCR.

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<sup>149</sup> Ibid at 156.

<sup>150</sup> Ibid at 168.

<sup>151</sup> *Certain expenses case*, *supra* note 145 at 169.

### 5.5.2 Attributing to the UNHCR the Wrongful Acts of its Agents

The UNHCR implements its material assistance activities for refugees in encampment through third parties, mainly foreign international non-governmental organisations, characterised as implementing or operational partners. Implementing partners are those NGOs the UNHCR funds the bulk of their work; there is an agreement and reporting obligations on the part of the implementing partner. Operational partners, in contrast, are NGOs who have their own sources of funding, but do receive some limited funding from the UNHCR. I treat both categories of partners as agents of the UNHCR because they are simply the means through which the UNHCR acts to carry out its function of providing international protection to refugees in refugee camps.

The International Law Commission (ILC) defines an agent of an IO as ‘an official or other person or entity, other than organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts.’<sup>152</sup> I use the term “agent,” in this section of my dissertation, with some modification of the ILC definition, to mean an ‘entity the UNHCR contracts to carry out the activities under one of its main functions of providing international protection to refugees in the refugee camps that the UNHCR helps create, fund, and administer.’

In DRCC, for example, UNHCR has several agents, most of which are foreign entities, both NGOs and governmental agencies, for implementing its programmes for refugees in the refugee camps.<sup>153</sup> Some agents with operations in the DRCC included, the Lutheran World Federation (LWF), Danish Refugee Council (DRC), International Rescue Committee (IRC), the Fafi Integrated Development

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<sup>152</sup> Report of the ILC, *supra* note 53 at 40 [article 2(d)].

<sup>153</sup> For a full list of both implementing and operational partners working with UNHCR in Kenya, see, UNHCR, “UNHCR Partners in Kenya,” online < <https://www.unhcr.org/ke/unhcr-partners-kenya> >.

Association (FaIDA), German Agency for International Cooperation (GIZ), formerly GTZ. As agents through whom UNHCR acts, their wrongful acts are acts of UNHCR, under international law.

The GTZ, for example, was responsible for clearing the land where the initial camp, Ifo I, in the Dadaab Refugee Camps Complex was established and, which a participant acknowledged, caused much harm to the environment:

It was much easier to provide protection and assistance to refugees by concentrating them in one area. And by concentrating the refugees in the Dadaab areas, it became easier to focus our limited resources in one area... In a short time, we realised that more camps were needed and had to be made. But by the time we developed Ifo I, we realised that we made grave mistakes. The Germany organisation, I believe it was GTZ, were hired to prepare the site for the establishment of Ifo I but they simply brought bull-dozers and razed everything to the ground – it cleared all the vegetation and creating some of the serious problems of environmental concern.<sup>154</sup>

Thus, GTZ's acts of clearing the site where the first camp was established without due regard to environmental concerns when it 'simply brought bull-dozers and razed everything to the ground – it cleared all vegetation,' are acts of the UNHCR. In other words, the wrongful acts of GTZ of destroying the vegetation are attributable to the UNHCR because it was the agent through whom the UNHCR acted to establish the refugee camps in Dadaab.

### **5.5.3 Attributing to the UNHCR the Wrongful Acts of Organs of a State**

Under article 7 of the ILC draft articles on the accountability of IOs,

[t]he conduct of organs of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under

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<sup>154</sup> Interviewed, 25 July 2018.

international law as an act of the latter organization if the organizations exercises effective control over that conduct.

I consider acts of organs a refugee-hosting state acting at the behest of the UNHCR to enforce refugee encampment as acts of the UNHCR. The evidence, both documentary and from fieldwork discussed in Chapter 3, shows the UNHCR's *revealed preference* for refugee camps; it has a vested institutional interest in refugee encampment although in public it claims camps are not good for refugees. The UNHCR believes that refugee camps help it implement one of its main function of providing international protection to them, is given as one the main reasons.<sup>155</sup> The UNHCR, however, does not have its own security or coercive apparatus with which to compel and confine refugees to camps. So, it has to request the refugee-hosting state's government to provide that coercive apparatus. Again, using Kenya, as an example, the UNHCR incentivised the GoK into embracing refugee encampment and provided resources, including providing 'equipment and materials to strengthen the capacity of both the security forces as well as the civilian authorities ...in order to secure the firm decision and ultimate approval of the GoK.'<sup>156</sup>

In this context, the activities of the different agents of the refugee-hosting states, such as the police and the camp commandants, whose salaries the UNHCR either fully or partly subsidises,<sup>157</sup> enforcing refugee encampment, especially enforcing restrictions on refugees' freedom of movement, are acts of the UNHCR. In other words, their wrongful acts, as the case of the DRCC in Kenya demonstrates, such denying refugees movement permits if refugees don't pay a bribe or beating up a refugee if they are found outside the 1 Km radius, are acts

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<sup>155</sup> UNHCR, *Emergency Handbook*, 3<sup>rd</sup> edn (2007) at 208.

<sup>156</sup> Interviewed, 25 July 2018.

<sup>157</sup> Interviewed, 21 February 2018.

attributable or imputable to the UNHCR. Indeed, as explained in the preceding subsections of this chapter, participants in the focus group interviews I had in the DRCC raised the issue of restriction on their freedom of movement as one of the main factors making life in the camp miserable. One participant in particular captured the concerns of other participants:

In addition to what my colleague has enumerated, there is vetting of applicants for movement permits every Tuesday. These vettings are problematic. The problem is that when the officials at the vetting ask a refugee applicant questions, the questions are deliberately aimed at rejecting the refugee's application. There are only two reasons the authorities consider valid for giving a refugee a movement permit: medical and educational. But even when you try to leave the camp for health reasons when you feel that you are not getting the right treatment, they require a refugee to produce a clearance from the agency providing health services in the camp. If a refugee wants to go to Nairobi, he or she can buy his or her way by paying between twenty to thirty thousand Kenyan shillings.

The officials that this participant refers to are the agents through whom the UNHCR achieves its goal of gathering refugees in a specific place where it can access them and control their movements, pending the refugees' repatriation to their countries of origin. Without the UNHCR funding and direction, these officials can do nothing. Their activities are attributable or imputable to the UNHCR.

## **5.6 The UNHCR's Degree of Effective Control over Refugee Encampment**

The question of the degree of control that the UNHCR exercises over the encampment of refugees in refugee-hosting states in the global south is relevant to the question of attributing wrongful acts to it and engaging its accountability under international law for the consequences of refugee encampment on the environment and lives of refugees. In other words, I must demonstrate that UNHCR has effective control of the *framework governance* and activities of the refugee camp system that it helps create, fund, and administer in refugee-hosting states in the global south if I am to make the case for its accountability under international law.



For the alleged wrongful acts of an entity to give rise to its legal accountability under international law, it must be proved that that entity had *effective control* over the activities alleged under the authority of the *Military and Paramilitary Activities* case.<sup>158</sup> In this case, Nicaragua instituted proceedings against the United States in the International Court of Justices in respect of disputes concerning United States responsibility for military and paramilitary activities in and against Nicaragua.<sup>159</sup> The Court stated, amongst other key points, that for the alleged activities of the United States ‘to give rise to legal responsibility of the United States it would in principle have to be *proved that the United States had effective control of the military or paramilitary operations in the course of which the alleged violations were committed*’ (my emphasis).<sup>160</sup>

My thesis is that there is ample evidence demonstrating that the UNHCR has had effective control of the *framework governance* of refugee policy and practice and the encampment system it helps create, fund, and administer in refugee-hosting states in the global south. Verdirame and Harrell-Bond are possibly the first scholars to highlight the issue of the UNHCR’s effective control of refugee policy and practice in refugee-hosting states in the global south. They demonstrated, in their study of refugee law, policy, and practice in Kenya and Uganda, that in Kenya, the UNHCR, and not the GoK, actually established the refugee camps and the GoK had no effective control of the camps. If anything, and at least at the time they conducted their study 1997 - 2000, the GoK had to negotiate with the UNHCR to be allowed to visit the refugee camps.<sup>161</sup>

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<sup>158</sup> *Military and Paramilitary Activities Against Nicaragua Case* [1986] ICJ Rep 4.

<sup>159</sup> *Ibid* at 16.

<sup>160</sup> *Ibid* at 65 para 115.

<sup>161</sup> *Rights in Exile*, *supra* note 132 at 33.

My study confirms Verdirame and Harrell-Bond's findings that the UNHCR, and not the GoK, had effective control over the *framework decisions* that produce refugee encampment in Kenya. One participant stated that the UNHCR was *de facto* in charge, in response to my question who is in charge of refugee policy and practice in Kenya:

From the 1990s to 2006, UNHCR was *de facto* in charge of refugee policy and management in Kenya. It was responsible for camp administration and coordination and management, which involved registration of refugees, conducting RSD, and providing material assistance. So, basically, all records on refugees in Kenya are with UNHCR. We are now trying to hand over to the GoK.<sup>162</sup>

My requests for GoK refugee policy documents and annual reports, both during the interviews were denied and my e-mail follow ups were never answered.

Indeed, even refugees were aware of who is in effective control in the camps. One participant responded rhetorically to my question, 'Who is in charge or control of this place?':

If you look around this camp generally, you will see that every vehicle has a UNHCR logo or something written on it that says that it belongs to UNHCR. Even GoK vehicles have UNHCR logo on it. Have you seen any vehicle on refugee work since you came to this place which bears a GoK logo saying that it belongs to the GoK and was given to UNHCR or MSF for refugee work? What does that tell you about who is in charge?<sup>163</sup>

One might wonder how keeping UNHCR logos on vehicles can be evidence of a shift in balance of power between UNHCR and a refugee-hosting state in the global south and demonstrating UNHCR's effective control of refugee policy and

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<sup>162</sup> Interviewed, 1 March 2018.

<sup>163</sup> Interviews with FG06, 22 February 2018.

practice, including refugee encampment. The evidence shows that this was not a practice exclusive to Kenya, and that the UNHCR's use of logos on vehicles used in refugee work in other refugee-hosting countries can provide further insights into the power dynamics and asymmetrical relationships between actors in refugee encampment and who is in *effective control* of the camp system. Verdirame and Harrell-Bond, for example, demonstrate in the case of Uganda the host Government's efforts to 'conceal the disempowering consequence' of its apparent surrender of its *framework governance* on refugee policy and practice to UNHCR through receipt of incentives, both monetary and material, from the UNHCR and maintain appearances or 'maintain at least the vestiges of control.' In the case Uganda, it was a dispute about number plates on vehicles that the UNHCR supplied to Uganda Government's Directorate of Refugees (DoR). Verdirame and Harrell-Bond observe that:

The deputy director had put government of Uganda number plates on the vehicles supplied by UNHCR as symbolic evidence that the government was in charge. UNHCR did not appreciate this. Its representative wrote to the deputy director, and, while describing the vehicle as a 'donation', reminded him that the vehicles were actually 'owned by UNHCR and temporarily seconded (on loan) to your office... Until then, UNHCR had also paid for the fuel, including customs duty. However, the deputy director was informed that there 'can be no longer a budget line for duty-included fuel in the agreement so long as the vehicles continued to display government licences.'<sup>164</sup>

In the end, UNHCR gave Ugandan government two options: 'either changing the plate numbers...and receiving duty-free fuel or keeping the Government plate numbers and accept to use only government coupons.'<sup>165</sup> In other words, and as Verdirame and Harrell-Bond put it, if the Ugandan government were prepared to

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<sup>164</sup> *Rights in Exile*, *supra* note 132 at 38.

<sup>165</sup> *Ibid.*

‘revert to UN number plates,’ thereby ‘giving up the symbol of government authority, it could benefit from tax-free fuel.’<sup>166</sup>

The ‘visual symbolism of power’, to borrow Landau’s expression,<sup>167</sup> and as already stated, was also very visible in Kenya. In DRCC, for example, almost every vehicle UNHCR’s implementing partners used to implement refugee programmes had a UNHCR ownership right written on it: ‘Property of UNHCR in Use by Care International for refugee operations.’ So, whether it was Care International, LWF, or Refugee Affairs Secretariat (RAS) of the GoK, it bore that clear message.

Despite the evidence, however, a GoK participant stated that the GoK was in charge of refugee policy and practice in Kenya:

The government of Kenya is in charge of the designated areas. We have camp managers. If you want to visit the camp and interview refugees, you write to us and then we write to the camp managers granting you permission to access the camps interview our officers. UNHCR has offices in the camps but they must also ask for our permission to allow their people to come to the camp.<sup>168</sup>

The UNHCR seeking ‘permission’ from the GoK for its officers to go to the camps, I would argue is a mere formality. My interactions with participants from the GoK during interviews revealed their discomfiture and reticence when answering my question, ‘Who is in charge of refugee policy and practice in Kenya?’ Or when I asked, ‘Kenya never had refugee encampment policies until 1990, whose idea is refugee encampment?’ There was an attempt, as Verdirame and Harrell-

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<sup>166</sup> Ibid.

<sup>167</sup> L.B. Landau, “Beyond Dependency: Is Human Development an Appropriate Model for Refugee Assistance?”, unpublished manuscript, Berkeley, as cited in Guglielmo Verdirame & Barbara Harrell-Bond, *Rights in Exile: Janus-Faced Humanitarianism* (New York: Berghahn Books, 2005) at 38.

<sup>168</sup> Interviewed, 20 August 2017.

Bond observed in the Ugandan situation, for these participants to ‘conceal the disempowering consequences’ of Kenya having surrendered its *framework governance* on refugee policy and practice to the UNHCR. Thus, participants attempted to present the picture of a government in control of the vestiges of refugee policy and practice in Kenya. To some extent the GoK now has some say in refugee policy and practice in terms of permission to visits the camps. I had to obtain the permission of both the Refugee Affairs Secretariat (RAS) and the UNHCR to visit the DRCC. This, however, must be understood in context: the UNHCR, according to one participant, started handing over to the GoK 2006.<sup>169</sup> This is significant because the apparent transfer of refugee policy to GoK starts to happen a year after Verdirame and Harrell-Bond published their book, *Rights in Exile* in 2005. It is not, I would argue, a coincidence that this happened just a year after *Right in Exile* was published because it exposes the asymmetrical relationships between the UNHCR and the GoK. From my fieldwork in Kenya in 2017 and 2018, however, the UNHCR is still in effective control of the refugee camp system. Indeed, the participant who stated that the UNHCR started handing over to the GoK in 2006 also added that as of 2018, handing over is still in progress.<sup>170</sup>

Even some refugee participants never fully grasped the extent of UNHCR power in their encampment. At least one participant in one of the twelve focus groups I interviewed also believed that the GoK was in effective control of refugee encampment:

I would say it is Kenya, I mean the government of Kenya is in charge. UNHCR is also a beggar like us. UNHCR and international actors are simply helping. Kenya realised that it can get a lot of money from confining refugees in camps. May be other countries have not realised this. That is why, I suppose,

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<sup>169</sup> See, *supra* note 162.

<sup>170</sup> *Ibid.*

Kenya created threats to close the camps. That allowed them to ask for further funding.<sup>171</sup>

This participant's view generated reproaches from other participants who vehemently rejected any idea that the GoK is in effective control of their encampment. The overwhelming response from the other participants was that the GoK, like them, is the beggar and depends on the UNHCR for everything. Similarly, one participant in one focus group interviews stated that, 'I would say it is the chairman of the camp who is in charge of this place; he makes most decisions in the camp.'<sup>172</sup> Several other participants put up their hands, itching to give a response in rebuttal or in support immediately. One particular participant had this reaction:

I don't think my colleague is right. The chairman simply handles matters between refugees and informs UNHCR and RAS of problems in the camp. When it comes to who really is responsible for how things are done in this camp, who has the power and authority to decide on our rights, I would say that the real power lies with UNHCR. It is UNHCR that is in charge.<sup>173</sup>

The key question becomes whether the evidence is sufficient to support the claim that UNHCR has *effective control* of the *framework governance* of refugee policy and practice in many of the refugee-hosting states in the global south and therefore the act of refugee encampment and its harmful consequences on the environment, violation of the refugees' right to freedom of movement, and the torturous conditions of life in the refugee camps are attributable to it. I submit, without fear of contradiction, that the evidence I have assembled in this chapter and Chapter 3, demonstrates that the relationship between the UNHCR and refugee-hosting states in the global south is such that the enjoys a level of freedom, independence, and,

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<sup>171</sup> Interview with FG10, 10 March 2018.

<sup>172</sup> Interviews with FG03, 21 February 2018.

<sup>173</sup> Ibid.

crucially, access to resources, that allows it to pull the strings and appropriate the *framework governance* of refugee policy from these hapless States. In other words, the UNHCR has *effective control* not only of the *framework governance* of refugee policy and practice, but also the encampment system. Therefore, the wrongful acts of the UNHCR's organs and agents administering the encampment of refugee are attributable to it and would engage its accountability under international law.

### **5.7 The Procedural Aspects and Obstacles to the UNHCR's Accountability**

I have demonstrated in the preceding sections that UNHCR's act of encamping refugees in refugee camps and the consequences of refugee encampment, such as harm to the environment and the deplorable conditions of life in the camps, constitute internationally wrongful acts. I have argued that these wrongful acts are attributable to the UNHCR under existing rules of international law because it has effective control of the refugee encampment system in some of the refugee-hosting states in the global south. In addition, I have also demonstrated that even if these acts are not considered wrongful because international law does not prohibit UNHCR's activities to provide international protection to refugees, the UNHCR still could be held accountable for the injurious consequences of those activities on the environment and the condition of life for refugees living in the refugee camps.

I now turn to addressing the procedural aspects and obstacles to UNHCR accountability under existing regime of accountability under international law in this section. I start with addressing my mind, albeit briefly, to three main interrelated questions: first, who has an interest or a right in holding UNHCR accountable for refugee encampment and the damage refugee camps cause to the environment and the suffering of refugees in the camps?; second, how does one proceed to hold UNHCR accountable; and third, what are the likely obstacles that one might encounter while doing so? My focus is on the second and third questions, in the light of individuals, whether as refugees or communities in whose area

refugee camps are located and where the environmental impact is greatly felt, claims for redress.

I believe states, refugees, communities where refugee camps are located and bear the immediate impact of environmental harm resulting from refugee encampment, and NGOs are some of the main actors who may have an interest in or right to engaging the international accountability of UNHCR for its internationally wrongful acts or the injurious consequences arising out of its refugee encampment activities that international law does not prohibit.

In the first place, states, especially states Parties to the 1951 Refugee Convention, are possibly the first set of actors to have an interest in and right to holding the UNHCR accountable for its wrongful acts because these acts breach the UNHCR's international obligations. In the second place, refugees follow closely states in having an interest in and right to holding the UNHCR accountable for their encampment and the torturous conditions of life in the camps. In the third place, communities where refugees are encamped, and NGOs also have an interest in holding the UNHCR accountable.

#### **5.7.1 Procedural Aspects of Engaging the UNHCR's Accountability**

The procedure for submitting a claim against the UNHCR or kick-starting the process of engaging the international accountability of the UNHCR for its breach of international obligations as a result of refugee encampment and the forum to which such claims may be submitted remains unclear. Indeed, in general most IOs do not have a system of judicial review of their decisions or acts or even have internal remedies for third parties who suffer injury as a result of the acts of an IO.<sup>174</sup> It is plausible to conclude that in practice, the procedure for individuals to file

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<sup>174</sup> See, e.g., Karel Wellens, *Remedies Against International Organisations* (Cambridge, UK; New York: Cambridge University Press, 2002) at 66.



complaints against IOs and the forum to which such claim may be submitted is unclear. This contrasts sharply with the regimes under international human rights treaties, which provide for individual complaint procedures against states parties to the respective human rights treaties.<sup>175</sup>

The procedural steps for filing a complaint against an IO may be clear for states, however. Indeed, Wellens observes that ‘States have access to a number of mechanisms to submit claims based on political or policy-related grievances against the UN.’<sup>176</sup> States can usually address their concerns or complaints through organs of the IO, such as the General Assembly of the United Nations, or the Executive Committee of the High Commissioners Office (ExCom).

Despite this, individuals, especially refugees, face daunting procedural challenges if they seek to engage the international accountability of an IO for injury they suffered as a result of the acts or omissions of the IO. The existing rules and principles constituting the regime of accountability under international law define the nature of the obligations and consequences to the key actors, states and IOs, but do not provide for procedural steps for individuals who suffer damage as a result of the acts of an IO for engaging the accountability of the specific IO.

### **5.7.2 Private Law Options and Obstacles to the UNHCR’s Accountability**

First, I consider the basis for private law options under existing rules of international law and whether IOs have made provision for such options. Then I move on to discussing the existing barriers to deploying private law options for

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<sup>175</sup> See, e.g., OUNHCHR, *Individual Complaint Procedures Under the United Nations Human Rights Treaties* (New York and Geneva: United Nations, Fact Sheet No. 7/Rev.2, 2013).

<sup>176</sup> See, e.g., Wellens, *supra* note 174 at 88.

holding international an IO, such as the United Nations or some of its independent subsidiaries such as UNHCR, the subject of my dissertation.

#### **5.7.2.1 The Basis for Private Law Options for Holding IOs Accountable Under International Law**

In theory, it is possible to use private law options to hold IOs accountable under international law because certain international legal instruments do require that IOs establish alternative dispute settlement mechanisms, including for dispute of a private law character. The Convention on the Privileges and Immunities of the United Nations (the General Convention), which implements the provisions of Articles 104 and 105 of the Charter of the United Nations, for example, requires that the United Nations establish alternative dispute settlement mechanisms, including ‘other disputes of a private law character to which the United Nations is a party.’<sup>177</sup> Similarly, the Convention on the Privileges and Immunities of the Specialised Agencies requires that the specialised agencies, such as the World Bank, the IMF, the ILO, etc, provide for dispute settlement mechanism, including ‘other disputes of a private law character to which the specialised agency is a party.’<sup>178</sup> Thus, international law, in theory, provides for mechanisms for settling disputes of a private law nature, such as in contract, tort, property, and commerce between IOs and third parties.

Not all the IOs, including the United Nations, however, have implemented the requirement that they make provision for modes of settlement of disputes of a

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<sup>177</sup> *Convention on the Privileges and Immunities of the United Nations* (13 February 1946) 1 *UNTS* 15 at 30 [Article VIII, Section 29 (a); *General Convention*].

<sup>178</sup> *Convention on Privileges and Immunities of Specialised Agencies* (21 November 1947) 33 *UNTS* 261 at 280 [Article IX section 31 (a)].

private law character or nature.<sup>179</sup> Indeed, one former UN official argues that the UN's duty:

to make provisions for appropriate modes of settlement of private law disputes does not imply that the United Nations is under an unconditional duty to submit to arbitration or to any other acceptable mode of settlement any claim which might arise.<sup>180</sup>

Crucially, even those IOs that claim to have internal accountability mechanisms do not have explicit procedural steps on how individuals can initiate private law-based complaints or claims against one of their officials or the organisation as a whole. The World Bank, after immense pressure from activists eventually established an Independent Inspection Panel in 1993.<sup>181</sup> Through the Inspection Panel, people affected by Bank funded development project can request for an independent investigation. There are still access problems to the panel, however, especially for individuals. In fact, individuals have no standing before the panel; in other words, individual victims of Bank funded projects cannot submit a complaint to the panel.<sup>182</sup>

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<sup>179</sup> See, e.g., United Nations, *The Blue Helmets: A Review of United Nations Peacekeeping* (New York, NY: United Nations Department of Public Information, 1996) at 227.

<sup>180</sup> R.H. Harpignies, "Settlement of Disputes of a Private Law Character to which the United Nations is a Party – A Case in Point: The Arbitral Award of 24 September 1969 *In Re Starways Ltd v. United Nations*" (1971) 7 *Belgian Review of International Law* 451 at 453.

<sup>181</sup> See, e.g., Daniel D. Bradlow and Sabine Schlemmer-Schulte, "The World Bank's New Inspection Panel: A Constructive Step In the Transformation of the International Legal Order" (1994) *The Max Planck Institute of Comparative Public Law and International Law* 393.

<sup>182</sup> See, The World Bank, "The World Bank Inspection Panel," Resolutions IBRD 93 – 10 and IDA 93 -6 (22 September 1993) at para 12, available online: <<https://www.inspectionpanel.org/sites/ip-ms8.extcc.com/files/documents/Resolution1993.pdf>>; for reviews of the inspection panel, see, e.g., Gudmundur Alfredsson, ed, *The Inspection Panel of the World Bank: A Different Complaints Procedure* (The Hague; Boston: Martinus Nijhoff Publishers, 2001).

Similarly, the United Nations reviewed its procedures for third party claims with respect to its peacekeeping operations in September 1996<sup>183</sup> and May 1997,<sup>184</sup> which covers certain aspects of claims of a private law character, such as ‘non-consensual use and occupancy of premises’ or ‘personal injury’ and ‘property loss.’<sup>185</sup> This follows the General Assembly’s request of 7 June 1996 that the Secretary-General ‘develop revised cost estimates on third party claims and adjustments’ after the Legal Counsel undertakes ‘a thorough study’ of the matter.<sup>186</sup> From the reports, the UN is aware that it is likely to incur tortious liability for damage caused in the ordinary operation of the force and describes the procedures – Standing Claims Commissions or internal UN procedures or local claims review boards for third parties to seek redress.<sup>187</sup> At the same time, they also seek to limit the extent of UN liability.

The UNHCR also claims to have an internal system of accountability. Indeed, Turk and Eyster, for example, claim that UNHCR has ‘a rich set of policies, tools and guidance that make up its current system of accountability.’<sup>188</sup> These

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<sup>183</sup> See, *Report of the Secretary-General*, UNGAOR, 51st Sess, UN Doc A/51/389 (1996).

<sup>184</sup> See, *Report of the Secretary-General*, UNGAOR, 51st Sess, UN Doc A/51/903 (1997).

<sup>185</sup> See, *supra* note 181 at 3 para 3.

<sup>186</sup> See, *Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force, and the United Nations Peace Force Headquarters*, GA Res A/RES/50/235 (1996).

<sup>187</sup> See, *supra* note 181 at 7 para 20 – 21.

<sup>188</sup> See, Volker Turk & Elizabeth Eyster, “Strengthening Accountability in UNHCR” (2010) 22:2 *International Journal of Refugee Law* 159 at 167; also see, e.g., UNHCR, *Practical Guide to the Systematic Use of Standards and Indicators in UNHCR Operations*, 2nd edn (Geneva: UNHCR 2006) at vii; for an outsider’s review of UNHCR’s internal accountability mechanisms, see, e.g., Mark Pallis, “The Operation of UNHCR’s Accountability Mechanisms” (2005) 37 *N.Y.U Journal of International Law and Politics* 869.

include, for example, the ‘Code of Conduct and UNHCR’s policy on Age, Gender and Diversity Mainstreaming... introduced in 2002,’<sup>189</sup> the Audit Services (ASU), the Results Based Management (RBM) launched in 2005, the Policy and Evaluation Services, the Office of the Inspector General (OIG), and the ‘Accountability Framework for Age, Gender and Diversity Mainstreaming’ (AGDM) launched in 2006. In practice, however, this system is inaccessible to refugees. In most cases, it is the same officer that is the first step in the process of seeking redress against the wrongful acts of the very officer and even where refugees attempt to bypass the officer gatekeeper and communicate their grievances directly to UNHCR headquarters in Geneva, Geneva will send back the accusation to the very same officer for verification.<sup>190</sup>

#### **5.7.2.2 The Problem of Immunity of IOs and the UNHCR’s Accountability**

In the absence effective mechanisms for settling any private law disputes within it or the wider UN system, individuals who have suffered injury as a result of UNHCR’s activities relating to refugee encampment, could resort to private law options available through national courts. Any attempts, however, to use private law options to seek remedies or hold UNHCR accountable for the damage suffered from UNHCR’s refugee encampment activities in some refugee-hosting states in the global south through national courts are beset with a number of procedural and substantive issues.

Some of the procedural and substantive issues likely to arise in the event individuals seek to pursue private law options, such as suing the UNHCR or the United Nations, in a national court in the tort of negligence, include issues of

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<sup>189</sup> See, *supra* note 188 at 167.

<sup>190</sup> See, e.g. *Rights in Exile*, *supra* note 132 at 306 – 307; Michael Alexander, “Refugee Status Determination by UNHCR” (1999) 11:2 *International Journal of Refugee Law* 251.

jurisdiction, choice of forum, cause of action, standing, and crucially, immunity. Indeed, while some of these procedural issues are surmountable, such as the question of standing and cause of action, it is the question of the immunity that the UNHCR enjoys from the jurisdiction of national courts that is the most formidable obstacle to deploying private law options for holding the UNHCR accountable under international law for its wrongful acts and injurious consequences arising of its activities international law does not prohibit. I will focus here on the question of immunity from jurisdiction of national courts.

In the first place, the United Nations and its specialised agencies enjoy near, if not, absolute immunity from the jurisdiction of national courts. Article II, Section 2 of the General Convention unequivocally stipulates that:

The United Nations, its property and asserts wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity shall extend to any particular case it has waived its immunity (*sic*). It is, however, understood that no waiver of immunity shall extend to any measure of execution.<sup>191</sup>

The Office of the Legal Affairs, at the Secretariat of the United Nations, argues that the expression ‘every form of legal process’, ‘include every form of process before national authorities, whether judicial, administrative or executive and irrespective of whether the Organization itself is named as a defendant or is asked to provide information or to perform some ancillary role.’<sup>192</sup> Even though there is possibility for waiver of immunity,<sup>193</sup> in practice, the IOs rarely waive immunity.

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<sup>191</sup> See, General Convention, *supra* note 177 at 17 -18.

<sup>192</sup> See, UN, *United Nations Juridical Yearbook* (New York: UN, 1990) at 213 para 52 sub-para 2.

<sup>193</sup> See, e.g., General Convention, *supra* note 177 at 22 Art IV section 14; at 26 Art V section 20; and at 28 Art VI section 23.

Thus, immunity law operates as a barrier in relation to private law options for third parties seeking redress against an IO in two interrelated ways. In other words, immunity law is an obstacle to holding IOs accountable for their wrongful acts or injurious consequences arising out of their activities international law does not prohibit. First, it closes the doors to the temples of justice, namely, courts of justice, national or international. An individual or a group of individuals in a class action suit, cannot successfully litigate a private law claim against an IO, such as the UNHCR, because the claim will be dismissed on a preliminary point of law: immunity from the jurisdiction of a national court.

I illustrate this point with some cases, both individual suits and class action suits in US courts, including the landmark decision of the US Supreme Court on the immunity of IOs from suit under US law delivered in 2019. In addition, the archives of IOs also enjoy immunity and that can frustrate a private law claim if key evidence in the suit depends on the documents in the archives of an IO. I demonstrate this aspect with a recent decision of the Supreme Court of Canada involving the World Bank.

#### **5.7.2.2.1 Immunity from Every Form of Legal Process**

On 22 February 2019, the United States Supreme Court delivered a landmark decision, in the case of *Jam v. IFC*<sup>194</sup> [*Jam*] on the extent of immunity from suit that IOs enjoy under US immunity law, the International Organisations Immunities Act (IOIA), 1945, 59 Stat. 669. To set the context, it is, however, best to start with a few earlier cases before discussing this landmark decision.

Prior to the *Jam* case, IOs sued in the US enjoyed virtually absolute immunity from suit that foreign governments enjoyed when the International Organisations Immunities Act (IOIA) was enacted in 1945. I review at least three cases, albeit

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<sup>194</sup> *Budha Ismaill Jam, et al v. International Finance Corporation*, 139 S. Ct. 759 (2019).



briefly, where the US courts dismissed suits against IOs for lack of subject matter jurisdiction, namely, the IOs invoked their immunity before US courts and the courts agreed. I then conclude with the the *Jam* case.

I will start with the case of two former UNHCR employees suing the UN in a US court in 2008. In *Brzak & Ishak v United Nations*<sup>195</sup> [*Brzak*], the complainants, former employees of the UNHCR, filed a suit against the UN and eight other defendants in the United States District Court for the Southern District of New York for *inter alia*, intentional infliction of emotional distress and indecent battery. Brzak alleges that ‘she was grabbed in a sexual manner by Lubbers,’ a former UN High Commissioner for Refugees, ‘at the conclusion of a business meeting in Lubbers’ office in Geneva in December 2003.’<sup>196</sup> She further alleges that her attempt to seek redress using the internal mechanisms within the UNHCR and the United Nations resulted in retaliatory measures taken against her and the second plaintiff, Ishak, a former official of UNHCR’s Office of the Inspector General, from whom she had sought advice after the incident and who had advised her to ‘file a complaint with the U.N.’s Office of Internal Oversight Services (OIOS)’.<sup>197</sup>

The United States District Court for the Southern District for New York dismissed the suit, holding that under the General Convention, ‘the United Nations is cloaked with absolute immunity from “every form of legal process except insofar as in any particular case it has expressly waived its immunity.” Because “the United Nations has not waived its immunity, the General Convention mandates dismissal of plaintiff’s claims against the United Nations for lack of subject matter

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<sup>195</sup> *Cynthia Brzak & Nasr Ishak v. United Nations, Kofi Anna, Wendy Chamberlin, Ruud Lubbers, et al*, 551 F Supp (2d) 313 ( DC SD New York 2008).

<sup>196</sup> *Id.*

<sup>197</sup> *Ibid.*



jurisdiction.’<sup>198</sup> On appeal to the United States Court of Appeals for Second Circuit,<sup>199</sup> contending that the General Convention was not self-executing in the US, and absent any specific legislation to bring it into effect, it cannot be enforced in the US courts and that if upheld grant of immunity violates the US Constitution, the Court affirmed the decision of the District Court for the Southern District for New York. The Court of Appeal held that the General Convention is self-executing under US law and that the General Convention ‘makes clear, the United Nations enjoys absolute immunity from suit unless “it has expressly waived its immunity.”’<sup>200</sup>

I now move to the tragic events of the Haitian cholera of 2010 and the failed attempts to hold the United Nations accountable for the deaths and illness of thousands of Haitians. In *Georges v. United Nations*<sup>201</sup> [*Georges*] and *LaVenture v. United Nations*<sup>202</sup> [*LaVenture*], the complainants, comprising individuals who suffered from cholera or whose relatives died from cholera during the outbreak in Haiti in 2010, brought putative class actions against the UN and the UN Stabilisation Mission in Haiti in US courts, seeking to hold them responsible for negligently causing the cholera outbreak in Haiti that killed over 8,000 Haitians and making over 600,000 ill. The *Georges* case was the first of the two to be filed in the United States Southern District of New York and was decided in January 2015.

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<sup>198</sup> Id.; on generally how national courts avoid dealing with questions of immunity of international organisations before them, see e.g., August Reinisch, ed, *Challenging Acts of International Organizations Before National Courts* (New York: Oxford University Press, 2010).

<sup>199</sup> *Brzak v. United Nations*, 597 F (3d) 107 (2nd Cir 2010).

<sup>200</sup> Ibid at at 6 lines 15 – 16.

<sup>201</sup> 84 F Supp (3d) 246 (SD NY 2015).

<sup>202</sup> 279 F Supp (3d) 394 (ED NY 2017).

One of the key legal issues was whether the defendants, the United Nations, the United Nations Stabilisation Mission in Haiti, and the UN Secretary-General, were immune, under international law, from the complainant's suit. The Southern District Court held that the UN and its officials involved in the Haitian cholera epidemic were 'absolutely immune from suit in this court' because Article II, Section 2 of the General Convention expressly provides that the United Nations and its officials and agents and property are immune from every form of legal process, unless immunity is expressly waived. Since the complainants failed to provide evidence of the UN having waived its immunity, the suit must be dismissed under the relevant procedural rules of the Court. On appeal, the US Court of Appeal for the Second Circuit affirmed the decision of the District Court for the Southern District of New York.<sup>203</sup>

In the *LaVenture* case, the complainants filed a putative class action against the United Nations, the United Nations Stabilisation Mission in Haiti (MINUSTAH), and other former or current UN officials, in the United States District Court for the Eastern District of New York, 'seeking redress for injuries and death that resulted from an outbreak of cholera in Haiti in 2010.' The District Court dismissed the suit, holding that the defendants enjoyed immunity from suit, and they had not waived that immunity. The complainants appealed to the United States Court of Appeals for the Second Circuit. The Court of Appeal affirmed the decision of the District Court, holding that 'the United Nations enjoys absolute immunity from the instant suit and that UN has not expressly waived its immunity.' In 2018 the complainants appealed to the United States Supreme Court, whose decision is yet to be given.

These cases, and several others I have not discussed here, share one common feature: they were all dismissed at the preliminary stage because the IOs moved to

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<sup>203</sup> 834 F (3d) 88 (2d Cir. 2016).

dismiss for lack of subject matter jurisdiction. *Brzak*, *Georges*, and *LaVenture* cases were based solely on the General Convention and were dismissed for lack of subject matter jurisdiction.

The *Jam* case, however, appears to break new ground in US IOs immunity law. In 2015, a group of farmers, fishermen, and a local village in the Indian state of Gujarat sued the International Finance Corporation for negligence, nuisance, trespass, and breach of contract in the US District court for the District of Columbia. The petitioners claimed that pollution from a coal-fired power plant that the IFC financed, such as ‘coal dust, ash, and water from the plant’s cooling system had destroyed and contaminated much of the surrounding air, land, and water.’ The IFC maintained that it was immune from suit under the IOIA and moved to dismiss for lack of subject matter jurisdiction. The District court affirmed, concluding that the IFC was immune from suit ‘because the IOIA grants IOs the virtually absolute immunity that foreign governments enjoyed when the IOIA was enacted.’ The petitioner’s appeal to the Court of Appeal for the DC Circuit court was dismissed and they appealed to the Supreme Court in 2018.

The IFC maintained that it was immune from suit under the IOIA because the IOIA ‘grants IOs the same immunity’ from suit that foreign governments enjoyed in 1945.’<sup>204</sup> The petitioners, however, contended that the IOIA grants IOs the “same immunity” from suit that foreign governments enjoy today. The US Supreme Court agreed with the petitioners’ interpretation of the IOIA thus:

We think the petitioners have the better reading of the Statute. The language of the IOIA more naturally lends itself to the petitioners’ reading. In granting international organizations the “same immunity” from suit “as is enjoyed by foreign governments,” the Act seems to continuously link the immunity of international organisations to that of foreign governments so as to ensure ongoing parity between the two. The statute could

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<sup>204</sup> See, *supra* note 194 at 4.

otherwise have simply stated that international organizations “shall enjoy absolute immunity from suit,” or specified some other fixed level of immunity. Other provisions of the IOIA, such as the one making the property and assets of the international organizations “immune from search,” use noncomparative language to define immunities in a static way...Because the IOIA does neither of those things, we think the “same as” formulation is best understood to make international organization immunity and foreign sovereign immunity continuously equivalent.<sup>205</sup>

The IFC fought very hard to defend the absolute immunity IOs had enjoyed before US courts. It further argued that ‘interpreting the IOIA provision to grant anything less than absolute immunity would lead to a number of undesirable results.’ And crucially, the IFC contended that:

affording international organizations only restrictive immunity would defeat the purpose of granting immunity in the first place. Allowing international organizations to be sued in one member country’s courts would in effect allow that member to second-guess the collective decisions of the others. It would also expose international organizations to money damages, which would in turn make it more difficult and expensive for them to fulfil their missions.<sup>206</sup>

The Court, however, opined that:

[t]he IFC’s concerns are inflated. The privileges and immunities accorded by the IOIA are only default rules. *If the work of an international organization would be impaired by restrictive immunity, the organisations charter can always specify the level of immunity* (my emphasis).<sup>207</sup>

After responding to the contentions of the IFC, the Court held that the IFC ‘is not absolutely immune from suit.’<sup>208</sup> And more generally, that the IOIA grants IOs the

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<sup>205</sup> Ibid.

<sup>206</sup> Ibid at 7.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid at 8.

“same immunity” from suit “as is enjoyed by foreign governments” at any given time. This means that the Foreign Sovereign Immunity Act (FSIA) now governs the immunity of IOs in the US.

What, then, are the implications of the *Jam v IFC* case for third party private law options against IOs? A detailed discussion of the implication of this case is beyond the scope of my dissertation. I argue, however, that the decision has no real significant impact on the immunity of IOs whose charters and specific instrument guarantee for them absolute immunity. In fact, the majority of the Court said explicitly that, ‘[i]f the work of an international organisation would be impaired by restrictive immunity, the organisation’s charter can always specify the level of immunity.’<sup>209</sup> In this context, the UN will not be affected because the General Convention guarantee it absolute immunity from suits in national courts.

Crucially, even if the restrictive immunities begins to bite, the IOs will fight all the way to the ICJ. The case of *MBF Capital Bhd. & Anor v. Dato’Param Kumaraswamy*,<sup>210</sup> a case that ended up in the ICJ, is illustrative. In this case the plaintiff companies in Malaysia filed a multi-million dollar suit for defamation against the defendant, a Malaysian jurist, appointed by the then UN Human Rights Commission (now UN Human Rights Council) as its Special Rapporteur on the Independence of the Judges and Lawyers.<sup>211</sup> In response to the defamation charge, the defendant pleaded immunity, invoking the provisions of Article VI, Section 22 of the Convention on the Immunities and Privileges of the UN to which Malaysia was party.

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<sup>209</sup> Ibid at 7.

<sup>210</sup> [1997] 3 CLJ 927 (High Court Malaysia, Kuala Lumpur), as cited in Abdul Ghafur Hamid & Khin Maung Sein, “Judicial Application of International Law in Malaysia: An Analysis” (2005 1 *Asia-Pacific Yearbook of International Humanitarian Law* 196 at 201.

<sup>211</sup> David Samuels, “Malaysian Justice on Trial” (1995) *International Commercial Litigation Magazine* 10.

The Malaysian High Court, disregarding the certificate issued by the Secretary-General of the UN, held, *inter alia*, that the question of immunity was not one that could be addressed in summary proceedings but at the trial of the suit against the Special Rapporteur and ordered that he file his defence in 14 days.

The United Nations sought the advisory opinion of the ICJ on the matter.<sup>212</sup> The Court stated that ‘questions of immunity are... preliminary issues which must be expeditiously decided *in limine litis*. This is a generally recognised principle of procedural law...’<sup>213</sup> The Court confirmed that the Secretary-General alone has the exclusive right to make a determination of a) whether acts or words uttered by UN experts were in the course of performing their official functions and b) whether in the interest of justice immunity may be waived.

#### **5.7.2.2 Archives of International Organisations are Inviolable**

The international law of immunity not only shields IOs from suits in domestic courts but also may be a huge barrier to accessing vital evidence in the possession of an IO, such as the UNHCR, to prosecute a private law related claim because the archives of IOs are inviolable. The *Jam v IFC* case, discussed earlier, does not modify this law. The Court said that the IOIA still makes the property and assets of IOs immune from searches.<sup>214</sup>

In *World Bank Group v. Wallace*<sup>215</sup> [*Wallace*], the respondents, employees of a Canadian company seeking to win a contract for supervising the construction of a World Bank funded bridge in Bangladesh, were charged with corruption under the

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<sup>212</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights* [1999] ICJ Rep 62.

<sup>213</sup> *Id* at 88.

<sup>214</sup> See, *supra* note 194 at 4.

<sup>215</sup> [2016] 2 SCR 207.

Canadian legislation, *The Corruption of Foreign Public Officials Act*. The Crown's evidence consisted of intercepted communication that Canadian police investigators had intercepted following a tip from the World Bank. The defence sought an order requiring, among other things, the production of the records of the World Bank's Integrity Vice Presidency unit, whose mandate is to investigate allegations of fraud, corruption, and collusion in relation to World Bank funded development projects. It was this unit that tipped the Canadian police that the respondents had conspired to bribe Bangladeshi officials to award the contract to SNC-Lavalin, the company the respondents were working for.

The agreements establishing two of the other separate entities comprising the World Bank, the International Bank of Reconstruction and Development (IBRD) and the International Development Association (IDA), however, stipulate that the archives of the IBRD and IDA shall be inviolable<sup>216</sup> and that their officials shall be immune from legal process in relation to acts in the performance of their official functions, save in contexts where immunity is explicitly waived.<sup>217</sup>

The most relevant legal issue to my discussion here is whether the World Bank Group was immune to production orders that a Canadian court issues against it. The trial court held that the Bank had immunity, but effectively waived that immunity when it participated in the Canadian police investigations of the respondents' involvement in bribing Bangladeshi official to secure that contract for inspecting the construction of the Bank funded bridge. The Bank appealed to the Supreme Court of Canada and the Supreme Court allowed the appeal, set aside the trial judge's decision. As regards the inviolability of the Bank's archives, the Court said:

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<sup>216</sup> See, World Bank, "International Bank for Reconstruction and Development: Articles of Agreement" (2012) at 17 article VII section 5.

<sup>217</sup> Ibid at section 8.



As regards the inviolability of the organization's archives, the trial judge erred in construing so narrowly an immunity that is integral to the independent functioning of international organizations. The immunity outline in s.5 shields the entire collection of stored documents of the IBRD and IDA from both search and seizure from compelled production...Partial or voluntary disclosure of some documents by the World Bank Group does not amount to a waiver of this immunity. Indeed, archival immunity is not subject to waiver.<sup>218</sup>

Similarly, all the UNHCR premises, property and assets, and funds are inviolate. The agreement between the UNHCR and Uganda is illustrative:

UNHCR, its property, funds and assets, wherever located and by whosoever held, shall be immune for every form of legal process except insofar as in any particular case it has expressly waived its immunity; it being understood that this waiver shall not extend to any measure of execution.<sup>219</sup>

Since the UNHCR concludes agreements with virtually all refugee-hosting states in the global south 'generally based on the Model UNHCR Co-operation Agreement,'<sup>220</sup> which incorporate immunity provisions, it is legitimate to conclude that the UNHCR enjoys virtually absolute immunity from any form of legal process in these states. Although there is always a provision that purports to give the impression that immunity may be waived, in practice that is unlikely to happen. In *Brzak*, the Office of Internal Oversight Services (OIOS) confirmed her allegations against Lubbers, yet the Secretary-General rejected the report and did not waive the immunity of the High Commission from suit. The case was dismissed.

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<sup>218</sup> *Wallace, supra* note 215 at 211.

<sup>219</sup> See, *Agreement on the establishment of a United Nations High Commissioner for Refugees field office in Uganda*, 2 September 1994, 1821 UNTS 191, at 195 article VIII para 1.

<sup>220</sup> *Repertory of the Practice of the United Nations 1995 - 1999*, Supp No.9 , vol 6 (New York: UN, 1999) at 13 para 19.



### 5.7.2.2.3 The Immunity of IOs from suit: Shield or Sword?

Reviewing some of the case law on the immunity from suit of IOs and the works of the leading authorities on the law of IOs, I am tempted to conclude that regardless of the totality of the evidence one may gather, IOs, including the UNHCR will, most of the time, if not all the time, escape accountability for their wrongful acts and omissions that injure the weak in society. I believe it is imperative that the time is now for questioning the basis of the virtually absolute immunity from suit in national courts that IOs enjoy.

The leading scholars on the subject assert that *functional necessity* is the basis upon which the privileges and immunities of IOs rest. These scholars claim that functional necessity is a clearer and specific criterion.<sup>221</sup> It is further claimed that functional necessity allows for ‘how much immunity from municipal jurisdiction an international organisation requires in exercise of its functions’<sup>222</sup> to be determined with some precision.<sup>223</sup>

I argue that functional necessity, like any other concept, has also some weaknesses that should be reviewed in the face of the mounting evidence that immunity of IOs from suit in national court is defeating the cause of justice, especially for the weak in society.

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<sup>221</sup> See, e.g., Peter H.F. Bekker, *The Legal Position of Intergovernmental Organisations: A Functional Necessity Analysis of their Legal Status and Immunities* (Dordrecht: Martinus Nijhoff, 1994) 165; Clarence Wilfred Jenks, *International Immunities* (London: Stevens, 1961) 41. Kuljit Ahluwalia, *The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations* (The Hague: Martinus Nijhoff, 1964) 200.

<sup>222</sup> M. Singer, ‘Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concern’ (1996), 36 *Virginia Journal of International Law* 53 at 66.

<sup>223</sup> Bekker, *supra* note 221; Jenks note 221

In the first place, what is claimed to be functionally necessary is indeterminate or as Klabbers notes, is open-textured.<sup>224</sup> Reinisch has stated that functional privileges and immunities mean ‘different, and indeed contradictory, things to different people, or rather different judges and states.’<sup>225</sup> Klabbers has noted, correctly in my view, that ‘[t]he determination of the functional needs of an organization is essentially in the eye of the beholder.’<sup>226</sup> In other words, what is functionally necessary for the beneficiary of immunities may not be so for a third party who is denied justice because the court tells him or her that its hands are tied; it cannot entertained the matter because the defendant is immune from suits before it.

In the second place, under the functional necessity theory, immunities were meant to be limited in scope – as are necessary for fulfilment of their purposes and functions. In practice, however, IOs’ immunities are framed in virtually absolute terms, ‘from every form of legal process.’ Whether it is the General Convention or the Specialised Agencies Convention, immunities are framed in absolute terms and one scholar has said that the privileges and immunities of IOs represent ‘an autonomous system of law.’<sup>227</sup>

In the third place, functional necessity makes an IO judge in its own cause thereby subverting a cardinal principle that protects against unfairness: ‘that a man may not be a judge in his own cause.’ This may not be a principle of universal application, having been developed in common law legal systems, namely, English

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<sup>224</sup> Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge: Cambridge University Press, 2009) 135.

<sup>225</sup> See, August Reinisch, *supra* note 198.

<sup>226</sup> Klabbers, *supra* note 224 at 134.

<sup>227</sup> See, e.g., R. Zacklin, ‘Diplomatic Relations: Status, Privileges and Immunities’, in R. Dupuy, *Manuel sur les organisations internationales / A Handbook on International Organisations* (1998) 293 at 294.

courts.<sup>228</sup> The practical implication of an IO being judge in its own cause may, however, be illustrated thus: a group of refugees from Dadaab refugee camp in Kenya decide to challenge their encampment in a Kenyan court; who decides whether the UNHCR's immunity should be waived? Under existing international immunity law, it is the UNHCR and the UN Secretary-General that decides whether the acts that the refugees are challenging were performed in the course of exercising official functions and whether immunity should be waived.

In the fourth place, under the functional necessity theory the wrongful acts of an IO, as long as performed in exercise of its functions, cannot be challenged unless the IO waives its immunity, which apparently may be declined. Indeed, in the cases of *Brzak*, *LaVenture*, and *George* the complaints did not produce evidence in court that the UN had waived its immunity. Absent proof waiver of immunity, the cases were dismissed for lack of subject matter jurisdiction.

The conclusion from this brief commentary on the implications of the immunity from suit that IOs enjoy is that the institution of immunity serves as IOs both a shield and a sword.

## **5.8 Conclusion**

In the first place, UNHCR, albeit a subsidiary organ of the United Nations General Assembly, is an independent legal entity under the authority of the *Reparation for injuries* and the *Interpretation of the Agreement of 25 March 1951* cases. Therefore, the UNHCR has capacity under international law to perform its functions on the international plane. As an independent legal entity, it has obligations incumbent upon it, both under its Statute, the 1951 Refugee Convention, and general international law. In this context, it is legitimate to inquire

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<sup>228</sup> On this aspect, see, e.g., *R v. Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte (No.2)* [2000] 1 A C 119 at 132.

and scrutinise issues surrounding its accountability for breach of its obligations under international law and how it can be held accountable.

In the second place, UNHCR as an independent actor on the international plane can be held accountable, in principle, under international law using two legal routes: (a) accountability for internationally wrongful acts and (b) accountability for injurious consequence arising out of activities international law does not prohibit. If UNHCR accountability is to be pursued under the regime of internationally wrongful acts, then it is a necessary requirement that the wrongful acts must have resulted from its breach of its international obligations and that the wrongful acts must be attributable to UNHCR under international law. The wrongful acts that must be attributable to UNHCR in order to engage its international accountability may be the acts of its organs, namely, its officials, such as the UNHCR Rep; or its agents, namely, those through whom its acts, such as NGOs or refugee-host state government entities, to implement activities.

In the third place, UNHCR has *effective control* of the *framework governance* of refugee encampment in most refugee-hosting states in the global south. In other words, the evidence shows that UNHCR has *effective control* of the encampment system in some refugee-hosting states in the global south.

In the fourth place, the encampment of refugees and the injurious consequences to the environment and the lives of refugees constitute internationally wrongful acts. The ECtHR in the *Sufi* case found that conditions in the Dadaab Refugee Camp Complex constitute torture and inhuman and degrading treatment. Refugee encampment created the conditions that caused damage to the environment, violated the rights and freedoms of refugees, and controlled their lives, subjecting them to torturous conditions of life for decades, and in some cases up to twenty-five years or more.

In fifth place, there are procedural and substantive barriers to engaging the accountability of the UNHCR for its refugee encampment and the resulting harm

to the environment and the lives the lives of refugees living in camps for decades in uncertainty. Procedures for third parties private law claims against IOs generally are either absent or inadequate. The regime of immunity shields IOs from every form of legal process against them in domestic courts. In theory IO must provide mechanisms for settling disputes of a private law character; in practice none of the organisations have established a robust, independent, and effective mechanism. Therefore, there is a serious gap within the existing regime of accountability under international law.

## CHAPTER 6: CONCLUSION

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### 6.1 Introduction

I now conclude the analyses I undertook in the previous chapters of my dissertation and the way forward in terms of future research. I do this in two steps. In the first place, I revisit the analyses in the preceding chapters and summarise the main argument in each. In the second place, I state the main conclusions and the prospects for further research.

### 6.2 Summary of themes from each chapter

In developing and writing my dissertation I took several steps, but I could summarise these into five main steps. My first step started with defining the problem and clarifying the conceptual issues relevant to answering my main research question, namely, how UNHCR can be held accountable, under international law, for the injurious consequences of refugee encampment and the environment and the conditions in refugee camps that it helps to create, fund, and administer. Thus, in Chapter 1, I demonstrated that the problem is that there is ample evidence to show that refugee camps adversely affect the environment and the lives of refugees living in them and yet refugee camps remain UNHCR's preferred default technology for providing international protection to refugees. And while proponents of refugee encampment often presented encampment as a humanitarian imperative, I agree with Malkki and Agamben that refugee camps are not merely humanitarian spaces where well-meaning people rally to save lives. No, refugee camps are 'devices of power' or 'biopolitical spaces' or 'political juridical structures' where human beings are subjected to perpetual screening, control of movement, disciplinary measures, and are denuded of power and live at the mercy of those exercising power over them. Scholars such as Agier, Verdirame, and Barbara provide ample evidence of unaccountable power that the UNHCR and other actors exercises in refugee camps.

The status quo, as I have demonstrated in Chapters 3 and 5 has not changed much to date, however.

From this I proceeded to argue that if refugee camps are devices of power, it must follow that the exercise of power must entail the accountability of those who ‘run the show’ in the camps.<sup>229</sup> In other words, the authors of refugee encampment must be held answerable for their exercise of power in the camps. I preferred the term “accountability” to “responsibility,” which is the traditional terminology accepted in international law scholarship and practice. My reasons for doing so are simply and basic. First, a critical reading of the responsibility literature demonstrates that the underlying or overarching objective of responsibility is actually to hold actors accountable. I decided that since accountability is the underlying theme, it is best to foreground it as the real terminology for capturing the essence of holding answerable those who violate the precepts of international law. Second, from a TWAIL perspective, accountability, rather than responsibility, connotes expressions of disapproval of acts or conduct that are wrong or that perpetuates injustice and evokes action and requirements of equity.

At least four main themes emerged from Chapter 1: refugee encampment or refugee camps damage the environment and the lives of refugees; refugee encampment involves the exercise and abuse of power; the exercise of power entails accountability; and few scholars have studied the accountability of UNHCR for its encampment of refugees and the consequence of that on the environment and the lives of refugees in the refugee camps.

In the second step, I reflected on issues of method and theory in Chapter 2. I needed a map that would guide me through the process of learning and thinking required to produce the dissertation and theory and method provided that map. As

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<sup>229</sup> Indeed, one participant said, ‘UNHCR is the one running the show’ in the camps. Interviewed, 3 March 2018.

in everything man-made, however, there are good and bad maps and so was my experience with identify the right theory and method in law, especially international law, with which to navigate the intellectual journey leading to the production of this dissertation. I quickly discovered that the method and theory terrain in international law is rugged, with competing meanings and assumptions that the reader already knows. Nonetheless, I found solace in four schools of thoughts – New Haven, Socio-legal, Political Economy, and Third World Approaches to International Law (TWAIL) and borrowed from their theoretical commitments and methods to complete the process of writing the dissertation.

In addition, I agree with Epstein and King that if lawyers insist that law is a science, then they must embrace the tenets of scientific inquiry, which involves integrating theory, method, and empiricism; these are not antithetical to each other. Rather, lawyers need to embrace empirical research, which is nothing more than observing the real world and that calls for following certain basic rules. And I realised how much more I need to learn about methods and rules of inference if I am to produce legal scholarship that will be truly empirical work.

Having defined the research problem and clarified the conceptual issues and decided what the best method and theory for gathering data and analysing that data, I moved to the third stage or step, namely locating the *framework governance* of refugee encampment and the locus of accountability. It was imperative that I determine the site where refugee encampment decisions are made because it also determined the locus of accountability and the allocation of responsibility for the consequences of refugee camps.

I borrowed from TWAIL and political economy schools of thought to explain where and how decisions on refugee encampment are made. From TWAIL I specifically borrowed Okafor's theory of the 'relative appropriation of the "third world" *framework governance* by entities external to the third world' and from political economy, I appropriated Mosco's theory of processes and structures in



understanding social relations. Thus, using ideas from these theories, I demonstrated that refugee encampment is an integral part of UNHCR's refugee emergency response. The UNHCR refugee emergency response is initiated, coordinated and implemented through a set of processes and structures located within UNHCR and it is one of these structures and processes that will finally 'sell' the idea of refugee encampment to refugee-hosting states in the global south, who are then incentivised to embrace the encampment of refugees.

Thus, Chapter 3 demonstrates four main themes or conclusions: the UNHCR is the architect of refugee encampment or refugee camps in some of the refugee-hosting states in the global south; the UNHCR appropriates the *framework governance* of refugee policy and practice in most refugee-hosting states in the global south; the UNHCR incentivises refugee-hosting states, taking advantage of their weaker governance areas and technical limitations and other resources needed for responding to a refugee emergency; and refugee-hosting states, once incentivised, embrace refugee encampment and own it and enforce the restrictions on freedom of movement for refugees living in the camps. It is this last aspect which gives the false impression that it is refugee-hosting states that are the architects of refugee encampment. Thus, it is clear that the UNHCR is the dominant actor and therefore it is legitimate to focus on its accountability for refugee camps and the impact of the camps on the environment and the condition of life for the refugees living in the camps.

In the fourth step, I focused on the rules and principles constituting the regime of accountability under international law. In Chapter 3 I had now established the sites where the *framework governance* decisions that produce refugee encampment are made; they are located within the internal structures and processes of the UNHCR and therefore, the UNHCR is the architect of refugee encampment and legitimate subject for an accountability inquiry. If that is the case, what are the rules and principles of international law needed to inquire into and engage its accountability? Chapter 4 is

where I attempted to explicate the relevant rules and principles of international law for engaging UNHCR accountability.

In Chapter 4, after reviewing, albeit briefly, the historical origins of the rules and principles constituting the regime of accountability under international law and the codification work of the ILC on international accountability of states and IOs, I discovered that there are at least two main legal routes for engaging the accountability of actors on the international plane. The first legal route, and the more commonly known one, is the *internationally wrongful act* route. It is a concept the ILC borrowed from both state practice and doctrinal writing of some of the leading publicists in late nineteenth and early twentieth centuries. The second is the *liability for injurious consequences arising out of activities that international law does not prohibit* route. Thus, in principle these two legal routes should suffice to engage the accountability of UNHCR under international law for its encampment of refugees and the consequences of refugee camps on the environment and the conditions of life for the refugees who live in the camps for year on long.

It also emerged from my analyses of the existing rules and principles governing the regime of accountability that there are limitations to the rules that militate against prospects of holding IOs, including the UNHCR, accountable. In the first place, the concept of internationally wrongful acts upon which accountability is anchored is inherently biased towards certain interests, that ignore historical injustices. Second, the scope of liability for injurious consequences arising out of activities that international law does not prohibit is limited to transboundary hazardous activities.

With a better understanding of the sites where the *framework governance* decisions on refugee encampment are made and the existing rules and principles governing the regime of accountability under international law, I moved to the final step – addressing how the UNHCR can be held accountable, under international law, for the injurious consequences of refugee encampment on the environment and the lives of refugees under encampment. Chapter 5 was devoted to achieving this.

Several themes emerged in the analyses in Chapter 5. I, however, limit myself to four pertinent ones. In the first place, the UNHCR is an international organisation (IO), with capacity to act independently on the international plane. This goes against the conventional position which insists that the UNHCR is simply a subsidiary organ of the UN and therefore lacks independent legal status and personality; instead, it derives its personality from the UN. I contend, however, that subsidiary organs are creatures of international law and therefore, we must not focus just on the nature of the constitutive instruments, but also look at what they do in practice. I base this contention solidly on the jurisprudence of the ICJ and the PCIJ. Right from the outset in Chapter 1, I had argued that UNHCR should be held accountable for the consequences of refugee camps because it is an independent actor on the international plane. In Chapter 5, I developed this further, delving into the legal basis of that claim and the obligations incumbent upon the UNHCR. I concur with Verdirame and Dale that subsidiary organs can acquire an independent status based on the nature of their activities. I also agree with the ICJ that IOs have obligations incumbent upon them under general international law (*Interpretation of the Agreement of 25 March 1951 case*<sup>230</sup>). I trace the sources of the UNHCR's obligations under international law to its Statute, the 1951 Refugee Convention, international human rights law, and international environmental law. On the latter aspect, I drew from the theories of the New Haven School of Thought to argue that the UN conferences on the environment, starting with the Stockholm conference of 1972 to Rio in 1992, are examples of authoritative decision-making that produced legal standards and rules which create binding obligations on both states, IOs, and individuals not to damage the environment.

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<sup>230</sup> *Interpretation of the Agreement of 25 March 1951 Between the World Health Organization and Egypt* [1980] ICJ Rep 73.

Second, in principle it is possible to hold the UNHCR accountable for the consequences of refugee camps on the environment and the conditions of refugees living in the camps. The UNHCR can be held accountable for both its internationally wrongful acts and for the injurious consequences arising out of its activities that international law does not prohibit. The UNHCR's internationally wrongful acts, which would engage its international accountability are, first, its encampment of refugees and the resulting harm on the environment and the violation of fundamental rights and freedoms of refugees who live in the camps and, second, its inducing of refugee-hosting states, such as Kenya, to abandon *laissez faire*, refugee-friendly policies, to embrace refugee encampment.

I, however, envisaged a possible barrier to using the internationally wrongful act legal route: that international law does not prohibit UNHCR's activities performed in the exercise of its mandate to provide international protection to refugees, including refugee encampment, and therefore precludes wrongfulness. If this is the case, then one would proceed under the second legal route, namely, liability for injurious consequences arising out of activities that international law does not prohibit. Indeed, the UNHCR itself concedes that refugee camps do harm the environment and the ECtHR has held that conditions of life in the Dadaab refugee camp complex violate the precepts of international law. Seen from a private law prism, the harm camps cause to the environment and the human beings who live in them constitute a tort for which private law remedies could be sought in courts of law.

Third, the UNHCR has *effective control* of refugee encampment in most of the refugee-hosting states of the global south. Under the authority of the *Military and Paramilitary* case,<sup>231</sup> effective control is a key element in the law of attribution of wrongful acts to an entity. Therefore, the acts that cause damage to the environment

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<sup>231</sup> *Military and Paramilitary Activities Against Nicaragua Case*, [1986] ICR Rep 4.

and the lives of refugees in the camps are attributable, under international law, to UNHCR because it has *effective control* of the encampment system it helps create, fund, and administer in the refugee-hosting states in the global south.

Fourth, there are both procedural and substantive obstacles to holding UNHCR accountable. Most IOs have not created internal mechanisms for handling disputes with third parties of a private law character. Save for the World Bank Group's pioneering Independent Inspections Panel created in 1993 and the United Nations mechanisms for handling disputes of a private law character arising out of its peacekeeping operations, most IO, such as UNHCR do not have internal dispute settlement mechanism to handle complaints from third parties. The alternative could be seeking private law options in domestic courts. The legal route is, however, immediately blocked because IO enjoy absolute immunity from every form of legal process in national courts. The *Jam* decision of the US Supreme Court enunciates that IOs in the US enjoy restrictive immunity from the jurisdiction of US courts, raising the hopes of those who have been fighting the injustice of absolute immunity for decades. The reality, however, is that the *Jam* decision is a domestic court decision; it does not disturb the absolute immunities that IOs enjoys under the international law of privileges and immunities.

### **6.3 Prospects for further research**

My goal in undertaking this study was modest: to understand how the UNHCR can be held accountable under international law for its acts which cause damage to the environment and the lives of refugees who are compelled to live in the camps under conditions of uncertainty and destitution for decades. In the process of learning and thinking along the way, however, I discovered two things that I realised require further research beyond the scope of my dissertation.

In the first place, that in addition to the traditional legal route of accountability of states for internationally wrongful acts, the ILC had developed for codification rules and principles on the liability of states and IOs for the injurious consequences

arising out of activities that international law does not prohibit. I had been contemplating over this question for some time because I had witnessed the impact of the activities of IOs, such as the UNHCR, the World Bank, and the IMF on the environment and lives of ordinary people, including refugees. I had no clue how I could challenge these IOs since their activities were considered legitimate or lawful under international law. Could there be an international law of torts, I pondered.

I believe that the issue of accountability for the injurious consequences arising out of acts international law does not prohibit law is critical to any contemporary system or regime of international accountability that seeks to hold accountable all those who violate the precepts of international law. The central idea in the concept of liability for injurious consequences arising out of acts that international law does not prohibit is that obligations might exist in situations where it would appear that there is no particular wrongful act or omission by a state or IO. In other words, legitimate acts or activities of a state, a private company in a given state, or an IO may give rise to injurious consequences or harm and must entail the accountability of the specific actor, be it the state or IO.

A classic illustration of this may be activities in the area of the economy, such finance, monetary policy, and investment, and humanitarian policies of certain IOs, such as the UNHCR's humanitarian activities for refugees, that international law does not prohibit, but have caused injurious consequences for millions of people around the world. Some concrete examples include the refugee encampment activities of the UNHCR, which I discussed in Chapter 5; the neo-liberal economic reform policies and conditionalities of the World Bank and the International Monetary Fund (IMF); and world free trading system rules of the World Trade Organisation (WTO).

The ILC, however, limits the scope of accountability for injurious consequences arising out of activities international law does not prohibit to significant transboundary hazardous activities, such as emission of transboundary

hazardous gases or chemicals. This leaves out the activities of IOs such as UNHCR, the World Bank Group, the IMF, and the WTO. It is imperative that TWAIL scholars should not consider this topic closed and that many TWAIL scholars will be interested in working in collaboration not only amongst themselves but also with sympathisers in the global north to research into ways of developing better rules and principles of international law that engage the accountability of these IOs. In this context, the focus of research might be on how to translate and integrate the ideals of the sovereignty of the people as the as basis of authority and imperative necessities of accountability and some level of independence for IOs to perform their functions.

In the second place, in addressing my main research question, I posited theoretical propositions and then identified some observable or practical implications necessary to confirm or refute my theories. Given time limitations and the modest goal of my dissertation, it was not possible for me to pursue each of the observable or practical implications for each theory. I believe each of the observable implications provide bases for further research.

#### **6.4 Conclusion**

The main conclusion is that in theory at least, the UNHCR can be held accountable, under international law, using two possible legal routes: (a) internationally wrongful acts, and (b) liability for injurious consequences of activities that international law does not prohibit. In practice, however, several procedural and substantive obstacles make it practically impossible to hold the UNHCR accountable for its contribution to the harm to the environment and the suffering of refugees resulting from the encampment of refugees in refugee camps that it helps create, fund, and manage.

In the first place, the existing rules and principles governing the regime of accountability under international law focus on clarifying what constitutes an internationally wrongful act, preventing transboundary harm from hazardous

activities that international law does not prohibit, rules of attributing wrongful acts or conduct, reparation, countermeasures, and circumstances precluding wrongfulness, etc. The rules and principles, however, do not address how an injured third party might start the process of engaging the accountability of the IO that has caused it damage or harm.

In the second place, third parties, such as refugees cannot seek remedies against the UNHCR because most IOs have not developed internal procedures for settling third party disputes of a private law character. Where IOs, including the UNHCR, have internal mechanisms, such mechanisms are often inaccessible to third parties, such as refugees. Crucially, the option of private law remedies through domestic courts is also unavailable, despite the recent *Jam* decision of the US Supreme Court because IOs tend to enjoy near absolute (or even absolute) immunity from every form of legal process in national courts. The result: a huge gap of accountability in international law. The international law on the privileges and immunities of IOs creates the space for impunity and double standards whereby, on the one hand international law demands that those who violate its precepts should be held answerable, but on the other hand, it selectively shields certain natural and juridical persons from being held accountable, giving them an unduly privileged status and in effect mocking the idea that all persons are equal before the law.

As I have pointed already, for some, however, there is reason to be optimistic that the status quo of absolute immunity for IOs may change sooner or in the foreseeable future in the light of the *Jam* decision of the United States Supreme Court delivered in February 2019. The Court held that the scope of immunities from suit that IOs can enjoy in the US is restrictive, i.e., ‘the same immunity’ from suit that foreign government dignitaries on US territory enjoy. For those who have closely followed the struggles of many people seeking redress against IOs in national courts, this decision gives a glimmer of hope that finally, IOs have been stripped of absolute immunity from suit. I am, however, cautiously optimistic. In



the first place, the decision is that of a national court, albeit the highest court of the land, and so it may have limited judicial value upon the international plane. Secondly, the Court left it open to IOs to 'always specify a different level of immunity,' if a given IO 'would be impaired by restrictive immunity.' Thus, in theory, IOs in the US have restrictive immunity, but in practice they can enjoy absolute immunity because they can elect to specify the level of immunity they want.

Seventy-five years ago, it was legitimate to shield the decisions of IOs from rigorous external scrutiny through an independent, impartial, and transparent system, such as a court of law. Then, institutionalists were rightly worried that the very states that created these IOs might use their national courts to undermine the independence of the IOs. I do believe that the necessity to shield IOs from some form of interference still remains valid, but on a lower threshold. The problematic issue is that IOs are given the power to decide whether they will waive immunity and allow justice to take its course. Since the question whether a given foreign government is entitled to immunity from suit is subject to scrutiny by courts of law, it is time we vest courts of law with the authority to also determine whether the immunity of an IO should be waived.

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## APPENDICES

### APPENDIX 1: TCPS2 : CORE Certificate



## APPENDIX 2: YORK University Ethics Approval



OFFICE OF  
RESEARCH  
ETHICS (ORE)  
5<sup>th</sup> Floor, Keele  
Tower  
4700 Keele St  
Toronto ON  
Canada M3J 1P3  
Tel: 416 736-5914  
Fax: 416 736-5612  
[www.research.yorku.ca](http://www.research.yorku.ca)

Certificate #: STU 2017 - 071  
Approval Period: 05/12/17-05/12/18

### ETHICS APPROVAL

**To:** **Zachary Lomo**  
Graduate Student of Osgoode Hall Law School  
[zacharylomo@osgoode.yorku.ca](mailto:zacharylomo@osgoode.yorku.ca)

**From:** Alison M. Collins-Mrakas, Sr. Manager and Policy Advisor, Research Ethics  
(on behalf of Denise Henriques, Chair, Human Participants Review Committee)

**Date:** Friday, May 12, 2017

**Title:** **Refugee Camps, Environmental Degradation and Accountability of Actors  
in Refugee Protection**

**Risk Level:**  Minimal Risk  More than Minimal Risk

**Level of Review:**  Delegated Review  Full Committee Review

I am writing to inform you that this research project, "Refugee Camps, Environmental Degradation and Accountability of Actors in Refugee Protection" has received ethics review and approval by the Human Participants Review Sub-Committee, York University's Ethics Review Board and conforms to the standards of the Canadian Tri-Council Research Ethics guidelines.

Note that approval is granted for one year. Ongoing research – research that extends beyond one year – must be renewed prior to the expiry date.

Any changes to the approved protocol must be reviewed and approved through the amendment process by submission of an amendment application to the HPRC prior to its implementation.

Any adverse or unanticipated events in the research should be reported to the Office of Research ethics ([ore@yorku.ca](mailto:ore@yorku.ca)) as soon as possible.

For further information on researcher responsibilities as it pertains to this approved research ethics protocol, please refer to the attached document, "RESEARCH ETHICS: PROCEDURES to ENSURE ONGOING COMPLIANCE".

Should you have any questions, please feel free to contact me at: 416-736-5914 or via email at: [acollins@yorku.ca](mailto:acollins@yorku.ca).

Yours sincerely,

Alison M. Collins-Mrakas M.Sc., LL.M.  
Sr. Manager and Policy Advisor,  
Office of Research Ethics

## APPENDIX 3: NACOSTI Research Authorisation Letter



**NATIONAL COMMISSION FOR SCIENCE,  
TECHNOLOGY AND INNOVATION**

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Website: www.nacosti.go.ke  
When replying please quote

P. Pamba, Uasin Gishu  
Uhuru Highway  
P. O. Box 30623-00100  
NAIROBI-KENYA

Ref No. **NACOSTI/P/17/35152/17520** Date: **19<sup>th</sup> June, 2017**

Zachary Agele Lomo  
[REDACTED]

**RE: RESEARCH AUTHORIZATION**

Following your application for authority to carry out research on *“Refugee camps, environmental degradation, and the accountability of the main actors in refugee protection.”* I am pleased to inform you that you have been authorized to undertake research in **Garissa and Nairobi Counties** for the period ending **19<sup>th</sup> June, 2018**.

You are advised to report to the **Principal Secretaries of selected Ministries, the Commissioner, Department of Refugee Affairs, the Chief Executive Officers of selected government agencies, the County Commissioners and the County Directors of Education, Garissa and Nairobi Counties** before embarking on the research project.

On completion of the research, you are expected to submit **two hard copies and one soft copy in pdf** of the research report/thesis to our office.

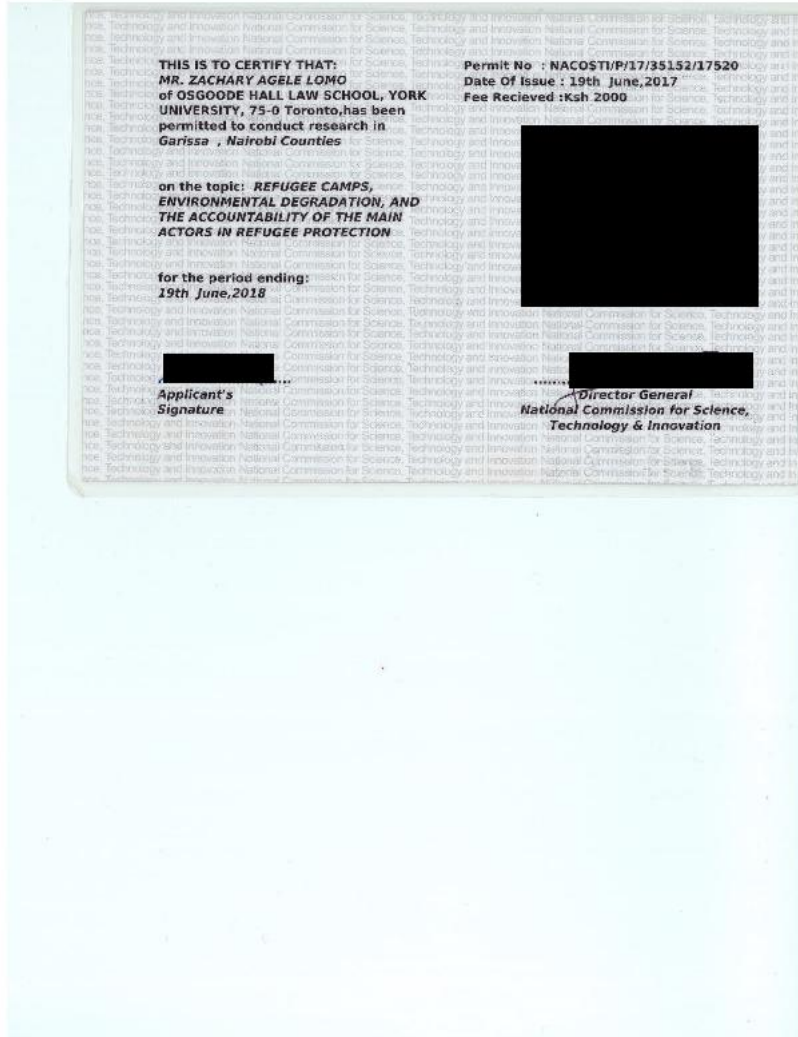
[REDACTED]  
**GODFREY P. KALERWA MSc., MBA, MKIM**  
**FOR: DIRECTOR-GENERAL/CEO**

Copy to:

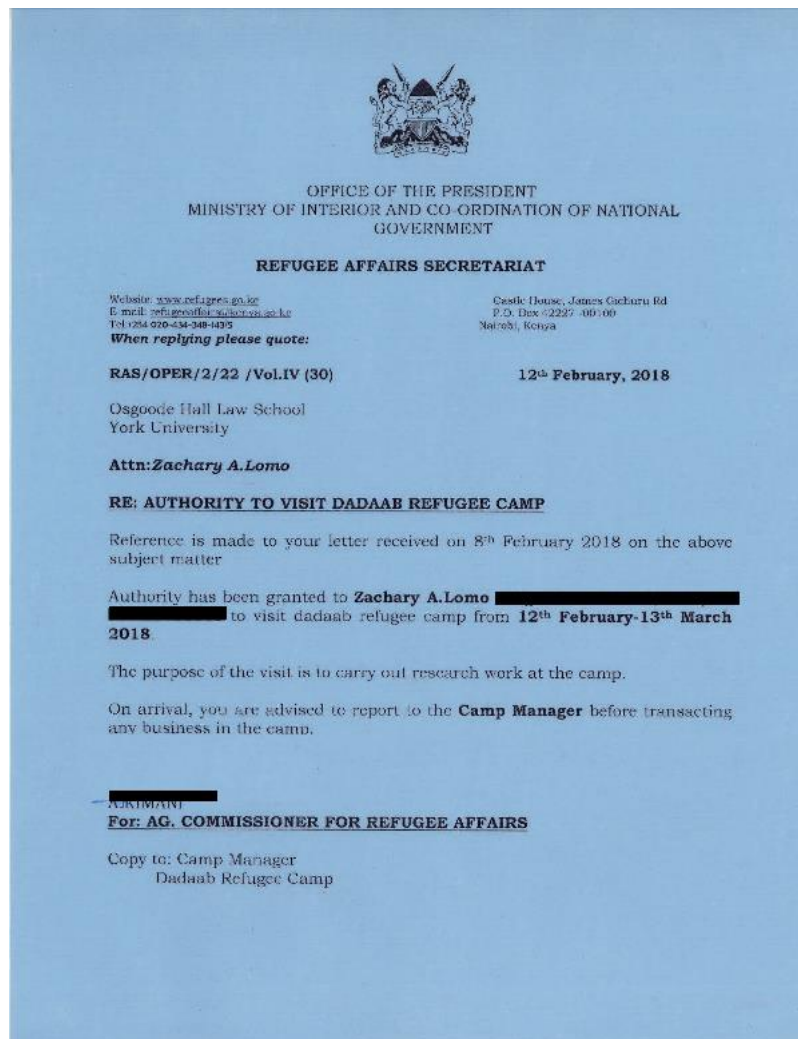
The Principal Secretaries  
Selected Ministries.

National Commission for Science, Technology and Innovation (NACOSTI) 2008 Certified

# APPENDIX 4: NACOSTI Research Clearance Permit



## APPENDIX 5: Authorisation To Visit Dadaab Refugee Camp



## APPENDIX 6: Summary of participants interviewed

Participant	Dadaab	Nairobi	Total
UNHCR	05	01	06
Former UNHCR official	0	01	01
GoK	01	03	04
Former GoK official	0	02	02
Refugees	02	02	04
Refugee Focus Groups (12)	74	15	89
Local NGO	0	02	02
International NGO	01	01	01
Total	83	26	109